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Levering van roerende zaken

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Summary

DELIVERY OF MOVABLES

The subject of this book is the delivery of movable property, non-registered goods. As is set out in *Chapter 1*, the central question is whether the delivery of movable property, not being property subject to registration, is characterised by the conclusion of a real agreement, and if so, which function the real agreement has at the delivery of such movables. The criticism expressed in the literature on the statement that the delivery of movable property is characterised by the conclusion of a real agreement concerns the supposition that for delivery of movable property an act of both parties is always required (1), on the proposition that the delivery according to Article 3:90 of the Dutch Civil Code, which is made ‘by giving possession of the object to the acquirer’, may be qualified as a legal act (2), on the assumption that in a causal system the real agreement has added value (3), and on the notion that the real agreement as dogmatic concept has a useful function (4).

Chapter 2 shows that the essence of the delivery according to Article 3:90 Civil Code is formed by the real agreement. It may be described as the multilateral legal act of the alienator and the acquirer, whereby they declare to transfer, respectively to accept the ownership of the property, and by which the property is transferred either automatically or in combination with a formality. If the legal requirements of transfer mentioned in Article 3:84 Civil Code have been met, ownership *and* possession pass to the acquirer by the conclusion of a real agreement that is accompanied by providing the actual control over the property. The consensus about the transfer of ownership gives the transfer of the control the meaning of providing possession. With this the first two points of criticism, which concern the qualification of the (essence of the) delivery as a multilateral legal act, have been refuted. After all, ‘providing possession’ is indeed the result of a (legal) act of the alienator *and* the acquirer. And the fact that ‘possession’ has also a factual component, does not alter the observation that the delivery is – also – effected by performing a legal act, namely concluding a real agreement.

The observation that the delivery according to Article 3:90 Civil Code should be qualified as a legal act implies the applicability of Title 3.2. So, the real agreement may for instance be set aside by virtue of Article 3:44 Civil Code, and Article 3:58 Civil Code, devoted to ‘ratification’, also applies. The

possibility to avoid the real agreement has actually little added value in situations in which the legal basis cannot be avoided. On the other hand, applicability of Article 3:58 does have added value.

A delivery is 'valid' if it has been effected by an alienator who is privileged to dispose of the object pursuant to a valid legal basis. In principle an invalid delivery does not result in transfer of ownership, but, if the acquirer has obtained the control over the property, it does result in providing possession. From the publicity principle which underlies the delivery requirement it follows that a real agreement, concluded by a possessor who is not privileged to dispose, which is not accompanied by a transfer of the control over the property that is apparent to third parties (a delivery *constituto possessorio*) cannot be repaired by Article 3:86 Civil Code. The legislator has expressed this in Article 3:90 (2) Civil Code, which provision may be best interpreted such that if a possessor who is not privileged to dispose delivers a property by means of *constitutum possessorium*, the acquirer does not qualify for protection by Article 3:86 Civil Code as long as the property remains in the hands of the alienator.

A real agreement, concluded by a *detentor* and accompanied by making a declaration of *constitutum possessorium* does not result in providing possession to the acquirer. Since no change of the actual control takes place by making the declaration of *constitutum possessorium*, according to the standards of Article 3:113 Civil Code the entitled person has not been deprived of the possession.

Now that the essence of the delivery according to Article 3:90 Civil Code is formed by the conclusion of a real agreement, it is natural to assume that the real agreement is also part of the delivery according to Article 3:95 Civil Code. Both the parliamentary history and the case law of the Supreme Court support this view. In order to legitimise the acquirer as owner a deed signed by the alienator should be drawn up of the conclusion of the real agreement.

On the basis of the observation that the essence of the delivery of a movable property is formed by the conclusion of a real agreement, it is investigated in Chapters 3 to 6 whether the real agreement as dogmatic concept has a useful function at the special forms of delivery of movables.

Chapter 3 discusses the delivery in advance. There is a question of a delivery in advance when the parties perform in advance the acts required for effecting the delivery, this in anticipation of the alienator acquiring the power to dispose of the good delivered in advance. Delivery in advance leads to an automatic and inevitable transfer of ownership at the moment that the alienator acquires the property delivered in advance. The essence of the delivery in advance is formed by the conclusion of a real agreement, concluded subject to the condition precedent of the alienator acquiring the privilege to dispose. The qualification of the delivery as a multilateral legal act implies that it may be performed subject to a condition (see Article 3:38 (1) Civil Code). The conclusion of the conditional real agreement, which is accompanied by making

a declaration as referred to in Article 3:115 Civil Code, and, if necessary, by performing a factual act, leads to the situation that transfer of ownership takes place at the moment that the alienator acquires ownership and possession, and the condition is fulfilled: the acquirer becomes owner and possessor. The formality of delivery prescribed in Article 3:95 Civil Code may also be performed in advance.

Since the condition included in the real agreement corresponds to a legal requirement for transfer, pending the fulfilment of the condition no (conditional) transfer is effected. However the conclusion of the real agreement leads to 'a binding of wills under property law': the alienator cannot unilaterally withdraw from the real agreement in order to frustrate in this way the transfer of ownership. Just as an entitled party can invoke his right under property law against everybody, the binding under property law, which has originated due to a delivery in advance, also has an absolute effect. By performing the delivery in advance the alienator has exercised in advance his privilege to dispose. In case of a delivery in advance by means of an anticipated *constitutum possessorium* Article 3:110 Civil Code is the final element of this binding under property law. From this provision it follows that at the moment at which the alienator will acquire the property he will inevitably start to detain it for the acquirer. So a possible contrary possessory will has no significance.

Article 3:97(2) Civil Code, which refers to a double delivery in advance, assigns (in principle) priority to the first delivery in advance. Since pending the fulfilment of the condition no right under property law has yet been transferred, the priority principle does not directly apply. Starting from the notion that from the conclusion of the conditional real agreement binding under property law with absolute effect results, application of the priority principle by analogy seems logical. It is in line with this principle to interpret Article 3:97(2) Civil Code, as follows: 'in case of a double delivery in advance the earlier delivery in advance leads to transfer, Article 3:86 Civil Code will apply by analogy'.

Case law shows that the alienator and acquirer may agree that by a contrary will the alienator may block the transfer of ownership by a delivery in advance. In such a case the acquirer has granted the alienator the power to terminate the real agreement, and with it to cancel the binding under property law resulting from the real agreement.

If the alienator is bankrupt at the moment at which he acquires the property, the absolute effect of the binding under property law will be lifted by Article 35 (2) Bankruptcy Act for the benefit of the bankruptcy creditors. The same applies *mutatis mutandis* if the alienator has been granted a moratorium when acquiring the property, or if the debt rescheduling arrangement for natural persons applies to him.

In *Chapter 4* it is investigated whether the real agreement fulfils a useful role in the delivery of movables by means of an undisclosed agent. Starting point

is that both in case of delivery according to Article 3:90 Civil Code by an undisclosed agent of the alienator and in case of delivery according to Article 3:90 Civil Code to an undisclosed agent of the acquirer the direct doctrine applies. In other words the movable property does not pass through the property of the undisclosed agent.

In case of delivery of a movable property according to Article 3:90 Civil Code both the alienator's undisclosed agency and the acquirer's undisclosed agency are forms of 'agency under property law'. Characteristic of agency under property law is that, although at the delivery the intermediary acts in his own name, the legal consequences of the delivery will be 'attributed' to his principal in the sense that the transaction intended with the delivery under property law is effected at the expense, respectively for the benefit of the principal's property. Since the transfer of ownership is effected directly between the alienator and the acquirer, the legal requirements for transfer should be fulfilled between them.

In case of undisclosed agency of the *alienator* the transfer of ownership is based on a composite legal basis. It comprises the legal basis effected between the intermediary and the acquirer (usually a purchase agreement), and the legal relationship from which the intermediary derives the obligation to transfer a property in his own name, but for the principal's account (mostly an agency or employment contract). In this agency or employment contract an 'authorisation' is implied. The intermediary, or, if so desired, the 'authorised person', derives from this authorisation the power to exercise the principal's privilege to dispose in respect of one or several movables belonging to the principal. When effecting the delivery the intermediary exercises on the basis of this authorisation the principal's right of disposition. The real agreement, which is the essence of the delivery according to Article 3:90, is concluded between the intermediary and the third party-acquirer. From the nature of the real agreement, which is aimed at effecting a transaction under property law, it results that in principle (unless the publicity principle provides otherwise) this agreement does not have to be concluded between the alienator and acquirer in order to lead to a transfer of ownership between the alienator and the acquirer. The authorisation is the basis for attributing the delivery performed by the intermediary to the principal. As the holder of the property the intermediary can transfer to the acquirer the control over the property corresponding to his right of ownership, and with it provide the possession. On balance a direct transfer of ownership and possession will take place between the alienator represented by an undisclosed agent and the acquirer.

Also in case of undisclosed agency of the *acquirer* the direct transfer of ownership at a delivery according to Article 3:90 Civil Code is based on a composite legal basis. It is formed by the legal relationship between the intermediary and the principal-acquirer (usually an agency agreement), on which basis the intermediary is obliged to acquire a property in his own name, but for the account of the principal, and by the legal relationship between the

alienator and the intermediary from which the obligation results for the alienator to transfer the ownership of the property (usually a purchase contract). As regards the legal requirement of power of disposition there are no special features here. In order to effect the delivery, the alienator and the acquirer's undisclosed agent conclude a real agreement. In view of the nature of the real agreement, which is aimed at effecting a transaction under property law, the person of the acquirer does in principle not have to be disclosed to the alienator. The intermediary derives his power to accept the ownership of a property for the benefit of the principal from the 'authorisation' granted to him by the principal and implied in the agency agreement. By the conclusion of a real agreement with the intermediary and the performance of a de facto act or by making a further arrangement about the transfer of the control over the property, the alienator transfers the possession of the property. By virtue of Article 3:110 Civil Code the intermediary will start to hold the property immediately and inevitably for the principal-acquirer at the moment that the alienator transfers the control over the property to him, so that on balance there will be a direct transfer of ownership and possession between the alienator and the acquirer represented by an undisclosed agent. The irrelevance of a contrary will of the intermediary at the moment of the delivery by the alienator is based here exclusively on a statutory provision which may be seen as a consequence of the notion that the legal system is served by a direct transfer of ownership to an acquirer who is represented at the delivery by an undisclosed agent.

At the delivery of a movable property according to Article 3:95 Civil Code the direct doctrine cannot be applied, since the names of the alienator and acquirer should be stated in the deed.

Retention of ownership is the subject of investigation of *Chapter 5*. Pursuant to Article 3:92 Civil Code the ownership of a movable property may be transferred depending on the fulfilment of a performance requirement by the buyer as described in Article 3:92 (2) Civil Code. According to Article 3:92 (1) Civil Code the vendor is presumed to assume the obligation to transfer the property while preserving the ownership subject to the condition precedent of fulfilment of that performance requirement. The text of the Articles 3:91 and 3:92 Civil Code leaves open the question whether a transfer under retention of ownership is based on a conditional legal basis or on conditional delivery. Since the obligation to deliver does not depend on the fulfilment of the condition, the obligation to deliver resulting from the purchase agreement is unconditional. The condition is implied in the delivery: the real agreement has been entered into subject to the condition precedent of fulfilment of the performance requirement by the buyer. So, a conditional delivery underlies a transfer under retention of ownership. By concluding the real agreement and providing the control prescribed by Article 3:91 Civil Code the delivery as such is 'completed', i.e. performed. The intended legal consequence, transfer of ownership,

is exclusively effected depending on the fulfilment of the party condition. A bankruptcy of the alienator pronounced after the delivery is therefore not relevant. Unlike a delivery in advance, a delivery under retention of ownership will lead to a conditional transfer, a 'transfer subject to a condition precedent'.

Due to the conditional transfer of ownership the vendor's power of disposition is limited: he cannot transfer more to a third party than a 'right of ownership subject to a condition subsequent'. At the fulfilment of the condition agreed upon between the vendor and the buyer, the vendor or his legal successor will lose his 'right of ownership subject to a condition subsequent' by operation of law.

As a consequence of the conditional transfer of ownership the buyer has acquired a right under property law, which at the fulfilment of the condition will convert into the right of ownership of the property. The assumption that pending the fulfilment of the condition the buyer holds a legal position under property law fits in with the fact that the limitation of the right of ownership of the owner due to an act of disposition performed by him results in the creation of a right under property law corresponding to the said limitation of the power of disposition in the property of the acquirer. I denote the right of the buyer, a property law right *sui generis*, as an 'entitlement under property law'. The observation that pending the fulfilment of the condition the buyer has already a right to the property under property law does not imply a breach of our closed system of property law, now that in the Articles 3:84 (4) and 3:92 Civil Code the law itself provides the basis for the creation of this right. The entitlement under property law as such may be transferred and pledged.

The vendor and the buyer may agree that the buyer is authorised to transfer the property to a third party in the normal conduct of his business (the 'second buyer'). The power of disposition of the first buyer arises in that case through the fulfilment of a second, alternative, condition precedent, included in the real agreement concluded between the vendor and the first buyer. This condition implies that the first buyer will (also) acquire the ownership of the property by delivering it to a third party in the normal conduct of his business. There is a coincidence of legal moments at the moment of delivery to the second buyer.

Contrary to the statutory presumption of Article 3:92 (1) Civil Code the parties may agree that the ownership will be transferred subject to the condition subsequent of non-fulfilment of the performance required from the buyer. In that case too there is a conditional transfer of ownership by virtue of a conditional delivery. Contrary to a transfer of ownership subject to a condition precedent the basis of the transfer of ownership subject to a condition subsequent may be both an unconditional and a conditional legal basis. The conditional nature of the delivery is expressed in the real agreement, which has been concluded subject to the condition subsequent that the buyer fails to pay the consideration due. Fulfilment of the condition included in the real agreement has, as may also be derived from Article 3:84 (4) Civil Code, a

property law effect: the ownership will revert by operation of law to the alienator.

Pending the fulfilment of the condition subsequent the vendor has still only an 'entitlement under property law' to the property. The buyer is 'owner subject to a condition subsequent'.

Chapter 6 concerns remedying an invalid delivery of a movable property. This may be done by ratification, a legal act aimed at remedying the invalid delivery, and by convalescence, the occurrence of a bare legal fact.

A delivery of a movable property which because of the alienator's lack of power of disposition is regarded as invalid may be ratified by the owner. The legal act to be ratified is the real agreement which because of the alienator's lack of power of disposition has not resulted in a transfer of ownership. The *ratification* may be qualified as a unilateral legal act under property law. It forms a legal basis between the owner and the acquirer which, together with the legal basis effected between the person lacking power of disposition and the acquirer, forms a composite legal basis for transfer between the owner and the acquirer. By the ratification the person lacking the privilege to dispose of the object obtains afterwards the authorisation to exercise the owner's privilege to dispose. As a result of the ratification the real agreement concluded by the person lacking power of disposition results in a property law transaction at the expense of the property of the owner.

Remedying by ratification has in principle retroactive effect: when answering the question which legal consequences the ratified delivery has, the hypothetical situation is assumed that the delivery has directly lead to a transfer of ownership.

Ratification will only lead to remedy of the invalid delivery if and insofar as the legal requirements for transfer have been fulfilled at the moment at which the ratification takes place. For instance, if the property which was the object of delivery is encumbered by the owner or his legal predecessor with a restricted right, the owner will have a limited power of disposition at the time of the ratification, so that as a result of the ratification the acquirer will acquire a property encumbered with a restricted right. In this view Article 3:58 (3) Civil Code, which was drawn up in order to protect the legal successors of the ratifying owner against the legal consequences of the ratification, is no more than an observation that the position of third parties which derive their right from the owner is not affected by the remedying of the invalid delivery.

Article 3:58 (1) Civil Code sets as condition for remedy that 'all directly interested parties who could have invoked this defect have treated the act as valid during the period between the act and the fulfilment of the requirement'. Contrary to what the text of this provision suggests, it should only be possible to prevent the remedying of an invalid delivery owing to a statutory requirement for transfer having ceased to apply, e.g. because the acquirer has dis-

solved the legal basis, or the parties have in mutual agreement ended the binding under property law resulting from the real agreement. Remedying by ratification is no longer possible after the expiry of the period stated for this by the acquirer. Third parties, such as the successors in title of the ratifying owner do not belong to the 'directly interested parties' in paragraph 1. Now that the statutory requirements for transfer should be fulfilled at the time of remedying, ratification will only lead to remedy if and insofar as their right does not preclude this. Therefore I interpret Article 3:58 (1) Civil Code as follows: when a statutory requirement provided for the validity of a delivery is only fulfilled after the performance of the delivery, and at that moment all other requirements for transfer have been fulfilled, the transfer takes place.

Remedy by *convalescence* takes place when the alienator acquires the property earlier delivered by him without power of disposition, and when the party entitled to the property succeeds the alienator under universal title. Since convalescence of a delivery by a person lacking power of disposition will only occur if and, as regards the requirement of power of disposition, insofar as all statutory requirements for transfer have been fulfilled at the moment at which the bare legal fact occurs, it also applies for convalescence of a delivery by a person lacking power of disposition that paragraph 3 is superfluous as protection provision. The proposal for the interpretation of paragraph 1 also applies to remedying by convalescence.

No retroactive effect is connected with remedying by convalescence, since it results from the occurrence of a bare legal fact. The fact that by virtue of Article 3:58 Civil Code the delivery will as yet become valid due to the occurrence of a bare legal fact, may, except to the continued existence of the legal basis, also be traced back to the binding under property law resulting from the concluded real agreement. The alienator has irrevocably, and with absolute effect, laid down his will about the transaction to be effected under property law. The final element of this binding under property law is formed by Article 3:58 Civil Code, by virtue of which the real agreement as yet results by operation of law in a transfer of ownership when the alienator acquires the property, or when the owner succeeds him under universal title.

If a person lacking the privilege to dispose delivers a property in succession to two persons, and both deliveries are capable of convalescence, the first delivery will be remedied. Since the alienator lacked the privilege to dispose, the delivery has not led to the creation of a right under property law, so that the priority principle may not be directly applied. Starting from the notion that from the conclusion of the invalid real agreement binding under property law with absolute effect results, it seems logical to apply the priority principle by analogy.

A delivery according to Article 3:95 Civil Code may actually be remedied by convalescence, but not by ratification.