

RETENTION OF TITLE CLAUSE

The purpose of a Retention of Title clause (RoT) is to protect the supplier of goods in the event of insolvency of the purchaser. It is a contractual clause whereby the supplier retains title to the goods until they have been paid for by the purchaser. Subsequently, in the event of insolvency proceedings the unpaid goods do not form part of the general pool of assets to be distributed. Theoretically, a RoT entitles the supplier to retake possession of the unpaid goods.

Care is needed however, and to be enforceable your RoT must be properly drafted and incorporated into the contract with the purchaser. Without a RoT, or with a defective RoT, it is likely you will rank with other unsecured creditors in insolvency proceedings and as such are unlikely to get the monies that you are owed.

The burden of proof is on the supplier to show that it has brought the RoT to the attention of the purchaser and that it was understood and accepted by the purchaser. Accordingly it is important to ensure that the RoT is clearly set out in your terms and conditions of sale, and that these in turn are brought to the attention of the purchaser. If possible, you should seek formal acceptance from the purchaser of your terms and conditions for example by getting them to sign a credit agreement. The RoT must form part of the contract between you and the purchaser and must be validly incorporated into the contract in order to be effective.

The purchaser will not be bound by a RoT unless it has clearly been brought to its attention and incorporated correctly in the contract governing the relationship.

Acting on foot of a RoT

A simple RoT will provide that title to the goods will not pass to the purchaser until they have been paid for in full, however without certain supplemental provisions a simple RoT may not be sufficient to take back possession of the goods.

The RoT should include the right of the supplier to enter on the premises of the purchaser for the purposes of repossessing the goods. The contract may also include an obligation for the purchaser to store the suppliers' goods separately, to mark them as the suppliers' property and to insure them.

Potential problems which may render your RoT ineffective

There are a number of circumstances which may mean that your RoT is not effective unless supported by relevant additional provisions.

The goods may no longer be identifiable

Goods may no longer be identifiable where they have been used and as a result lose their original identity, for example in a manufacturing process. Once the goods have become unidentifiable the RoT will no longer be effective. You may want to include a provision that the goods may not be used in any such process without the supplier's prior consent.

The goods are identifiable but irretrievable

Where the goods have become part of other property (e.g. building materials) they may be identifiable but irretrievable. Accordingly, dependent on the type of goods being supplied it may be advisable to include a provision whereby the purchaser is not entitled to so attach the goods without the supplier's prior consent.

The goods cannot be attributed to a particular invoice

Where there is a continual supply of similar goods to a purchaser it may be difficult to attribute specific goods to a particular invoice. In such situations an 'all monies' form of clause would be advisable. This provides that title to the goods shall not pass until such time as all monies owed to the supplier have been discharged.

The goods have been sold on to a third party

Where the goods have been sold to a third party who bought in good faith and without notice of the RoT it may be difficult to enforce the clause. A provision stating the monies are to be held on trust for the supplier may be included, however there is a difficulty with such a clause as it is unclear whether it requires registration in order to be effective. The general consensus is that, unless registered, such a clause is unenforceable. It should be noted however that such registration would only be required in the case of a company and not an individual.

Conclusion

As can be seen from the above, it is important that you have a carefully drafted RoT which takes into account the nature of the goods being supplied and the relationship between the parties.

If your customer is in financial difficulty, as is unfortunately more and more frequent, it is important act quickly to recover your goods. If the customer does go into liquidation, receivership or examiner it is important to notify the liquidator, receiver or examiner as soon as possible, identifying the goods in question.

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