

RECOVERY OF GOODS AND RETENTION OF TITLE

Every business which sells or supplies goods should consider using a Retention of Title clause in its terms of business. It can be a valuable aid to a seller where a buyer becomes insolvent and fails to pay for goods delivered. Although it is no substitute for effective credit control, Retention of Title can be a very useful last line of defence in helping to salvage something from the wreckage of a buyer's insolvency.

Retention of Title is achieved by the parties agreeing that although goods may be delivered to the buyer by the seller, ownership will only pass upon payment being made. Should payment not be received, the seller would then be entitled to take back the goods and re-sell them. If there is any shortfall between invoice and resale price, then the seller would also be able to look to the defaulting buyer for damages by way of compensation.

Three key areas should be considered when looking to establish an effective Retention of Title: what to look out for in the drafting process; incorporating the clause in the contract and the exercise of Retention of Title rights.

The Drafting Process

Care should be taken to ensure that the drafting of the Retention of Title clause is legally-binding and suits the seller's business. The options available include:

- a "simple" clause which will provide that title in specified goods will only pass once they have been paid for;
- an "all monies" clause which provides that title in goods supplied will only pass once all goods which have been supplied have also been paid for, and
- there are other variations, some of which may not be enforceable at law, for example a clause which seeks to enable a buyer to take the proceeds on sale of goods which have been sold on to a third party before the purchase price has been paid.

In drafting an effective Retention of Title clause, detailed consideration should also be given to:

- the seller's type of business;
- the nature of the goods; and
- the likely buyers of the goods.

A seller should also consider other terms of contract which should be incorporated into

its contracts to complement the Retention of Title clause and to deal with other problem areas which may be specific to its particular industry.

Incorporation into Terms of Contract

Once effective Retention of Title provisions have been prepared, the seller must ensure they are incorporated into its contracts with the buyers. Although it is usual to find such terms applied in standard terms of trading, the law on incorporation of standard terms can be complicated, depending on the documentation and procedures adopted by the parties.

Commonly, Retention of Title clauses fail because they are printed on the reverse of invoices, which are post-contractual documents and thus excluded from any contractual terms. Whilst a seller who has dealt regularly with a particular buyer might be able to overcome such a problem by proving an established commercial relationship, it is advisable to avoid such problems in the first place by ensuring that the terms are legally incorporated into the contract.

Exercising Retention of Title Rights

If a buyer defaults and the seller wishes to exercise rights under the Retention of Title clause then the seller must act quickly:

- it will be necessary to show that the Retention of title clause is enforceable and that it has been effectively drafted and incorporated into the contract of sale between the seller and buyer; and
- the seller will need to identify its goods, for example by reference to serial numbers.

Where the goods have been modified or incorporated into other goods through a manufacturing process then it may not be possible to recover them and Retention of Title rights may be lost. If the goods remain and can be identified, action can be taken for their recovery and should the buyer refuse to deliver up the goods, then a seller's rights can be enforced through the courts if necessary.

Notification of Rights

The seller should notify the buyer immediately that it intends to exercise Retention of Title rights under the provisions in the contract, and demand a return of the goods. The goods should be inspected and an inventory prepared detailing all the seller's goods retained by the buyer which are the subject of the Retention of Title claim.

Alternatives

The law also provides rights such as a lien over goods and right of resale for an unpaid seller in limited situations where there is no Retention of Title clause.

How Stevens & Bolton can help

We have considerable experience of dealing with Retention of Title and recovery of goods claims, acting for both unpaid sellers seeking to recover their goods and liquidators and receivers in resisting such claims. We can advise on all Retention of Title issues, including drafting effective clauses and ancillary terms and conditions, advising how to incorporate those terms and conditions into the contract of sale and handling any enforcement or other dispute resolution.

For further information contact:

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This information is necessarily brief and is not intended to be an exhaustive statement of the law. It is essential that professional advice is sought before any decision is taken.