

# fact sheet

CORPORATE RECOVERY AND INSOLVENCY GROUP

## Retention of Title in England: Protecting the Seller

Too often, a seller delivers goods but then is not paid. If the buyer becomes insolvent, the seller may wish to minimise his losses by taking back his goods.

Standard terms and conditions of trading often contain a reservation or retention of title clause by which the seller seeks to remain owner of the goods until the purchase price is paid.

### A. HOW CAN THE SELLER PROTECT HIS POSITION AND MAXIMISE HIS RECOVERY?

#### 1. First precautions

- A seller should check his buyer's creditworthiness in advance of the sale.
- Credit insurance may be available.
- Standard terms and conditions of sale can be critical. These are considered further, below.

#### 2. Is the buyer bound by the retention of title clause?

Subject to the points made at B. below, the English courts will in principle uphold a valid retention of title clause if it can be shown that it was properly agreed between the parties when the contract was made.

Points for a seller to remember are:-

- The buyer may seek to displace the seller's terms and conditions (in their entirety) so that the seller's retention of title clause is lost.
- Generally, terms and conditions on a seller's acknowledgement of order form will be incorporated when the buyer's offer to purchase is accepted by the seller on that form and those conditions will prevail over those on the buyer's order.

- The seller should print his terms and conditions on all appropriate materials including product brochures, catalogues, websites, price lists, acknowledgement of orders and order forms, delivery notes and invoices. Where there is a series of transactions it will then be more difficult for a buyer to plead ignorance of the seller's conditions.

- However, terms and conditions on an invoice will come too late unless there is a course of dealing.
- If standard terms and conditions are printed on the back of documents, a clear notice on the front will draw them to the buyer's attention.
- It is preferable for terms of trading to be in English, but the seller's own language may suffice, provided that the buyer clearly accepts the seller's conditions including the retention of title clause.

### B. THE RETENTION OF TITLE CLAUSE

If the retention of title clause works, the seller remains the owner of the goods and ownership will not pass to the buyer until he pays. If the buyer becomes insolvent, the interests of other creditors (in particular the buyer's bank) will conflict with those of the seller: a liquidator and/or receiver will wish to sell all available assets of the insolvent buyer or for the benefit of the creditors generally or to realise the bank's security. An effective retention of title clause should preserve the seller's title to the goods he has supplied. (The position is however more complex where an administrator is appointed and a moratorium over assets applies).

There are various types of clause, the most significant of which are:-

1. Simple clauses;
2. All monies clauses;
3. Mixed or processed goods clauses;
4. Clauses which attempt to secure the proceeds of sale of the goods.

Most clauses are variations of one of the above.

#### 1. Simple clauses

*"The seller remains owner of the goods until the purchase price is paid in full."*

A simple retention of title clause seeks to preserve the seller's title to goods which remain unpaid and are in the seller's possession. However, the buyer (or more likely a receiver or liquidator in an insolvency situation) may claim that goods still on the premises have been paid for, and that other, absent, goods which have been sold to a third party, are the subject of the seller's unpaid invoices.

The seller can, to some extent, take steps to protect himself by:

- Labelling his goods clearly so that they may be identified against specific invoices, e.g. by bar codes or batch numbers;
- Making it a term of the contract that his goods are stored separately so that those remaining on the premises can at least be more easily identified.

However an **all monies clause** is preferable.

#### 2. All monies clauses

- *"The seller remains owner of the goods until the price and all other sums owing by the buyer to the seller are paid in full"*.

Such a clause has received the approval of the highest English Court (the House of Lords). The seller need not identify his goods by reference to individual invoices; he remains owner if any debt owed to him by the buyer is unpaid.

Title can however pass to the buyer if all debts are paid off at any time during a "running account"-type arrangement.

### 3. Proceeds of sale clauses

*"The Seller remains owner of the goods and any proceeds of their sale, until the price is paid in full".*

Such clauses will, in England, generally fail. The English Courts consider the clause creates a form of charge or security over the goods which must be formally registered at Companies House.

Registration is necessary within 21 days of the creation of the charge, that is, the moment when the buyer sells to his sub-purchaser. If there is a series of deliveries, it would be necessary to register every time a supply was made. This is simply not commercially practicable.

Some sellers attempt to avoid this problem by stating that the buyer is the seller's "agent". Although this is unclear, sellers should expect that an "agency" argument would fail before the English courts.

### 4. Mixed or processed goods clauses

*"If the goods are mixed with or incorporated in other goods before the price is paid, the seller shall have ownership of the whole of the goods until payment is made in full".*

In short, these are rarely, if ever, effective. The English courts have consistently ruled that any clause by which the unpaid seller claims ownership of goods processed or incorporated into another product (and where these cannot easily again be separated) constitutes a "charge" on the goods which, if not registered, is invalid.

If the goods have been fixed to the premises of the buyer (e.g. screwed into the floor) and cannot be removed without causing substantial damage to the goods or the premises, they will become fixtures and the landlord of the premises can keep them.

### PROTECTION FOR THE SELLER

- Check the buyer's creditworthiness in advance of supply
- Take out credit insurance where possible, and particularly if there is any question mark over the buyer's financial stability.
- Use good standard terms and conditions which are reviewed regularly by your lawyers and updated to reflect changes in the law.
- Ensure your terms and conditions are properly incorporated into the contract of sale.
- Provide for your goods to be separately stored and labelled to match invoices.
- Ensure that the buyer insures the goods.
- Provide for a right of re-entry and re-possession of your goods.

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