

IS YOUR BUSINESS PROTECTED AGAINST CUSTOMER NON-PAYMENT OF GOODS?

This article looks at the importance of effective Retention of Title provisions in a suppliers contractual terms and conditions.

What is a Retention of Title provision?

Retention of Title (ROT) provisions, if effective, enable a supplier in certain circumstances to recover goods that a customer has received but not yet paid for. In the absence of such provisions, title to the goods shall pass to the customer on delivery. ROT clauses are particularly poignant in the event a customer becomes insolvent, as goods subject to a valid ROT claim will not form part of the assets of the company to be sold by an administrator or liquidator. Thus, the supplier generally receives a better recovery than it would have done, had it been ranked as an unsecured creditor of the insolvent customer.

How does a ROT claim work in practice?

Although a relatively straight forward concept, ROT provisions often fail to operate effectively in practice. In order make a valid ROT claim, suppliers must ensure

1. ROT provisions are properly drafted;
2. ROT provisions are effectively incorporated into the contractual relationship between the supplier and customer; and
3. goods supplied to the customer can be identified with sufficient certainty.

Ensuring ROT provisions are properly drafted.

There are various types of ROT clauses.

- Simple clause – this provides that a supplier shall retain title to the goods supplied under a single transaction, until payment is received in full. As it relates to a single transaction, as opposed to all goods supplied to that date, the supplier must be able identify the specific stock held by the customer which relates to the unpaid invoice.
- All-monies clause – this provides that the supplier shall retain title to the goods supplied until all debts owing by the customer are settled. As this does not relate to a single transaction, it is much easier for the supplier as it will not need to relate specific goods to specific unpaid invoices.

- Complex ROT clauses – this may include proceeds of sale or mixed goods clauses. Generally, the purposes of these clauses are to create a trust relationship with the customer i.e. that the customer will hold the proceeds of sale or the mixed goods on trust for the supplier. Care should be taken with such clauses, as in the event they are rendered invalid as an unregistered charge, they shall be void against a liquidator or administrator.

Ensuring ROT provisions are effectively incorporated.

ROT disputes often centre upon whether the provisions have been effectively incorporated into the contractual relationship between the supplier and the customer. One of the most effective ways of evidencing incorporation is to obtain written confirmation/signed agreement from the customer confirming its assent to the terms. In the absence of this, a supplier may alternatively seek to argue that it has taken reasonable steps to bring the ROT provisions to the attention of the customer, and that the provisions have been incorporated into the customer and supplier relationship through a course of dealing.

Care should also be taken where the supplier and the customer each send out their own contractual terms and conditions. The general position, known as “battle of the forms” provides that the last party to send its contractual terms and conditions, prior to performance of the contract, usually wins. That said, it should also be noted, that the inclusion of ROT provisions on invoices alone will not be considered as successful incorporation. Invoices are typically raised in execution of an existing contract and therefore shall not normally be treated as having separate contractual effect.

In addition, even if ROT provisions have been successfully incorporated, suppliers must also ensure that the provisions are consistent with their terms and conditions as a whole.

Ensuring goods can be identified with certainty.

A successful ROT claim hinges on the supplier being able to identify the goods with certainty and remove them. Suppliers may use methods such as distinctive packaging or serial numbers on goods to assist with identification. They may also set out within their contractual terms and conditions, that the goods they supply to the customer must be stored separately from any other party's goods. This may however, prove difficult if the goods have been mixed with other goods or cannot be removed without damaging property.

Enforcing ROT provisions in the event of customer insolvency.

In the event of customer insolvency, the supplier must notify the insolvency practitioner (IP) promptly to assert its ROT claim. Pursuant to article 198 (3) and (4) of the Insolvency (Northern Ireland) Order 1989, an IP shall not be liable for disposing of property which is not property of the customer, if they have reasonable grounds for believing that they are entitled to seize or dispose of that property. It is imperative that suppliers assert ROT claims in a timely manner.

The supplier will usually be required to provide the IP with the ROT provisions upon which it seeks to rely, details of the goods supplied and evidence that the customer has not paid them.. The IP will then examine the extent of the suppliers ROT claim.

If the ROT claim fails, the supplier will be an unsecured creditor of the insolvent customer and depending on the realisations available, may not receive any distribution.

Given the uncertain economic climate facing businesses over the coming months, suppliers should take a closer look at their contractual terms and conditions to ensure that they contain well drafted and effective ROT provisions before it is too late. If you would like to have your contractual terms and conditions reviewed and/or updated, please contact Caoimhe Lowe or Claire Daly on 028 8775 2990.

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