



Limiting Your Risk In A Customer Insolvency - Retention of Title

A retention of title ("ROT") clause in a supply agreement can give you priority over secured and unsecured creditors of your customers if they fail to pay for goods supplied by you.

Benefit

ROT clauses work by providing that legal ownership of the goods is retained by you until the customer pays for them, irrespective of the goods being delivered to and in the possession of the customer.

To enhance the effect of a ROT clause it is also advisable to include clauses in your supply agreement that require customers to:

- **store your goods separately from those of other parties;**
- **mark goods as your property (it may help if you mark them as your property prior to delivery); and**
- **to allow you access to their premises to reclaim possession of your goods and to allow you check how your goods are being stored (if you include this, do not just take a customers word for it, go and check that your goods are being stored separately and are marked as yours).**

The efficiency of a ROT clause can also be enhanced by including a separate 'all monies' clause. By doing this ownership of all of the goods you have supplied to a customer is retained by you until all outstanding payments have been made, notwithstanding that some of the goods may have been paid for. This avoids the need to match specific goods to specific invoices.

Weaknesses

'All monies' clauses have a potential weakness. Concern has been expressed that they create a charge which is void against a liquidator or administrator and unless registered at Companies House. The House of Lords determined a charge is not created by an 'all monies' clause, but this was in relation to a Scottish case and is therefore only of persuasive, rather than binding, authority in the English courts.

If the goods you supply are to be used in a manufacturing process of a product, then a ROT clause will only be of use if your goods remain capable of identification and can be separated from the product without causing damage. Suppliers of goods that are quickly consumed in a manufacturing process should therefore consider other methods of protecting against non payment.

A ROT clause can only be enforced against a company in formal administration if the administrator consents.

Incorporating an ROT Clause

If you are trading on standard terms of business, then you must ensure that the agreement for the supply of goods is made on your standard terms of business and not your customer's which are likely to provide that ownership passes at the time of delivery of the goods to the customer.

Other Measures to Take

ROT clause should be regarded as an addition to a credit control policy not a substitute. If you have serious doubts about a customer's ability to pay you should also consider:

- **reducing the customer's credit limit and/or time period for payment;**
- **requiring security for payment such as a charge, personal guarantee by a director, bank guarantee or letter of credit; and**
- **taking out credit insurance.**

If you require advice regarding the use of ROT clauses or other supply agreement issues whether from a buyer's or seller's perspective please contact **Simon Dakin** on **0115 9 100 200** or by email simon.dakin@actons.co.uk



Simon Dakin
Actons Solicitors
20 Regent Street, Nottingham, NG1 5BQ
Tel: 0115 9 100 200 Email: simon.dakin@actons.co.uk