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Retention of Title - the benefits and the pitfalls



The following article - drafted by UK-based credit information and collection company **Top Service** - is understandably based on UK law. However, the principles remain true and many countries have similar legislation in principle.

In previous articles we have looked at the most common type of insolvency that you are likely to face as an unsecured creditor - **Creditor's Voluntary Liquidation** - and the processes that you may come across leading up to and including the initial meeting of creditors. We have also emphasised the importance of creditors participation in the process so they can have an influence on the insolvency.

This article provides an overview of Retention Of Title (ROT), the benefits and the pitfalls and how it could help mitigate your risk of being placed at the bottom of the payment hierarchy i.e. an unsecured creditor.

At least a quarter of UK businesses have experienced a client or customer entering insolvency. If you are waiting on payment for your goods, it can seriously impact

your ability to trade. Without a valid Retention of Title (ROT) clause, it's highly likely you will have to write off the majority or all of your debt. Having a well drafted ROT clause could improve your position considerably.

If you have a valid ROT clause and your customer becomes insolvent, the first thing you must do is find out whether or not they still have any of your products. If so, then they may be recovered so that you can resell them.

Retention of Title

A ROT clause is one that is included in the terms and conditions of sale when goods are being sold. The clause protects the seller if the goods are not paid for.

A straightforward ROT clause within a contract of sale essentially means that ownership of goods remains

with the supplier until full payment for the goods has been received. There are a variety of clauses which may be used depending on the circumstances.

Simple Clause

This is a basic ROT clause that states title to specific goods that can be matched up to an outstanding invoice are retained by the supplier until payment has been received in full.

'All Monies' Clause

An 'all monies' clause allows for retention of title until all monies due from the debtor are paid to the supplier. This contrasts with the order by order basis of a simple ROT clause. An 'all monies' clause is often included separately, but also in addition to the 'simple' retention of title clause within a contract.

Proceeds of Sale Clause

This type of clause addresses the problem of goods having already been sold on and may entitle the original supplier to the proceeds of sale. Unless the funds are held in a client account, these clauses are very difficult to enforce.

Mixed Goods Clause

If the goods supplied were used in the manufacturing process, and mixed with other goods, a 'mixed goods' clause may allow the supplier to claim right of ownership over the original raw materials. This type of clause can be problematic as it may not always be possible to separate the raw materials without causing damage to the third party goods.

Enforceability

In order to enforce these retention clauses, they need to be clearly defined and signed by both parties. A supplier can then put their case to the appointed liquidator to prove that title should remain with the supplier and enforce the clause accordingly.

A customer should be made aware of any ROT clause before, or when a contract is agreed, for it to be enforceable. It is also advisable to include these clauses within the terms and conditions of trade and not simply documented on the back on an invoice.

Ensure that you have evidence of the customer agreeing to the clause, whether in email form, a signature, or a note.

ROT clauses work best when they are specific and limited in scope. Too broad and non-specific, and they will prove useless when it comes to putting the clause into action following your customer's insolvency.

Are there any limitations to enforcing a Retention of Title Clause?

If the supplier is aware that their goods will go on to be used in the purchaser's normal course of business i.e. sold on before payment has been made, then any ROT clause may well be unenforceable. Where a company has entered administration unless permitted by the administrator or by Court Order, a supplier will not be able to enforce



a ROT clause due to the moratorium that is in place.

Common sense dictates that any perishable goods are, by their very nature, going to make a ROT clause unenforceable.

Ensure that your clause does not try and represent itself as charge over the customers assets. Charges over companies must be registered with Companies House within 21 days of their creation. If you fail to do so, then the charge becomes void.

What should I do next if I think I have a valid retention of title clause?

On the appointment of either the official receiver or a commercial Insolvency practitioner you should notify them of your claim. Until this notification, the company, under the office holders' control, may continue to use your goods without payment to you.

Additionally, the insolvency practitioner has the right to sell or dispose of any goods they reasonably believe belong to the insolvent company.

The appointed office holder will likely send a retention of title questionnaire to you on appointment, but if they haven't, then be sure to request one and complete it as soon as a practically possible. The questionnaire will give the appointed office holder a better understanding of the situation and establish whether the ROT clause meets the necessary requirements to be enforceable, it's very important that you send any relevant documents to support your claim.

Documentation to support a claim

- Details of the Retention of Title Clause.
- Evidence of express acceptance of your terms and conditions by the insolvent company.
- Details of the Supplied Goods.
- Identification of Goods.
- Specific Goods Belonging to You.
- Proof beyond doubt, that the customer has not paid for goods - Always keep accurate records.

Other measures

Following notification, you should arrange try to attend the company premises in order to identify your goods so that they can be put to one side and not mixed with other assets.

It is essential that when drafting your ROT clause, that you seek the appropriate legal guidance to ensure that they are legally enforceable and commercially effective.

All too often suppliers draft their own ROT clause then rely on it indefinitely. With the ever-changing development in case law, it is important that you regularly review them and their ongoing enforceability and effectiveness.

If challenged on the validity of your clause you should always obtain professional advice and guidance as retention of title is a complex area of the law. This can be further complicated by the various scenarios that could occur during an insolvency process.

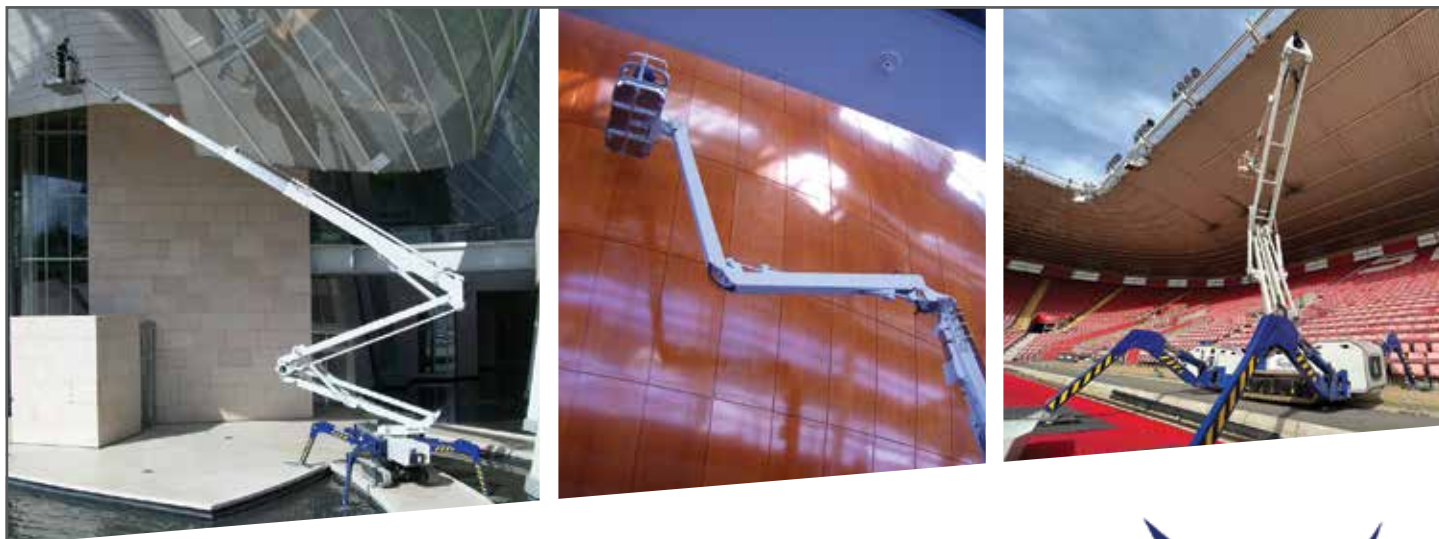
If you are unable to meet the requirements to enforce your clause, you may find yourself back in the payment hierarchy as an unsecured creditor. This brings us back to the importance of always

filing a proof of debt, no matter how small your debt may be.

Another useful tip is to hold onto any invoicing or statement data that may be deleted or archived because of the bad debt. We often see this dealing with claims further down the line, and without this supporting information the insolvency practitioner may not agree your claim.

Don't be afraid to ask for updates on the progress of the insolvency and ensure that you take note of progress reports to understand what progress has been made and likely dividend prospects. Ultimately, the insolvency practitioner is trying and get your money back, so you are fully entitled to receive such information and able to question the level of fees even though the basis may have been approved.

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