

## THE IMPORTANCE OF RETAINING TITLE TO GOODS

We have seen a gradual increase in client's from different industries seeking to protect themselves from non-payers by use of carefully drafted Retention of Title ("ROT") clauses.

In order to rely on a ROT clause it must be expressly stated and incorporated into the contract for sale of goods. A ROT clause will not be implied into a contract such as terms relating to fitness for purpose or satisfactory quality. To avoid any argument from a buyer, a seller should ensure that its terms and conditions (including the ROT clause) are stated on all brochures, invoices, delivery notes and price lists etc.

The ROT clause can be a simple statement that legal title to the goods shall not pass to the buyer until payment has been made to the seller in full. However, in practice ROT clauses are more complicated and require careful legal advice. By way of example consideration should be given to extending the ROT clause to cover payment of all monies due to a seller and not just monies due in respect of a specific order so that legal title does not pass until the seller's full account has been paid.

The real test is when a debtor is insolvent since Liquidators will generally do their utmost to contest a ROT clause in an effort to retain assets for the benefit of secured creditors. We had a dispute recently for a client who supplied aluminium ignots to a customer who subsequently went into liquidation. The liquidator sought to challenge our client's widely worded ROT clause which sought to retain title in goods supplied until all monies owed were paid notwithstanding the goods were converted into other products. This impacted upon the client's ability to enforce the ROT clause since unpaid goods must be identifiable and once goods have been converted the ROT clause may be defeated. In this particular case the ignots were liquefied at which stage other components were added as part of the manufacturing process. The original goods lost their integrity such that they were no longer protected by the ROT clause.

Consideration should be given to ensuring goods supplied are identifiable by serial numbers, batch numbers and distinguishing features. This is particularly important if the buyer receives the same goods from several suppliers. Buyers often take positive steps on delivery of goods to remove packing or other distinguishing qualities. A ROT claim is not defeated if the goods are still identifiable.

ROT clauses are useful devices to protect against debtors provided these are accurately drafted and incorporated into the contract for sale. Most importantly a seller must take prompt action to enforce a ROT clause in order to benefit from the protection it provides.

For further information or advice on any issues relating to ROT clauses please contact Harminder Sandhu on 01384 216840 or [hsandhu@hawkinshatton.co.uk](mailto:hsandhu@hawkinshatton.co.uk).