



## OWN IT UNTIL YOU'RE PAID

Everyone understands the simple concept of a sale - one person owns a product, someone else pays for that product and then they own it. However, the reality in the supply world is never this straightforward. As a seller you probably pass products to the buyer before receiving payment more often than not.

So if you are a supplier, how do you ensure that you retain your rights to your product if you have not yet been paid, even if it has been physically passed to the buyer? To attempt to achieve this solicitors draft what they call 'retention of title' clauses. I say 'attempt' as this is not straightforward and even if such clauses are drafted well, it cannot be guaranteed that they will be enforced.

Are these clauses any use then? The short answer is that they can be in a variety of situations, provided they are well written and include some relevant additional provisions. As the old cliché goes, 'if a job's worth doing it is worth doing well' and the same goes with such clauses. A good retention of title clause needs additional provisions beyond simply stating that the supplier retains ownership of the goods until payment has been made.

Those additional provisions may not be obvious at first. It will often be advisable for you to expand the clause to delay passing of title to the buyer until you have received all

payments owed to you by that buyer for any other goods and services you may have provided under other contracts. But you should go further:

- III retain the right to collect your goods from the customer's property if you do not receive payment; and
- III make sure that you require that your goods are stored separately from anyone else's and that they can be clearly identified as yours.

Such measures should ensure that if it all goes wrong and you don't receive payment then you can get your products back relatively easily. However there are limitations. At some stage it is reasonable to assume that any product you have sold may become incorporated into another product and as such become less identifiable. If you cannot clearly identify your product as being solely your product and if it cannot be retrieved without damaging or fundamentally changing something you do not own, you will not be able to get it back.

For example if you were selling car paint, it could be stored separately and clearly labelled as your product. However, once the paint has been sprayed onto a car, it would be good to be able to assert that you now own the car! However, you will probably not be surprised to learn that that does not work and your paint has become irretrievable at that stage.

To summarise, if you want to rely on these types of clauses they must be drafted well. It cannot be guaranteed that they will work every time, but provided you have the right procedures in place and you manage your customer relations well (for example by having the right to inspect that they are complying with their obligations under these types of clauses, even before insolvency happens) then you have at least a fighting chance of getting your goods back.

Nothing can remove all risk from your commercial transaction, not even the amazing clauses I can draft (even if I do say so myself), but retention of title clauses combined with other types of clause can help to manage your risk. I will be considering these other 'types of clause' in future articles.

Please call me if you have any contractual/commercial issues you think I can help with. My contact details are below and we do not charge for a quick enquiry or discussion to scope what you might need.

**The article contains a summary of complicated issues and should not be relied upon for specific matters. You are advised to take legal advice on particular problems.**

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