

Guide to Retention of Title



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What is Retention of Title?

An effective Retention of Title (ROT) clause in your terms and conditions of sale will ensure that you are ranked ahead of ordinary unsecured trade creditors in the event of the insolvency of one of your customers. There are two main types of ROT clauses as follows:

A “**simple clause**” is the most basic form of retention of title which specifies that title to the goods represented by each of your invoices shall only pass from you to the buyer when the buyer has paid you in cleared funds the invoice value of those specific goods.

An “**all monies clause**” specifies that title to the goods represented by each of your invoices shall only pass from you to the buyer when the buyer has paid you in cleared funds the invoice value of those specific goods and the invoice value of all other goods that you have sold or agreed to sell to the buyer.

Our advice would be that you have an “**all monies clause**”. For many of our policies having an effective “all monies clause” is a condition of cover. The main benefit of having this as opposed to a “simple clause” is that in the event that you make an ROT claim after your customer has entered insolvency, as long as you are able to **identify** your goods, there is no need to match up specific goods against specific unpaid invoices.

Your chances of a successful recovery under a valid ROT clause depend on your ability to identify your goods and prove you supplied them. You should therefore package or label your goods in a way which would enable you to easily distinguish them from goods supplied by other creditors of your customer.

The following example ROT clause contains the minimum required to establish an “**all monies clause**”:

The risk in the goods shall pass from the seller to the buyer upon delivery of such goods to the buyer. However, notwithstanding delivery and the passing of risk in the goods, title and property in the goods, including full legal and beneficial ownership, shall not pass to the buyer until the seller has received in cash or cleared funds payment in full for all goods delivered to the buyer under this and all other contracts between the seller and the buyer for which payment of the full price of the goods thereunder has not been paid. Payment of the full price of the goods shall include the amount of any interest or other sum payable under the terms of this and all other contracts between the seller and the buyer under which the goods were delivered.

Contractual incorporation

Statistics indicate that over 90% of ROT clauses fail not because of poor drafting of the clause but rather due to the lack of proper and effective incorporation of the clause into the terms and conditions of sale which govern the contractual relationship between the buyer and the seller.

Best credit management practice and prudence dictate that you should have standard terms and conditions of sale pertaining to amongst other things:

- the applicability of the conditions to all sale transactions with your customers
- the terms of payment, delivery, quality and description of the goods
- default by the customer and your ability to cancel the contract without liability to you
- entitlement to late payment interest and all collection and recovery costs
- notices
- applicable law and jurisdiction
- an effective “**all monies**” ROT clause

All terms and conditions of sale must be **incorporated** into the contract. As far as the obligation goes in contract law, **it is up to you** to demonstrate (i.e. you bear the burden of proof) that you have used **all reasonable efforts** to bring your terms and conditions of sale to the attention of your customer **before** or **at the time** that the sale contract was executed. It is essentially an

objective test. Terms printed on post contractual documents alone (eg. invoices, delivery and advice notes) will not be incorporated into the sale contract and will not be valid unless a course of dealing argument can be proven.

Accordingly, an effective ROT clause and all other terms and conditions of the sale contract ought to be printed on:

- all price lists and brochures,
- all credit application forms completed by the customer,
- all quotations or estimates,
- all customer order forms,
- all acknowledgement of order forms,
- all delivery or advice notes, and
- all invoices.

If you do not employ the use of either **Acknowledgement/Acceptance of Order Forms** or **Customer Order Forms**, or if your Standard Terms and Conditions of sale are not incorporated on such documents then, in the situation where a customer orders goods using its own form with its own terms and conditions of sale/purchase incorporated therein, or otherwise brings its terms and conditions of sale/purchase to your attention before or at the time the contract is concluded, you may find yourselves with a problem concerning the “Battle of Forms”. Where this situation occurs, the terms and conditions applicable to the contract will be the last one (either yours or your customer’s) brought to the attention of the other party immediately before the contract of sale is concluded.

Our suggestion would be to ensure that you use Acknowledgement/Acceptance of Order Forms with your terms and conditions of sale either printed on the reverse with clear print on the face of the form drawing the customer’s attention to the terms and conditions printed on the reverse or at least referred to thereon. This would be the stage when the sale contract is executed by way of acceptance of your customer’s offer.

The use of a **Credit Application Form** is also highly recommended as a safe method of discharging the burden of proof in establishing that your terms and conditions have been incorporated into the sale contract. As long as your standard terms and conditions of sale are actually printed on the reverse of this form and/or attached and/or drawn to the attention of your customer, that will usually suffice for the purpose of having your contractual terms govern the sale contracts entered into.

On the Credit Application Form should be a clear and watertight declaration to be signed by all your customers as follows:

//We hereby acknowledge receipt of a copy of your standard terms and conditions of sale which //We have read and which //We accept shall apply to every sale contract entered into between us. In particular, //We have noted and accept all the conditions relating to the granting of credit, terms of payment and retention of title and property in all goods supplied until all monies outstanding under any sale contract have been received by you by way of cleared funds.

We also suggest that your standard terms be printed on all **invoices, delivery or advice notes, price lists and brochures**. Once this is done, your standard terms and conditions of sale will usually have a better chance of being the terms and conditions that govern the sale contracts between you and your customers. However, there would still be scope for those terms and conditions of sale to be varied notwithstanding anything stipulated to the contrary.

To assist in the **identification of your goods** (not just physically but also in relation to the outstanding invoices), we suggest that the goods be marked with individual serial numbers and these serial numbers quoted on your invoices. It would also be helpful if your name and address appeared on your goods.

Enforcing ROT clauses

Finally, it should be noted that **in the event of the failure of a buyer, it is imperative that you act swiftly in identifying your goods and lodging an ROT claim with the Insolvency Practitioner concerned.** Our Recoveries section can assist with advice on the practicalities of enforcing your Retention of Title rights with Insolvency Practitioners.

Assuming you have a well drafted “all monies” ROT clause correctly incorporated into your contract of sale and you can identify your goods we would encourage you to take the following actions immediately in order to enforce your rights when your customer fails to pay you the debt owed or goes into insolvency:

- Immediately contact your customer or the insolvency practitioner concerned verbally and in writing;
- Say that you retain title to your goods and refer to your ROT clause;
- Arrange to physically identify your goods with the least delay – the longer the delay, the more chance that the goods will be untraceable;
- Take an inventory of your goods and, if possible, photograph them and have the photographs and/or inventory authenticated by recording the location on them and arranging for them to be signed and dated by your representative and by the representative of the customer;
- Revoke your customer's right to resell your goods and demand that they are segregated and marked as your goods;
- Advise your customer or the insolvency practitioner that further dealing with your goods will result in their liability for wrongful interference or conversion under the Torts (Interference with Goods) Act 1977;
- Arrange a date to recover your goods, or if you are dealing with an insolvency practitioner, get their payment assurance for your goods.

A suggested draft ROT enforcement letter, which covers the above points, is attached for your reference.

Reviewing your terms and conditions

ROT clauses can be extended further to impose various conditions on the customer. Whilst they have so far not found favour with the courts in England & Wales there is no real danger in having extended ROT clauses as one day they may be upheld and in any event as long as they are subdivided into paragraphs, the court will be able to sever those parts that are valid from those that fall foul of the current law.

As the law develops in this area and in relation to sale contracts generally, it would be prudent to have standard terms and conditions of sale reviewed periodically by specialist lawyers. Please note that Euler Hermes Collections UK Ltd provide an independent terms and conditions review and/or redrafting service at very competitive rates and we would encourage you to contact them for further details on 020 7860 2756.

EXAMPLE ROT ENFORCEMENT LETTER

Dear Sirs,

Retention of Title

We refer to (“the Stock”), [describe stock], supplied to, (“the buyer’s name”), under our terms of sale incorporating a Retention of Title clause.

We have not received payment for the Stock, which therefore remains our property. We hereby terminate your right to sell or otherwise dispose of the Stock, and require that it be delivered up to us as soon as practicable. Please note that any sale or other dealing by you of the Stock after receipt of this letter may constitute wrongful interference with goods, with consequent liability for damages.

Please confirm as soon as possible that:

1. The Stock remains secure, is stored separately from other goods and is clearly identified as our property; and
2. You will immediately inventorise the Stock and supply us with a copy of the inventory; and
3. We may access your premises at a time to be arranged, to inspect the Stock and make arrangements for its removal.

We look forward to hearing from you.

Yours faithfully,

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