

## Retention of title and the potential perils of delivering to third parties



### The purpose of a retention of title clause

A retention of title clause in a contract for the sale of goods means that legal title to the goods does not pass to the buyer until they are paid for. It is intended to give the seller priority over secured and unsecured creditors of the buyer and allows the seller to recover the goods supplied if the buyer fails to pay for them. In practice, a well drafted retention of title clause is an important weapon in the armoury of a supplier if a customer becomes insolvent.

### The effects of inadvertent delivery to a third party

Most suppliers understand that there is a risk that their goods may be sold on to a third party before the customer has paid for them and that they may lose the benefit of the retention of title clause. However, they are less likely to be aware that the delivery of goods to an address other than the primary trading address of their customer may mean that at no point do they ever have the benefit of the retention of title clause.

The high cost of real estate and transportation, increasingly widespread geographical customer bases and the upswing in outsourcing in recent years has meant that it is increasingly common for suppliers to be asked to deliver goods to an address that is not the primary trading address of their customer. This may seem like a reasonable commercial request, but it presents a potential pitfall for suppliers hoping to rely on a retention of title clause in the event of the insolvency of their customer. If the customer delivers or transfers the goods to a third party (the end customer) either directly or through an agent, then the end customer receives good title to



those goods unless he has knowledge of the supplier's retention of title clause. This means that the supplier can no longer rely on the retention of title clause to recover those goods even if he has not been paid for them.

It is not unusual for a supplier to be asked to deliver goods to a warehouse and most suppliers would assume that the warehouse is simply their customer's outsourced storage facility. However, it may in fact be storage hired by the end customer. That link can be disguised by the relative anonymity of a warehouse and the usual warning signs would be hidden.

If the warehouse is the end customer's storage facility then delivery to that warehouse by the supplier amounts to delivery to a third party through an agent, and title passes to the end party on delivery. This is the case even where the supplier is not expressly told that he is acting as agent for the customer.

## What can suppliers do to protect themselves from this scenario?

Whilst this is not a risk that can be entirely eliminated, a supplier can help to protect its position by taking the following steps:

1. Asking for further information about the delivery address and either refusing to deliver to an address that is not the primary trading address of the buyer or insisting upon upfront payment;
2. Including an "all monies" clause in the contract for sale enabling the supplier to reserve ownership of the goods supplied until the buyer has not only paid for those goods, but for all goods supplied by the seller to the buyer. However, such clauses are limited in effectiveness and it has been suggested that such clauses create a charge by the buyer in favour of the seller which would be void against a liquidator or administrator unless registered at Companies House;
3. Clearly labelling the goods so that they are identified as belonging to the seller; and
4. Putting in place a proper credit control system with the buyer which could include, for example, setting up a form of deposit or reserve fund that is regularly topped up by the buyer and which can be used in the event of the buyer's financial difficulty and/or in the event that a scenario as outlined above arises.

## How we can help

If you would like further advice or information on this topic, then we can help. Get in touch with us or contact our [commercial disputes](#) team.



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