

Retention of Title (RoT) | All Monies Clause

It is now a condition within most credit insurance policies that customers have an 'all monies' Retention of Title clause written into their sales contracts. In the event of an insured buyer becoming insolvent this form of Retention of Title provides the best security for the insured goods and the money due. Herewith is a guide to Retention of Title to help ensure that you incorporate effective clauses in your contracts, and so can meet the conditions of your credit insurance policy if applicable.

What is Retention of Title (RoT)?

Retention of Title can be an effective form of security in case any of your customers become insolvent. The RoT clause should be a condition of your contract of sale, which will allow you to retain ownership of, or title to, all goods until they are paid for. If the Insolvency Practitioner wants to use the goods rather than allow you to collect them, they will have to pay for them if you use this clause.

Two types of RoT

A RoT clause can be either 'simple' or 'all monies'. If it's 'simple', you can retain title only to the goods belonging to the particular contract or delivery for which you have not had payment. That means that in the event of a loss, you will have to be able to identify your goods sold under the particular contract e.g. by a serial number stamped on the goods. This can often be difficult in practice, especially if you have made a number of deliveries: some paid for, but others not. However an 'all monies' clause stipulates that the goods sold under a particular contract remain your property until the customer has paid both for these goods and for any other goods that you've supplied under any contract with them. In this case, you don't have to link particular goods to particular invoices, although you will still need to be able to identify your goods in order to enforce the 'all monies' clause.

The following is an example of the wording typically found in an 'all monies' clause:

'Notwithstanding delivery and the passing of risk, property in and title to the goods shall remain with the seller until the seller has received payment of the full price of (a) all goods and/or services the subject of the contract and (b) all other goods and / or services supplied by the seller to the buyer under any contract whatsoever. Payment of the full price shall include, without limitation, the amount of any interest or other sum payable under the terms of this and all other contracts between the seller and buyer'. The particular wording of such a clause for a specific contract would need to be tailored to be consistent with the rest of the contract terms and appropriate to your specific business.

How do you ensure that RoT applies to your sales contract?

Always check the following:

- Has the buyer agreed to trade under your conditions of sale?
- Unless the buyer explicitly agrees to the terms and conditions of sale - including the RoT clause, you will need to demonstrate the buyer's implicit acceptance before the performance of the contract.

Always check whose 'terms of trade' you are trading under and ensure they are yours

Do not simply set out the 'terms and conditions' on the back of an invoice. An invoice is a 'post – contractual' document and it is too late to try to impose terms after the contract has been made. If you acknowledge orders in writing, you can include your conditions of sale (incorporating the RoT clause) in your acknowledgement. However, your customer may counter with their own trading terms. You may then find yourself in a legal wrangle to determine whose conditions apply to the contract. This is called 'The battle of the forms'. Ideally, get your customers to sign a contract accepting all your conditions of sale, acknowledging that these are the terms of trade on which you both rely. Check your contracting procedures regularly to ensure that your RoT clause and indeed your other terms of trade, continue to be the operative terms: in practice such procedures can sometimes change unintentionally over time with unwanted consequences.

How do you enforce the RoT clause?

In the event of a buyer failing, you must act swiftly to register your RoT claim with the Insolvency Practitioner. You can enforce your rights under RoT at any time and not just Insolvency. Obviously your relationship would have deteriorated if you apply RoT prior to Insolvency. Any recovery may be treated as Salvage on your insured debt.

Unless there are good reasons not to do so, we recommend that you take the following actions:

As soon as you become aware of the Insolvency, telephone your customer and the Insolvency Practitioner, and then confirm in writing, to advise that under the RoT clause in your terms and conditions, you retain title to the goods. This means that your customer and / or the Insolvency Practitioner are on notice that they no longer have the right to resell your goods. Demand that your goods be separated from any other stock they have and that an 'inventory' be created. This is termed quarantining by the Insolvency Practitioner.

Warn your customer and any Insolvency Practitioner, that in relation to any further dealings with your goods, you reserve all the rights, both under the Torts (Interference with Goods) Act 1977 and otherwise. Arrange to identify your goods and get the Insolvency Practitioner to sign the inventory. If the goods subsequently go missing you have the means to extract payment for them from the Insolvency Practitioner. This will resolve any disputes over the existence of the goods.

What if you don't have RoT in your contracts of sale?

When you sell goods, ownership normally passes from you to the customer. Once ownership has passed, you have no right to repossess the goods even if your customer has not paid for them. The only remedy that you have is to sue for the price – but if the customer has become insolvent, often all you can do is hope for a dividend, but you first have to lodge your claim in the insolvent estate.

Do you have to have 'all monies' RoT in your contract?

An 'all monies' RoT clause is usually a condition of a credit insurance policy, with particular onus on countries and trade sectors where experience leads the insurer to believe there is significant value to be gained by its presence, not just for you, but also the Underwriter. Please check your policy carefully.

If you have RoT, does this automatically mean you get a claim paid?

The inclusion of RoT in your terms and conditions is for your benefit, as well as to protect the potential recovery position for an Underwriter. Given that RoT is quite probably a condition of your credit insurance policy, you should ensure the RoT clause is 'all monies' and suitably worded and checked from a legal perspective by your legal advisers. Having a valid clause does not mean an automatic claim settlement will follow.

Summary

Always check that:

- You have acted in a timely manner to register any RoT claim with the Insolvency Practitioner, taking all the steps to recover the goods and prevent onward sale. (see – 'How do you enforce the RoT clause?' above for more recommendations)
- You should ensure that your RoT clause has been properly incorporated into your contracts, and as such, accepted by your buyer before you commence trading. As we have said – don't rely on RoT terms on the back of invoices.
- Occasionally, the Insolvency Practitioner may decline all or part of your RoT claim because, for example, your goods have been mixed with others and rendered unidentifiable or have all been on-sold and are no longer in your buyers possession or control. This does not mean that an Underwriter will avoid liability. Provided you are operating under your terms of trade, have an 'all monies' wording incorporated into your contract, and make sure you can show you have acted properly and swiftly to register your claim, then you will have complied with RoT conditions. Of course the Underwriter will expect you to minimise loss in accordance with your policy conditions, but where the Insolvency Practitioner declines all or part of your RoT claim for reasons beyond your control, we do not expect that this action will be treated as a breach of your RoT conditions.

Overall, with adequate contractual wording, and timely enforcement, you can benefit from quicker, less problematical claim payments and stronger recovery options. For more complicated scenarios the Underwriter may step in and help you.

The main points to remember:

Ensure that your RoT clause governs the contractual arrangement between you and your customer.

- In the event of a customer's Insolvency, act swiftly to identify the goods and claim title to any of your goods still in the customer's possession before they are sold on or used in the manufacturing process. Obtain written acknowledgement of this.
- Be persistent. Get in touch as soon as an Insolvency Practitioner is appointed. Provide detailed information about your goods and do not be fobbed off. Record and confirm phone calls and meetings in writing – if a legal battle ensues this will improve the chances of proving your case.
- Get good legal advice early on. If your clause is well drafted, your terms properly incorporated and your case well documented, you may avoid the expense of legal proceedings. If you need help finding a lawyer, we can assist.
- And finally, remember that, although goods may be useless to you if returned, they may be critical to the Insolvency Practitioner and he will need (and even perhaps be keen) to pay for them if they belong to you.
- The Underwriter will usually consider the residual commercial value providing it is reasonable, so original invoice values need not be credited to the account.
- The Underwriter may consider allowing you to set off reasonable costs to recover the goods e.g. transport.

The information provided in this document is intended as a guide only and should not be relied upon in the event of litigation. You are strongly advised to seek your own legal opinion before taking any action.