

**USE OF RETENTION OF TITLE CLAUSES IN TERMS AND CONDITIONS OF
TRADE**
A comparison between German and Australian law

Under the German Civil Code and the NSW Sale of Goods Act and similar legislation in the other Australian states, the seller of goods may reserve its ownership of goods it sells, and accordingly retain property in those goods until certain conditions have been met. Retention of title clauses are generally designed to retain the seller's title in the goods so that ownership does not pass to the buyer on sale or delivery. The purpose of retention of title clauses is:

- a) firstly to avoid the usual presumption that title to goods passes on delivery. The clauses usually seek to retain title in the seller until payment for the goods is received in full by the seller; and
- b) secondly, to allow the seller to re-take possession of the goods if they are not paid for, typically in circumstances where the buyer has become insolvent (e.g. a liquidator or administrator is appointed).

Incorporation of retention of title clauses

Under Australian law, if the seller wishes to rely on a retention of title clause, it must give the buyer sufficient notice of the clause **before or at the time** when the contract of sale for the goods is concluded, and ensure that the buyer accepts the clause. It is therefore strongly recommended that the seller should require the buyer to sign the terms and conditions of trade containing the retention of title clause in order to avoid a subsequent dispute about the buyer's awareness of, and agreement to the seller's terms and conditions at the time the contract was made. It follows that if the sale contract is concluded by fax, email or telephone and the buyer becomes insolvent, it will not help the seller if the seller prints its terms and conditions of sale on the back of its order confirmation form or tax invoice. However, if there has been a course of dealings between the seller and the buyer and invoices received by the buyer have a retention of title clause printed on them, such a clause may be effective if the buyer has not rejected the clause during the course of the previous dealings.

Under German law, the seller and buyer must also agree contractually on a retention of title clause for it to be effective. However, unlike Australian law, the seller can declare a retention of title up until the time of delivery of the goods.

All moneys clauses

Retention of title clauses may claim title to goods supplied by the seller until all goods supplied by the seller to the buyer have been paid for. Such "all moneys" clauses may be particularly desirable where the seller is making repeated deliveries of standard items which do not have unique serial numbers or if deliveries are not easily separable or identifiable.

In Australia, under certain conditions, it is possible to reserve title to goods until all outstanding moneys owed by the buyer to the seller have been paid, and not just until the purchase price for

the particular goods has been paid. However, sellers should note that the more ambitious the clause, the more likely it is that the courts will decline to give effect to the clause. This is usually on the ground that the clause amounts to a charge over the customer's assets. Such a charge would then be void unless it is registered at ASIC (which almost invariably is not the case). Moreover, such a clause is inconsistent with the general legal principles of transfer of title in goods, and therefore likely to be unenforceable.

Unlike Australian law, under German law "all moneys" clauses are generally valid between businessmen (so called "Kontokorrentvorbehalt").

Identification of goods

Under Australian law, in order to establish a valid retention of title clause, the seller must be able to identify the goods covered by the clause. This is generally not an issue if the goods have a unique serial number or are otherwise easily identifiable and can and have been kept separate from other deliveries. However, where the seller supplies a standard product, practical measures to ensure that the goods are readily identifiable, will be required.

The same problem arises for sellers under German law, if the retention of title clause is a "basic" retention of title type clause which only extends to the sold goods.

What happens if the goods have been used to manufacture other goods?

Under Australian law, a seller must consider whether practically, it is possible to identify and to retain title over goods which are used in a manufacturing process by the buyer. For example, if goods are incorporated in an assembly process and can be recovered intact by using a screwdriver and without damaging the products into which they have become incorporated, then it should be possible to retain title over the goods incorporated in the assembly process.

On the other hand, where the seller's goods are inextricably mixed with other products, a "basic" title retention clause may be useless, as the goods may no longer be separately identifiable or re-useable.

So what can a seller do?

Firstly, a seller can in certain circumstances extend the protection of a retention of title clause to the manufactured goods themselves. That is to say, the vendor retains ownership in its goods and obtains ownership in the new products into which they have been transformed. However, where the arrangement between the buyer and seller confers such additional rights (so called "extended" retention of title clause), it may well be held by a court that a charge has also been created. As mentioned above, the court may then deny giving effect to the clause as a charge is only effective against third parties (e.g. liquidators and administrators), if it is registered at ASIC. The law in this regard has been described as a "minefield". The terms of each individual clause must be looked at individually, and small changes in the text may mean significant changes in effect. When interpreting such clauses, the nature of the commercial transaction itself will also be taken into account by the courts.

Unlike Australian law, German law allows for an "extended" retention of title clause which is generally upheld if used in commerce between businessmen. Under an "extended" retention of title clause, the parties agree that the retention of title does not lapse with an assembly process, but extends to the end product of the assembly process. Therefore, under German law, the seller

becomes the owner of the end product. If, during the assembly process, the buyer uses goods from different sellers supplied under extended retention of title clauses, the various sellers become joint owners of the end product. Their respective interests in the end property is determined by the value of their respective goods at the time of the assembly process.

Proceeds of re-sale of goods

In many circumstances, it is also necessary to afford the buyer sufficient freedom to trade normally in or with the goods.

Under Australian law, sellers should consider the possibility of tracing and recovering the purchase price for their goods from the proceeds of re-sale, if the buyer becomes insolvent having resold the goods without paying for them. However, the above comments about overly “ambitious” clauses should be kept in mind when attempting this approach. Generally, such clauses will only be valid if a fiduciary relationship between the seller and the buyer is found to exist by the courts.

Under German law, an “extended” retention of title clause may also cover future claims of the buyer against third parties. Under such a clause, the buyer assigns all future claims against third parties to the seller. It allows the seller to trace and recover the proceeds of sale against the third party. Such an assignment is generally valid between businessmen, unless the contract between the buyer and the third party prohibits the assignment.

Group of companies

What is the situation if the seller or buyer is part of a group of companies? Can a retention of title clause be extended to claims against other members of the group of companies?

In Australia, the answer is no. A retention of title clause is only effective between the actual parties to the contract (so-called “privity of contract”).

Under German law, the answer depends on whether the group of companies is on the seller’s or on the buyer’s side. If the seller is a member of a group of companies, a retention of title clause extending to all goods delivered to the buyer by members of the seller’s group is invalid. On the other hand, if the buyer is a member of a group of companies, a retention of title clause extending to all claims against third parties which are members of the group, is not prohibited.

Conclusion

The applicable law may have major effects on a seller’s right to recover goods it sells from defaulting customers. Sellers must therefore carefully consider whether German or Australian law should apply to a transaction before entering into a contract for sale of goods if the sellers intend to retain title to the goods. The terms of the contract for sale should also clearly stipulate which law should apply. Of course, the choice of applicable law may also have numerous other ramifications. Therefore, all the relevant aspects should be taken into account when making this decision.

Michael Kobras

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