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The Importance of the Retention of Title Clause in the General Terms and Conditions

Companies often ask us why it is important to include a retention of title clause in the general terms and conditions of an agreement. The answer is quite simple. Rather than regulating matters related to the core of an agreement, such as product and price, the general terms and conditions are concerned with the framework around the agreement. These include liability, the duration of the contract, the time limit for complaints, jurisdiction in case of disputes, the retention of title, debt recovery costs and late payment penalty. Companies that supply goods to other companies, nationally or internationally, would be wise to negotiate and include a retention of title clause in the general terms and conditions of their agreements.

What is retention of title?

Retention of title means that the seller remains the legal owner of the goods he delivers until the purchase price is paid in full. As long as the seller retains title to the goods, he has the right to reclaim them from the buyer, should buyer fail to pay the purchase price. The retention of title clause is therefore a pre-emptive measure, regarded as a highly effective business tool. Under Dutch law, the retention of title clause must meet several conditions.

1. It must be agreed in writing either by being included in the purchase agreement or in the general terms and conditions.

2. The goods delivered must be sufficiently defined and identifiable;
   Should it be unclear which exact goods are involved, it becomes very difficult for the seller to reclaim them.

3. The goods delivered must not yet be incorporated into new products;
   This includes parts such as screws, which may form part of other products.

4. The goods must not be processed and remodelled into a new product.

Unfortunately, the retention of title clause is not available for companies delivering services, such as the provision of education, courses and the like.

In practice, the retention of title clause is included in the general terms and conditions. Companies are advised to have the buyer sign for the receipt and acceptance of their general terms and conditions. Noting a retention of title provision on the invoice is not sufficient.

What happens if the buyer declares bankruptcy?

Should the buyer become insolvent prior to the full payment of the purchase price, the seller can reclaim his goods from the buyer's bankruptcy estate. As the seller retains ownership of the goods, these do not form part of the bankruptcy estate of the insolvent buyer. Under the Dutch Bankruptcy Act, in case of bankruptcy the supervisory judge may specify that recovery claims not be exercised for up to a period of two months, and then only with the authorisation of the supervisory judge. This gives the administrator of the estate time to assess the outstanding claims.

The two months are the so-called cooling off period. A cooling off period may extend to a maximum of two months. After this period, the administrator must either return the goods to the seller, or he can choose to pay for them. This could be to the advantage of the estate, for instance in cases where part of the purchase price has already been paid. Under Dutch law, a seller who has not been paid but has retained the title to his goods has a very strong position in case of buyer's bankruptcy. The seller may either reclaim the goods or be entitled to payment in full. If the seller has reserved ownership of the goods, he can demand payment even when the buyer has applied for a moratorium. The Dutch Bankruptcy Act contains a similar provision for moratoriums.

Conclusion

Unless you have agreed on a retention of title clause, you will not be able to reclaim your goods and must join a frequently long queue of unsecured creditors. You will have to write off the debt as uncollectible, at considerable cost. It is a case of better safe than sorry.

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