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**Related Reading**

**About the International Chamber of Commerce (ICC)**

# INTRODUCTION

## RETENTION OF TITLE

### A practical ICC guide to the legislation in 37 countries

#### SCOPE OF THE GUIDE

Retention of title (RT) is an important means for protecting the seller's rights, especially in the case of deferred payment, by postponing the transfer of title until the buyer has paid the full purchase price.

In a normal sales transaction without an RT clause, title will pass to the buyer at the moment of actual delivery or when the contract of sale has been concluded, depending on the applicable national law, which may substantially differ on this issue. This is also true when the contract is submitted to the Convention on Contracts for the International Sale of Goods (CISG), since the transfer of title is an issue which is expressly excluded from the Convention.

By including a valid RT clause in the contract, the seller will in most countries be able to reclaim the unpaid goods, even in case of bankruptcy of the buyer. However, the actual effectiveness of the clause may vary substantially according to the applicable law (which will in principle be the law of the place where the goods are located). Certain laws may provide particular limitations or conditions.

This is why parties who decide to include the RT clause in their contracts may wish to know more about the validity and enforceability of such a clause in the various countries where they are selling their goods, in order to be able to evaluate whether it may be an appropriate defence against the risk of non-payment by its customers.

The purpose of this guide is to give a general overview of the legal framework in the various countries covered, with a description of the applicable legal rules. This information can be the basis for a more in-depth inquiry in case the seller needs to ensure that its credit will be adequately protected through an appropriate RT clause.

We believe that this basic information will help parties to understand whether the recourse to RT as a tool for protecting the seller in case of non-payment may be an appropriate solution with respect to a given country. It will at the same time, provide them with the necessary information for choosing the most appropriate legal solutions, and possibly with the assistance of a local expert.

#### THE CONTENTS OF THE COUNTRY REPORTS

The country reports have been prepared on the basis of a questionnaire evidencing mainly the following issues:

1. Rules governing RT, if any, and their characteristics
2. Effects of RT on transfer of risk
3. Formal requirements for validity of the RT clause
4. Effectiveness:
  - with respect to third parties who have acquired the goods;
  - in case of goods transformed
5. Enforcement against the buyer
6. Bankruptcy of the buyer—Interaction with RT
7. Model clauses—Drafting tips

### **WHEN IS RECOURSE TO RETENTION OF TITLE APPROPRIATE?**

When dealing with RT, one should begin by considering that the possibility offered to the seller under an RT clause, to reclaim the unpaid goods, does not necessarily amount to an effective means of protection of credit. Whenever recovering the goods does not adequately cover the unpaid amount (e.g. with respect to goods made for a specific buyer which cannot be resold without loss, or seasonal goods) or when the cost of taking back the goods would be disproportionate, the RT is not necessarily the appropriate means for protecting the seller's credit and the seller should look for other means for warranting payment, such as bank guarantees, letters of credit, advance payment, etc.

This means that, before choosing to use this mechanism as a protection against the risk of non-payment, the seller should verify whether an RT clause is the most effective means, and if not, look for alternative solutions.

### **THE APPLICABLE LAW**

While the validity of the RT clause and its effectiveness between the parties is governed by the law of the contract in which the clause is included, the effectiveness and enforceability of the clause towards third parties (including the case of bankruptcy) shall be governed by the law of the place where the goods are located (*lex rei sitae*).

Consequently, when goods are sold abroad, the seller must ascertain to what extent and under which conditions the RT clause is effective in the buyer's country and draft the clause in conformity with the requirements of such law as far as possible.

## DRAFTING THE RETENTION OF TITLE CLAUSE

It is common practice to include RT clauses in contracts of sale without having analysed their actual effectiveness. This practice is acceptable when the seller simply wishes to have an additional protection without really counting on its effectiveness, since a standard RT clause can be easily included in the general conditions of sale.

However, when the seller needs to be sure that it will be able to recover the unpaid goods, a specific clause, especially adapted to the law of the buyer's country and to the specific needs of the seller, must be prepared, possibly with the assistance of a local lawyer experienced in this field.

In fact, according to the possible options available under the applicable law, parties may negotiate various types of clauses, from the simple RT clause to more complex clauses which extend the seller's protection in case of resale of the goods, their incorporation in other products, etc. These clauses, which must respect the options available under the law of the country of the buyer, must be drafted with the utmost attention.

The guide provides a number of sample clauses, which are helpful for understanding the usual practice in the respective country. However, it is recommended not to use them without the advice of a local expert, so that the seller can be confident of their enforceability.