EUROJURIS INTERNATIONAL CONTRACTS & LITIGATION Group

THE RETENTION OF TITLE IN INTERNATIONAL COMMERCE

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Introduction

This article is meant to give an overview over a relatively accessible tool for the protection of the seller, the retention of title (ROT, and over its functioning in an international context.

Nature of ROT and its effects on the sale of goods

The retention-of-title clause is commonly considered a suspensory condition attached to the contract of sale, having the effect of postponing the transfer of the ownership till full payment of the goods sold. It is usually embodied in a contract clause, especially in general terms and conditions, but in some countries (e.g. Germany) can be validly created by a unilateral declaration of the seller at the time of delivery. The ROT actually affects one aspect of the sale of goods, i.e. the "transfer of title", by ruling it independently from the transfer of possession and from the passing of risks, which are otherwise naturally connected and often coincident with the transfer of ownership. While these two last aspects are usually governed by widely harmonised sources of law (see e.g. CISG) or commonly adopted standard terms (see e.g. INCOTERMS©), this is not the case for the transfer of title, which is ruled by the national laws applicable to the (moving) goods and needs therefore a separate and accurate analysis.

Different types of ROT clauses

In the countries where the ROT is most used, it has been developed in a variety of forms. Beside the simple ROT, under which the seller retains the ownership of the concerned goods as long as they are in possession of the buyer and they are separated from other goods, other known forms are:

- the extended ROT, which follows the goods once they are sold by the buyer or grants the seller a right on the reselling price (in this case the buyer normally undertakes to inform the seller accordingly and to keep records of the sub-sales);

- the enlarged ROT, which survives in case of transformation or incorporation of the goods;

- the all-monies-ROT; which remains in force as long as the seller has pending credits towards the buyer.

All these forms imply, for the ROT to be enforceable in practice, that the seller maintains a certain degree of control over the goods, through some kind of contractual and/or technical mechanism that allows him to find out or track "his" goods among others' goods.

Formal requirements of the ROT clause … for its validity between the parties

Regarding the validity and effectiveness of the ROT between seller and buyer, some countries admit (at least in theory) the use of the oral form (Italy, the Netherlands, etc.), others expressly require the written form (United States, Spain, United Kingdom). This condition is generally considered to be respected also in case of implied acceptance of written GT&C in which the ROT-clause is included and, in Germanic legal systems, in case of non-objection to the seller's order confirmation containing that clause. The written form is anyway to be preferred for evidence's sake. In Switzerland the ROT, to be valid even between the parties, needs to be registered in a public register held by the bailiff in the place of the buyer's domicile (Art. 715 ZGB).

… and for its effectiveness against third parties

A validly created ROT, in order to be enforceable against third parties (e.g. sub-buyer, creditors of the buyer or of the seller, etc.), in some countries has to respect some further requirements. In Italy, for example, the contract and the invoices need to have a sure date. In case of a frame contract (e.g. distribution agreement) the clause has to be expressly mentioned in each single invoice. See above for the registration in Switzerland. A form of publicity is also required in France for the ROT to be opposable in insolvency proceedings.

The mobile conflict of laws

Because of the above described variety of rules concerning the ROT, some issues may arise when goods are moved from a jurisdiction to another one where different rules apply, as it happens in the case of international sale contracts. On one side, the question of the valid creation and of the effectiveness between the original parties (seller and buyer) can be relatively easily addressed to, according to the contract law, which normally can be chosen by the parties or, at EU level, be determined according to common and foreseeable rules (EU Reg. 593/2008 which, in principle, leads to the application of the seller's law). On the other side, the question of effectiveness and enforceability of the ROT against third parties have generally to be addressed taking into account the rules of the legal system of the place in which the goods are located at a given time. States tend, in fact, to keep the control over critical aspects of the transfer of ownership (such as protection of creditors, bona fide possession, etc.) concerning the goods which are in their own jurisdiction. This prerogative, at EU level, has been acknowledged by the ECJ (C-32/05), which has not considered that situation to be in contrast with the scopes of the Directive on late payments (Dir. 35/2000, now replaced by Dir. 2011/7/EU, which mentions the ROT).

The application of the so-called lex rei sitae (law of location of the goods), which often

corresponds to the lex fori (law of the court), represents a filter for the application, in a certain country, of a ROT created under a foreign law. A first issue is represented by the transposition of the foreign ROT into a legal institute which is known or accepted in the "target" country. While for the simple ROT this is normally not a problem, being the simple ROT known in most countries, more elaborated forms of ROT, such as the enlarged or extended ROT (admitted e.g. in Germany, Austria, U.S., etc.), may encounter difficulties and may not be recognised in some other countries (e.g. Italy, France, England). A second and often deciding issue is represented by the formal conditions or publicity required for enforcing the ROT against third parties and in insolvency proceedings. To this regards a main distinction can be drawn between countries which do not foresee particular formal requirements (e.g. Germany, Austria) and some others which have a stricter regulation of ROT (e.g. Italy, Spain, to some extent France). That diversity has as a consequence that, for example, a ROT created under German law can hardly be enforced in Italy, while a ROT which would not be opposable in Italy (lacking e.g. the "sure date") might be successfully enforced in Germany. A hybrid and interesting solution, which expressly takes into account the above described issues, is offered by Swiss international private law (Art. 102, 2. par. IPR), which provides a salvation period of 3 month to register, according to Swiss law, a ROT created under a foreign law. A similar mechanism is provided by U.S. interstate legislation.

Conclusions

Unlike other kind of securities, the ROT is a "cheap" tool in the hands of the seller, generally accepted in the commercial practice and therefore available also for sellers without a particular contractual power. The lack of harmonisation at international level on certain aspects (types of ROT, formal requirements for enforcement) suggests though the need of some analysis of the laws of the target countries and, when required, the adoption of suitable measures to ensure the enforceability of the ROT. The benefits of a proper use of the ROT may nevertheless largely compensate those efforts and the related costs, in particular in case of insolvency proceedings, where the ROT can really represent an important advantage for the seller.