

Retention of Title in Italy: How Does It Work?

- Irene Grassi -

In a sale and purchase contract, it is possible to agree that the seller **keeps the ownership (title) of the goods until they are fully paid**, even after they are delivered to the purchaser. Retention of title is a form of guarantee for the seller known in many jurisdictions, but there are local specificities which should be kept in mind when delivering goods in a different country.

We will examine here the main features of retention of title of movable goods under Italian law.

- *When is it possible to agree retention of title?*

According to Italian law, ownership is transferred to the purchaser with consent, i.e. with the conclusion of the sale contract (offer and acceptance), delivery being an obligation of the seller but not a condition for the validity or effectivity of the sale. Therefore, **it is not possible to agree retention of title after the sale is concluded**, as in this case the ownership has already passed.

But what if retention of title is agreed **before the sale is concluded**? This may be the case in a framework agreement, e.g. in a **distribution agreement between the principal and the dealer**: such contracts often contain a clause of retention of title applicable to all future sales between the parties. Not all courts in Italy recognize such clauses, as the Italian Supreme Court has stated that the purchaser must agree on the retention of title in each sale contract. It is highly recommended therefore that, even if there is a framework clause, **retention of title is agreed in each sale contract**, or in each order and order confirmation.

- *How can the seller enforce retention of title in practice?*

As a general rule, in case the purchaser does not fully pay the price retention of title grants the seller the right to **declare the dissolution of the sale contract and claim return of the goods**. This can be done with a formal declaration to be notified by registered mail or certified email. However, retention of title can only be enforced if the unpaid sum is higher than 1/8 of the price. Seller declaring dissolution of the sale contract is obliged to **pay back any partial payments received** but is entitled to an **equitable indemnity** for the use of the goods and compensation for damages. It may be agreed in the contract that the amounts paid will be kept by the seller as indemnity and

compensation, but if the amount is too high the purchaser can ask a court to reduce it.

In case goods are not returned spontaneously, the seller can apply for **an interim order** from a court, to be enforced with the support of a bailiff.

- *Is retention of title effective against third parties like purchaser's creditors or bankruptcy liquidator?*

Once movable goods are in the purchaser's premises, they may be seized by purchaser's creditors. This is particularly dangerous for the seller in case the purchaser goes bankrupt.

In order to make retention of title enforceable against the purchaser's creditors and bankruptcy it is necessary that a) retention of title is **agreed by the parties** in the sale contract; b) retention of title is **mentioned in sale invoices**; c) invoices are duly registered in the books and have a **"firm date" prior to the bankruptcy or the seizure of the goods** by the purchaser's creditors. Having firm date ("data certa") means that the seller can prove that the invoices were issued before the mentioned events.

If the retention of title concerns **machines** which are not going to be moved from the place where they are delivered, it is possible to register the retention clause in a special register: this is only possible however if the contract is concluded in notarial form, so that high costs and formalities make this option very rare in practice.

In case of purchaser's bankruptcy, the unpaid goods which are in its premises will in principle be considered as belonging to the purchaser, and it is for the seller to enforce retention of title giving evidence of the requirements described above. This must be done with a **formal claim addressed to the bankruptcy court**. If retention of title is proved, the goods will not be considered part of the insolvency assets and the Liquidator will return them to the seller. If retention of title is not recognized, e.g. because it cannot be adequately proved, the seller will **only be entitled to claim the unpaid part of the price** at the same conditions of other creditors.

- *What happens if the purchaser sells the goods to its customers before they are fully paid?*

This is the worst case for the seller.

Once the purchaser has resold the goods to a customer, and the customer has obtained possession of the goods **in good faith**, the customer acquires the ownership free of burdens and liens. This means that **retention of title cannot be enforced against a third party in good faith** who has concluded a final sale contract with the purchaser

and has obtained delivery of the goods. In case the customer was in bad faith (i.e. knew that the purchaser was not the legal owner of goods) **it will be for the seller to prove it.**

Reservation of title **does not extend to the proceeds of sale**, nor to any other assets of the purchaser.

In conclusion, although retention of title is a useful instrument, the seller **cannot fully rely on it** to secure the payment of purchase price.