

Retention of Title Clauses: Sleep Easier When Selling Finished Wine Goods, Bulk Wine or Grapes

**An article written by Mark Hamilton
for The Australian & New Zealand Grapegrower & Winemaker Magazine**

Nightmare Scenario

One of your worst nightmares: one of your distributors has just gone into receivership. Worse still, it is your sole national distributor. You have that “all eggs in one basket” exposure you were concerned about when you considered the simplicity (and depth of distribution) of dealing with a national distributor.

You are owed a lot of money. The distributor has a lot of your stock in store. You realise that it is only in a rare case that creditors will receive payment in full (or indeed, any payment) and then, only after a long time.

Then you remember something your financial controller was on about; the need to include some type of title clause in your distribution agreement, and on the back of your invoices.

Did we do that, you wonder and does it work? It sounds a little strange, selling and delivering goods, but “retaining” title until you are paid.

To your relief, your financial controller confirms that you did in fact get some seemingly expensive legal assistance to draft a retention of title clause (“ROT”) (or Rompala clause). Your financial controller says that the lawyer’s idea was that, in these circumstances, you should be able to recover the unsold goods from the distributor’s warehouse.

You immediately take steps to arrange for collection of your wine stock thinking that you will obtain legal assistance to recover the goods if necessary.

Reality

This scenario is of course the worst nightmare of a wine company. Debt exposure to distributors, particularly national distributors, will involve significant financial exposure.

This financial risk, coupled with the risk of a sudden cessation of distribution, make obtaining an effective ROT clause not just a good idea, but vital to the ongoing financial security and an existence of a wine company.

What is a Retention of Title Clause?

Sale of goods legislation in all Australian states provides that, unless the parties to the sale otherwise agree, title to goods passes on delivery of the goods. A supplier must therefore ensure that the contract of supply incorporates any ROT clause upon which they wish to rely, otherwise title passes upon delivery.

A ROT clause is an agreement between a supplier and a purchaser that title to the goods supplied will not pass to the purchaser until such time as the goods are paid for.

There are three main ways in which a ROT clause may become part of a contract to supply packaged wine product, bulk wine or grapes.

- Through the execution of a specific written acknowledgment such as a credit application form. This is a good way of getting express written acknowledgment of the existence of a ROT clause without having to negotiate a full-scale distribution or sale agreement.

- The inclusion of a ROT clause in, for example, a written distribution or sale agreement.

- A ROT clause may emerge as part of the contractual relationship through the course of dealings that arises between a supplier and purchaser over time. This can occur when the ROT clause is printed clearly on the supplier's invoices over time and the parties have been trading with each other for a sufficient period for the court to conclude that the purchaser has received reasonable notice of the retention of title claim. This may suit a situation where the supplier, for whatever reason, does not wish to negotiate or enter into a written formal agreement.

Finished Wine Goods

ROT clauses will potentially work well for finished wine goods, which are usually quite durable, and safely stored in cardboard cartons in a customer's warehouse in original condition.

To the extent that finished wine goods are still in the possession of the purchaser at the time the purchaser becomes the subject of some sort of insolvency administration, an effectively drafted ROT clause should enable the supplier to recover the goods. The wine producer can, if necessary, take legal proceedings seeking an order for delivery up of the goods.

Tracing Proceeds of Sale where Customer on-sells Product

It is possible to draft a ROT clause to extend to the proceeds of an on-sale by the customer. This is where, for example, a distributor on-sells branded product to a retailer. A properly drafted ROT clause will impress the debt, owed by the retailer to the distributor for the goods, with a "trust" in favour of the wine producer. This will potentially, for example, enable a wine producer to obtain a court order that the payment from the retailer be kept separate from the distributor's ordinary funds, and be paid to the wine producer in satisfaction of the distributor's liability.

ROT Clauses with Bulk Wine Sales

Enforcing ROT clauses generally becomes impossible when the goods sold are transformed or mixed with another product. A ROT clause will potentially continue to work where bulk wine sold remains separate and identifiable in the purchaser's possession.

Once blended with other wine of the purchaser, and packaged, it is difficult to see how a court could order that the goods (i.e. the original bulk wine) could be delivered up under the ROT clause.

A contractual term requiring the bulk wine purchased to be kept separate in unpackaged state until payment is a possibility, but would be impractical in many situations where the wine was required for short term use, and extended credit terms are given.

ROT Clauses and Grape Sales

For similar reasons, ROT clauses are going to provide limited practical protection for grapegrowers except where the grower's grapes are or are required by the ROT clause to be separately processed and made into wine, which is kept separate until payment.

Lesson: Include a carefully drafted ROT clause to provide maximum opportunity for protection. Get detailed legal advice on your situation