

ROMALPA CLAUSES

Inventory is an important asset to retailers. It represents the main form of revenue earned by retailers, and is critical to the sustenance of any business. To protect their interests, most retailers include retention clauses in their contractual agreements. These retention clauses are commonly referred to as Romalpa clauses, deriving their name from the landmark English case, *Aluminium Industrie Vaasen BC v Romalpa Aluminium Ltd*. Romalpa clauses serve to keep the title to the goods for sale with the seller under the buyer fulfils their required obligations, most often being the payment of the purchase price. As such, the Romalpa clause retains the retailer's title to the goods until the full purchase price has been paid.

What forms can the *Romalpa* clause take?

A *Romalpa* clause can manifest itself in a variety of forms. The effect of the clause can be varied depending on the nature of the goods and the buyer's intended use of the goods upon possession. In some instances it may be appropriate to add a liabilities clause requiring the seller to reserve title until the buyer has paid all amounts owing to the seller.

Conversely, where the goods purchased are raw materials, with the buyer intending to use the goods as an input in the manufacturing process, the *Romalpa* clause can be structured to assert a claim on the end product where the buyer fails to fulfil their obligations.

Implications of the *Romalpa* clause

There are essentially two main implications of the *Romalpa* clause:

1. If the retailer becomes **insolvent**, the supplier is able to reclaim the goods from the insolvency administrator on the grounds that the goods belonged to the supplier, not the retailer, and hence are not part of the estate.
2. If the retailer has created a **floating charge** in the third party's favour, and if the retailer defaulted, the supplier could claim the goods ahead of the chargee. This claim could be made on the grounds that the goods were not the retailer's property, and thus fall outside the scope of the floating charge.

It can be inferred from the above that *Romalpa* clause provides overwhelming support for Romalpa suppliers over the buyer's other creditors, with both instances being decided in their favour.

Personal Properties Securities Act 2009 (Cth)

Since the Personal Property Securities Act 2009 (Cth) (hereafter '*PPSA*') was introduced, the position of Romalpa clauses is more complex.

By way of background, the PSSA broadly seeks to reform the law governing secured transactions in personal property. While the PPSA has been criticised for its complexity, it seeks to restore some of the power imbalances prevalent in its absence.

The following three changes are of particular relevance:

- The PPSA strengthens the position of other creditors
- The PPSA strengthens the retailer's position relative to other creditors in relation to proceed claims
- The PPSA substitutes a policy-driven approach to priority disputes involving *Romalpa* agreements

More specifically, the PPSA has the following implications:

- The PPSA applies to **every transaction**, regardless of form, that in substance creates a security interest, including both transfer and title retention arrangements
- The PPSA establishes a **registration system** for personal property security interests
- In a competition between registered security interests, the **first registered security interest has priority**, however, to retain the commercial utility of *Romalpa* clauses, a *Romalpa* supplier must register their interest before the goods are delivered, and hence will achieve "super" priority.

The retailer can still achieve its pre-PPSA priority position in respect of unpaid goods, but in order to so, the retailer will need to register their interest. This will guard against other secured creditors taking security of the goods in the event of the buyer's insolvency.

Concluding remarks

Overall, *Romalpa* clauses continue to be used in agreements involving retailers and suppliers. The PPSA has attempted to overcome the prejudice afforded towards *Romalpa* suppliers, though commercial arrangements of this nature are still viable through the compliance with the PPSA's additional requirements.

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(The law as it stands in August 2015)

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