

## SUPPLY CHAIN MEMO



### INTRODUCTION

In these uncertain times, a contractual counterparty may face financial distress. In this memo, we provide a number of practical tips to mitigate the risks of exposure to a counterparty's insolvency.

### CONTRACTING

- Conclude all agreements in writing and negotiate that your general terms and conditions apply.
- Check that your agreements and general terms and conditions are up to date.
- When stipulating that your terms and conditions apply to an agreement, provide your counterparty with a copy of the general terms and conditions.
- If your counterparty also makes use of general terms and conditions, consider that 'battle of the forms' disputes are resolved according to the 'first-shot-rule'. This means that the party that refers to their set of terms and conditions will have their version applied.
- When contracting with foreign counterparties, it is advisable for Dutch businesses to contract under Dutch Law.

### IMPROVE YOUR POSITION

- When providing products or services to a counterparty, negotiate terms of payment that are as short as possible. Be advised that as of 1 July 2022, the terms of payment for business-to-business (B2B) transactions may not exceed 30 days.
- Assess the creditworthiness of your counterparty before contracting.
- Negotiate a clause in the agreement that obliges your counterparty to provide you with updated financial statements on a regular basis.
- In the agreement, negotiate that non-performance of a contractual obligation on behalf of the counterparty leads to default ('*verzuim*') automatically. Thus, making a notice of default ('*Ingebrekestelling*') superfluous for terminating the agreement or suing for damages.

### RETENTION OF TITLE

- When you deliver goods to your counterparty on credit, retain ownership of the goods until the goods have been paid ('*eigendomsvoorbehoud*').
- You can embed the retention of title in the agreement itself or include it in the general terms and conditions.
- When you conclude an agreement for multiple deliveries over a longer period time, make sure to specify that the goods be delivered on the basis of an extended retention of title. This to ensure that your counterparty will only gain legal ownership of the delivered goods once all outstanding invoices are paid.
- Stipulate in either the agreement or the general terms and conditions that the goods you deliver under retention of title may not be processed or mixed with other goods.
- Make sure to include your company name, logo and/or serial number on all goods. This to ensure that your goods can be identified if you need to reclaim them.
- If your counterparty goes bankrupt, you must provide the bankruptcy trustee with a copy of the unpaid invoices and evidence of your retained ownership (i.e. copy of the agreement/ general terms and conditions) if you wish to collect the goods. Be aware that the bankruptcy trustee may request compensation for the preservation, storage and collection of the goods ('*boedelbijdrage*').



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- Generally, the trustee will request payment of a predetermined percentage of the unpaid invoice(s). It is however customary to negotiate over the amount that is to be paid.

## NON POSSESSORY RIGHT OF PLEDGE

- A right of pledge can be vested on the goods of your counterparty to secure your claim.
- To establish a right of pledge, you require either an authentic deed of pledge passed by a notary or a private deed registered with the tax authority.
- The major advantage of a right of pledge allows for immediate enforcement. You can have the encumbered goods sold for your benefit if your counterparty defaults on its obligations. Immediate enforcement is also possible in bankruptcy, except during a court-sanctioned moratorium.
- If your counterparty has already pledged the class of goods that you supply to another creditor, you will generally only be able to establish a second right of pledge. In practice, this is a key limitation for suppliers using rights of pledge.

## GUARANTEES

- It is possible to negotiate for a third party to be a guarantor for certain contractual obligations. Common examples include bank guarantees, shareholder guarantees and guarantees provided by directors and officers of counterparties.

## PROTECTION OF INTELLECTUAL PROPERTY RIGHTS

- Register your Intellectual Property Rights (IPR) in the relevant registers.
- When licensing your IP rights to your counterparty, it is suggested to include an '*ipso facto*' clause in the licensing agreement that serves to terminate the agreement upon bankruptcy.
- If you have licensed IP-rights from your counterparty, be aware that the trustee in the bankruptcy of your counterparty may discontinue your license or sell the IP rights to a third party. To mitigate these risks, there are a number of options worth exploring. For instance, it is possible to agree with your counterparty that he will establish a usufruct on his intellectual property rights for your benefit.

## GET IN TOUCH



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