

RIGHTS OF AN UNPAID SELLER

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Who Is An Unpaid Seller?

An unpaid seller has been defined by S.38 of the [Sales of Goods Act](#). It provides:

38.(i) The seller of goods is deemed to an “unpaid seller” within the meaning of this Act”

(a) When the whole of the price has not been paid or tendered;

(b) When a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition on which it was received has not been fulfilled by reason of the dishonour of the instrument or otherwise.

(2) In this Part of this Act the term “seller” includes any person who is in the position of a seller, as for instance, an agent of the seller to whom the bill of lading has been indorsed, or a consignor or agent who has himself paid, or is directly responsible for, the price.

From the above, it can be deduced that an unpaid seller is a person who has not being paid, either by cash or other negotiable instruments. For negotiable instruments, the mere fact that they haven’t been tendered by the seller doesn’t mean that he is an unpaid seller. He becomes an unpaid seller when after tendering them, they are rejected.

The term “seller” was also defined; it doesn’t only refer to the seller in his person but includes the seller’s agents.

The Rights of An Unpaid Seller

The act further provides for means of redress in the situation of an unpaid seller. The means are a right of lien on the goods, the right to stop the goods in transit if it is discovered that the buyer is insolvent and a right to resell the goods. This is encapsulated in the provisions of S.39 of the Act which provides:

39.“(i) Subject to the provisions of this Act, and of any statute in that behalf, notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods, as such, has by implication of law”

(a) A lien on the goods or right to retain them for the price while he is in possession of them;

(b) In case of the insolvency of the buyer, a right of stopping the goods in transitu after he has parted with the possession of them;

(c) A right of re-sale as limited by this Act.

(2) Where the property in goods has not passed to the buyer, the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to and co-extensive with his rights of lien and stoppage in transitu where the property has passed to the buyer.

The Unpaid Seller’s Right of Lien

A right of lien is simply the right of a seller to withhold the delivery of goods to the seller till he has been paid. The act provides for situations in which an unpaid seller would be able to exercise his right of lien: where the goods are not sold on credit, if they were sold on credit; the term of the credit has expired, where the buyer becomes bankrupt.

The act also provides that the seller can exercise this right notwithstanding that he is an agent, bailee or custodian for the buyer.

All these are encapsulated in S. 41 which reads:

41.“(1) Subject to the provisions of this Act, the seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price in the following cases, namely: ”

(a) Where the goods have been sold without any stipulation as to credit;

(b) Where the goods have been sold on credit, but the term of credit has expired;

(c) Where the buyer becomes insolvent.

(2) The seller may exercise his right of lien notwithstanding that he is in possession of the goods as agent or bailee or custodian for the buyer.

However, in a situation in which the seller makes part delivery of the goods, he may exercise his right of lien on the remaining part unless there is an agreement in which he waives this right. This is provided in **S.42** of the Sales of Goods Act which states:

42. Where an unpaid seller has made part delivery of the goods, he may exercise his right of lien or retention on the remainder, unless such part delivery has been made under such circumstances as to show an agreement to waive the lien or right of retention.

By the provision of **S.43 of the sales of Goods Act**, the following are situations in which the seller loses his right of lien:

43.â€”(1) The unpaid seller of goods loses his lien or right of retention thereon

(a) When he delivers the goods to a [carrier](#) or other [bailee](#) or custodian for the purpose of transmission to the buyer without reserving the right of disposal of the goods;

(b) When the buyer or his agent lawfully obtains possession of the goods;

(c) By waiver thereof.

(2) The unpaid seller of goods, having a lien or right of retention thereon, does not lose his lien or right of retention by reason only that he has obtained judgment or decree for the price of the goods.

The Unpaid Sellerâ€™s Right of Stoppage In Transitu

Stoppage in transit is the right of the unpaid seller to stop delivery of the goods if he discovers that the buyer is bankrupt. This is provided for in S.44 of the Sales of Goods Act which provides:

44. Subject to the provisions of this Act, when the buyer of goods becomes insolvent, the unpaid seller who has parted with the possession of the goods has the right of stopping them in transitu, that is to say, he may resume possession of the goods as long as they are in course of transit, and may retain them until payment or tender of the price.

The Act further discusses the intricacies and technicalities of stoppage of goods in transit, This is done in S.45 which provides thus:

45.â€”(1) Goods are deemed to be in course of transit from the time when they are delivered to a carrier by land or water, or other bailee or custodian for the purpose of transmission to the buyer; until the buyer, or his agent in that behalf, takes delivery of them from such carrier or other bailee or custodian.

(2) If the buyer or his agent in that behalf obtains delivery of the goods before their arrival at the appointed destination, the transit is at an end.

(3) If, after the arrival of the goods at the appointed destination, the carrier or other bailee or custodian acknowledges to the buyer, or his agent, that he holds the goods on his behalf and continues in possession of them as bailee or custodian for the buyer, or his agent, the transit is at an end, and it is immaterial that a further destination for the goods may have been indicated by the buyer.

(4) If the goods are rejected by the buyer, and the carrier or other bailee or custodian continues in possession of them, the transit is not deemed to be at an end, even if the seller has refused to receive them back.

(5) When goods are delivered to a ship chartered by the buyer it is a question depending on the circumstances of the particular case, whether they are in the possession of the master as a carrier, or as an agent to the buyer.

(6) Where the carrier or other bailee or custodian wrongfully refuses to deliver the goods to the buyer, or his agent in that behalf, the transit is deemed to be at an end.

(7) Where part delivery of the goods has been made to the buyer or his agent in that behalf, the remainder of the goods may be stopped in transitu, unless such part delivery has been made under such circumstances as to show an agreement to give up possession of the whole of the goods.

The unpaid seller can exercise his right of stoppage in transitu by either taking actual possession of the goods or by notifying the carrier, bailee or custodian in possession of the goods of his right of stoppage in transitu. He can also notify the principal of the person in possession of the right of stoppage in transitu if it is in a situation in which the principal would be able to communicate such right to the person in actual possession; **S.46(1)**.

When the notice of stoppage in transitu is delivered to the carrier, bailee, custodian or any other person in possession, such person must re-deliver the goods according to the sellerâ€™s instructions. The cost of re-delivering the goods in this situation would be borne by the seller; **S.46(2)**.

â€” The Unpaid Sellerâ€™s Right of Re-Sale

According to the provision of **S.47** of the **Act**, the unpaid sellerâ€™s right of lien or stoppage in transitu is not affected by any resale or other disposition done by the buyer to a third party without the sellerâ€™s consent. However, in a situation in which the documents of title, having been lawfully transferred to the buyer, are then given to the third party who receives them in good faith for a reasonable consideration, the sellerâ€™s right of lien and stoppage in transitu has been defeated. If the said transfer was by way of pledge or other disposition for value, the unpaid sellerâ€™s right can only be exercised subject to the right of the transferee.

Also, **S.48(1)** provides that subject to its provisions, the exercise of the seller's right of lien or stoppage in transitu does not repudiate the initial contract. It is further provided for in **S.48(2)** that where an unpaid seller that has exercised his right of lien or stoppage in transitu resells the goods, the new buyer has a right to the goods over the former buyer.

Where the goods are perishable in nature and the unpaid seller notifies the buyer of his intention to resell them, if the buyer doesn't pay within a reasonable time, the seller can resell the goods. He would also be able to recover from the original buyer any damages incurred due to his breach of the contract; **S.48(3)**.

Where the seller, in the [contract of sale](#), reserves the right to resell the goods on the default of payment by the buyer and the buyer defaults in payment, the subsequent resale by the seller brings the contract to an end but it does not affect the seller's right to recover damages from the buyer; **S.48(4) SOGA**.

SOURCES

1. MC Okany: Nigerian Commercial Law
2. Sale of Goods Act 1893
3. Lecture on Commercial Law by Dr KI Adam, Faculty of Law, University of Ilorin.