

English Law and Terminology 2.

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Commercial Law.



Commercial- Intro.

- ▶ Keep in mind that the English have always been **excellent traders and were pioneers in this field hence the rise in commerce** and thus eventually commercial law.
- ▶ A business when started by an individual or a group of people doing the business from the United Kingdom, the commercial law regulates its sales and purchases. It mainly deals with the commercial transactions. The commercial law is also known as 'Lex Mercatoria'.
- ▶ During the nineteenth century the commercial law was further developed in all aspects and at the end of this century it was "**illuminated by the statutory draftmanship of Sir Mackenzie Chalmers, Bills of Exchange Act 1882 and sales of goods act 1893** were adopted.
- ▶ There is no particular and clear definition for commercial law till today. Many scholars and lawyers tried to explain about the commercial law among which the leading commercial lawyer Roy Goode described commercial law as "*that branch of law which is concerned with rights and duties arising from the supply of goods and services in the way of trade*".
- ▶ The term **commercial law** covers quite a variety of individual areas of law-with the commonality that they all concern relationships that arise from trade or business transactions.
- ▶ Such laws include: law of contracts relating to **carriage** and **insurance** of **goods, banking law, agency** and the paradigm of commercial law, **the sale and supply of goods**.
- ▶ Contract law is the root of all these other areas of law concerning commercial transactions, therefore general rules of contract apply therein.
- ▶ However, the specialist nature of each area of commercial law has led to the development of distinct principles applicable to them.

Sale of Goods Law.

- ▶ Law concerning the sale of goods have been regulated by statute for a long time.
- ▶ The 1st SGA was in 1893 & then consolidated by the SGA 1979.
- ▶ Hence, the present law is covered by the 1979 Act though amended a few times- **Sale and Supply of Goods Act 1994** & the **Sale of Goods (Amendment) Act 1995**.
- ▶ SGA 1979 covers both **commercial and consumer contracts**.
- ▶ However, the introduction by the **Sale and Supply of Goods to Consumers Regulations 2002**, or by the **Consumer Rights Act 2015** are specific to consumer contracts.

The Sale of Goods Act as the Core of English Commercial Law

- The old Sale of Goods Act 1893 is responsible for much of the development of world trade, as we know it
- This Act has been simplified but essentially preserved in 1979 in the form of the Sale of Goods Act 1979 (as amended in 1994)
- The USA, before the birth of the Uniform Commercial Code in 1952, had a law which was not very different to our Sale of Goods Act (SGA)

Sale of Goods Law cont.

- ▶ **The sale of goods dominates the commercial law**, and the important issue in this context is the contract between the seller and the buyer.
- ▶ *It is the duty of the law to not only protect the interest of the sellers*, as there are many other considerable issues like delivery, third party rights, same business competitions, liabilities etc., which goes well with the commercial law rather than sale of goods. Example: A person may either claim for any damages, injury, delay in delivery etc., either by the referring the statute or by the common law i.e., file a suite for negligence.
- ▶ The sale of goods act 1893 is the first act implemented on contract of sales before the sale of goods act 1979 came into existence. *This act mostly concentrated on the common law which mainly dealt with trading of sale of goods, rather than dealing with the damages/compensation and entirely omitted the contract law*. Almost at the end of the twentieth century it was realised that these principles does not protect and serve the necessities of the consumers.
- ▶ So, *in order to protect the consumers, the sale of goods act 1979* was implemented, which stated that it is for the buyer to take care of the goods not to suffer from any damages and it is the duty of the seller to make sure that the goods does not have any damages, if there are any, also the seller should intimate such damages to the buyer.
- ▶ The SGA 1979 applies only to contracts for the sale of goods. **The Sales of Goods Act 1979** is an Act that regulates the sale of goods that are bought and sold in the UK and the binding contract between both parties. The contract of sale states that the transfer of property from a seller to a buyer is completed through a money transaction, known as the price.
- ▶

Sale of Goods Law cont.

- ▶ A distinction must be drawn between contracts under which property in goods is transferred from seller to buyer, called a **sale**, and contracts under which this transfer is to take place at a **future time**, called an **agreement to sell**.
- ▶ It is important that the consideration provided is money, but it does not matter whether the price is paid immediately (*sale for cash*) or whether the buyer promises to pay at a later date (*sale for credit*).
- ▶ The parties to the contract are the **seller**, the person who **sells or agrees to sell**, and the **buyer**, who **buys or agrees to buy the goods**.
- ▶ A contract of sale is first and foremost a contract, i.e. a consensual transaction based on an agreement to buy and an agreement to sell. So where an out-patient at a hospital obtains drugs at the hospital dispensary, *even on payment of a statutory prescription charge*, this is not a contract of sale at all. The patient has a statutory right to receive the drug and the hospital a statutory obligation to supply it.
- ▶ Contracts for the sale must be distinguished from other legal relationships, which is at times difficult but necessary since **the sales act only applies to agreements** which fall within its definition of a contract of sale.
- ▶ As aforementioned contract of sale of goods must be distinguished from several other transactions which are normally quite different from a sale of goods but which, in particular circumstances, may closely resemble such a contract, namely:
 - ▶ (1) a *contract of barter or exchange*, (2) a *gift*, (3) a *contract of bailment*, (4) a *contract of hire-purchase*, (5) a *contract of loan on the security of goods*, (6) a *contract for the supply of services*, (7) a *contract of agency*, and (8) *licences of intellectual property such as 'sales' of computer software*.

Sale of Goods Law cont.

- ▶ A contract under which a seller delivers goods in exchange for other goods or services is not a contract for sale under the sales Act, as money is not the consideration. It is however a **contract for barter or exchange**.
- ▶ **A gift is the transfer of property without consideration**. Under general contract rules, the *promise of a gift is only binding if it is made in a deed*. In most cases, it is not hard to differentiate between the a contract for sale and a gift.
- ▶ However issues have emerged where **a free gift was offered to buyers on the purchase of certain goods or certain amounts of goods**. In such cases, the free gift might be a true gift or might be the subject matter of a **collateral contract**.
- ▶ In regard to transactions in which a 'free' gift is offered on the condition of entering into some other transaction:
- ▶ *In Esso Petroleum Ltd v Commissioners of Customs & Excise*, garages selling petrol advertised a 'free' gift of a coin (bearing a likeness of a footballer) to anyone buying four gallons. It was held by the House of Lords that, although the transaction was not a gift, inasmuch as the garage was contractually bound to supply the coin to anyone buying four gallons of petrol, it was not a sale of goods either.
- ▶ The transaction was characterised by Lord Simon and Lord Wilberforce as one in which the garage promised to supply a coin in consideration of a customer buying the petrol. It was thus, in substance, a collateral contract existing alongside the contract for the sale of the petrol. On this analysis it would presumably be *a contract for the transfer of goods within the Supply of Goods and Services Act 1982*.
- ▶ An unsolicited offer to sell goods, accompanied by a delivery of those goods to the offeree, may be treated as a gift in the circumstances laid down in the Unsolicited Goods and Services Act 1971. This deemed gift now takes place immediately and the rights of the sender are extinguished.

Sale of Goods Law cont.

- ▶ **A collateral contract** usually takes the form of a unilateral contract. A unilateral contract is where only one party to it makes a promise. This promise is usually in the form of doing something in return for something else.
- ▶ The offer and acceptance of the agreement is the original intention of the first contract that is in place. The consideration of the collateral contract is the promise to enter into the original agreement.
- ▶ A collateral contract was evidenced in the case of *Shanklin Pier v Detel Products [1951] 2 KB 854*. In this case the plaintiffs were owners of a pier and were promised by the paint manufacturers, who were the defendants, that their paint has a life span of seven years. This was said in the attempt to induce the plaintiff into buying the defendant's paint.
- ▶ Due to this representation the plaintiff instructed the decorators to purchase the paint and use it to decorate the pier. This was duly done, however the paint only lasted three months. During the inception of the case the plaintiff's did not appear to have a remedy as they had not provided the defendants with any consideration for the promise. The only contract in force was between the defendant and the decorators for the purchasing of the paint, this did not include the plaintiffs. However, it was held that the plaintiffs could recover damages on the basis of a collateral contract.
- ▶ It was held that the consideration for the promise as to the life of the paint was sufficiently inductive to render it effective in the chain of purchase. The contract in existence in this case was to purchase paint in order to re-decorate the pier. However, according to the case of *Wells (Merstham) Ltd v Buckland Sand and Silica Co Ltd [1965] 2 QB 170*, the construction of a collateral contract can be used even when there is not a contract specified at the time the promise was made. In this specific case the plaintiffs were chrysanthemum growers and bought sand from a third party that was produced by the defendants. This sand was purchased on the undertaking from the defendants over its iron oxide content.
- ▶ This undertaking proved to be incorrect and the plaintiffs sued on the basis of the loss suffered. It was held that they could claim damages, even though no main contract was in existence, due to the fact that one was in contemplation. Thus, a collateral contract is a creation of the courts to allow certain pre-contractual comments to be relied upon in the event of a dispute.
- ▶ In conclusion, a collateral contract is one that is a second agreement that pertains to the original agreement. It is used to insert an intention that the goods bought by the claimants should reflect the pre-contractual statements made as to their durability and quality.

Sale of Goods Law cont.

- ▶ Generally speaking, the transfer of **possession** (*and not ownership*) of goods by the owner (*the bailor*) to another person (*the bailee*) so that they might be used for a specified purpose on condition that they are returned to, or in accordance with the instructions of, the bailor, or kept until he reclaims them. The bailee does not own the goods, but has possession of them.
- ▶ The bailee has a duty to take reasonable care of the goods and return them in accordance with the terms of any express or implied contract of bailment.
- ▶ For example, bailment arises where goods are supplied subject to a retention of title clause in the contract, and where an item is given to a delivery company to transfer the property to the customer.
- ▶ It is crucial to understand that legal ownership of the property itself is not being transferred, only the physical possession of it. The bailor remains the legal owner of the property. The *bailee* possesses the property for a specific purpose and must return it to the *bailor* in accordance with the bailment agreement. Usually, the *bailee* is not permitted to use the goods for their own purposes.
- ▶ Although the law does not precisely define possession, the basic characteristics are control and an intention to exclude others. **Note that bailment only arises in relation to personal, tangible property – and not to land and buildings.**
- ▶ The property in the goods is not intended to and does not pass on delivery, though it may sometimes be the intention of the parties that it should pass in due course, as in the case of the ordinary hire-purchase contract. But where goods are delivered to another on terms which indicate that the property is to pass at once, the contract must be one of sale and not bailment.
- ▶ In *Chapman Bros v Verco Bros & Co Ltd* farmers delivered bags of wheat to a company carrying on business as millers and wheat merchants. The wheat was delivered in unidentified bags which were identical to those in which other farmers delivered wheat to the company.
- ▶ The terms of the transaction required the company to buy and pay for the wheat on request by the farmer or failing such a request, on a specified date, to return an equal quantity of wheat of the same type; but there was no obligation to return the identical bags. Although the contract referred to the company as 'storers', it was held by the Australian High Court that this transaction was necessarily one of sale as the property passed to the company on delivery.
- ▶ Similarly, if the nature of the transaction is such that the property must pass (even if not at once) the transaction seems inconsistent with the possibility of a bailment. It will be an 'agreement to sell' within s. 2(5) of the Act. If the goods are delivered to the buyer before the property passes he will be a 'buyer in possession' rather than a mere Bailee.

Sale of Goods Law cont.

- ▶ Contracts of **Hire-Purchase (HP)** resemble contracts of sale very closely and, indeed, in practically all cases of hire-purchase the ultimate sale of the goods is (in a popular sense) the real object of the transaction. Under an HP agreement, you hire the goods and then pay an agreed amount by instalments.
- ▶ The legal distinction is clear and important, though its importance has greatly diminished since **the Sale of Goods (Implied Terms) Act 1973**, and the **Consumer Credit Act 1974**. A sale is a contract whereby the seller 'transfers or agrees to transfer' the property in goods to the buyer; that is to say, as soon as the contract is made the ultimate destination of the goods is determined even though the property is not to pass for some considerable time, for example until all the instalments of the price have been paid.
- ▶ A contract of hire-purchase, on the other hand, is a bailment of the goods coupled with an option to purchase them which may or may not be exercised. Only if and when the option is exercised will there be a contract of sale
- ▶ The main difference from a contract of sale is that the buyer has the option/choice to buy the goods or not. Under a contract of sale the buyer is obliged to complete the sale.
- ▶ While you are still making payments, you aren't allowed to sell or dispose of the goods without the lender's permission. If you do, you'll be committing a criminal offence.
- ▶ The lender may be able to repossess (take back) the goods if you fall behind with payments.
- ▶ Conditional sale is similar to **hire purchase**. The agreement usually includes the condition that the goods don't belong to you until you've paid the final instalment and the lender may be able to repossess (take back) the goods if you fall behind with payments.
- ▶ The similarity between the two transactions is accentuated by the artificial nature of most hire-purchase agreements. This is brought out by consideration of three points.
- ▶ First, as already observed, the real object of a contract of hire-purchase is almost invariably the ultimate sale of the goods to the hirer.
- ▶ Secondly, the amount which the hirer is bound to pay under the contract is usually far in excess of that which he would have had to pay if he were really hiring the goods.
- ▶ Thirdly, the legal purchase price for which the hirer has the option to buy the goods is frequently nominal only and, in fact, is sometimes not exacted in practice. Moreover, for the purposes of the hirer claiming capital allowances, hire-purchase transactions in respect of machinery or plant are treated in the same way as outright purchases.
- ▶ In *Helby v Matthews*, it was held that a person in possession of goods under a hire-purchase agreement had not 'bought or agreed to buy' them within the meaning of s. 25(2) (now s. 25(1)) of the Sale of Goods Act. This meant that the buyer, or the 'hirer' as it now became more correct to call him, could not dispose of the goods to a third party in contravention of the agreement, and the seller's (or 'owner's') security was thus fully protected.
- ▶ And in *McEntire v Crossley Bros* it was also held that a hire-purchase contract did not fall within the Bills of Sale Acts; those Acts, it was held, applied only where an owner of goods granted a charge, or right to seize the goods, to another party, while in the hire-purchase contract the hirer was not owner at the time he granted the right to seize the goods.

Sale of Goods Law cont.

- ▶ It may at first seem a little odd that it is thought necessary to distinguish a **contract of sale** of goods from a **contract of agency**, but in a certain type of case the distinction may well be a fine one by no means easy to draw. The definition of agency law deals with agent-principal relationships; that is a relationship where one party- **agent** has the legal authority to act in place of another-**principal**.
- ▶ Where, for example, A asks B, a commission agent, to obtain goods for him from a supplier or from any other source, and B complies by sending the goods to A, it may well be a fine point whether this is a contract under which B sells the goods to A, or is a contract under which B acts as A's agent to obtain the required goods from other sources.
- ▶ It is important to distinguish between the two transactions for a number of reasons. In the first place, the Commercial Agency Regulations apply to many agency contracts, and regulate the rights and duties of the parties in certain respects. Furthermore, if the transaction is an agency contract there may be privity of contract between the buyer and the agent's supplier which will enable action to be brought between them.
- ▶ On the other hand, if it is a sale, there will be no privity between the buyer and the seller's own supplier. Other reasons for distinguishing the relationship of agent and seller may be that the duties of a commission agent are less stringent than those of a seller and, in the event of a breach of contract, the measure of damages may also be different.
- ▶ Thus if a seller delivers less than he is bound to under the contract, the buyer can reject the whole; but if, despite his best endeavours, a commission agent delivers less than his principal has ordered he has committed no breach of contract and the principal is bound to accept whatever is delivered.
- ▶ Again, should the commission agent deliver goods of the wrong quality he will only have to pay as damages the actual loss suffered by the buyer. On the other hand, should a seller be guilty of such a breach he may have to pay as damages the buyer's probable loss of profit. So, also, an agent who merely introduces a seller to a buyer is not necessarily warranting the seller's title to sell, whereas if he is himself buying and reselling, such a warranty is invariably implied.
- ▶ In *Esso Petroleum Co Ltd v Addison*, Moore-Bick J left open whether petrol station franchisees who provided customers with 'gifts' in return for tokens, furnished the gifts as agents for Esso or on their own account.
- ▶ Where one person contracts to manufacture goods for another out of materials to be supplied by that other, it may again be doubtful whether the manufacturer is a seller or an agent.
- ▶ The converse position, where a person contracts to dispose of the goods of another, it is again necessary to decide whether the relationship between the parties is that of buyer and seller or principal and agent. In the latter case, the agent is not in precisely the same position as a buyer and, for instance, cannot pass a good title to a third party without the principal's actual or apparent authority.
- ▶ Again, where a person contracts to dispose of another's goods, it may be important to decide whether he is a buyer or an agent if he receives any payment from a third party as a result of disposing of the goods. If he is a buyer, such payment will discharge the third party, wholly or *pro tanto*. But if he is an agent and he fails to account to his principal for the money, the third party will only be discharged if the agent was authorised to receive the money

Sale of Goods Law cont.

- ▶ **Section 61, good** includes all personal **chattels** (tangible property) but excludes all the services or choses in action or money. Products of the soil are generally sold with a view to severance and though they may sometimes be of the nature of land for the purpose of the **Law of Property (Miscellaneous Provisions) Act 1989**, they are usually goods within the meaning of the Act of 1979. Nor would crops sold with the land on which they are growing because they are not in such a case to be 'severed before sale or under the contract of sale' as section 61 requires.
- ▶ **Goods** may be:
 - ▶ Existing goods: goods actually in existence when the contract is made. They may be either specific or unascertained in the sense that they have yet to be appropriated to the contract (section 5(1)).
 - ▶ Future goods, goods yet to be acquired or manufactured or grown by the seller (section 5(1)) as in *Sainsbury V Street*. Where the seller agreed to sell to the buyers a crop of some 275 tons of barley to be grown by him on his farm.
 - ▶ Specific goods, goods identified and agreed upon at the time the contract of sale is made (section 61(1)). The sale of a raincoat at a market stall.
 - ▶ Unascertained goods: as where A agrees to sell to B 200 bags of flour from a stock of 2000 lying in A's warehouse. The main problem in examination terms arises in question which is concerned with when ownership in such goods passes from seller to buyer. This problem will be considered below.

Sale of Goods cont.

- ▶ § 5, distinguishes goods in the following way:
 - ▶ • Existing goods, these are goods that are in the possession of the seller at the time of the contract.
 - ▶ • Future goods, those goods that have to be manufactured or acquired by the seller pursuant to the contract.
 - ▶ • Specific goods, those goods that are identifiable in a complete form at the time of the contract.
 - ▶ • Unascertained goods, those goods that are not specific and are sold by a generic description.
- ▶ § 61 defines the types of goods that fall within the above classifications. Recently problems have emerged regarding the classification of computer software

Sale of Goods Law cont.

- ▶ Goods must be of a level of satisfactory quality for the price that the consumer is willing to pay, and meet the description and relevant factors at time of purchase.
- ▶ These factors might include the level of expectation that an item may conjure, for example, second hand goods will provide much less expectation than that of a brand new product which will have a much higher expectation with regards to its quality and will cause concern about expectation if it has a defect.
- ▶ Goods should be fit for purpose, i.e that they are capable of carrying out the purpose for what they were designed to do. A seller should express the purpose of their goods and has a responsibility to make sure that they attain that state.

Sale of Goods Law cont.

- ▶ **Duties of seller- *Duty to Pass Good Title***: SGA 1979 s 12(1), imposes a duty on the seller in a contract for the sale of goods to transfer to the buyer an absolute legal interest in the goods. Failure to transfer an absolute legal interest will allow the buyer to reject the goods and terminate the contract. **Title here simply means ownership. Good title refers to the buyer taking the goods free from any other entities or persons.**
- ▶ Where there is an unconditional contract for the sale of specific goods in a deliverable state, title passes to the buyer when the contract is made.
- ▶ Where there is a contract for the sale of specific goods and the seller must do something to the goods for the purpose of putting them into a deliverable state, title does not pass until such thing is done and the buyer has notice that it has been done.
- ▶ Where there is a contract for the sale of specific goods in a deliverable state but the seller must weigh, measure, test or do some other act to ascertain the price, the title does not pass until the act or thing is done and the buyer has notice that it has been done.
- ▶ When goods are delivered to the buyer on approval or on sale or return (or other similar terms), the property in the goods passes to the buyer when it:
 - ▶ signifies its approval or acceptance to the seller or does any other act adopting the transaction; or
 - ▶ retains the goods without giving notice of rejection beyond the expiration of the time fixed for return, or, if no time has been fixed, on the expiration of a reasonable time:

Sale of Goods Law cont.

- ▶ SGA 1979 does not require that the seller is the owner, **he must merely have the right to sell.**
- ▶ A seller who does not own the goods can sell them with the permission of the owner and thereby comply with the duty to pass good title. The right to sell must be distinguished from the power to transfer title to the goods.
- ▶ Power refers to the ability of the seller to actually transfer property to the buyer.
- ▶ In most cases the two go together, but there may be situations in which the seller has the right to sell goods, but not to transfer good title or vice versa.

Sale of Goods Law cont.

- ▶ **Duty to deliver**- English law does not impose any requirements regarding the method or place of delivery of goods. Parties should agree these details between themselves. However, if no place of delivery is agreed, delivery takes place at the seller's place of business (*section 29(2), SGA*).
- ▶ Under s 27 delivery requires the voluntary transfer of possession from one person to another in accordance with the terms of the contract. In *Four Points Garage v Carter* (1985) 3 All ER 12 the court held that the transfer of possession may be satisfied symbolically through the delivery of documents of title or to an agent.
- ▶ Delivery can be: **Physical** transfer, **Symbolic** transfer-keys to a car and **Constructive** transfer- 3rd party holds goods on behalf of buyer and not seller. **Attornment**-goods now in possession of 3rd party who acknowledges he holds them for buyer now.
- ▶ The seller must deliver the goods and the buyer must accept and pay for them, in accordance with the terms of the contract of sale (*section 27, SGA*). Acceptance occurs when the buyer either: 1-Tells the seller that it has accepted the goods. 2- Does any act in relation to the goods that is inconsistent with the ownership of the seller.
- ▶ (*Section 35, SGA.*) If the buyer has not previously examined the goods, it is not deemed to have accepted them until it has had a reasonable opportunity to examine them.
- ▶ The parties can agree on particular packaging requirements in the contract. However, there is an expectation that the seller will package the goods in such a way that they do not get damaged in transit, and that it will bear the expense of doing so (*section 29(6), SGA*). The requirement for goods to be of satisfactory quality (*section 14, SGA*) extends to the packaging.

Sale of Goods Act cont.

- ▶ **Duty to Deliver Goods at the Right time-** The goods must be delivered within a reasonable time (*section 29(3), SGA*) and at a "reasonable hour" (*section 29(6), SGA*), to be determined with reference to relevant industry practices.
- ▶ Early delivery is as much a breach of contract as late delivery. Sometimes the parties allow the seller some degree of flexibility by providing that he uses his best endeavours to deliver the goods by a certain date.
- ▶ Alternatively, the contract may stipulate for delivery as required, in which case the buyer informs the seller of his requirements and the seller delivers accordingly.
- ▶ Some contracts may contain clauses that free the seller from liability for non-delivery if he can show he was prevented from performing his obligations- *force majeure* or *Act of God* clauses.

Sale of Goods Act cont.

- ▶ **Duty to Supply the Right Quantity of Goods**- The contract of sale will fix the amount of goods to be delivered and failure to comply with that term will result in an unenforceable contract. **SGA s 30**, lays down a detailed set of rules defining the buyers rights where the seller delivers more or less than the agreed quantity of goods. In essence, if the incorrect amount is delivered the buyer may reject the whole contract amount subject to the applicable limitations under **SGA s 30(2A), & s 30(2B)**.
- ▶ These sections prohibit a buyer dealing as a non consumer from rejecting goods where the shortfall is so slight that it would be unreasonable to do so- *De minimis no lex curat- the law does not concern itself with trifles*.
- ▶ **Duty to Supply Goods of the Right Quality**- The seller is under a duty to supply goods in accordance with the implied terms as to the condition of the goods under the SGA 1979. The implied terms are contained in SGA ss. 12-15. The implied terms are the most important source of redress for the buyer if the goods are defective in any way.

Sale of Goods Act cont.

- ▶ **SGA s 13**, implies a condition that where the goods are sold by description they will correspond with that description once they are in the possession of the buyer. The following requirements must be satisfied:
- ▶ In relation to the description and quality of the goods, the SGA implies that the goods must:
- ▶ Correspond with their description in the sale agreement (*section 13, SGA*).
- ▶ Be of a standard that a reasonable person would regard as satisfactory, taking into account any description of the goods, the price (if relevant) and all the other relevant circumstances (*section 14(2A), SGA*).
- ▶ Be reasonably fit for any purpose expressly or impliedly made known to the seller by the buyer (*section 14(2B), SGA*).
- ▶ The implied terms will not apply where the buyer has had a defect specifically drawn to its attention, or in certain situations where a buyer examines the goods and the examination should have revealed a defect.
- ▶ These implied terms have been replicated for consumer contracts in the CRA.

Sale of Goods Law cont.

- ▶ **Duties of the Buyer- The Price-** *Section 8* of the Act is as follows:
 - ▶ (1) The price in a contract of sale may be fixed by the contract, or may be left to be fixed in a manner agreed by the contract, or may be determined by the course of dealing between the parties.
 - ▶ (2) Where the price is not determined as mentioned in subsection (1) above the buyer must pay a reasonable price.
 - ▶ (3) What is a reasonable price is a question of fact dependent on the circumstances of each particular case.
 - ▶ We have already seen that the consideration must be paid in money and that, strictly speaking, the contract will not be a contract of sale of goods if the consideration is in some other form.
 - ▶ *Section 8* has given rise to more difficulty than might have been thought. The section assumes that a contract has been made by the parties and then proceeds to explain the methods by which the price can be ascertained.
 - ▶ The first point of consideration in an action on the sale is *whether a contract has in fact been finally agreed upon by the parties*, and the absence of an agreement as to the price (or even as to the mode in which the price is to be *paid*) *may show that the parties have not yet reached a concluded contract.*
- ▶ Another problem concerns the question whether the parties can make a binding contract in which they agree to fix the price at some future date. When s. 8 says that the price can be 'left to be fixed in a manner agreed', does this exclude the possibility that 'the manner' may simply require the parties to agree on the price?
- ▶ One view is that the parties simply cannot make a binding contract for the sale of goods at prices 'to be agreed', and that s. 8 does not apply to such a case, because under that section the buyer would have to pay a reasonable price, that is a price fixed by a judge (or arbitrator) which is not the same thing as a price agreed between the parties.
- ▶ There is undoubtedly some support for this view in the difficult case of *May & Butcher v The King*. The House of Lords here held that an agreement for the sale of goods at a price to be later fixed by the parties was not, in the circumstances of the case, a concluded contract; but the later case of *Hillas & Co Ltd v Arcos Ltd* shows that we cannot regard the earlier case as laying down any general rule and that that case is best regarded as one where the parties had not in the circumstances arrived at a concluded agreement.
- ▶ In *Foley v Classique Coaches Ltd*, the Court of Appeal held that an agreement to supply petrol 'at a price to be agreed by the parties' was a binding contract as the parties had clearly evinced an intention to be bound, and the contract contained an arbitration clause under which a reasonable price could be fixed in the event of disagreement.

Sale of Goods Law cont.

- ▶ English law does not impose any requirements in relation to price (such as the method or place of payment), leaving this to be agreed between the parties.
- ▶ The seller must pay for goods in accordance with the terms of contract of sale.
- ▶ He cannot claim possession until he is ready and willing to pay for them, unless parties have agreed to a period of credit.
- ▶ Where there is no stipulation to the method of payment, the buyer has to pay the price in cash-money in notes or coins.
- ▶ Common methods of payment in commercial transactions include:
 - ▶ Letters of credit.
 - ▶ Bills of exchange.
 - ▶ Promissory notes.
 - ▶ Banker's draft.
 - ▶ Funds transfers.
 - ▶ Credit Cards.
 - ▶ Cheques.
- ▶ A **letter of credit-documentary credit** is a letter from an issuing bank to another bank (often a bank located in another country) assuring that the seller will receive payment from the buyer of the amount specified in the letter if the conditions of delivery are met. Most letters of credit now incorporate standard terms of the Uniform Customs and Practice for Documentary Credits. The documentary letter of credit is issued at the request of the buyer (the applicant for the credit) in favour of the seller (the beneficiary of the credit).
- ▶ **Elements of a Letter of Credit**
 - ▶ A payment undertaking given by a bank (issuing bank)
 - ▶ On behalf of a buyer (applicant)
 - ▶ To pay a seller (beneficiary) for a given amount of money
 - ▶ On presentation of specified documents representing the supply of goods- bill of lading, quality certificates etc
 - ▶ Within specified time limits
 - ▶ Documents must conform to terms and conditions set out in the letter of credit
 - ▶ Documents to be presented at a specified place

Sale of Goods cont.

- ▶ The following procedures include a flow of events that follow the decision to use a Commercial Letter of Credit. Procedures required to execute a Standby Letter of Credit are less rigorous. The standby credit is a domestic transaction. It does not require a correspondent bank (advising or confirming). The documentation requirements are also less tedious.
- ▶ **Step-by-step process:**
- ▶ Buyer and seller agree to conduct business. The seller wants a letter of credit to guarantee payment.
- ▶ Buyer applies to his bank for a letter of credit in favour of the seller.
- ▶ Buyer's bank approves the credit risk of the buyer, issues and forwards the credit to its correspondent bank (advising or confirming). The correspondent bank is usually located in the same geographical location as the seller (beneficiary).
- ▶ Advising bank will authenticate the credit and forward the original credit to the seller (beneficiary).
- ▶ Seller (beneficiary) ships the goods, then verifies and develops the documentary requirements to support the letter of credit. Documentary requirements may vary greatly depending on the perceived risk involved in dealing with a particular company.
- ▶
- ▶ Seller presents the required documents to the advising or confirming bank to be processed for payment.
- ▶ Advising or confirming bank examines the documents for compliance with the terms and conditions of the letter of credit.
- ▶ If the documents are correct, the advising or confirming bank will claim the funds by:
 - ▶ Debiting the account of the issuing bank.
 - ▶ Waiting until the issuing bank remits, after receiving the documents.
 - ▶ Reimburse on another bank as required in the credit.
- ▶ Advising or confirming bank will forward the documents to the issuing bank.
- ▶ Issuing bank will examine the documents for compliance. If they are in order, the issuing bank will debit the buyer's account.
- ▶ Issuing bank then forwards the documents to the buyer.

Sale of Goods cont.

- ▶ A **bill of exchange** is an unconditional written order signed by one party ordering another party to make a payment to a specified third party (*section 3, Bills of Exchange Act 1882*). The bill can be payable on demand or at a future date, and the payee can transfer the bill by endorsing it and delivering it to the transferee.
- ▶ A **promissory note** is an unconditional written promise to pay a specified sum of money to the other party (or to their order or to bearer) (*section 83, Bills of Exchange Act 1882*). A promissory note can be payable on demand or at a specified future date.
- ▶ A **banker's draft** is a cheque for payment directly from the bank, rather than from the individual drawer's account. The advantage of a banker's draft is that the party depositing the draft does not need to wait for it to clear. With a **normal cheque**, the clearing process can take a few days and the cheque can bounce if the payer does not have enough money in their account-conditional payment. There is no contractual relationship between a seller and the bank, therefore the seller can only bring an action against the buyer for non-payment by a bounced cheque.
- ▶ With a banker's draft, the bank has already verified that there was enough money in the payer's account. The parties must agree the currency in which the payments must be made.
- ▶ **Credit Card** payments involve a triangle of contracts. First there is a prior contract between the seller and the credit card company, under which the seller agrees to accept payment by credit card and the company accepts liability for payments made with their cards.
- ▶ Second there is a prior contract between the buyer and the credit card company. The contract obliges the company to pay for transactions made with their card, while the buyer has to repay the relevant amount to the company.
- ▶ The third contract involved is the contract of sale between the seller and buyer, which is the subject of the payment made by credit card.
- ▶ The primary duty to pay is on the credit card company. The seller will approach the company, and not the buyer, for payment. The onus of recovering the money from the buyer is on the company, not the seller.

Sale of Goods Act cont.

- ▶ **Duty to Take Delivery and Accept Goods**- The seller must deliver the goods and the buyer must accept and pay for them, in accordance with the terms of the contract of sale (*section 27, SGA*). Acceptance occurs when the buyer either:
 - ▶ Tells the seller that it has accepted the goods.
 - ▶ Does any act in relation to the goods that is inconsistent with the ownership of the seller.

Sale of Goods Law.

- ▶ **Effects of the Contract- *Transfer of Property***- The primary objective of a contract of sale is the passing of property in goods from seller to buyer. Property is used a synonym for ownership or title. The buyer is to receive full legal title to the goods and not just mere possession.
- ▶ There are various points at which property can pass- the formation of contract, the delivery of goods or the payment of goods' price. The SGA lays down rules pertaining to these depending on whether goods are specific or unascertained.
- ▶ ***Passing of Risk***- If the parties have incorporated Incoterms into their contract, the Incoterms expressly provide for each type of contract (namely for FOB (free on board), CIF (cost, insurance and freight) and CFR (cost and freight) contracts) that the transfer of risk in relation to the goods, passes to the buyer when the goods "pass the ship's rail".
- ▶ If the parties have not incorporated Incoterms or agreed otherwise, risk in relation to the goods passes to the buyer at the same time as title (**section 20, SGA**). A seller seeking to retain title will not want to retain risk until title passes. In these circumstances, a well drafted contract will provide that risk passes on delivery, and that the buyer must insure the goods and note the seller's interest on the insurance policy.

Sale of Goods Law.

- ▶ **Remedies of the Seller:** Where a buyer has either not paid or only partly paid for goods, the seller may have the following remedies, depending on the circumstances of the sale:
- ▶ **Lien.** A seller in possession of the goods can exercise a lien over them. This means that the seller can retain possession of the goods and refuse to deliver them to the buyer until the price due for them is paid. Once the possession is lost, the lien is also lost.
- ▶ **Stoppage in transit.** In the event of the buyer's insolvency, the seller may have the right to stop the goods in transit, regain possession and retain them until the full price is paid.
- ▶ **Re-sale.** A seller may have a right to re-sell the goods where:
 - ▶ the goods are of a perishable nature; or
 - ▶ this right is expressly reserved in the contract in the case of a buyer's default.
- ▶ **Withhold delivery.** A seller may have the right to withhold delivery where the property in the goods has not passed to the buyer.
- ▶ **Action for the price.** A seller can make a claim for the contract price.
- ▶ **Damages for non-acceptance.** A seller may have the right to claim damages for non-acceptance of the goods where the buyer does not accept and pay for the goods.
- ▶ In the case of late payment under a business-to-business contract, the seller can claim late payment penalties and interest at a rate of 8% plus the Bank of England base rate under the Late Payment of Commercial Debts (Interest) Act 1998.

Sale of Goods Law.

▶ **Buyers' Remedies: Non-delivery and late delivery**

- ▶ When a seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer can sue the seller for damages for non-delivery. Where a seller fails to deliver goods on time, a buyer can bring an action for damages for late delivery. This is in addition to the buyer's right to recover the price, if already paid.
- ▶ The measure of damages is generally the loss (or estimated loss) resulting directly and naturally, in the ordinary course of events, from the seller's breach. This is normally based on the difference between the contract price and the market price at the time when the goods should have been delivered. When the goods are specific or ascertained, a buyer can apply for an order for specific performance. This is a discretionary remedy and will only be ordered when damages would not be an adequate remedy. Specific performance is generally allowed where the goods are of special significance or value, such as a unique work of art.

▶ **Unsatisfactory quality**

- ▶ Where goods are delivered but are of unsatisfactory quality, a buyer may have a right to reject the goods and to recover the price. If there is a right to reject, any rejection of the goods must take place within a reasonable time from delivery. A buyer may also be able to claim damages for the cost of repair or replacement.

▶ **Goods not as described or not fit for purpose**

- ▶ Where goods supplied by a seller are not as described or not fit for all the purposes for which the goods are commonly supplied, a buyer may, depending on the facts, have a right to either:
 - ▶ Reject the goods, terminate the contract and claim damages for breach.
 - ▶ Affirm the contract and/or claim damages for breach.
- ▶ There is no general right to terminate the contract if the breach is so slight that it would be unreasonable for a buyer to reject the goods.

Sale of Goods Law.

- ▶ Remedies applicable to either party: The main remedy for breach of a sale of goods contract is damages. Damages are a monetary award to compensate the injured party and put them in the position they would have been in had the contract been performed in accordance with its terms. Damages are subject to the application of the rules on causation and remoteness, and to a duty to mitigate loss.
- ▶ In claims for breach of a sale of goods contract, where the buyer fails or refuses to accept (and pay) for goods or where the seller fails or refuses to deliver goods, damages are generally assessed as at the time when the goods should have been accepted or delivered, based on the difference between the contract price and the market price at that time. In claims for defective goods, damages are generally based on the difference between the value of the goods as delivered and their value had they not been defective.
- ▶ Equitable remedies may be available for breach of contract, but are only available at the discretion of the court. They include: **Rectification**. A court can rectify a mistake in a contract if it decides that the contract does not reflect the true agreement between the parties, or that: one party believed that a written contract contained a certain term when it did not;
 - ▶ the other party was aware of that but did not draw it to the attention of the first party; and the mistake was calculated to benefit the other party.
- ▶ **Rescission**. Rescission seeks to place the parties back in their pre-contractual position. It is available where a contract is voidable as a result of a vitiating factor such as misrepresentation, undue influence or duress. The right to rescind may be lost in the following cases: if the claimant affirms the contract; where a third party acquires rights in the goods;
 - ▶ through lapse of time; or where restoration to the pre-contractual situation is not possible.
- ▶ **Specific performance**. Specific performance is an equitable remedy available at the discretion of the judge. It is an order by the court requiring one party to perform their contractual obligation. In considering whether to grant specific performance, the courts consider:
 - ▶ whether damages would be an adequate remedy; the type of contract; whether equity requires an order for specific performance.
- ▶ **Injunctions**. There are three main types of injunctions: interlocutory or interim (temporary injunction until a court hearing);
 - ▶ prohibitory (a court order that a party must not do something); and mandatory (an order that a party must do something).