

**Modus operandi** – way of doing something

**Mutatis mutandis** – exactly the same with the necessary changes made

**Nemo dat quod non habet** – one can give a better title than the one he has

**Nexus** – connection

**Nisi** – unless

**Non compos mentis** – not of sound mind and understanding

**Non est factum** – not my deed

**Non sequitur** – an inconsistent statement, it does not follow

**Novus actus interveniens** – a new act intervening

**Nudum pactum** – a bare promise

**Obiter dictum** – observations not essential for coming to the decision

**Pacta sunt servanda** – agreements must be followed

**Pactum illicitum** – unlawful contract

**Pactum** – agreement

**Pari delicto** – at equal faults

**Pari passu** – equally

**Per annum** – by the year

**Per curiam** – by the whole court

**Per incuriam** – through want of care

**Per se** – by itself

**Post mortem** – after death

**Post** – after; later

**Prima facie** – on the face of it

**Pro bono** – for the public good

**Pro forma** – as a matter of form

**Pro rata** – in proportion

**Pro tanto** – so far, to that extent

**Qua** – in the capacity as

**Quantum meruit** – so much money as the plaintiff reasonably deserves to have

**Quantum** – how much, an amount

**Quia timet** – because he or she fears.

**Quia timet injunction** – injunction to secure the plaintiff against a future apprehended loss or wrong which would cause substantial damage

**Quid pro quo** – one thing in exchange for another

**Quorum** – minimum number of attendees to validate a decision

**Ratio decidendi** – reason for deciding

**Re** – in the matter of

**Res communes** – things in their nature incapable of appropriation, such as light and air

**Res ipsa loquitur** – the thing or matter speaks for itself

**Res judicata** – a question decided by competent legal proceedings, which cannot again be raised

**Res** – thing; the object of an action; matter, affair

**Restitutio in integrum** – restoration to the original position or condition

**Sine die** – indefinitely

**Sine qua non** – a necessary condition

**Stare decisis** – the decision must stand

**Status quo** – the state of affairs existing

**Sui generis** – unique

**Supra** – above

**Tertius** – third party

**Uberrimae fidei** – utmost good faith

**Ultra vires** – beyond the power

**Veto** – forbid

**Volenti non fit injuria** – there can be no injury to the willing

**Vox populi** – voice of the people

## SALE OF GOODS ORDINANCE

### (CAP 26)

#### Introduction

##### 1 History of legislation

The Sale of Goods Ordinance (Cap 26) was loosely based on the English Sale of Goods Act 1893 when it was first enacted in 1896 as a codification of the law relating to the sale of goods. Before the enactment of the Sale of Goods Ordinance, the law regarding sale of goods was based on the common law, including the law merchant. It is still very similar to the revised English Sale of Goods Act 1979. It was amended in 1977 by the Sale of Goods (Amendment) Ordinance (58 of 1977), commencing 15 July 1977.

Following recommendations put forward by the Law Reform Commission, further amendments were made to the Ordinance by the Sale of Goods (Amendment) Ordinance 1994 (85 of 1994) which was assented to on 20 October 1994 and came into operation on 21 October 1994.

The Ordinance does not cover all aspects of contract law relating to the sale of goods, so in many instances practitioners will still need to make recourse to the common law: see s 62(2) of the Ordinance below.

##### 2 Application

The Ordinance is of great importance in Hong Kong as it applies to all contracts for the sale of goods. The Ordinance only relates to goods as defined, ie all personal chattels other than things in action or money. It includes emblements, industrial growing crops, and things attached to or forming part of the land, which parties agree to be severed before sale or under the contract of sale. A contract of sale of goods is defined in s 3 of the Ordinance as being a contract by which the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration called the price; and by ss 14-17 of the Ordinance there are implied, as part of every such contract, certain conditions and warranties as to title, sale by description, quality or fitness and sale by sample. Provision for exclusion of the implied terms is contained in s 57, but this is subject to the provisions of the Control of Exemption Clauses Ordinance (Cap 71) under which contracting out of those terms is prohibited or restricted. For the principal remedies available on breach of contract through delivery of defective goods, see ss 13, 36, 37 and 55 of the Ordinance.

The Sale of Goods Ordinance (Cap 26) deals only with those rules of law which are peculiar to the law of sale. There are excepted from the scope and effect of the Ordinance (i) the rules in bankruptcy, relating to contracts of sale; (ii) the rules of common law, including the law merchant, save in so far

as they are inconsistent with the express provisions of the Ordinance, and in particular, the rules relating to the law of principal and agent and the effect of fraud, misrepresentation, duress or coercion, mistake or other invalidating cause; all of which continue to apply to contracts for the sale of goods; (iii) the enactments relating to bills of sale or any enactment relating to the sale of goods which is not expressly repealed by the Ordinance; and (iv) transactions in the form of a contract of sale which are intended to operate by way of mortgage, pledge, charge or other security: see s 62.

### 3 Overview of the sections

The essential provisions of the Ordinance are as follows:

- a contract of sale of goods is made when the seller transfers or agrees to transfer the property in goods to the buyer for a price. A contract can be either absolute or conditional. When property in the goods is transferred under the contract, it is called a sale; when property in the goods is transferred later, or is subject to a future condition, the contract is an agreement to sell (s 3)
- the goods to be sold may be either existing goods owned and possessed by the seller or goods yet to be manufactured or acquired after the contract is made (s 7)
- if the contract is for specific goods which had perished by the time the contract is made without the seller's knowledge, the contract is void (s 8)
- if the agreement to sell is for specific goods which perish after the contract is made but before the risk passes to the buyer, the contract is avoided (s 9)
- the price may be fixed by the contract, or left to be fixed in an agreed manner or may be determined by the course of dealing between the parties. Otherwise, the buyer must pay a reasonable price, depending on the circumstances of each case (s 10)
- there is an implied condition that the seller has a right to sell the goods, or will have the right to sell the goods when the property is to pass and an implied warranty that the goods are free from undisclosed encumbrance and the buyer will enjoy quiet possession (s 14)
- when the seller sells in the course of business, there is an implied condition that the goods supplied are of merchantable quality, unless defects are drawn to the buyer's attention or the buyer examines the goods and such examination should reveal defects. There is also an implied condition that goods supplied are reasonably fit for any purpose for which the goods are being bought, made known to the seller (s 16)
- when the contract is a sale by sample, there is an implied condition that the bulk shall be of similar quality as the sample (s 17)
- property passes in specific or ascertained goods when the parties intend it to be transferred (s 19)

- rules for ascertaining intention of the parties as to the time property in the goods is to pass to the buyer (s 20)
- the seller can reserve the right of disposal of the goods until certain conditions are fulfilled (s 21)
- goods remain at the seller's risk until the property is transferred to the buyer, unless otherwise agreed (s 22)
- the buyer acquires no better title to the goods than the seller had, subject to the following provisions (s 23):
  - (i) when goods are openly sold in a shop or market in the ordinary course of its business (s 24)
  - (ii) where seller has a voidable title, but it has not been avoided at the time of sale, the buyer acquires good title, if he bought them in good faith and without notice of any defect in the seller's title (s 25)
  - (iii) where a seller or buyer remains in possession of the goods or documents of title after sale, sells and transfers the goods to a third person who buys in good faith without notice of the previous sale (s 27)
- payment and delivery are concurrent conditions, unless otherwise agreed (s 30)
- rules as to delivery (s 31)
- provisions when seller delivers the wrong quantity of goods (s 32)
- delivery to the carrier is deemed to be delivery to the buyer, when seller is required to send the goods to the buyer (s 34)
- how a buyer accepts goods (s 37)
- if the buyer does not take delivery of the goods within a reasonable time when the seller is ready, the buyer is liable for any loss (s 39)
- rights of unpaid seller (ss 41-45)
- provisions as to stoppages in transit by unpaid seller (ss 46-48)
- the seller can sue the buyer to whom property has passed but has not paid for the goods (s 51)
- the seller can sue for damages for non acceptance if the buyer refuses to accept and pay for the goods (s 52)
- when the seller refuses to deliver the goods, the buyer can sue the seller for damages (s 53)
- where there is a breach of warranty by the seller, the buyer is not entitled to reject the goods but he may sue for damages (s 55)
- implied terms and conditions can be excluded by agreement (s 57)
- in sale by auction, each lot is subject to a separate contract of sale (s 60).

### 4 Further Reading

- On the law of contract generally, see Betty Ho, *Hong Kong Contract Law* (2nd Ed, Butterworths Asia, 1994).
- *Halsbury's Laws of Hong Kong*, Vol 1(2), Auction

- *Halsbury's Laws of Hong Kong, Vol 7, Contract*
- *Halsbury's Laws of Hong Kong, Vol 11(2) (2005 Reissue), Equity [165.024]*
- *Halsbury's Laws of Hong Kong, Vol 23 (2004 Reissue), Sale of Goods*
- **Control of Exemption Clauses Ordinance (Cap 71)** of this Handbook
- **Misrepresentation Ordinance (Cap 284)** of this Handbook
- **Supply of Services (Implied Terms) Ordinance (Cap 457)** of this Handbook
- *Hong Kong English-Chinese Legal Dictionary (2005, LexisNexis)*

## CHAPTER 26

## SALE OF GOODS ORDINANCE

To codify the law relating to the sale of goods

[cf. 1893 c. 71 U.K.]

Originally: No 7 of 1896

Operation: 1 August 1896

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**1. Short title**

This Ordinance may be cited as the Sale of Goods Ordinance.

**2. Interpretation**

Remarks:

Adaptation amendments retroactively made - see 66 of 2000 s. 3

(1) In this Ordinance, unless the context otherwise requires-

"action" (訴訟) includes suit, counterclaim, and set-off;

"business" (業務) includes a profession and the activities of a public body, a public authority, or a board, commission, committee or other body appointed by the Chief Executive or Government; (Added 58 of 1977 s. 2. Amended 59 of 1989 s. 20; 66 of 2000 s. 3)

"buyer" (買方) means a person who buys or agrees to buy goods;

"contract of sale" (售賣合約) includes an agreement to sell as well as a sale;

"delivery" (交、交付) means voluntary transfer of possession from one person to another;

"document of title to goods" (貨品的所有權文件) includes any bill of lading, dock warrant, warehouse keeper's certificate, and warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorize, either by indorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented;

"fault" (錯失) means wrongful act or default;

"future goods" (期貨) means goods to be manufactured or acquired by the seller after the making of the contract of sale;

"goods" (貨、貨品) includes all chattels personal other than things in action and money. The term includes emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale;

"plaintiff" (原告人) includes a defendant counterclaiming;

"property" (產權) means the general property in goods, and not merely a special property;

"quality of goods" (貨品品質) includes their state or condition;

46. Right of stoppage in transitu

47. Duration of transit

"sale" (售賣) includes a bargain and sale as well as a sale and delivery;

"seller" (賣方) means a person who sells or agrees to sell goods;

"specific goods" (特定貨品) means goods identified and agreed upon at the time a contract of sale is made;

"warranty" (保證條款) means an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of such contract, the breach of which gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated.

(Amended 59 of 1989 s. 20)

(2) A thing is deemed to be done "in good faith" when it is in fact done honestly, whether it is done negligently or not. (Amended 8 of 1912 s. 47)

(3) A person is deemed to be insolvent who either has ceased to pay his debts in the ordinary course of business or cannot pay his debts as they become due, whether he has been adjudged bankrupt or not. (Amended 8 of 1912 s. 47; 37 of 1998 s. 4)

(4) Goods are in a "deliverable state" when they are in such a state that the buyer would, under the contract, be bound to take delivery of them. (Amended 8 of 1912 s. 47)

(5) Goods of any kind are of merchantable quality within the meaning of this Ordinance if they are

- (a) as fit for the purpose or purposes for which goods of that kind are commonly bought;
- (b) of such standard of appearance and finish;
- (c) as free from defects (including minor defects);
- (d) as safe; and
- (e) as durable,

as it is reasonable to expect having regard to any description applied to them, the price (if relevant) and all the other relevant circumstances; and any reference in this Ordinance to unmerchantable goods shall be construed accordingly. (Replaced 85 of 1994 s. 2)

**[SG2.01] Enactment history**

Subsection (1) was amended by s 20 of the Control of Exemption Clauses Ordinance (Cap 71), commencing 1 December 1990. Subsection (3) was amended by s 47 of the General Revision Ordinance 1912 (8 of 1912) and s 4 of the Bankruptcy (Amendment) Ordinance 1998 (37 of 1998), commencing 20 November 1998. Subsections (2) and (4) were amended by s 47 of the General Revision Ordinance 1912 (8 of 1912). Subsection (5) was inserted by the Sale of Goods (Amendment) Ordinance 1994 (85 of 1994), commencing

## CONTROL OF EXEMPTION CLAUSES ORDINANCE

### (CAP 71)

#### 1 Introduction

The Control of Exemption Clauses Ordinance (Cap 71) limits the extent to which civil liability for breach of contract, negligence or other breach of duty can be avoided by means of contract terms. It also acts to restrict the enforceability of arbitration agreements in certain circumstances. Particularly in standard form contracts, it is common for one or more party to seek to exclude or limit liability for breach of contract or misrepresentation which would otherwise be imposed upon him. The exclusion may be in respect of terms implied by law into the contract or to the express terms or representations in, or leading up to the contract. The Ordinance, which was brought into force on 1 December 1990 by LN 38/1990, is largely based on the UK's Unfair Contract Terms Act 1977 and was introduced as a result of a 1986 Law Reform Commission Report on the subject. The Commission found there was a need to control exemption clauses by statute, particularly where the parties were not in positions of equal bargaining strength, as the common law could deal with fraudulent exemption clauses, but not with unfair ones. They also recommended that "domestic" arbitration clauses in consumer contracts should be enforceable only if the consumer agrees to arbitrate after the dispute has arisen or has himself resorted to arbitration to settle the dispute.

Previously, the courts exercised control over exemption clauses in consumer transactions where one party obviously had an upper hand under the common law. As the Ordinance does not apply to many exemption clauses, the common law which is unaltered by the statute, still remains important.

#### 2 Types of exclusion clauses

Exclusion clauses are generally of two basic types, one seeks to exclude or cut down a primary obligation of the contract, the other seeks to qualify the right of the promisee upon breach, for example, by denying or limiting the right to rescind for breach, or by limiting the amount of damages recoverable, or by specifying a time limit for the exercise of the right to rescind or claim damages. Although the common law cannot alter the effect of an exemption clause, or ignore it, except in limited circumstances, the courts have generally looked on exemption clauses with disfavour. If it is drawn too wide, a clause of the first type may have the effect of rendering the contract a unilateral one or of removing all contractual force from the agreement.

If the exclusion clause is unreasonable, it is void. There are also some statutory provisions rendering exclusion clauses void: eg the Sale of Goods

Ordinance (Cap 26) s 14 (which implies certain undertakings as to title, freedom from incumbrances and quiet possession into any contract for the sale of goods); any term of such a contract which gives exemption from those undertakings is void. Further, there are also implied into many contracts for the sale of goods certain undertakings as to compliance with description, quality or fitness and correspondence with sample (Sale of Goods Ordinance (Cap 26) ss 15-17). Any term purporting to grant exemption from those undertakings is void in the case of a consumer sale, and in other circumstances, is not enforceable to the extent that it is shown that it would not be fair or reasonable to allow reliance on the term: see also the **Sale of Goods Ordinance** (Cap 26) of this Handbook. However, none of the above applies to a contract for the international sale of goods. The **Motor Vehicles Insurance (Third Party Risks) Ordinance** (Cap 272) and the **Employees' Compensation Ordinance** (Cap 282) both preclude the insurer from avoiding liability on the basis of an act or omission after the happening of an event giving rise to the claim. Any purported exclusion or limitation of liability of an employer in respect of personal injuries to an employee is rendered void by virtue of the **Law Amendment and Reform (Consolidation) Ordinance** (Cap 23) s 22(2).

Section 4 of the **Misrepresentation Ordinance** (Cap 284) deals with provisions excluding or restricting liability for misrepresentation. These are generally of no effect except to the extent, if any, that it satisfies the requirement of reasonableness as stated in s 3(1) of the **Control of Exemption Clauses Ordinance** (Cap 71): see also the **Misrepresentation Ordinance** (Cap 284) of this Handbook.

Arbitration clauses and *Scott v Avery* clauses (a clause whereby the making of an award is to be considered as a condition precedent to any right of action) are not in general to be treated as exclusion clauses, so the special rules relating to construction of exclusion clauses and to deviations do not apply to them. The same applies to an agreement for liquidated damages, that is, a genuine pre-estimation of loss.

### 3 Common law concepts applicable

In the absence of statutory provision, there is no general rule of law to the effect that courts have power to refuse to give effect to exclusion clauses on the ground that they are unreasonable or unconscionable. However, no exclusion clause can protect a party from the consequences of his own fraud. In some cases, the intentions of the parties are not reflected in the terms of the contract and while the common law could not theoretically run counter to the parties' intentions, it devised a series of tests to identify the intentions clearly. So the courts have where appropriate, particularly applied the following general rules of the law of contract, in order to control the possibilities of abuse inherent in complete freedom of contract. While not overtly aimed at controlling exemption clauses, these tests or rules often have the effect of rendering such a clause ineffective:

- a party seeking to rely on an exclusion clause must show that it was incorporated as a term of the contract, which usually involves the

- taking of reasonable steps to bring it to the notice of the other party;
- an exclusion clause is to be construed strictly against the party who introduced it and seeks to rely on it (the *contra proferentem* rule – see next para);
- where there is a contract between two parties containing an exclusion clause, a third party will not be allowed to shelter behind that clause in the absence of clear evidence that he is a party to the contract and that the clause was intended to protect him.

### 4 The 'contra proferentem' rule

Exemption clauses must be strictly construed and very clear wording is necessary in order to escape liability for breach of an obligation considered to be of fundamental importance to the contract. Consistent with the 'contra proferentem' principle, any ambiguity in an exemption clause should be resolved against the party seeking to rely on it. Terms which are ambiguous, muddled and imprecise and contained patent inconsistencies with the terms on the face of the bill of lading cannot be relied on: dicta of Clarke J in *The 'Ines'* [1995] 2 Lloyd's Rep 144 at 145 and dicta of Lord Hobhouse in *Hamburg Houtimport BV v Agrosin Private Ltd, The 'Starsin'* [2003] 2 WLR 711 (HL) at para 144 applied (at 129C-H, 130F-131F): *Vastfame Camera Ltd v Birkart Globistics Ltd* [2005] 4 HKC 117. In a case where it was a term of a bill of lading that goods would only be delivered against an original bill of lading, it was permissible to limit the ambit of an exclusion clause in the light of that term.

### 5 Later inclusion of exemption clauses

To be effective as an exemption clause, the clause must be incorporated into the contract at the time the contract is made and it is insufficient if the clause is put forward at a later stage. There are, however, certain exceptions to this statement:

- an exclusion clause may be effectively incorporated into the contract by a subsequent variation of its terms
- where there has been a previous course of dealing between the parties, and the party against whom the clause operates has on previous occasions been put on notice of the other party's intention to contract on the basis of the clause, it may be incorporated in the contract notwithstanding that it is contained in a document such as a confirmation note which according to general principles would come too late to be part of the contract
- where the bargaining power of both parties is equal and both are in the same line of business and know of the contractual terms in common use in that business, those terms may be regarded as being incorporated into an oral contract
- in certain circumstances, an apparently post-contractual document such as a confirmation note may, on the proper interpretation of the

conduct of the parties, form the contract itself, in which case an exclusion clause in the note will clearly be incorporated.

An exclusion clause in a contractual document may be modified or deprived of effect by a collateral and overriding undertaking or by a misrepresentation as to the effect of the clause.

## 6 Overview of the sections

The essential provisions of the Ordinance are as follows:

- definition of the "reasonableness" test (s 3)
- definition of "dealing as a consumer" (s 4)
- definition of the varieties of exemption clause that are excluded by the Ordinance (s 5)
- liability for negligence cannot be excluded by any contract term (s 7)
- in a contract, when one party is dealing as a consumer or on the other party's written standard terms of business, the other cannot exclude his liability for breach of contract by relying on a contract term, or claim to be able to render a different performance of the contract unless the term satisfies the requirement of reasonableness (s 8)
- a person dealing as a consumer cannot by reference to any contract term be made to indemnify another person in respect of liability incurred by the other for negligence or breach of contract, except in so far as the term satisfies the requirement of reasonableness (s 9)
- where loss and damage arise from goods proving defective while in consumer use, resulting from the negligence of a person concerned in the manufacture or distribution of the goods, liability for the loss or damage cannot be excluded or restricted by reference to any contract term or notice contained in or operating by reference to a guarantee of the goods (s 10)
- the seller's liability for breach of the obligations arising under the implied undertakings in the Sale of Goods Ordinance (Cap 26) ss 15-17 (ie implied undertakings as to conformity of goods with description or sample, or as to their quality or fitness for a particular purpose) in a contract with a person dealing as a consumer, cannot be excluded by reference to any contract terms (see also **Sale of Goods Ordinance (Cap 26)** of this Handbook). Liability for a breach of obligation under s 14, that is an undertaking as to title, cannot be excluded or restricted by reference to any contract term (s 11)
- the seller's liability in respect of goods corresponding with description or sample, or their quality or fitness for any particular purpose cannot be excluded or restricted by reference to any such term, when the other person deals as a consumer. If the other person is not a consumer, such liability can be excluded or restricted by reference to such a term, but only in so far as the term

satisfies the requirement of reasonableness. Liability in respect of the right to transfer ownership of the goods, or give possession, or the assurance of quiet possession to a person taking goods in pursuance of the contract cannot be excluded or restricted by reference to any such term except in so far as the term satisfies the requirement of reasonableness (s 12)

- a contract term may be found to be reasonable and given effect even if the contract has been terminated. If a party entitled to repudiate the contract nevertheless affirms it, this does not of itself exclude the requirement of reasonableness in relation to any contract term (s 13)
- a person cannot circumvent the provisions of this Ordinance by means of a separate contract prejudicing or taking away rights which arise under or in connection with the performance of another contract (s 14)
- when dealing with a person as a consumer, an agreement to submit future differences to arbitration cannot be enforced unless he gives his written consent after the differences has arisen or where he has himself had recourse to arbitration in pursuance of the agreement in respect of any differences (s 15)
- the limits imposed by this Ordinance defining the extent to which a person may exclude or restrict liability by reference to a contract term do not apply to liability arising under an exempted supply contract. The terms of an exempted supply contract are not subject to any requirement of reasonableness under ss 8 or 9 (s 16)
- where the contract is governed by the laws of Hong Kong through the choice of the parties, ss 7-12 do not operate as part of the proper law. But the Ordinance has effect notwithstanding any contract term which applies or purports to apply the law of some other country, where the term appears to the court to have been imposed mainly for the purpose of enabling the party to evade the operation of this Ordinance, or where one party making the contract dealt as a consumer, and was habitually resident in Hong Kong and the essential steps for making the contract were taken by him there (s 17).

## 7 Further Reading

- On the law of contract generally, see Betty Ho, *Hong Kong Contract Law* (2nd Ed, Butterworths Asia, 1994), in particular pp 119-143, which deal with the judicial control of exemption clauses.
- *Halsbury's Laws of Hong Kong*, Vol 7, Contract
- *Halsbury's Laws of Hong Kong* Vol 11(2) (2005 Reissue), Equity, para [165.024].
- *Halsbury's Laws of Hong Kong* Vol 23 (2004 Reissue), Sale of Goods
- **Misrepresentation Ordinance (Cap 284)** of this Handbook