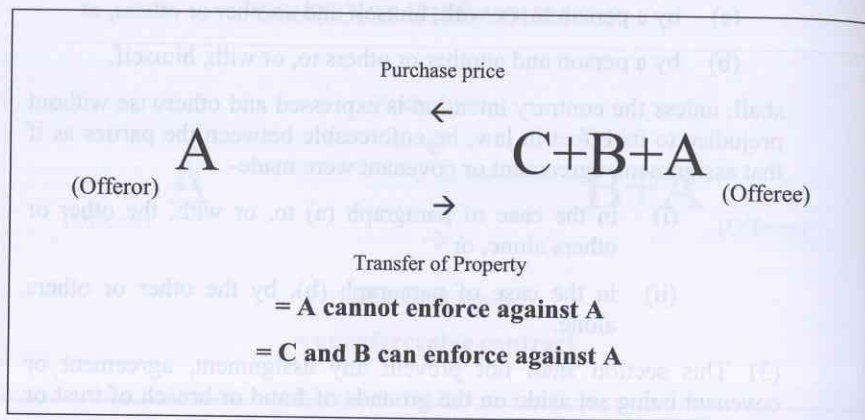


FIGURE 3 – UNDER S 25, THE COMMON PARTY IS EFFECTIVELY NON-EXISTENT



13 Privity of contract

Generally only parties to a contract are legally bound by and are entitled to enforce it, even if the purpose of the contract is to benefit third parties: *Beswick v Beswick* [1968] AC 58, [1967] 2 All ER 1197 (HL) applied in *Always Win Ltd v Autofit Ltd* [1995] 2 HKC 48. The rule prevents contractual burdens as well as enforceable rights being placed on persons who are not parties to the contract.

Privity of contract is conceptually different from the requirement that consideration must move from the promisee: *Re Wyvern Developments Ltd* [1974] 2 All ER 535, [1974] 1 WLR 1097.

A valid contract may be found under the rule where consideration has been provided by the promisee, but the person who is intended to receive the performance of the promise is not a party to the consideration and not a party to the contract: *Kepong Prospecting Ltd v Schmidt* [1968] AC 810. However, there are some exceptions to this rule.

13.1 History

Dunlop Pneumatic Tyre v Selfridge and Co Ltd [1915] AC 847 (HL) (applied in Hong Kong in *B + B Construction Ltd v Sun Alliance and London Insurance Plc* [2000] 2 HKC 295 (CA)) was the landmark case in which Viscount Haldane established conclusively that only a party to a contract can be sued on it.

- Dunlop, a tire manufacturing company, made a contract with Dew, a trade purchaser, for tires at a discounted price on condition that they would not resell the tires at less than the listed price and that any

reseller who wanted to buy them from Dew had to agree not to sell at the lower price either.

- Dew sold the tires to Selfridge at the listed price and made Selfridge agree not to sell at a lower price either.
- Selfridge sold the tires below the price he promised to sell them for.
- Dunlop sued Selfridge for an injunction from selling tires and damages.

At trial the judge found for Dunlop. On appeal the damages and injunction were reversed, saying that Selfridge was not a principal or an agent and thus was not bound. The issue put to the court was whether Dunlop could get damages from Selfridge without a contractual relationship.

Viscount Haldane considered privity, consideration and agency. First, privity requires that only a party to a contract can sue. Second, the doctrine of consideration requires a person with whom a contract not under seal is made is only able to enforce it if there is consideration from the promisee to the promisor. Third, the law of agency requires that the principal not named in the contract can only be sued if the promisee contracted as an agent. On application to the facts, Viscount Haldane could not find any consideration between Dunlop and Selfridge, nor could he find any indication of an agency relationship between Dew and Selfridge.

13.2 Exceptions

A claim in tort

in some situations, a third party beneficiary of a contract to which he or she is not a party is entitled to enforce the contract which was made for his or her benefit, for example, where the fact which constitutes a breach of the contract between parties to the contract may also give rise to a claim in tort, ie breach of a duty of care owed to the third party: *D & F Estates Ltd v Church Comrs for England* [1989] AC 177, [1988] 2 All ER 992 (HL). In such situations the privity rule is not a bar.

Collateral contracts

Where a third party has given a warranty to X, praising the product or services of Y, thereby inducing X to contract with Y, and it transpires that the warranty was false, X can maintain an action against the third party for breach of warranty, even though X only entered into a contract with Y: *Shanklin Pier Ltd v Detel Products Ltd* [1951] 2 KB 854.

Trust of promises

Under this exception, a party can declare himself trustee of a promise (eg a debt) given by X for the benefit of a third party Y. Provided X was aware of this trust, Y as the beneficiary of a trust acquires equitable interest in the promise: Corbin, 'Contracts for the Benefit of Third Parties' (1930) 46 LQR 12. This exception was developed by equity in antiquity to circumvent the injustice created by privity, and remains little used.

Agency

Relationships of agency do not per se amount to an exception to the privity doctrine, since the principal is not to be regarded a third party to the contract. Even the agent himself may sue or be sued under the contract if he entered into the contract which indicates personal liability. See paragraph 14 below.

Joint promisees

Where a promise is made jointly to two persons, then the two of them may jointly enforce the promise, notwithstanding that the consideration for the promise only moved from one of them: *Dutton v Poole* (1677) 3 Keb 786; *Coulls v Bagot's Executor and Trustee Co Ltd* (1967) 40 ALJR 471.

Subrogation

The doctrine of subrogation applies in a situation where A is under an obligation towards B which is discharged by C. If the conditions are satisfied then C can stand in the shoes of B and acquire B's right of action against A. This is very common in the insurance context where insurers discharge the insured's liability towards the third party victim and acquire the right of action against the insured.

Assignment of choses in action – LARCO s 9

The Law Amendment and Reform (Consolidation) Ordinance (Cap 23) s 9 allows contracting parties to assign a chose in action to an assignor where (i) the assignment is absolute, (ii) it is in writing, (iii) it involves a debt or other legal choses in action, and (iv) notice has been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action.

The operation of this section can be excluded by contract: *Zhang Qiyun Shun Shing Construction & Engineering Co Ltd* [2010] 2 HKLRD 348.

Covenants over land – CPO ss 39-41

Covenants in relation to land are special in that they are said to 'run with the land.' It creates an exception to privity in that the benefit and burden of these covenants may pass to successors in title of the original parties to a land contract. On the other hand, privity of contract results in both original parties to a lease remaining liable for performance of all the lease covenants even after their interests in the lease have been assigned: *Oriental Solution Investment Ltd v Sin Ka Wing* [1999] 4 HKC 135 (CFI).

See Conveyancing and Property Ordinance (Cap 219) ss 39-41.

13.3 Criticisms of the doctrine

The application of the doctrine of privity could potentially frustrate the intention of the contracting parties causing injustice and commercial inconvenience. Critics found that it seems to be unfair to prevent a third party from enforcing a benefit which was made expressly for him despite the fact

that he is not a party to the contract. Moreover, in situation where agents or employees are involved in performing the contract, the doctrine makes it difficult for the contractual party to extend the protection as provided in the contract, such as exemption to liability clause, to its agents or employees.

13.4 Reform

The common law doctrine of privity current remains part of the law in Hong Kong. Recently, on 31 October 2012, the Department of Justice has released a draft of the Contracts (Rights of Third Parties) Bill, which proposes to reform the doctrine of privity by providing a legal framework for enforcing third party rights.

Under the Bill, a third party may enforce a term of the contract if:

- (a) the contract expressly provides for such a right; or
- (b) a term purports to confer a benefit on the third party, and the contracting parties intend for the term to be enforceable by the third party.

Third parties must also be expressly identified in the contract by name, as a member of a class or by a particular description.

Parties would be at liberty to contract out and maintain the privity doctrine in their contracts.

Similar reforms to the privity doctrine have been introduced in other common law jurisdictions such as England and Wales, Singapore, New Zealand, and certain states in Australia. The bill has finished consultation on 31 December 2012 and is expected to be formally enacted in late 2013 or early 2014.

14 Agency

An agency relationship occurs when one person appoints another person to effect his or her legal relations with others. Agency is the fiduciary relationship that exists between two persons, the agent and the principal, where the principal either expressly or impliedly consents to the agent acting on his or her behalf. At contract law we are always interested in the relationship between the principal, the agent, and the other contracting party typically called the 'third party'. This diagram represents one most typical structure of this relationship. However, the most important relationship in contractual obligation terms is that between the principal and the third party.

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 section 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 (section 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 (section 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 (section 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 (section 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 (section 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 (section 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 (section 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 (section 17)
- property passes in specific or ascertained goods when the parties intend it to be transferred (section 19)

- rules for ascertaining intention of the parties as to the time property in the goods is to pass to the buyer (section 20)
- the seller can reserve the right of disposal of the goods until certain conditions are fulfilled (section 21)
- goods remain at the seller's risk until the property is transferred to the buyer, unless otherwise agreed (section 22)
- the buyer acquires no better title to the goods than the seller had, subject to the following provisions (section 23):
 - (i) when goods are openly sold in a shop or market in the ordinary course of its business (section 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 (section 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 (section 27)
- payment and delivery are concurrent conditions, unless otherwise agreed (section 30)
- rules as to delivery (section 31)
- provisions when seller delivers the wrong quantity of goods (section 32)
- delivery to the carrier is deemed to be delivery to the buyer, when seller is required to send the goods to the buyer (section 34)
- how a buyer accepts goods (section 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 (section 39)
- rights of unpaid seller (sections 41-45)
- provisions as to stoppages in transit by unpaid seller (sections 46-48)
- the seller can sue the buyer to whom property has passed but has not paid for the goods (section 51)
- the seller can sue for damages for non acceptance if the buyer refuses to accept and pay for the goods (section 52)
- when the seller refuses to deliver the goods, the buyer can sue the seller for damages (section 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 (section 55)
- implied terms and conditions can be excluded by agreement (section 57)
- in sale by auction, each lot is subject to a separate contract of sale (section 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) (2008 Reissue), Auction
- *Halsbury's Laws of Hong Kong*, Vol 7 (2012 Reissue), Contract
- *Halsbury's Laws of Hong Kong*, Vol 11(2) (2008 Reissue), Equity [165.024]
- *Halsbury's Laws of Hong Kong*, Vol 23 (2008 Reissue), Sale of Goods
- *The Annotated Ordinances of Hong Kong*, Control of Exemption Clauses Ordinance (Cap 71) (2013 Reissue)
- *The Annotated Ordinances of Hong Kong*, Misrepresentation Ordinance (Cap 284) (2013 Reissue)
- *The Annotated Ordinances of Hong Kong*, Supply of Services (Implied Terms) Ordinance (Cap 457) (2009 Reissue)
- *Butterworths Hong Kong Contract Law Handbook* (2nd Ed, LexisNexis, 2006)
- *Hong Kong English-Chinese Legal Dictionary* (LexisNexis, 2005)

CHAPTER 26

SALE OF GOODS ORDINANCE

To codify the law relating to the sale of goods.
[cf 1893 c 71 U.K.]
[1 August 1896]
(Originally 7 of 1896 (Cap 26, 1950))

Note: The following Imperial Statutes and parts thereof so far as they were applicable in Hong Kong were repealed by this Ordinance—
1 James 1, c. 21. --- An Act against Brokers.
29 Car. 2, c. 3. --- The Statute of Frauds, sections 15 and 16.
9 Geo. 4, c. 14. --- The Statute of Frauds Amendment Act, 1828, section 7.

ARRANGEMENT OF SECTIONS

- 1 Short title
- 2 Interpretation
- 2A 'Dealing as consumer'

PART I

FORMATION OF THE CONTRACT

CONTRACT OF SALE

- 3 Sale and agreement to sell
- 4 Capacity to buy and sell

FORMALITIES OF CONTRACT

- 5 Mode of making contract of sale
- 6 (Repealed 58 of 1977 s 3)

SUBJECT-MATTER OF CONTRACT

- 7 Existing or future goods
- 8 Goods which have perished
- 9 Goods perishing before sale but after agreement to sell

PRICE

- 10 Ascertainment of price
- 11 Agreement to sell at valuation

CONDITIONS AND WARRANTIES

- 12 Stipulations as to time
- 13 When condition to be treated as warranty
- 14 Implied undertaking as to title etc

- 15 Sale by description
- 16 Implied undertakings as to quality or fitness

SALE BY SAMPLE

- 17 Sale by sample

PART II

EFFECTS OF THE CONTRACT

TRANSFER OF PROPERTY AS BETWEEN SELLER AND BUYER

- 18 Goods must be ascertained
- 19 Property passes when intended to pass
- 20 Rules for ascertaining intention
- 21 Reservation of right of disposal
- 22 Risk prima facie passes with property

TRANSFER OF TITLE

- 23 Sale by person not owner
- 24 Market overt
- 25 Sale under voidable title
- 26 (Repealed 21 of 1970 s 35)
- 27 Seller or buyer in possession after sale
- 28 (Repealed 52 of 1987 s 45)

PART III

PERFORMANCE OF THE CONTRACT

- 29 Duties of seller and buyer
- 30 Payment and delivery are concurrent conditions
- 31 Rules as to delivery
- 32 Delivery of wrong quantity
- 33 Delivery by instalments
- 34 Delivery to carrier
- 35 Risk where goods are delivered at distant place
- 36 Buyer's right of examining goods
- 37 Acceptance of goods
- 38 Buyer not bound to return rejected goods
- 39 Liability of buyer for neglecting or refusing to take delivery of goods

PART IV

RIGHTS OF UNPAID SELLER AGAINST THE GOODS

- 40 Definition of unpaid seller

- 41 Unpaid seller's rights
- 42 Withholding delivery

UNPAID SELLER'S LIEN

- 43 Unpaid seller's lien
- 44 Part delivery
- 45 Termination of lien

STOPPAGE IN TRANSITU

- 46 Right of stoppage in transitu
- 47 Duration of transit
- 48 How stoppage in transitu is effected

RE-SALE BY BUYER OR SELLER

- 49 Effect of subsale or pledge by buyer
- 50 Sale not generally rescinded by lien or stoppage in transitu

PART V

ACTIONS FOR BREACH OF THE CONTRACT

REMEDIES OF SELLER

- 51 Action for price
- 52 Damages for non-acceptance

REMEDIES OF BUYER

- 53 Damages for non-delivery
- 54 Specific performance
- 55 Remedies for breach of warranty
- 56 Interest and special damages

PART VI

SUPPLEMENTARY

- 57 Exclusion of implied terms and conditions
- 57A (Repealed 59 of 1989 s 20)
- 58 Reasonable time a question of fact
- 59 Right, etc, enforceable by action
- 60 Auction sale
- 61 Reservation of right to bid
- 62 Saving

1. Short title

This Ordinance may be cited as the Sale of Goods Ordinance.
(Amended 5 of 1924 s 6)

2. Interpretation

(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;

‘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

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

[2.01] Enactment history

Subsection (1) was amended by section 20 of the Control of Exemption

3 Implied terms under this Ordinance

Where a supplier of a service is acting in the course of a business, there is an implied term that the supplier will carry out the services with reasonable care and skill (s 5) and within a reasonable time (s 6). Further, whether or not a supplier is acting in the course of a business, there is an implied term that the other party will pay a reasonable charge (s 7). The terms as to time for performance and consideration will be implied into the contract only if they are not fixed by the contract, are not left to be fixed in a manner agreed by the contract or are not determined by the course of dealing between the parties.

What is a reasonable time or a reasonable charge is a question of fact (ss 6(2) and 7(2)).

As against a person who deals as consumer (as defined in s 4), the supplier cannot, by reference to any contract term, exclude or restrict any liability of his arising under the contract by virtue of this Ordinance (s 8(1)). This is an important consumer protection provision unavailable under UK law. As against other persons, such implied liability may, subject to the Control of Exemption Clauses Ordinance (Cap 71), be negated or varied by express agreement, in the course of dealing between the parties or such usage as binds both parties to the contract (s 8(2)). In defining the term 'dealing as consumer', the Ordinance adopts the approach of the Control of Exemption Clauses Ordinance (Cap 71), Sale of Goods Ordinance (Cap 26) and Unconscionable Contracts Ordinance (Cap 458).

Unlike the Australian Trade Practices Act 1974, there is no implied obligation on the supplier that the promised services will produce the intended effect. Further, in contracts for work and materials, there is no requirement that the materials supplied in connection with those services will be reasonably fit for the purpose for which they are supplied (see the Law Reform Commission's Report, above, para 6.6).

4 Implied terms at common law

The terms implied into contracts for the supply of services under this Ordinance are in addition to other implied terms at common law. Specific reference should be made to the following paragraphs of *Halsbury's Laws of Hong Kong*, Vol 7, Contract, when examining the question of what other implied terms form part of a contract:

Para [115.149] General overview of where terms will be implied

In general implying of terms is a matter for the court, and logically implied terms are logically inferred from the express terms of the contract. The usual distinction is terms implied by (a) custom; by (b) law; and by (c) courts.

Para [115.150] The relationship of the parties

As in this Ordinance, many terms are implied based on some fact or assumption about the relationship between the parties, and not merely the intention of the parties. Sections 3-5 of this Ordinance are an example of that more general common law principle.

Para [115.151] Implication by custom or usage

Para [115.152] Implication by law

As in situations relating to the sale of goods, the supplying of services to someone dealing as a consumer have been codified in this Ordinance (but see further s 9(1)(a) for savings).

Para [115.153] Giving efficacy to the contract

5 Further reading

See also *Annotated Ordinances of Hong Kong*, Sale of Goods Ordinance (Cap 26) (2006 Reissue), Control of Exemption Clauses Ordinance (Cap 71) (2006 Reissue), Unconscionable Contracts Ordinance (Cap 458) (2006 Reissue), and Misrepresentation Ordinance (Cap 284) (2006 Reissue).

On the law of contract in Hong Kong in relation to implied terms, see *Halsbury's Laws of Hong Kong*, Vol 18 (2012 Reissue), Contract, paras [115.153] to [115.165]. See also Betty Ho, *Hong Kong Contract Law* (2nd Ed, Butterworths Asia, 1994).

6 Excerpts from the Report of the Law Reform Commission of Hong Kong on the Sale of Goods and Supply of Services (Topic 21)

The following paragraph is reproduced to provide guidance to the interpretation of reasonable care and skill by the Law Reform Commission:

"6.3.2 In Australia, the expression 'due skill and care' is used (s 74(1) Trade Practices Act; s 9(1) Victorian Goods (Sales and Lease) Act; s 8 Tasmanian draft Supply of Goods and Services Bill.) The Irish Sale of Goods and Supply of Services Act uses 'due skill, care and diligence'. There has been criticism of the use of the word 'due' as it is unclear whether it imposes a higher duty than the avoidance of negligence. We prefer the word 'reasonable' because it is more prevalent in common law usage."

The following paragraph illustrates the similarity to the UK approach both in terms of exempt categories of services and general approach to the term:

"6.2.1 The SGSA [Sale of Goods and Services Act] defines a contract for the supply of a service as 'a contract under which a person (the supplier) agrees to carry out a service'. The SGSA does not attempt to define 'services'. The Secretary of State has the power under the SGSA to exempt specified services from all or any of the implied terms. Services, which have been exempted include services of an advocate, of company

directors and building society directors and the services rendered by an arbitrator or umpire. The Irish Sale of Goods and Supply of Services Act 1980 takes a similar approach.”

7 Software contracts — supply of goods or services?

There have been conflicting views on the nature of software contracts. It depends on the circumstances whether they will be sales of goods or services. A standard software package delivered on tangible media was a sale of goods contract because physical entities were handed over, previously was thought to be a sale of goods, but is now generally thought to be the supply of services. If the contract provided for the writing of software to meet a client's specific requirements, one can assume that the contract was a contract for services. David Bainbridge, in 'The Nature of Software Contracts' IP & IT Law 10.6(3) 19 December 2005 (2005 EMIS Professional Publishing Ltd) points to difficulties in two cases:

- (1) where software is delivered as part of computer equipment, such as where a computer is delivered with pre-loaded software or applications software, and handed over with the computer as part of the same transaction; or
- (2) where the contract provides for the customisation of existing software to satisfy a client's particular requirements.

The issue whether a contract for the supply of computer software is a contract of sale of goods and therefore governed by the Sale of Goods Ordinance (Cap 26), or whether it is a contract for the supply of services and therefore governed by Supply of Services (Implied Terms) Ordinance (Cap 457) is important. Contracts for the sale of goods always contain implied terms as to fitness for purpose (see for example s 16 of Cap 26), except to the extent that they can lawfully be excluded, whereas contracts for work and materials normally only require the supplier to carry out the service with reasonable skill and care (s 5 below).

CHAPTER 457

SUPPLY OF SERVICES (IMPLIED TERMS) ORDINANCE

An Ordinance to consolidate and amend the law with respect to the terms to be implied in contracts for the supply of services.

(Enacted 1994)
[21 October 1994]
(Originally 86 of 1994)

ARRANGEMENT OF SECTIONS

PART I

PRELIMINARY

- 1 Short title
- 2 Interpretation
- 3 Contracts for the supply of services
- 4 'Dealing as consumer'

PART II

IMPLIED TERMS

- 5 Implied term as to care and skill
- 6 Implied term as to time for performance
- 7 Implied term as to consideration

PART III

MISCELLANEOUS

- 8 Exclusion or restriction of implied terms
- 9 Savings

PART I

PRELIMINARY

(Enacted 1994)

1. Short title

This Ordinance may be cited as the Supply of Services (Implied Terms) Ordinance.

(Enacted 1994)

[1.01] Words not defined in this enactment

When a word is not defined in this enactment it will have the meaning, if any, assigned to it under the general construction and interpretation sections of the Interpretation and General Clauses Ordinance (Cap 1). The Ordinance is based closely on Pt II of the Supply of Goods and Services Act 1982 [UK]. It is the logical counterpart to the Sale of Goods Ordinance (Cap 26).

2. Interpretation

In this Ordinance-

'business' (業務) includes-

- (a) a profession;
- (b) the activities of a public body or public authority; and
- (c) the activities of a board, commission, committee or other body appointed by the Chief Executive or Government. (Amended 65 of 2000 s 3)

(Enacted 1994)

[2.01] UK Comparison

The wording of this section is based on Supply of Goods and Services Act 1982 s 18(1), except that the Act uses the term 'any government department' instead of 'a public body' (arguably public body is a slightly broader term — see [2.04] below), and it does not refer to 'the activities of a board, commission, committee or other body appointed by the Chief Executive or Government'. Therefore in the context of the Ordinance, it appears the definition of 'business' has a potentially wider application in Hong Kong.

[2.02] 'Business': general definition

This definition is required since the terms relating to reasonable care and skill and reasonable time are implied only where the supplier is acting in the course of a business. The definition is not intended to be exhaustive. It has been said

(in the context of a landlord and tenant dispute) that anything which is an occupation or duty which requires attention is a business: *Rolls v Miller* (1884) 27 Ch D 71 at 88, per Lindley LJ, and that (for the purpose of the Town and Country Planning Act 1947 [UK]) neither the making of a profit nor any commercial activity is essential: *Rael-Brook Ltd v Minister of Housing and Local Government* [1967] 2 QB 65, [1967] 1 All ER 262. In other cases, however, it has been pointed out that there is a difference between 'business' in this very broad sense and 'business' meaning a regularly conducted commercial enterprise: see Halsbury's Statutes, Vol 39, notes to s 18(1) of Supply of Goods and Services Act 1982 [UK].

It is thought that a single transaction may not be a 'business' for the purpose of this Ordinance: see *Halsbury's Statutes* above, 3rd para of the note under 'business'. However, it appears that a business does not cease to be such merely because it makes a loss: *Re Ogilby, Ogilby v Wentworth-Stanley* [1942] Ch 288, [1942] 1 All ER 524, and even activities intended permanently to be carried on at a loss have been held to be a business: *Rolls v Miller*, above; *South West Suburban Water Co v St Marylebone Guardians* [1904] 2 KB 174 at 180.

The definition of 'business' in s 2(1) of the Unconscionable Contracts Ordinance (Cap 458) is in identical terms and is similar to that in Sale of Goods Ordinance (Cap 26) s 2 and Control of Exemption Clauses Ordinance (Cap 71) s 2. See the *Annotated Ordinances of Hong Kong*, Sale of Goods Ordinance (Cap 26) (2006 Reissue), Control of Exemption Clauses Ordinance (Cap 71) (2006 Reissue), Unconscionable Contracts Ordinance (Cap 458) (2006 Reissue) and the notes thereto.

On the meaning of 'business' generally, see *Halsbury's Laws of England* (5th Ed 2001 Reissue) Vol 47, para 6 and *Words and Phrases legally defined* (3rd Ed, Butterworths London, 1988) Vol 1 p 204 et seq.

[2.03] Business: para (a) — 'Profession'

See Shorter Oxford English Dictionary (6th Ed, OUP, 2007) Vol 2 p 2359, and also the dictum of Starke J in *Robbins Herbal Institute v FCT* (1923) 32 CLR 457 at 461, where it was stated that the word implies special knowledge which is acquired only after patient study and application as distinguished from mere skill, and that whether a person in any given case carries on a profession is a question of degree and always of fact.

Following on from this classification in *Holman v Deol* [1979] 1 NSWLR 640, at 650-651, Lee J stated it directs the mind to professions such as law, medicine and dentistry. Dental technicians, taxation consultants, brokers, real estate valuers, teachers, business colleges, entertainers and masseurs or masseuses are work of a professional nature but not generally associated in the mind with the professional field of lawyers, doctors or dentists. However, it is arguable that since *Holman* there is not at the present such a rigid distinction in Hong Kong. This is arguable by reference to the principle in *Carr v IRC* [1944] 2 All ER 163 at 166-167 per du Parcq LJ who suggests

there is no strict legal definition, so the question is whether an ordinary reasonable person would describe a particular occupation in the time in which he or she lives as a profession.

To further support this point, categories in Hong Kong which are likely to be considered professions should at least include those regulated by statute, for example accountants, architects, chiropractors, dentists, engineers, landscape architects, legal practitioners, medical professionals not limited to doctors, midwives, nurses, planners, surveyors, vets, and housing managers. These professions are regulated to ensure professional competency, honesty and fairness, and attempts to control the structure of professional practice and the conduct of its participants: *Halsbury's Laws of Hong Kong*, Vol 21 (2010 Reissue), Professions and Trades para [315.003].

For a detailed consideration of the meaning of 'profession' and how to distinguish from the meaning of 'trade' see *Halsbury's Laws of Hong Kong*, Vol 21 (2010 Reissue), Professions and Trades paras [315.001] — [315.002].

[2.04] Business: para (b) — 'Public body'

This is defined in s 3 of the Interpretation and General Clauses Ordinance (Cap 1) to include the Executive Council, Legislative Council, any District Council, any other urban, rural or municipal council, any department of the Government and any undertaking by or of the Government.

It has been held that a commercial company performing duties of a public nature was not a 'public body' or 'public authority': *A-G v Ma Pak Chi* [1964] HKLR 98. For the purposes of s 2 of the Prevention of Corruption Ordinance (Cap 215, repealed), where 'public body' was defined to include 'any body which had power to act under or for the purposes of any enactment in force in the Colony', the police force and the Hong Kong Telephone Company had been held to be within this definition: *R v District Judge, ex p A-G* [1958] HKLR 174, *A-G v Mak Pak Chi* (above). However, since privatisation of the Hong Kong fixed line industry this position may now have changed somewhat.

[2.05] Business: para (c) — 'Board'

In this context — a board is a group of members with managerial and / or other assigned responsibilities of an entity appointed by the Chief Executive or Government, such as the Town Planning Board.

[2.06] Business: para (c) — 'Commission'

A commission of enquiry is appointed by the Chief Executive to inquire into the conduct or management of any public body, the conduct of any public officer, or into any matter whatsoever which is, in his opinion, of public importance: s 2(1) of the Commissions of Inquiry Ordinance (Cap 86). The definition of Commission is however wider than mere commissions of enquiry.

[2.07] Business: para (c) — 'Committee'

For an example of such a committee, as stated in the Hong Kong

English-Chinese Legal Dictionary (LexisNexis, 2005) the Finance Committee of the Legislative Council was established under the r 71 of the Rules of Procedure of the Legislative Council of the Hong Kong SAR (Appendix II). In the Cooperative Societies Ordinance (Cap 33) s 2, committee means the governing body of a registered society to whom the management of its affairs is entrusted.

[2.08] Business: para (c) — 'Chief Executive'

The amendment in 2000 removed the term Governor and replaced it with Chief Executive. The Interpretation and General Clauses Ordinance (Cap 1) s 3 defines 'Chief Executive' as '(a) the Chief Executive of the Hong Kong Special Administrative Region; (b) a person for the time being assuming the duties of the Chief Executive according to the provisions of Article 53 of the Basic Law.'

[2.09] Business: para (c) — 'Government'

'Government' means the Government of the Hong Kong Special Administrative Region: see the Interpretation and General Clauses Ordinance (Cap 1) s 3.

3. Contracts for the supply of services

- (1) In this Ordinance a 'contract for the supply of a service' (服務提供合約) means, subject to subsection (2), a contract under which a person ('the supplier') agrees to carry out a service.
- (2) For the purposes of this Ordinance—
 - (a) a contract of service or apprenticeship is not a contract for the supply of a service;
 - (b) a contract is a contract for the supply of a service whether or not goods are also—
 - (i) transferred or to be transferred; or
 - (ii) bailed or to be bailed by way of hire, under the contract, and whatever is the nature of the consideration for which the service is to be carried out.
- (3) The Chief Executive in Council may by order provide that one or more of sections 5 to 7 shall not apply to services of a description specified in the order, and such an order may make different provision for different circumstances. (Amended 65 of 2000 s 3)

(Enacted 1994)

[cf 1982 c 29 s 12 U.K.]

[3.01] UK Comparison

The wording of this section is based on Supply of Goods and Services Act