



## Commercial Law Concentrate: Law Revision and Study Guide (6th edn) Eric Baskind

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## 1. Introduction to contracts of sale of goods 📖

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### Abstract

Each Concentrate revision guide is packed with essential information, key cases, revision tips, exam Q&As, and more. Concentrates show you what to expect in a law exam, what examiners are looking for, and how to achieve extra marks. This chapter provides a general introduction to sale of goods law in the UK. It explains the sale of goods contract, why there is a different framework for these types of contract under English law, and the specific legislation for contracts of sale of goods and other relevant transactions. The chapter considers the statutory definitions for contract, property, and goods and discusses the distinction between sales and agreements to sell, between specific goods and unascertained goods, and between existing goods and future goods. The chapter introduces and provides an analysis of the Consumer Rights Act 2015, which subsequent chapters then build upon. Finally, it examines contracts other than of sale of goods.

**Keywords:** sale of goods, contracts, agreements to sell, specific goods, unascertained goods, existing goods, future goods, consumer transactions, Brexit, frustration, and force majeure, cryptoassets

### Key facts

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- English law has different legislative regimes for certain kinds of contractual relationships.
- A contract of sale of goods is a special kind of contract defined by s 2(1) of the Sale of Goods Act 1979 (hereafter referred to as the SGA).
- Essentially, this is a contract by which the seller transfers or agrees to transfer the property (this means ownership) in the goods to the buyer and where the consideration is satisfied by money.
- This distinguishes it from other forms of contract, some of which may also be regulated by statute.
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As we will see in Chapter 2, 'Statutory implied terms', certain terms are implied into contracts of sale of goods by operation of law that, for example, require them to be of satisfactory quality and fit for purpose.

- For this reason, it is important to know whether or not a contract is one of sale of goods.
- Some other statutes also imply certain terms into other types of transaction.
- With effect from 1 October 2015, the **Consumer Rights Act 2015** has regulated certain consumer contracts.
- A few cases are now appearing in connection with Brexit and COVID-19 and whether they could constitute frustrating or *force majeure* events.

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## Chapter overview

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This chapter provides a general introduction to sale of goods law. It explains:

- what a sale of goods contract is;
- why there is a different framework for these types of contract;
- the specific legislation for contracts of sale of goods and other relevant transactions; and
- an introduction to consumer transactions.

## Key definitions used in the SGA

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There are several important definitions contained in the **SGA** that you need to know. The first is, what is meant by a **contract of sale of goods**?

## Contract of sale of goods

This is defined by s 2(1) **SGA** as:

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.

This definition calls for the words in italics to be defined:

### Contract

This is not defined in the **SGA** and (apart from consideration) takes an identical meaning to a contract at common law: **offer**, **acceptance**, **consideration**, and an intention to create a legal relationship.

### Property

Property means ownership. So, to *transfer the property in goods* simply means to transfer ownership in them.

### Goods

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Goods are defined in s 61(1) SGA as including ‘all personal chattels other than things in action and money’. A ‘personal chattel’ is something physical such as a chair, television, or hat. It also includes domestic animals. Note that land and houses are not personal chattels but are ‘real property’. However, 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 are deemed to be goods. A ‘thing in action’ is an intangible right enforceable by legal action. It has no intrinsic value—its value derives from the right to sue in respect of it. Examples of things in action include cheques, shares in companies, patents, and copyrights. By way of illustration, a cheque for £100 has no intrinsic worth in the sense that it is not worth £100, but it gives the recipient the right to sue for the money if unpaid. For the particular purposes of the SGA, cryptoassets are ‘things in action’ and are not characterised as ‘goods’.

### *The Mayor and Burgesses of the London Borough of Southwark v IBM UK Ltd [2011] EWHC 549 (TCC)*

This case considered whether the sale of software is a contract of sale of goods. The contract stipulated that title, copyright, and all other proprietary rights in the software remained vested in the manufacturer. The purchaser merely had a licence to use it. The court held that there was no transfer of property in goods for the purpose of the SGA. Therefore, the SGA did not apply to the contract. As Akenhead J explained (at [95]):

A preliminary question to consider is whether the ... contract was a contract for the sale of goods at all. That involves a consideration first as to whether under section 2(1) there was to be a ‘transfer’ of ‘property in goods’ and secondly whether ‘goods’ were being sold. I have formed the view that there was here no ‘transfer’ of property in goods for the purposes of the 1979 Act. What was provided by IBM was in effect a licence ... to use the software and, therefore, there is no transfer of property ... [The contract] specifically talks about ‘title, copyright and all other proprietary rights in the software’ remaining vested in [the manufacturer]. Because copyright is identified as a specific right being retained, the use of the words ‘title’ and ‘other proprietary rights’ suggests strongly that ownership rights are retained.

But is computer software ‘goods’ for the purposes of the SGA? Akenhead J stated (*obiter*) that in principle software could be ‘goods’ for the following reasons:

- although a blank CD is worth very little, there is no restriction in the SGA on any goods being excluded from the Act by reason of their low value. CDs are physical objects and there is no reason why they should not be considered as goods;

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the fact that a CD is recorded so as to add functions and values to it simply gives a CD a particular attribute. Thus, if a customer buys a music CD, it must be 'goods'. There can be no difference if the CD contains software; and

- the definition of 'goods' is expressed to be an inclusive rather than an exclusive one. Put another way, the *SGA* is not excluding anything which might properly be considered as goods. See also *Computer Associates (UK) Ltd v The Software Incubator Ltd* (2021) discussed at p220.

### Looking for extra marks?

Although in *St Albans City and District Council v International Computers Ltd* (1996), Sir Iain Glidewell said that it is necessary to distinguish between the program and the disk carrying the program, it seems from the decision in *Southwark* that it is important to examine the contractual terms pursuant to which the customer acquires the software. If, as in the *Southwark* case, it is simply a licence to use that is being granted, there may be no transfer of property. However, if the arrangement between the parties can be said to involve the transfer of property to the buyer, then there may be no reason why in principle software that is so transferred cannot be 'goods' for the purposes of the *SGA*.

### p. 4 Money consideration

English law usually requires something known as 'consideration' to render an agreement enforceable as a contract. Unlike an ordinary contract, where consideration may be satisfied by something of economic value, a contract of sale of goods requires consideration to be money. A simple exchange where one person exchanges their goods for another person's goods will be the basis of a contract but not one of sale of goods because of the absence of money changing hands. But if the exchange involves some money changing hands (e.g. because one person's goods are worth more than the other's), then this may be deemed to be two contracts of sale.

### *Aldridge v Johnson* (1857) 7 E&B 885

A farmer exchanged some bullocks for some barley. As the barley was worth more than the bullocks, the difference was made up by a payment of cash. The court held that this amounted to two contracts of sale of goods because the parties had given a price to both lots of goods and the consideration was money.


### ***Esso Petroleum Ltd v Commissioners of Customs & Excise* [1976] 1 WLR 1**

Garages supplied a free gift to motorists for every four gallons of petrol purchased. The House of Lords held that the supply of the free gift did not constitute a contract of sale of goods. The motorist's consideration in return for the gift was not the payment of money but was the entering into of the separate (but linked) contract for the petrol.

### **Revision tip**

When answering a question on sale of goods, it is essential to have in mind that the **SGA** only applies to contracts of sale of goods as defined by s 2(1) **SGA**. A contract will not be one of sale of goods unless:

1. there is a transfer or an agreement to transfer the property in the goods to the buyer.  
Therefore, other kinds of contract, such as contracts of hire, **hire purchase**, or contracts to provide services, are not governed by the **SGA**; and
2. the consideration is satisfied by money.

After the Supreme Court's ruling in *PST Energy 7 Shipping LLC and another v OW Bunker Malta Ltd and another (The 'Res Cogitans')* (2016), it may not always be that straightforward to be able to recognize a contract of sale of goods. Despite its initial appearance as a contract of sale, the Supreme Court held that a contract for the supply of fuel bunkers, which contained a retention of title clause and permitted the shipowner to consume the bunkers during the period allowed for credit, was not a contract of sale within the meaning of s 2(1) **SGA**. The contract was silent as to whether property in the consumed bunkers passed to the owners  before or at the point of consumption. Lord Mance rejected an argument that property in the fuel must have been transferred a nanosecond before it was consumed and concluded that title in the consumed bunkers never passed to the owners. This case will be discussed in greater detail at pp 61–63, 71–72.

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An unsuccessful attempt to extend the principles in *The Res Cogitans* to a case involving a claim for food poisoning at an all-inclusive catering holiday was made in *Wood v TUI Travel plc, t/a First Choice* (2017), where the tour operator sought to rely upon the case in support of the contention that there was no intention to transfer any property in the food until the precise moment it was placed in the customer's mouth and thereby destroyed. Burnett LJ was unconvinced by the reliance on *The Res Cogitans*, stating that:

the conclusion reached by the Supreme Court depended upon the relationship between the retention of title clause and the liberty nonetheless to consume fuel in which property had not already passed. The problem would not have arisen but for the retention of title clause. If the contract had been a straightforward one for the sale of fuel oil with no such clause, property in the bunkers would have passed on delivery, assuming the seller itself had property in them.

In *Wood*, it was held that, in the absence of any express agreement to the contrary, when customers order a meal, property in the meal transfers to them when it is served. The fact that the food and drink might be laid out in a buffet to which customers help themselves can make no difference. Liability was confirmed against the defendant.

A dispute arose in *Gregor Fisker Ltd v Bernard Carl (2021)* as to whether or not there was a sale of a gearbox and therefore whether or not the SGA would apply. This case concerned a contract for the sale of a classic Ferrari 250 GTO, which had become separated from its original gearbox, for the sum of \$44m. The agreed price reflected this. The parties included terms in their contract recognising that the seller was unable to deliver the gearbox, providing that he would use his best efforts to recover and deliver it to the buyer and agreeing that, in certain circumstances, if he succeeded in doing so he would be entitled to a further payment of \$500,000. The contract stated that it was to be governed by English law and subject to the exclusive jurisdiction of the courts of England and Wales. The purchase of the Ferrari proceeded and the location of the gearbox was identified. An issue arose as to whether there was a sale of the gearbox, in which case the provisions of the SGA would apply, or whether Carl undertook a personal obligation aimed at locating it and then turning the gearbox over to the buyer, which was something different as a matter of legal analysis. It was Carl's case that the provisions of the contract relating to the gearbox should be viewed separately from those concerning the Ferrari itself and did not fall within the statutory definition contained in s 2(1). On this analysis, there was no agreement by Carl to transfer property in the gearbox and the payment of \$500,000 was a fee for services rendered in locating and recovering it rather than a payment in consideration of a transfer of property. It was held that the contract was a contract for the sale of goods, which included the gearbox. The contract contemplated that Carl had title to the Ferrari, including its original gearbox, which he intended to transfer to the buyer. Accordingly, the contract fell within the definition of a contract of sale of goods for the purposes of s 2(1).

p. 6      ↩ A contract of sale may take place between one part owner and another (s2(2) SGA) and may be absolute or conditional (s2(3) SGA).

In addition to the definition of a contract of sale, you should also be familiar with the following terms as these are also used in the SGA.

## Sales and agreements to sell

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Both sales and agreements to sell may be contracts of sale of goods. The difference between these two types of transaction is that with a sale the property in the goods is transferred from the seller to the buyer as soon as the contract is made (s 2(4) SGA), whereas with an agreement to sell the transfer of the property in the goods

takes place at a future time or is subject to some condition later to be fulfilled (s 2(5) SGA). An agreement to sell becomes a sale when the time elapses or the condition is fulfilled subject to which the property in the goods is to be transferred (s 2(6) SGA).

### Specific goods and unascertained goods

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At the time of making the contract, the goods will either be specific or unascertained.

**Specific goods** are goods that are identified and agreed upon at the time a contract of sale is made (s 61(1) SGA). This means that both buyer and seller have identified and agreed upon precisely which goods will be sold under the contract.

**Unascertained goods** are not defined in the SGA but are in effect all goods that are not specific.

Goods may become **ascertained** as soon as they have been identified and agreed upon after the contract of sale is made.

It will be seen in Chapter 3, 'The transfer of property in unascertained goods', pp 46–47, that the distinction between specific and unascertained goods is important as this usually determines the time at which property in the goods is transferred from the seller to the buyer.

### Existing goods and future goods

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The goods which form the subject of a contract of sale may be either **existing goods** or **future goods**.

**Existing goods** are goods that are either owned or possessed by the seller (s 5(1) SGA).

**Future goods** are goods to be manufactured or acquired by the seller after the making of the contract of sale (s 5(1) and s 61(1) SGA).

#### Looking for extra marks?

It is important to know whether or not the SGA governs the transaction because this will often determine the type and extent of liability in the event, for example, of the goods being defective. As we will see in Chapter 2, 'Statutory implied terms', the SGA implies into contracts of sale of goods certain terms (e.g. they must be of satisfactory quality and fit for purpose) which impose strict liability on the seller. As these terms are implied by statute into all contracts of sale of goods, they do not need to be agreed expressly by the parties. If the SGA does not apply to the transaction and no other statute applies, then these terms will not be statutorily implied and the liability of the seller will be based on common law and is likely to be fault-based.

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### Contracts other than of sale of goods

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As we have seen, a contract of sale of goods is intended to transfer the property (ownership) in the goods to the buyer. There are many other ways of doing this (e.g. by giving away goods as a gift or leaving them in a will), but these are not contracts of sale of goods because one of the essential ingredients (money consideration) contained in s 2(1) SGA is missing.

There are also other ways of transferring possession (but not ownership) in goods such as contracts of hire. These are also not contracts of sale of goods because, once again, an essential ingredient in s 2(1) is missing—the transfer of ownership in the goods.

These contracts are, therefore, not governed by the SGA but by other statutes. For that reason, in addition to contracts of sale of goods, it is important to consider other types of contracts, governed by different statutes, as these also impose certain implied terms, similar to those contained in the SGA. These are set out in Table 1.1.

**Table 1.1 Implied terms in other types of transaction**

TYPE OF TRANSACTION	IMPLIED TERMS	WHY NOT SGA?
Exchange or barter	<b>Supply of Goods and Services Act 1982, ss 2–5</b>	Consideration not ‘money’ as required by s 2(1) SGA
Hire	<b>Supply of Goods and Services Act 1982, ss 6–11</b>	No transfer or agreement to transfer property (ownership) in goods as required by s 2(1) SGA
Hire purchase	<b>Supply of Goods (Implied Terms) Act 1973, ss 8–11; Consumer Credit Act 1974</b>	No obligation by the hirer to purchase goods, hence no obligation to transfer property in them as required by s 2(1) SGA
Services—including where goods are also supplied (known as work and materials contracts)	<b>Supply of Goods and Services Act 1982, ss 2–5 and 12–16</b>	The substance of the contract is the provision of the overall service rather than the transfer of property in the goods as required by s 2(1) SGA

### Consumer transactions

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The SGA has been the subject of significant amendments. In respect of consumer sales, it was amended by the **Sale and Supply of Goods to Consumers Regulations 2002** and, since 1 October 2015, certain consumer transactions have been governed by the **Consumer Rights Act 2015 (CRA 2015)**. The CRA 2015 consolidates in one place key consumer rights covering, inter alia, contracts for goods, digital content, services, and unfair terms. The CRA 2015 applies only to trader-to-consumer transactions, not consumer–consumer or business–business transactions. This will be dealt with in the appropriate chapters, but for present purposes



it should be noted that the provisions in the legislation listed in Table 1.2 covering trader-to-consumer contracts have been repealed. The provisions relating to other types of contract (e.g. contracts between businesses) remain as they were.

**Table 1.2 Provisions that have been repealed**

<b>Supply of Goods (Implied Terms) Act 1973 (SGITA 1973)</b>	For business-to-consumer contracts, the provisions of <b>SGITA 1973</b> have been replaced by the <b>CRA 2015</b> . <b>SGITA 1973</b> has been amended so that it covers business-to-business contracts and consumer-to-consumer contracts only.
<b>Sale of Goods Act 1979 (SGA 1979)</b>	For business-to-consumer contracts, this has mainly been replaced by the <b>CRA 2015</b> although some provisions of the <b>SGA</b> will still apply, for example, rules which are applicable to all contracts of sale of goods (as defined by that Act—essentially these are sales of goods for money) regarding matters such as when property in goods passes. The <b>SGA</b> still applies to business-to-business contracts and to consumer-to-consumer contracts.
<b>Supply of Goods and Services Act 1982 (SGSA 1982)</b>	For business-to-consumer contracts, <b>SGSA 1982</b> 's provisions have been replaced by the <b>CRA 2015</b> . <b>SGSA 1982</b> has been amended so that it covers business-to-business contracts and consumer-to-consumer contracts only.
<b>Sale and Supply of Goods Act 1994 (SSGA 1994)</b>	<b>SGSA 1994</b> amended the <b>SGA 1979</b> and the <b>SGSA 1982</b> and, as such, has now been superseded by provisions in the <b>CRA 2015</b> for trader-to-consumer contracts.
<b>Sale and Supply of Goods to Consumers Regulations 2002</b>	These Regulations have been replaced by provisions in the <b>CRA 2015</b> .
<b>Unfair Contract Terms Act 1977 (UCTA 1977)</b>	In respect of business-to-consumer contracts, the Act's provisions have been replaced by the <b>CRA 2015</b> . <b>UCTA 1977</b> has been amended so that it covers business-to-business and consumer-to-consumer contracts only.
<b>Unfair Terms in Consumer Contracts Regulations 1999</b>	These Regulations have been replaced by the <b>CRA 2015</b> .

## p. 9 The Consumer Rights Act 2015

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By way of general introduction, the **CRA 2015** is arranged in three Parts, although we are mainly concerned with **Parts 1** and **2**.

**Part 1**—Consumer contracts for goods, digital content, and services

**Part 2**—Unfair terms

**Part 3**—Miscellaneous and general provisions.

**Part 1** is concerned with a contract between a trader and a consumer under which a trader agrees to supply goods, digital content, or services (or any combination of these) to a consumer. For this Part of the Act to have effect, there must be a contract for a trader to supply goods, digital content, or services to a consumer.

### Key definitions

The key definitions used in the **CRA 2015** are set out in s 2. One of the policy objectives was to align, as far as possible, the definitions of certain key terms across the Act and other relevant consumer law to facilitate easier interpretation and clearer application of the law. These terms are ‘trader’, ‘consumer’, ‘business’, ‘goods’, and ‘digital content’.

‘**Trader**’ (which is a new word introduced for the purposes of the **CRA 2015**) means a person acting for purposes relating to that person’s trade, business, craft, or profession, whether acting personally or through another person acting in the trader’s name or on the trader’s behalf (s 2(2) **CRA 2015**). A ‘person’ is not just a natural person but can also include companies, charities, and arms of government and can also include more than one person. Where these types of body are acting for purposes relating to their trade, business, craft, or profession, they are caught by the definition of ‘trader’. The meaning and scope of ‘trader’ was clarified by the Court of Justice of the European Union (CJEU) in *Komisia za zashtita na potrebitelite v Evelina Kamenova* (2018), which involved the sale of a second-hand watch using an online sales platform. The watch failed to correspond to the description provided in the sales advert. The seller (Kamenova) had advertised a number of products on the platform. The court stated that the meaning and scope of ‘trader’ must be determined in relation to ‘consumer’, which refers to any individual not engaged in commercial or trade activities. The court stated that it is for the national court to determine, in each case, and on the basis of all the facts in its possession, whether or not a natural person was acting for purposes relating to their trade, business, craft, or profession by verifying, in particular, whether the sale on the online platform was carried out in an organised manner; whether that sale was intended to generate profit; whether the seller had technical information and expertise relating to the products which they offered for sale which the consumer did not necessarily have, with the result that they were placed in a more advantageous position than the consumer; whether the seller had a legal status which enabled them to engage in commercial activities and to what extent the online sale was connected to the seller’s commercial or professional activity; whether the seller was subject to VAT; whether the seller, acting on behalf of a particular trader or on their own behalf or through another person acting in their name and on their behalf, received ↵ remuneration or an incentive; whether the seller purchased new or second-hand goods in order to resell them, thus making that a regular, frequent, and/or simultaneous activity in comparison with their usual commercial or business activity; whether the goods for sale were all of the same type or of the same value; and, in particular, whether the offer was concentrated on a small number of goods.

‘**Consumer**’ means an individual acting for purposes that are wholly or mainly outside that individual’s trade, business, craft, or profession (s 2(3) **CRA 2015**). A trader claiming that an individual is not acting for purposes wholly or mainly outside the individual’s trade, business, craft, or profession must prove it (s 2(4) **CRA 2015**). For these purposes, a person is generally not a consumer in relation to a sales contract if the goods are second-hand goods sold at public auction (s 2(5)(a) **CRA 2015**) and individuals have the opportunity of attending the sale in person (s 2(5)(b) **CRA 2015**). Because ‘consumer’ means an individual (i.e. a natural

person), the Act's protection does not extend to small businesses or legally incorporated organisations. Where a group of consumers contracts for goods, services, or digital content, they are not left without protection. For example, if one consumer makes all the arrangements for a group to go on holiday, then, depending on the circumstances, each member of the group may be able to enforce their rights or the person who made the arrangements may have to enforce the rights on behalf of the group. The other main restriction on the meaning of 'consumer' is that a consumer must be acting wholly or mainly outside their trade, business, craft, or profession.

'Business' includes the activities of any government department or local or public authority (s 2(7) CRA 2015). These bodies may therefore come within the definition of a trader. Not-for-profit organisations, such as charities, mutuals, and cooperatives, may also come within the definition of a trader, for example, sales by charity shops.

'Goods' means any tangible movable items, although it includes water, gas, and electricity, but only if they are put up for supply in a limited volume or set quantity such as with bottled water, gas cylinders, or batteries (s 2(8) CRA 2015). 'Tangible movable items' broadly means anything physical that can be moved. This necessarily excludes purchases of immovable property such as land or a house. It also includes domestic animals.

'Digital content' means data which are produced and supplied in digital form (s 2(9) CRA 2015). Where this is supplied on a tangible medium, such as a DVD, special rules apply. The creation of a category of digital content in the CRA 2015 does not affect the treatment of digital content in any other legislation.

For this Part of the CRA 2015 to apply, a contract to supply goods must be either a sales contract, a contract for the hire of goods, a hire purchase agreement, or a contract for the transfer of goods. We will now look briefly at the meaning of these words.

### Sales contracts

p. 11 A contract is a sales contract if under it the trader transfers, or agrees to transfer, ownership of goods to the consumer and the consumer pays, or agrees to pay, the price (s 5(1) CRA 2015). A contract is also a sales contract if the goods are to be manufactured or produced in circumstances where the trader agrees to supply them to the consumer and, on being supplied the goods, will be owned by the consumer, and the consumer pays or agrees to pay the price (s 5(2) CRA 2015). A sales contract may be a conditional sales contract, meaning a sales contract under which the price for the goods (or part of it) is payable by instalments, and the trader retains ownership of the goods until the conditions specified in the contract (for the payment of instalments or otherwise) are met; it makes no difference whether or not the consumer possesses the goods (s 5(3) CRA 2015).

### Contracts for the hire of goods

A contract is for the hire of goods if under it the trader gives, or agrees to give, the consumer possession of the goods with the right to use them, subject to the terms of the contract, for a period determined in accordance with the contract (s 6(1) CRA 2015). But a contract is not for the hire of goods if it is a hire purchase agreement (s 6(2) CRA 2015).

### Hire purchase agreements

A contract is a hire purchase agreement if it meets the following two conditions: first, the goods are hired by the trader in return for periodical payments by the consumer (s 7(2) CRA 2015); second, ownership of the goods will transfer to the consumer if the terms of the contract are complied with and the consumer exercises an option to buy the goods, any party to the contract does an act specified in it, or an event specified in the contract occurs (s 7(3) CRA 2015). A contract is not a hire purchase agreement if it is a conditional sale contract (s 7(4) CRA 2015).

### Contracts for transfer of goods

A contract to supply goods is a contract for transfer of goods if under it the trader transfers, or agrees to transfer, ownership of the goods to the consumer and the consumer provides (or agrees to provide) consideration otherwise than by paying a price or the contract is, for any other reason, not a sales contract or a hire purchase agreement (s 8 CRA 2015).

Further discussion on the CRA 2015 can be found in the appropriate chapters.

### Frustration and *force majeure*: Brexit and COVID-19

A few cases are now appearing in connection with Brexit and COVID-19 with regard to whether they could constitute frustrating or *force majeure* events.

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In *Canary Wharf (BP4) T1 Ltd and others v European Medicines Agency (2019)*, the European Medicines Agency (EMA) had been granted by Canary Wharf a 25-year lease of premises in Canary Wharf, which it used as its European Union (EU) headquarters. Three years into the lease, the UK gave notice of its intention to withdraw from the EU. As a result, the EMA moved its headquarters to Amsterdam so as to remain located within the EU. It argued that the Canary Wharf lease was frustrated on two bases: first, that the purpose of the lease was to provide the EMA with EU headquarters and that this purpose would be defeated following the UK's withdrawal from the EU (the 'common purpose' argument); and, second, that the lease was frustrated by 'supervening illegality' on the basis that, under EU law, it will either no longer have the capacity to pay the rent due under the lease or to occupy the premises or alienate them to another EU institution. Both of these arguments were rejected by Marcus Smith J, who held that the change in circumstances brought about by Brexit, together with the EMA's shift of headquarters from London to Amsterdam, did not amount to frustration of common purpose and that it was lawful for the EMA to pay the rent due under the lease and it had the capacity to do so. His Lordship explained that even if he was wrong on the legality point, frustration

would still not be available because in the case of supervening capacity the courts do not have regard to the foreign law of incorporation or domicile of the relevant party or because any supervening incapacity was self-induced.

*Canary Wharf* was concerned with frustration. There is no reason in principle why Brexit could not be a *force majeure* event. This will depend largely on the date of the contract and the precise terms of the clause.

It was held in *Dwyer (UK Franchising) Ltd v Fredbar Ltd and Bartlett (2021)* that where a contract gave one party the unilateral right to designate a *force majeure* event, there was an implied duty to exercise that right in good faith and in a rational manner. Fredbar operated a small plumbing business under a 'Drain Doctor' plumbing and drain repair franchise with Dwyer. The franchise agreement provided that the franchise arrangements would be suspended if the parties were prevented or hindered from carrying out their obligations 'by any cause which the Franchisor designates as *force majeure*'. During the COVID-19 pandemic period, the owner of the Fredbar business (Bartlett) was advised by his doctors to isolate at home for a period of 12 weeks in order to shield his young son, who was clinically vulnerable. Dwyer refused to designate this as a *force majeure* event. Fredbar asserted that this refusal constituted a fundamental breach of an implied duty by Dwyer to exercise its discretion rationally, thereby entitling Fredbar to terminate the franchise agreement. Dwyer denied the existence of such a duty, claimed that Fredbar was in repudiatory breach of the agreement, and sought an injunction to prevent Fredbar from setting up a new business in competition with Dwyer. The High Court held that under the principles established in *Braganza v BP Shipping Ltd and another (2015)* there was an implied duty of rationality. This duty meant that Dwyer was required to exercise its discretion honestly, in good faith, and genuinely and must not exercise the discretion arbitrarily, capriciously, perversely, or irrationally. It also had to take into account all relevant matters and avoid taking into account irrelevant ones. In the result, Dwyer should have taken into account the fact that Fredbar was a small business whose ability to service its customers was significantly disrupted by its owner's requirement to isolate. The court observed that for some time Dwyer failed even to acknowledge the owner's need and, by failing to do so, it had failed to take into account all relevant matters and had accordingly acted irrationally. Dwyer was therefore in breach of the so-called *Braganza* duty, and Fredbar was entitled, in principle, to terminate the franchise agreement. However, the court held that Fredbar had subsequently affirmed the agreement and therefore lost the right to terminate by reaching an informal agreement with Dwyer that allowed Fredbar's owner to isolate without the contractual consequences of declaring a *force majeure* event. Fredbar's purported termination was therefore itself a repudiatory breach, although the injunction to prevent Fredbar from setting up a competing business was refused because the court considered that the restraint of trade clauses in the franchise agreement were too wide to be enforced.

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## Key debates

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Topic	The Consumer Rights Act 2015
Author/ academic	Alec Samuels

<b>Topic</b>	<b>The Consumer Rights Act 2015</b>
<b>Viewpoint</b>	Reviews key reforms introduced by the <b>CRA 2015</b> . Evaluates its provisions relating to goods (including measures concerning satisfactory quality, fitness for purpose, and consumer remedies); digital content; provision of services; and unfair contract terms.
<b>Source</b>	(2016) 3 <i>Journal of Business Law</i> 159
<b>Topic</b>	<b>Digital content under the Consumer Rights Act 2015</b>
<b>Author/academic</b>	Oliver Bray and Ben Kerry
<b>Viewpoint</b>	Summarises the provisions of the <b>CRA 2015</b> on the rights of consumers of digital content, including definitions; the application of the Act to content provided free of charge; the quality requirements for digital content; and the remedies of repair, replacement, and price reduction for breaches of these requirements.
<b>Source</b>	(2015) 26(8) <i>Entertainment Law Review</i> 271
<b>Topic</b>	<b>Time for an English commercial code?</b>
<b>Author/academic</b>	Dame Mary Arden
<b>Viewpoint</b>	Discusses the original <b>Sale of Goods Act in 1893</b> , which was intended simply to codify rather than to alter the common law rules.
<b>Source</b>	(1997) 56 <i>Cambridge Law Journal</i> 516
<b>Topic</b>	<b>Software as goods</b>
<b>Author/academic</b>	Sarah Green and Djakhongir Saidov
<b>Viewpoint</b>	Discusses the decision in <b>Watford Electronics Ltd v Sanderson CFL Ltd (2001)</b> as to whether or not software should be classed as 'goods' for the purposes of the <b>SGA</b> .
<b>Source</b>	[2007] <i>Journal of Business Law</i> 161
← <b>Topic</b>	<b>Software: binding the end user</b>
<b>Author/academic</b>	George Gretton
<b>Viewpoint</b>	Discusses the Scottish case of <b>Beta Computers (Europe) Ltd v Adobe Systems (Europe) Ltd (1996)</b> , where Lord Penrose criticised the idea that software supplied on a permanent medium, such as a disk, would amount to a contract of sale of goods in the same way as, for example, the sale of a book.

<b>Topic</b>	<b>The Consumer Rights Act 2015</b>
<b>Source</b>	[1996] <i>Journal of Business Law</i> 524

## Online resources

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This chapter is accompanied by a selection of online resources to help you with this topic, including:

- multiple choice questions <https://iws.oup.support.com/ebook/access/content/baskind-concentrate6e-student-resources/baskind-concentrate6e-chapter-1-multiple-choice-questions?options=showName>;
- key facts checklists <https://iws.oup.support.com/ebook/access/content/baskind-concentrate6e-student-resources/baskind-concentrate6e-chapter-1-key-facts-checklists?options=showName>.

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