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# Personal Property

## Meaning of “Property” 财产权

* “Before a right or an interest can be admitted into the category of property, or of a right affecting property, it must be definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability.” per Lord Wilberforce, National Provincial Bank v Ainsworth [1965]
* Section 3 of the Interpretation and General Clauses Ordinance (Cap. 1) –

“‘property’ includes

(a) money, goods, choses in action and land; and

(b) obligations … and every description … interest and profit. …arising out of or incident to property as defined in paragraph (a) of this definition.”

## Types of Property

* Real Property (outside scope of this course) 不动产
* Personal Property 动产/个人财产
* *Chose in possession* 占有之物权，可通过直接占有行使权利—tangibles e. g. goods
* *Chose in action* 诉权之物权，指无形财产权益，如债权、存款、股票、知识产权等，权利人不能直接占有，需要通过诉讼或其他手段主张—intangibles e. g. debts

“all personal rights of property which can only be claimed or enforced by action, and not by taking physical possession” (*Torkington v Magee* [1902] ) 只能通过诉讼主张和执行的个人财产权利，不能通过直接占有的方式行使

* Pure intangible 纯粹无形财产，债权、股权、知识产权、保险赔偿请求权…
* Documentary intangible 文件化无形财产，票据、债券、提单…有形，但价值不在于物理本身，而是它们所承载的权利。

## Types of Rights & Interests in Personal Property

* Personal rights (*in* *personam 债权*) – claim against the person; no delivery of identified asset 债权人对特定义务人享有的请求权，可以要求对方履行一定的义务；不能直接针对特定物，而是要求债务人履行义务，如支付款项；无物上追及力。
* Real rights 物权 (*in* *rem 对世权*) 对特定财产享有的排他性权利，权利人可以对抗所有人。
* Ownership (see next slide) 所有权，对财产享有最完整权利，包括占有、使用、收益、处分
* Possession 占有权 – relevant to *chose in possession* only (see further below)
* Real security 担保物权 (not necessarily based on ownership or possession) – security holder being granted certain limited rights over the personal property by the owner 不基于所有权或占有，债务人仍可能保留财产的所有权。

## Real Rights

* Ownership 所有权
* Indefeasible title to the absolute (or greatest) interest in the personal property 对个人财产的绝对权益；
* Bundle of rights “权利束”理论：所有权并非单一权利，而是多个权利的捆绑
* Right to possession 占有
* Right to use or manage 使用权/管理权
* Right to alienate, dispose or destroy 处分权
* Right to income 收益权
* Residual rights in the property after granting lessor interests 如果暂时让渡某些物权，仍保留其他权利。
* Possession (legal) 占有

1. Exercise of control: *The Tubantia (No.2)* [1924]: 打捞公司发现沉船并称对其拥有权利，船的继承人认为他们仍然保有所有权；法院认为，沉船所有者已经失去possession，没有实际控制财产，possession不复存在；打捞公司投入实际努力来恢复占有，因此可以主张新的权利。（财产长期无人控制）
2. Intention to possess

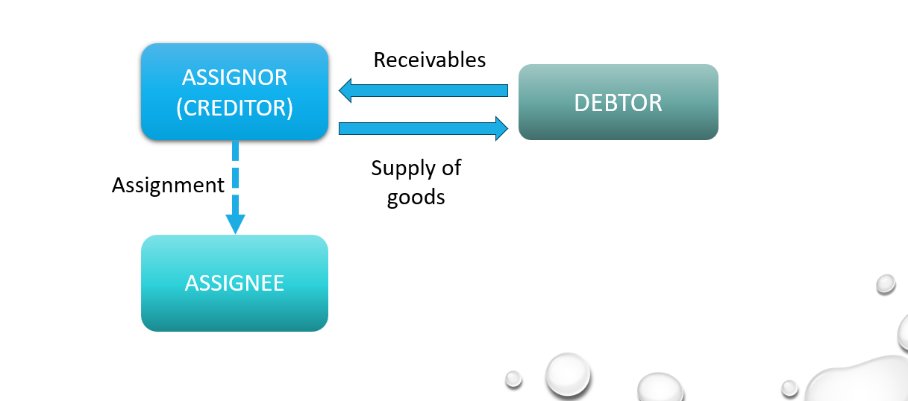
* *Wilson v Lombank Ltd* [1963]: car left at garage for repair by buyer; 卖车方误将修车厂的汽车拿走，以为是他们的车，其实已经被Wilson买走； Wilson拥有汽车的possession, never lost possession of the car at any stage and had rights to immediate possession. Lombank’s mistaken occupancy of the vehicle amounted to trespass of Wilson’s property. D的行为构成侵权
* *Costello v Chief Constable of Derbyshire* [2001]: stolen car kept by police; C拥有的汽车被警方扣押，后交给另一方； C主张自己是车辆的合法占有人；法院裁定possession受法律保护，警方无权擅自移交财产。

1. Constructive possession 推定占有

* Bailment 委托保管， transfer of possession by a party (bailor 委托人) to another party (bailee 受托人) for a specified purpose and in accordance with instructions of bailor 转移占有，不转移所有权
* requires consent of bailee 需要受托人同意
* bailee owes duty of care to bailor 受托人有义务合理保管财产
* Attornment 认可，财产原占有人认可新的占有者，使其取得占有权， a process whereby constructive possession is passed from one person to another 推定占有转让给另一个人了

## Dealings in *Chose in Action*—Assignment 权利转让

* “Immediate transfer of an existing proprietary right, vested or contingent, from assignor to assignee” (*Norman v Federal Commissioner of Taxation* (1963) 将现有财产权利从转让人assignor转移到受让人assignee处
* Does not require consent of original debtor 不需要原债务人同意
* To be distinguished from ‘novation’ which replaces old contract with a new one 与novation区分：novation是合同替代，新合同替代原合同，assignment不涉及替换合同，而是直接转让现有的权利。

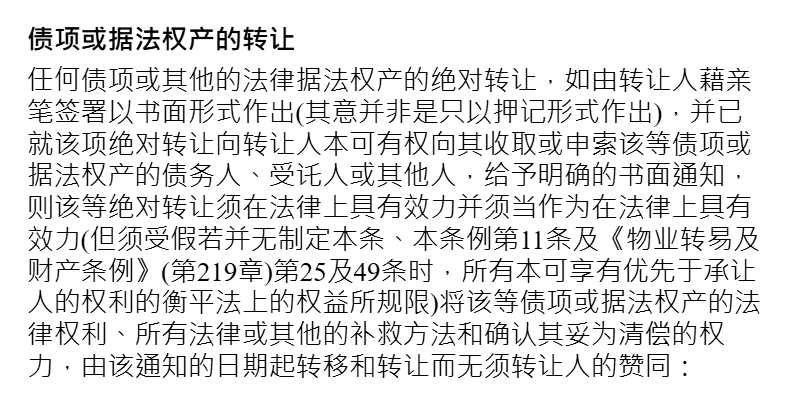


* What can or cannot be assigned:
* Bare right to sue
* Personal agreement (e. g. employment agreement)
* Future *chose in action*(possible under equity)
* Benefit(yes) vs burden(no)

\*Creditor是债权人，Debtor是债务人；此时债权人将应收账款receivables转让给第三方（如银行）Assignee受让人, 此时债权人为Assignor转让人；Debtor应当向银行偿还receivables

## Legal/Statutory Assignment 法律上的转让

* S9 of the Law Amendment and Reform (Consolidation) Ordinance (Cap.23) (‘LARCO’)

“Any absolute assignment, by writing under the hand of the assignor (not purporting to be by way of charge only), of any debt or other legal chose in action, of which express notice in writing has been given to the debtor… shall be and be deemed to have been effectual in law (subject to all equities) … to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor…”

* Point: 1. Absolute assignment 绝对转让; 2. In writing 书面通知债务人才生效; 3. Express written notice to debtor; 4. Consideration not needed.

## Equitable Assignment 衡平法上的转让

* Intention to assign (*Brandt’s Sons v Dunlop Rubber* [1905] 要求有转让的意图)
* **No particular form of words is required** so long as sufficient to establish a clear intention to transfer
* No need to be absolute assignment 不要求绝对转让（可以部分、附条件）
* Consideration required (but usually not a problem) 需要对价
* No need to give notice but… 无需通知债务人
* Legal vs Equitable Assignment
* Both subject to contractual prohibition – non-assignment clause (*Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* case) 如果合同中有禁止转让条款，则转让都无效或受限制；
* Both subject to equities before notice is given (e.g. set off 抵销权) 如果债务人在转让前对债权人有合法的抵销权，则即使债务转让，债务人依然可以行使权益；
* Recourse to original debtor? Discharge of original debt?
* Claims between rival assignees – issue of priorities 受让人之间的优先顺序
* Normally, legal assignment (without notice of prior equitable assignment) will have priority
* As between two or more assignments - the *Dearle v Hall* rule applies (i.e. **whoever gives notice to debtor first** 谁先通知债务人，谁拥有优先权)

# Sale of Goods—Introduction

## Broad Structure of SOGO

* Arrangement of Provisions
* Part I – formation of the contract 合约的成立
* Part II – effects of the contract 合约的效力
* Part III – performance of the contract 合约的履行
* Part IV – rights of unpaid seller against the goods 未获付款的卖方对货品的权利
* Part V – actions for breach of the contract 就违约而提出的诉讼
* Part VI – supplementary provisions 补充条文

## Definition—Types of Goods

‘Goods’ includes all chattels personal other than things in action and money. The term includes emblements, industrial growing crops… (s2(1) SOGO)

* Existing Goods vs Future Goods **(point: the time of making the contract) 关键在订立合同时**

***future goods*** means goods **to be manufactured or acquired** by the seller after the making of the contract of sale

(s2(1)/s7(1) SOGO) 期货，卖方在订立合同后才制造或取得的货品；

* ‘Specific goods’ (s2(1) SOGO) – goods identified and agreed upon **at the time of contract 特定货品，订立合约时经认定及议定的货品；**(timing is different from Ascertained goods: Ascertained goods identified after the time of contract?)
* Unascertained goods vs Ascertained goods: Not defined in statute; essential for the passing of property
* Specific goods vs Ascertained goods
* Specific goods 特定货物: 订立合同时有描述过的特定的货物；如具有特定车辆识别号码的汽车、某幅特定画作、某件特定珠宝；
* Ascertained goods 已确定货物：是特定货物的一个子集，指的是在合同成立后被选定或指定的货物。这些货物通常是从更大批次中挑选出来的，或者是为买方生产或预留的。如果买方订单100个单位的商品，之后再指定其中的10个单位，这10个单位就成为已确定货物。
* Specific goods在合同签订时就已认定，而ascertained goods可能在合同成立后才被识别；所有ascertained goods都是specific goods，但并非所有specific goods都是ascertained goods; ascertained goods的概念更适用于批量货物或合同成立后进行挑选的情境。

## Contract of Sale of Goods

* SOGO only applies to **‘contracts of sale of goods’**
* “A contract of sale of goods is a contract whereby the seller transfers (or agrees to transfer) the property in goods to the buyer for a money consideration, called the price…” (s3(1) SOGO)
* A ‘contract of sale’ includes an agreement to sell 售卖协议[[1]](#footnote-1) (executory agreement) as well as a sale售卖 (s2 SOGO) and may be absolute or conditional (s3(2) SOGO)售卖合约可为不附带条件的，亦可为附带条件的。
* Where under a contract of sale the property in the goods is transferred from the seller to the buyer, the contract is called a sale; but where the transfer of the property in the goods is to take place **at a future time or subject to some condition** thereafter to be fulfilled, the contract is called **an agreement to sell** (s3(3) SOGO) 货品的产权在将来或满足特定条件后才转让，则为售卖协议。
* Agreement to sell becomes a sale on fulfillment of conditions/lapse of time (s3(4) SOGO)
* Formalities – could be oral, in writing, or both (s5 SOGO) 合同形式可书面或口头或两者均有
* Is hire purchase 分期付款购物 agreement a contract of sale of goods? （要不要exercise the option: 可行使可不行使，不是必须，无购买义务， not a condition precedent, 可以随时终止合同并归还货物，不符合“买方”身份要求）是否适用SOGO?

*Helby v Matthews* [1895]: hire purchase agreement of a piano; 钢琴所有者同意以分期付款的方式将钢琴租给H, 在付款前产权仍属M; 支付几期款项后H将钢琴抵押给第三方， M起诉；法院裁定H无权处分，抵押权人did not get a good title. 因此hire purchase agreement不属于买卖合同，不适用SOGO.

* The provisions …. do not apply to any transaction in the form of a contract of sale which is intended to operate by way of mortgage, pledge, charge, or other security (s62(4) SOGO) SOGO不适用于形式上为买卖合同实际上为融资性质合同的交易

## Price 货价

* S3(1) SOGO – money consideration called the price 即金钱对价
* S10 SOGO – ascertainment of price 货价的确定

“(1) The price in a contract of sale may be fixed by the contract, or **may be left to be fixed** in manner thereby agreed, or may be determined **by the course of dealing** between the parties. 货价确定的方式和时间点很多

(2) Where the price is not determined in accordance with the foregoing provisions, the buyer must pay a **reasonable price**… is a question of fact dependent on the circumstances of **each particular case.**”

* S11 SOGO – price to be fixed by third party’s valuation

## Sale of Goods or Supply of Service? — Scope of Ordinance

* “What is the substance of contract?”
* *Lee v Griffin:* contract to make and fit a set of dentures 装假牙的过程中老人去世，但是假牙已经安装好，是否应该付款？ Supply of goods or service? 老人已经无法享受service; 现代倾向于解释为service, 因为包含后续服务；当时倾向解释为good.
* *Robinson v Graves:* a contract to paint a portrait; 被告委托原告绘制肖像，还未完成时被告违约；法院裁定是contract for work and labour, not for the sale of good. The substance of the contract was that skill and labour should be exercised when producing the portrait requested by the defendant. According to the court, the P could recover the costs.
* *Mak Ping Kui v Millionice Ltd*

*“…A contract of sale is a contract the main object of which is the transfer of the property in, and the delivery of the possession of, a chattel as such to the buyer. Where the main object of work undertaken by the payee of the price is not the transfer of a chattel as such, the contract is one for work and labour.* ***The test is whether or not the work and labour bestowed end in anything that can properly become the subject of sale.*** *Neither the ownership of the materials, nor the value of the skill and labour as compared with the value of the materials, is conclusive, although such matters may be taken into consideration in determining in the circumstances of a particular case whether the contract is in substance one for work and labour or one for the sale of a chattel.”（look into specific fact）* ***货物买卖合同****与****承揽合同****，关键区别在于****合同的主要目的****：如果是为了获得货物本身，那是买卖合同；如果是为了获取特定的工作成果或服务，那是承揽合同。*

# Sale of Goods—Transfer of Property 产权转让

## Transfer/Passing of Property

* Time when seller ceases to be, and the buyer becomes, the owner of goods
* “Property” means general property in goods （包括货物上的一切权利，property interest）, not merely a special property (s2(1) SOGO) （小偷可以pass the property, invalid, 但没有title, property is limited）
* Where there is a contract for the sale of unascertained goods, no property in the goods is transferred to the buyer unless and until the goods are ascertained (s18 SOGO). 售卖未确定的货品产权不转让给买方；

at the time of contract, 没有确定which 10 backpacks, 可以是任意10个，no property can pass, 此时无法请求法院强制执行，因为没有确定的goods, 只能请求damages, 也就是money

* For specific or ascertained goods, property passes when the parties intend it to be passed (s19(1) SOGO) 特定货品或已确定货品的产权在双方有意图将其转让时转让给买方；
* For ascertaining such intention, regard to be had to the terms of contract, the conduct of the parties, and the circumstances of the case (s19(2) SOGO) 确定intention时要考虑合同条款、双方行为等；
* Illustration: *Re Anchor Line Ltd （所有权保留方式购买起重机；法院裁定property 已经交付转移了，只能get damages）法院根据交易双方的意图intention来确定所有权何时转移；*
* intention of the parties inferred from the terms of the contract
* deferred payment for the purchase of a crane
* specific clause （意图在于not to pass property, argue that seller仍拥有property, 这样就可以get crane back） placing the risk on the buyer （risk passes with property）
* 1. pass physically; 2. specific goods; 通常满足这两点的时候， property pass at the time of contract, 交付时buyer取得物权。

## Presumptive Rules for Ascertaining Intention (rebuttable) 确定产权转让意向的规则

* (S20 SOGO) Where parties fail to make clear their intention:
* Rule 1 – **unconditional** contract for sale of **specific goods** in a **deliverable** state[[2]](#footnote-2) 不附带条件合同+可交付状态的特定货品=合约订立时转移；
* Rule 2 – contract for sale of specific goods not in a deliverable state 特定商品如果需要卖方做某种处理才可交付，则产权在作出处理并买方收到通知前，不转移；
* Rule 3 – contract for sale of specific goods in a deliverable state but seller must do some act to ascertain price 可交付状态的特定货品，需卖方确定货价，则卖方作出确定货价行为、买方收到通知前，不转移；
* Rule 4 – sale on approval dealing with specific goods
* Rule 5 – sale of unascertained or future goods by description 未确定货品/期货+符合说明+可交付状态+appropriated to the contract with either party’s consent=货品产权转移。

## Appropriation

* The **common intention** to attach the contract **irrevocably** to the subject goods so that those goods and no others become the property of the buyer (which goods belong to the contract); 买卖双方达成共同意图，使货物不可撤销地属于该合同，即拨归该合同，使买方获得这些货物的产权；
* Internal organisation (e.g. setting aside of goods) by the seller may **not be sufficient** to constitute unconditional appropriation – matter of fact (whether the appropriation had been done); 卖方内部操作，如在仓库中挑选，可能不足以构成无条件appropriation, 因此可能不足以使产权转移；
* *Healy v Howlett & Sons* – earmarking of boxes of mackerel on arrival; 买方是鱼贩向卖方出口商订20箱鱼，卖方指示“鱼在铁路交付后风险归买方”；火车延误导致鱼在到达买方前变质；法院裁定没有完成unconditional appropriation, 买方订的20箱鱼只是190箱中的一部分，产权未转移，不承担风险。*…there had been no appropriation of the twenty boxes to the defendants at Valentia and hence the property did not pass and the plaintiff could not recover the price from the defendants.*

## Appropriation by Exhaustion 通过耗尽实现的“拨归”

In case of an identified bulk situation, can have appropriation by exhaustion (shrinkage of the bulk to a quantity no

greater than that stipulated in the contract) 双方实际知道货物from which bulk, 只是不知道which part of bulk, 已经identified bulk, 但仍然是unascertained goods, 此时是quasi-specific类确定, 当bulk内的数量shrank到合同规定数量,此时good has been ascertained.

* *Wait & James v Midland Bank* – sale of wheat （仓库里的小麦数量大于合同约定数量，此时货物是unascertained goods，但是仓库里的数量开始减少因为有其他买家；银行主张剩下的小麦property has been pass 因为appropriation by exhaustion）

Point: 1. 货物属于identified bulk （已知来源）；2. The left amount equals the amount in contract; 3. Remaining goods are taken to be appropriated to the buyer’s contract and property in them passes to the buyer.

* *Re London Wine Co (Shippers) Ltd* （没有identified bulk situation, 就不能主张appropriation by exhaustion）
* A single purchaser of a particular wine by generic description purchased what was in fact the seller’s total stock of a particular wine at the day of the purchase
* Two or more purchasers who had bought quantities of a particular wine which taken together, exhausted the whole of seller’s stocks of wine of that description, which stocks were held by different warehousemen
* Purchaser did not exhaust the seller’s stocks and, although there was no act of appropriation, there was an acknowledgement given by the warehouseman that the appropriate quantity of the particular wine was being held to the purchaser’s order
* There could be no award for [specific performance](https://en.wikipedia.org/wiki/Specific_performance) because the [Sale of Goods Act](https://en.wikipedia.org/wiki/Sale_of_Goods_Act) required similarly that any goods be ascertained.

# Sale of Goods—Transfer of Risk 风险转移

## What Type of Risk

* Risk of theft, loss or damage to the contract of goods
* Not risk of non-payment or non-conforming goods
* Issue:
* Which party is to bear the loss? –risk allocation
* The effect of the loss-making event on the contract

## Transfer of Risk

* “Unless otherwise agreed, the goods remain at the seller’s risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer the goods are at the buyer’s risk, whether delivery[[3]](#footnote-3) has been made or not …” (s22 SOGO) 货品风险随产权转让而转让给买方；
* *Pignataro v Gilroy* – risk in unascertained goods – implied appropriation from failure to reply to note of appropriation

Ascertain case, rice is ready to collection, but the buyer only took part of the rice, after that the rest of the rice was stolen. Who to bear the risk of remaining rice? Has the property been transferred? It was held that the property had passed to the buyer. 大米准备好后买方没有及时提货，后存货被偷；裁定产权已转移至买方，买方承担风险。

* *Sterns Ltd v Vickers Ltd* – contrary intention is shown (i.e. risk to pass before property) – buyer accepted a delivery warrant 由于买方接受了交付凭证，风险在交付产权之前就转移了

Subject matter: liquid. Appropriation hasn’t been made to the buyer. The seller handed the buyer the delivery warrant. Whoever holds the warrant can take the goods from the warehouse. 买方没有立刻去取货，商品变质。

Unascertained good, the risk would not pass to the seller. 但是这边有contrary intention, the buyer is who going to make the appropriation. 尽管还没有交付，但买方应当承担风险，因为是买方决定何时交付，而非卖方。

* “…Provided that where delivery has been delayed through the fault[[4]](#footnote-4) of either seller or buyer, the goods are at the risk of the party in fault” 如因错失而延迟交付，则过错方承担风险 (s22 SOGO)
* *Demby Hamilton v Barden –* delivery delayed due to fault of buyer 只取了部分果汁，剩余的留下给卖方。Buyer should give delivery instructions, 所以卖方无法根据指示交付，果汁变质。 Buyer would be responsible for the risk although the property in the juice remained in the seller.

## Perishing of Goods 货物灭失

* Where there is a contract for the sale of specific goods, and the goods, without the knowledge of the seller, have perished at the time when the contract is made, the contract is void. (s8 SOGO) 订立合约时该特定货品已灭失，但卖方不知情，则合约无效。 (can also sue under contract by mistake)
* *Barrow, Lane & Ballard Ltd v Philip Philips & Co* – part of the goods being stolen

Question: s8 applied? —The seller didn’t know. The contract has been made. Then the contract is void. 通常情况下部分灭失不会导致合同无效，但该案中是specific goods, 部分灭失也导致合同无效。

…the court held that the contract between the parties was concluded for a parcel of 700 bags of ground nuts. However, at the time when the was made, there were only 591 bags. It is clear that the parties contracted about something which, at the date of the contract, did not exist as there had been no 700 bags stored in the warehouse. Thus, the court ruled in favor of the defendants and concluded that the contract was void.

* “Where there is an agreement to sell specific goods, and subsequently the goods, without any fault on the part of the seller or buyer, perish before the risk passes to the buyer, the agreement is thereby avoided.” (s9 SOGO) 订立agreement to sell specific goods, 随后特定货品灭失，agreement失效。
* Risk relating to transit: “Where the seller of goods agrees to deliver them at his own risk at a place other than that where they are when sold, the buyer must, nevertheless, unless otherwise agreed, take any risk of deterioration in the goods necessarily incident to the course of transit.” (s35 SOGO) 远地交付（售卖地与交付地不同），买方承担运送过程中商品损坏等的风险。

# Sale of Goods—Transfer of Title (ownership, 所有权转让)

## Common Law Nemo Dat Rule

* ‘… [I]n the development of our law, two principles have striven for mastery. The first is for the protection of property: **no one can give a better title than he himself possesses.**  The second is for the protection of commercial transactions: the one who takes in good faith and for value without notice should get a good title. The first principle has held sway for a long time but has been modified by the common law and by statute so as to meet the need of our own times’ (per Lord Denning, *Bishopgate Motor Finance v Transport Brakes*)
* 如果passer不是true owner, 则无法pass the title

## Statutory Nemo Dat Rule

* “Subject to the provisions of this Ordinance, where goods are (seller who is not the true owner) sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the **buyer acquires no better title to the goods than the seller had**…” (S23 SOGO) 无权处分情况下，买方取得的货品所有权（title）不优于无权处分人的所有权。
* That is, the general rule is subject to exceptions. If an exception applies, the practical effect is that the owner will be divested of his/her ownership. 但存在例外规则，owner可能被剥夺所有权

## Exceptions—Estoppel

* Proviso in s23 SOGO “… unless the owner of the goods is by his conduct precluded from denying the seller’s authority to sell …” 除非owner的行为无法否定无权处分人的售卖权（非拥有人售卖，须有representation并且TP rely on it, 类似于表见，无权处分人拥有售卖权外观）。
* Definition: Estoppel arises where the owner of a good is, by virtue of his conduct precluded from denying the sellers authority to sell.
* *Shaw v Commissioner of Police of the Metropolis* – estoppel – ‘agreed to buy’

原告将车给dealer帮忙卖车，虽然合同约定title在车被售出时转移，但其行为已经构成representation, TP可能合理相信dealer有权处分。*The claimant had clearly made a representation to the dealer that he should sell the car and therefore would have been estopped from claiming return of the car.*

* *Farquharson Brothers & Co v King & Co* – estoppel – apparent ownership?

职员滥权以欺诈手段将木材卖给被告；法院裁定欺诈行为不构成对所有人的estoppel. Merely negligently abetting the fraud of a third party will not be sufficient to establish an estoppel against the true owner, there must be some **representation by the true owner** that he has parted with the property in the goods. 需要true owner的representation表示已转让title.

* *Central Newbury Car Auctions v Unity Finance* – handing over of car and registration document

车主通过hire purchase出售汽车，买方将车开走并交付行驶证（载有被登记人未必为法定所有人）；车被出售给TP; 法院裁定车主未表示买方有权处分，并且行驶证载有提示。The court held that by entrusting the car to the seller, together with a document which clearly stated that it did not prove legal ownership, the owners made no representation entitling the seller to deal with the car as his own therefore estopping them from asserting title.

* *Mercantile Credit v Hamblin* – does the owner have a duty of care to third-party buyer?

被告通过分期付款买车，误以为自己拥有所有权，抵押给原告，后违约，但汽车所有权属卖车公司；原告主张Hamblin已作出representation. 法院裁定Hamblin无权处分，卖车公司未作representation. Representation should come from the true owner to the third party.

* *Moorgate Mercantile Co v Twitchings* – non-registration of hire-purchase agreement. Moorgate does not bear any duty of care.

## Exceptions—Sale by Mercantile Agent[[5]](#footnote-5) 代理商销售

* “Provided, also, that nothing in this Ordinance shall affect the provisions of the Factors Ordinance (Cap. 48), or any enactment enabling the apparent owner of goods to dispose of them as if he were the true owner thereof…” (s23(2)(a) SOGO) 犹如货品的真正拥有人般处置货品，类似表见代理
* S3(1) FO “Where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent, shall, subject to the provisions of this Ordinance, be as valid as if he were expressly authorized by the owner of the goods to make the same:

Provided that the person taking under the disposition acts in good faith, and has not, at the time of the disposition, noticed that the person making the disposition has no authority to make the same.” 商业代理人在owner的同意下占有货品或所有权文件，则可视为有权处分，前提是受让人善意。

* Requirement for this exception to apply：
* Transaction initiated by a mercantile agent (‘MA’)
* MA must be **in possession of the goods**, or the document of title to the goods at the time of the transaction - *Beverley Acceptance Ltd v Oakley* – not previously been in possession 要有表见外观
* MA must obtain possession with the consent of the owner 占有得到owner的同意
* MA must receive goods in the capacity as MA

*Pearson v Rose & Young* – MA instructed to obtain offers but with no authority to sell 原告将车交给MA以获得报价，但授权出售；MA设法取得文件，后卖掉汽车。法院裁定同意无效， consent obtained by fraud is no consent at all. “*The owner must consent to the agent having them for a purpose which is in some way or other connected with his business as a mercantile agent. It may not actually be for sale. It may be for display, or to get offers, or merely to put in his showroom; but there must be a consent to something of that kind before the owner can be deprived of his goods.”* (dicta) per Lord Denning 必须存在用于商业途径的consent

* Sale must take place in the ordinary course of business

*Oppenheimer v Attenborough & Son –* 原告委托钻石经销商展示钻石，经销商将钻石质押；法院裁定当铺可以获得title. “…‘acting in such a way as a mercantile agent acting in the ordinary course of business of a mercantile agent would act’; that is to say, within business hours, at a proper place of business, and in other respects the in the ordinary way in which a mercantile agent would act so that there is nothing to lead the [buyer] to suppose that anything wrong is being done, or to give him notice that the disposition is one which the mercantile agent had no authority to make.”

* Buyer must take goods in good faith and without notice that the sale was made without the owner’s authority

## Exceptions—Sale under Voidable Title 根据可使无效的所有权而售卖

* S25 “When the seller of goods has a voidable (means the sale could be avoid) title thereto, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of the seller’s defect of title.” 卖方对货品有可使无效的所有权，但在售卖时所有权尚未无效，且买方善意且不知所有权瑕疵，即可取得title.
* *Car & Universal Finance Co Ltd v Caldwell* – Does the avoidance need to be communicated to the buyer?

车主被骗，将车卖给歹徒，发现后报警想追回车，但车已经又被卖给第三人。

**Rescission is barred where the subject matter of the contract is sold to third-party bona fide purchaser without notice of the misrepresentation, before any intention to rescind is communicated to representor**

However, it is possible to rescind without communication to the representor where such communication is impossible

## Exceptions—Sale by Seller (also the owner) in Possession

* S27(1) SOGO “Where a person having sold goods continues or is in possession of the goods, …. the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods …., under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make the same.” 已出售货品但仍占有或有所有权文件，且受让人善意+不知前宗售卖，则卖方视作有权处分。（title已经转移给first buyer, rationale是first buyer did not completely fulfil the transaction, leaving the goods or document so that should take the risk）
* Requirement:
* Seller must remain continuously in possession of the goods – *Pacific Motor Auctions Pty Ltd v Motor Credits (Hire Finance) Ltd* (The words “continues … in possession” referred to the continuity of physical possession, regardless of any changes in legal title due to private transactions between the seller and the original purchaser. 强调对货品的持续占有，不受权利变动影响)
* The third party must also **have taken delivery** of the goods 已向第三人交付
* The third party must be a bona fide purchaser without notice 善意第三人

## Exception—Sale by Buyer in Possession

* S27(2) SOGO “Where a person **having bought or agreed to buy** goods obtains, **with the consent of the seller**, possession of the goods …, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods …., under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner.” 买方在卖方同意下占有货品或所有权文件+善意第三人，则此时买方视为有权处分。
* *Helby v Matthews* – does not apply to hire purchase agreement不适用分期付款协议，因为不属于have bought or agreed to buy的情况，后面可能不买。
* *Newtons of Wembley Ltd v Williams* – consider the effect of this case on s25 (voidable title)

If a rogue obtains possession of goods from the true owner under a contract of sale induced by his fraud, he can **pass a good title to an innocent buyer** notwithstanding the fact that the true owner has avoided the rogue’s voidable title before the innocent buyer purchased the goods. 尽管第一次sale中的title is voidable in time.

* *National Employers’ Mutual General Insurance Association Ltd v Jones* – meaning of ‘consent of the seller’
* Exceptions—Sale in Market Overt 公开市场
* “Where goods are openly sold in a shop or market in Hong Kong, in the ordinary course of the business of such shop or market, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of any defect or want of title on the part of the seller.” (s24(1) SOGO) 公开市场+通常业务+善意第三人=取得所有权
* *Au Muk Shun v Cho Chuen Yau—*Four conditions must be fulfilled: 1) goods must be openly sold 2) the sale must take place in shop or market in HK 3) the sale must be in the ordinary course of business of that shop or market; and 4) the buyer must act in good faith without notice of any defect or want of title of seller

# Sale of Goods—Implied Terms

## Implied Terms (Condition vs Warranty)[[6]](#footnote-6)

* Implied Undertaking as to Title 有关所有权的隐含责任承担
* Implied condition that the seller has the right to sell the goods
* S14(1) SOGO “In every contract of sale…there is

1. an implied condition隐含条件 on the part of the seller that in the case of the **sale**, he has a right to sell the goods, and in the case of an **agreement to sell**, he will have a right to sell the goods at the time when the **property is to pass**…” 卖方应有权出售货物
2. an implied warranty 隐含的保证条款：Implied warranty that the goods are free from undisclosed charge and encumbrance卖方的披露义务，如告知物上权利瑕疵，保证the buyer will enjoy quiet possession of the goods.

* *Rowland v Divall* – seller had no title to a car 经销商从D处买了汽车，卖给顾客，后汽车因是被盗的而归还给原主人， C将款项退还顾客，向D提出索赔—seller did not have the title, the true owner argued for items) breach of condition-fundamental breach-get back full price 即卖方未能转移所有权，构成根本违约，买方有权解除合同并要求退还款项。*Where in a contract of sale for goods the seller fails to pass good title, there is a total failure of consideration and the buyer is entitled to rescind the contract and demand his money back.*
* *Niblett v Confectioners’ Materials Co Ltd* —The seller has the title, but the label has to be removed. The seller did not have the right to sell, 因为商标侵权。 购买炼乳，商标类似雀巢涉嫌侵权，被要求remove商标；买方诉卖方违反隐含条件: 1. Implied condition on the part of the seller that in the case of a sale he has a right to sell the goods 卖方有权出售货物; 2.  implied condition that the goods shall be of merchantable quality 商品必须具有适销品质；即，卖方有权销售货物的implied condition不仅是其拥有title, 还包括未侵犯第三方合法权利。*The implied warranty that the seller has the right to sell the goods is not merely a warranty that the seller has good title, it also encompasses a warranty that the seller is not infringing on the rights of third parties who have the legal right to restrain the sale (e.g. where the goods breach the IP rights of third parties).*
* **Cannot be contracted out**: S11(1) of the Control of Exemption Clauses Ordinance (Cap. 71) (“CECO”) “Liability for breach of the obligations arising from section 14 of [SOGO] (seller’s implied undertaking as to title, etc.) cannot be excluded or restricted by reference to any contract term.” 不能通过合同约定排除implied undertaking as to title — 严格责任

## Sale by Description 凭货品说明的售卖

1. Implied condition that goods shall correspond with the description in a contract of sale of goods by description (s15 SOGO) 货品必须与说明相符

* S15(1) “Where there is a contract for **the sale of goods by description**, there is an implied condition that the goods shall correspond with the description…”
* *Joseph Travers & Son Ltd v Longel Ltd:* “Sales by description may ... be divided into sales (1) of **unascertained or future goods**, as being of a certain kind or class, or to which otherwise a ‘description’ in the contract is applied; (2) of **specific goods**, bought by the buyer in reliance, at least in part, upon the description given, or to be tacitly inferred from the circumstances, and which identifies the goods.” 因为是unascertained, the seller should give words to the buyer—sale by description; 如果是specific goods, 有详细的description, 不构成sale by description, 而是sale by specific goods. 没太懂
* S15(2) “A sale of goods shall not be prevented from being a sale by description by reason only that, being exposed for sale or hire, they are selected by the buyer.” 柜台陈列方式进行的销售也属于说明
* “.. there is a sale by description even though the buyer is buying something displayed before him on the counter: a thing is sold by description, though it is specific, so long as it is sold not merely as the specific thing but as a thing corresponding to a description, e.g. woollen under-garments, a hot-water bottle, a second-hand reaping machine…” per Lord Wright in *Grant v Australian Knitting Mills*

1. Distinction between the goods’ identity and attributes/quality 是否需要满足适当的quality？

* *Ashington Piggeries v Christopher Hill Ltd* 买方提供配方要求制作水貂饲料，卖方按照配方生产但未检查某种成分的安全性，导致大量水貂死亡*:* “**The ‘description’ by which an ascertained goods are sold is, in my view, confined to those words in the contract which were intended by the parties to identify the kind of goods which were to be supplied.** It is open to the parties to use a description as broad or as narrow as they choose but ultimately the test is whether the buyer could fairly and reasonably refused to accept the physical goods proffered to him on the ground that their failure to correspond with what was said about them makes them good of a different kind from those he had agreed to buy. The key… is identification.” per Lord Diplock多数意见认为货品仍符合合同说明，且不能推定买方依赖卖方的专业判断；Lord Diplock认为说明应当包括基本用途，要保证适用性。

\*可以claim breach of more than one implied term

1. Description constitutes a substantial ingredient of the “identity” of the goods 当说明构成货品identity的重要性质

* *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* 买方不想要货品了，称货船停的船坞和约定的不同，构成违约– Vessel being constructed in another yard with a different yard number (did not use the yard—buyer try to argue breach of contract by implied term, but the only difference is yard number. Buyer wanted to get out of contract, try to find technical reason) 所以yard number不能构成identity of the goods, 不重要

1. Intention of Paries

* *Lee Yuk Shing v Dianoor International Ltd* *(in liq)* - a common intention that that the description is a term of the contract and that the goods will correspond with the description (sale of diamonds; has to be a term of the contract)
* *Harlingdon & Leinster Enterprise Ltd v Christopher Hull Fine Art* – no reliance on description by the buyer 双方都以为画作是真迹，合同因此不是“按说明销售”，买方不能据此索赔；法院裁定画具有适销品质，虽不符合description, 但卖方未违反画作是真迹的implied condition. (parties relied on that words then enter the contract, without the description would not sign the contract) *…every item in a description that constitutes a substantial ingredient in the identity of the thing being sold is a condition. 如果是substantial ingredient的话则构成合同中的condition*

1. Applies to goods not sold ‘in the course of business’

* *Varley v Whipp* – sale of a second-hand reaping machine by a person, not a dealer in the agricultural industry (seller tells the buyer the machine is new; buyer sued in this section, the seller said it is not in the course of business.) 销售二手割麦机，但告诉买方几乎是全新，实际上很破旧，买方拒绝付款，卖方抗辩不是惯常商业交易过程，他并非专业商家。

1. Correspondence with description must be exact 对货品的说明必须准确

* *Arcos Ltd v EA Ronaasen & Son* – thickness of wood (there is a breach) 木板厚度与合同规定不符，法院裁定不能因为具有适销性而要求买方接受不符合合同规格的货物。

*The Court held that a buyer in a contract for sale has the right to demand goods of certain specifications and is not, accordingly, bound to accept goods that do not conform to contractual specifications merely due to them being merchantable or commercially equivalent to that specification. Rather, the goods must conform to the specifications to which the parties have agreed and the contract cannot be constructed as to add a qualification of commercial equivalence that is not otherwise stipulated. On the facts, the contract for timber wood provided no elasticity in its terms and expressly specified the thickness of the wood. As the staves of wood did not conform to the contractual requirements, despite the possibility of their commercial equivalence and merchantability under the contract, the buyer had the right to reject the goods.*

* *Re Moore & Co Ltd and Landauer & Co’s Arbitration Ltd* – packaging of canned fruits (买了一堆fruits想按一定数量包装，但每个package里的number错了。Buyer reject the goods, court made in favour of buyer. Can’t force buyer to take the wrong-number package) total amount is right if self-use, it does not matter; but for resale, it matters.

*The Court of Appeal held that notwithstanding that there was no loss to the buyer, he could reject the whole consignment because of the breach of …(goods must correspond with the description).*

## Implied Undertakings as to Quality and Fitness 关于品质或适用性的隐含责任承担

1. Implied condition that the goods supplied under the contract are of merchantable (saleable) quality (s16(2) SOGO) 货品应具备可售品质

* S16(2) “Where the seller sells goods in the course of a business, there is an implied condition that the goods supplied under the contract are of merchantable quality…” 货品应具备可售品质
* *Stevenson v Rogers* – ‘in the course of business’ includes **one-off sale** in the course of business and habitual dealings in the goods sold is not required (one-off sale could also constitute the course of business 单次售卖也可以构成course of business)

2. Meaning of ‘merchantable quality’ 可商售品质的定义

* (S2(5) SOGO) “Goods of any kind are of merchantable quality within the meaning of this Ordinance if they are—

1. as fit for the purpose or purposes for which goods of that kind are commonly bought 通常购买该货品的用途

* *Aswan Engineering Establishment Co v Lupdine Ltd* – stacking of pails containing waterproofing compound in intense heat; subject to the condition should be container; no breach); could have multi-purpose, which purpose should be considered? *The court applied the usability test as it was a business to business contract.* *This test asks if a reasonable user could have used the goods for the purposes for which they are commonly supplied. Consequently there was no breach of s.14 as it was the extreme conditions which caused the pails to melt. A reasonable user could have used the goods without incurring damage.* 极端条件导致商品不适用，不构成breach

(b) of such standard of appearance and finish;

(c) as free from defects (including minor defects); 无明显瑕疵

(d) as safe; and 安全

(e) as durable, 耐用

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.”

\*should take certain circumstance into consideration whether the goods have merchantable quality

* Test is an objective one—*Cehave v Bremer*
* ‘Merchantable…. is a composite quality comprising elements of description, purpose, condition and price. The relative significance of each of these elements will vary from case to case according to the nature of the goods in question and the characteristics of the market which exists for them.’ Merchantable的定义根据所涉商品和所处市场等因情况而异
* *Rogers v Parish* – sale of new car with minor defects (Range Rover, 买了之后发现有很多小问题，但开是没问题的；sue the seller of not merchantable quality, 有许多轻微瑕疵，court said there is a breach, for a new car should not be so many minor defect, also as a high price); *all these were below the standard that is normally expected of a vehicle costing that much. It was decided that the vehicle did not* ***have a quality that could render it merchantable.*** *Even though it could be driven and the damage could be repaired, this did not fulfill the requirements of… This requirement could only be met if the vehicle was of a standard that was reasonable for a vehicle of its kind.*

3. Exceptions 默认应当具有适用性的例外（即以下情况中不默认具有merchantable quality）

* (S16(2) SOGO) “… except that there is no such condition—

(a) as regards defects specifically drawn to the buyer’s attention before the contract is made (seller should tell the buyer with certain details about the defects) 订立合同前卖方提请买方注意缺陷; or

(b) if the buyer examines the goods before the contract is made, as regards defects which that examination ought to reveal; 买方在合同订立前验货，则应当发现缺陷 (the exam did happen, but unable to find out the defect, the buyer would not be protected by the exception)

(c) if the contract is a contract for sale by sample, as regards defects which would have been apparent on a reasonable examination of the sample.” 凭样本售货的合约，在检验样本时应当发现的缺陷

4. Implied condition that the goods supplied under contract are reasonably fit for a particular purpose 如果已经知道有特殊用途，则应当符合这一目的

* (s16(3) SOGO) “Where the seller sells goods in the course of a business and the buyer, expressly or by implication, makes known to the seller any particular purpose for which the goods are being bought, there is an implied condition that the goods supplied under the contract are reasonably fit for that purpose, whether or not that is a purpose for which such goods are commonly supplied, except where the circumstances show that the buyer does not rely, or that it is unreasonable for him to rely, on the seller’s skill or judgment.” 买方使卖方知悉有特定用途而采购，则应当合理地适合该用途。
* Requirement:

a. Seller sells subject goods in the course of business 一般商业交往过程

b. Buyer makes known to seller the particular purpose 存在特定目的

* *Henry Kendall v William Lilico* – groundnut extracts poisonous for feeding pheasants 饲料中存在对野鸡有毒的成分；
* *Ashington Piggeries v Christopher Hill Ltd* – sale of herring meal which was suitable for inclusion in foodstuffs in small quantities for most animals but seriously poisonous to minks 饲料毒死水貂

c. Buyer’s (reasonable) reliance on seller’s skill or judgment 买方合理依赖卖方的专业知识[[7]](#footnote-7) (whether the reliance is reasonable?)

* *Cammell Laird & Co Ltd v Manganese Bronze & Brass Co Ltd* – construction of propellers. Only rely on certain aspects of the seller? Buyer miss certain details when provide the description. 合同规定了螺旋桨的细节，但未特别说明必须适用某特定船只；卖方按合同制造后不适用，买方拒收；法院裁定因为没有告知适用特定目的，因此不受fitness for purpose的implied terms约束。The buyer did **not** inform the seller that the propellers were for a specific type of ship. If a buyer wants goods to be suitable for a specific purpose, they must communicate this to the seller. （该案另一个point是即使买方提供了技术规格，但仍依赖卖方的技能和判断，仍然可以构成sale by description）
* Does not apply where damage caused by goods due to sensitivity or particular unusual characteristics of the buyer that was unknown to the seller 不适用于特殊敏感或非常性质且卖方不知的买方
* *Griffiths v Peter Conway Ltd* – buyer contracted dermatitis after wearing a bought tweed coat (buyer did not tell the seller, the seller would not have been breached)
* *Slater v Finning Ltd* – failure of camshafts on a vessel

5. Relationship between s16(2) and s16(3) SOGO

* *Jewson Ltd v Boyhan:* “The function of section [16(2)], by contrast with section [16(3)], is to establish a general standard of quality which goods are required to reach. It is not designed to ensure that goods are fit for a particular purpose made known to the seller. That is the function of section [16(3)]” 16.2规定货品应达到的一般质量标准（merchantable quality），16.3则强调货品的特殊适用性（买方明确告知特殊用途+依赖卖方的技能或专业判断选择商品）。

## Sale by Sample 凭样本售货

1. Implied conditions in s17 SOGO

“(1) A contract of sale is a contract for sale by sample (usually by bulk) where there is a term in the contract, express or implied, to that effect.

(2) In the case of a contract for sale by sample—

(a) there is an implied condition that the bulk shall correspond with the sample in quality; 整批货品要与样本相符；

(b) there is an implied condition that the buyer shall have a reasonable opportunity of comparing the bulk with the sample; 买方有权利检验货物（与样本作比较）

(c) there is an implied condition that the goods shall be free from any defect, rendering them unmerchantable, which would not be apparent on reasonable examination of the sample.” 货品不应unmerchantable; 如果存在缺陷应该要使goods unmerchantable.

1. Function of ‘sample’

* *Drummond v Van Ingen*

“The office of a sample is to present to the eye the real meaning and intention of the parties with regard to the subject matter of the contract which, owing to the imperfections of language, it may be difficult or impossible to express in words.” per Lord Macnaghten (it is about intention of parties) 样品可清晰表达双方对货品的真实意图，语言具有局限性。

\*‘Sale by sample’ – the bulk to be delivered will correspond to the sample in quality 卖方交付的大批量商品（bulk）必须符合样品的质量标准

1. Free from latent defect 无潜在瑕疵 (which renders the goods unmerchantable, and which would not be apparent on reasonable examination of the sample 使货物不适售且经合理检查样本后无法发现 – s17(2)(c))

* *Steels & Busks Ltd v Bleecker Bik & Co*

“The extent to which a sample may be held to ‘speak’ must depend on the contract and what was contemplated by the parties in regard to it. A sample may be analysed, X-rayed-tested to destruction. In the present case the parties were content, in accordance with the normal practice of the trade, to rely on a visual examination.” per Sellers J (visual exam would not discover the defect, latent defect does not cause breach, should render the goods merchantable 存在目测无法发现的瑕疵，不构成breach, 仍使得货物适销)

1. Relationship of s17 with s15 and s16 SOGO

* S15(1) “… and if the sale is by sample, as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.” …如果既凭description又凭sample, description不相符但sample相符，也不行；
* S16(2)(c) “…if the contract is a contract for sale by sample, as regards defects which would have been apparent on a reasonable examination of the sample.” – one of the exclusions; 如果是凭sample的合同，货品存在在合理检验样本时就会发现的缺点，则卖方不受该implied condition约束。

# Sale of Goods—Duties of Seller

## Duty to Deliver

* “It is the duty of the seller to deliver the goods … in accordance with the terms of the contract of sale.” (s29 SOGO) 卖方有责任按合同交付货品
* Meaning of ‘delivery’: (s2(1) SOGO) “voluntary transfer of possession from one person to another” 自愿转让占有
* S31(1) SOGO “Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending in each case on the contract, express or implied, between the parties…” 交付地按合同规定；无约定则依次按卖方营业地、住所地。

## Mode of Delivery

* Actual delivery (physical delivery)
* Constructive delivery 推定交付- “Where the goods at the time of sale are in the possession of a third person, there is no delivery by seller to buyer unless and until such third person acknowledges to the buyer that he holds the goods on his behalf....” 第三人占有，卖方无交付，除非第三人向买方承认是代买方持有货品 (s31(3) SOGO) hold by someone else, attornment

## Place of Delivery

* S31(1) SOGO “…. Apart from any such contract, express or implied, the place of delivery is the **seller’s place of business**, if he has one, and if not, his residence:

Provided that, if the contract is for the sale of **specific goods**, which, to the knowledge of the parties when the contract is made, are in some other place, then that place is the place of delivery.” 交付地按合同规定；无约定则依次按卖方营业地、住所地；如果是特定货品，且双方订立合同时均知货品在另一地，则该地为交付地点。

## Time of Delivery

* Time of the essence? –could rebut the presumption
* S12(1) SOGO “Unless a different intention appears from the terms of the contract, stipulations as to time of payment are not deemed to be of the essence of a contract of sale. Whether any other stipulation as to time is of the essence of the contract or not depends on the terms of the contract.” 付款时限不当成合同要素，除非另有意图（否则延迟给付很容易导致repudiate）。
* ‘... [T]he enormous practical advantages **in certainty**, not least in regard to string contracts where today’s buyer may be tomorrow’s seller. Most members of the string will have many ongoing contracts simultaneously and they must be able to do business with confidence in the legal results of their actions’ (per Lord Lowry, *Bunge Corp v Tradax Export SA: 买方通知迟延，卖方认为构成违约，这个案子中时间很重要，所以构成根本违约，卖方可以撤销合同； whether the notification clause constitutes a condition? —in this case, time is essential and clauses related to time require precise compliance by the Parties. The ability of the seller to fulfil his contractual obligation is entirely dependant on the buyer’s punctual performance of this contractual clause. Thus, and particularly in consideration of the essential role of time within mercantile contracts, the notification clause is constructed as a contractual condition that requires strict compliance. Accordingly, the buyers have breached the condition and the sellers had the right to terminate and claim for damages.*)
* *Charles Rickards Ltd v Oppenheim* – giving reasonable notice to make the time of the essence—part of the car; 卖方通知无法按合同约定交货，买方说可以extend the ddl, 到了ddl卖方还是无法交货，于是买方give reasonable notice that not gonna accept, sue for price. 此时reasonable notice made the time of the essence.
* S31(2) SOGO “Where under the contract of sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time.” 卖方送货，未约定送货时间，则在合理时间内送货（合理时间是question of fact via s58）。
* S31(4) SOGO “Demand or tender of delivery may be treated as ineffectual unless made at a reasonable hour. What is a reasonable hour is a question of fact.” 要求交付/提供交付应当在合理时间内作出，否则可能无效——合理时间也是question of fact.

## Delivery to Carrier 交付承运人

* S34(1) SOGO “Where, in pursuance of a contract of sale, the seller is authorized or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not (both parties agreed), for the purpose of transmission (cannot be the agent of seller, seller still has the possession) to the buyer is prima facie deemed to be a delivery of the goods to the buyer.” 货品交付承运人，表面当作交付买方；
* S34(2) “Unless otherwise authorized by the buyer, the seller must make such contract with the carrier on behalf of the buyer as may be reasonable having regard to the nature of the goods and the other circumstances of the case. If the seller omits to do so, and the goods are lost or damaged in course of transit, the buyer may decline to treat the delivery to the carrier as a delivery to himself, or may hold the seller responsible in damages.” 如果是卖方代买方与承运人订立合约，则必须合理，否则货品运送损坏，买方可拒绝承运人交付，或要求卖方损害赔偿。
* *Thomas Young & Sons v Hobson & Partners –* sale of electric engines; Carrier operate the train, *卖方没有要求承运人take care of engines. 必须保证goods would be secured on the train.*

## Expense to Deliverable State

* S31(5) “Unless otherwise agreed, the expenses of and incidental to putting the goods into a deliverable state must be borne by the seller.” 卖方承担使货品达到可交付状态的开支，但不包括delivery expense
* To be distinguished from expenses of delivery itself which is to be agreed between the seller and the buyer

# Sale of Goods—Duties of Buyer

## Duty to Accept and Pay

* S29 “It is the duty …. of the buyer to accept and pay for [the goods], in accordance with the terms of the contract of sale.” 买方有义务根据合同接受货品+付款
* S12(1) “Unless a different intention appears from the terms of the contract, stipulations as to time of payment are not deemed to be of the essence of a contract of sale….” 付款时限不被视为合同的要素，另有约定除外。

## Acceptance

1. **Delivery of Wrong Quantity**

* S32(1) “Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts the goods so delivered, he must pay for them at the contract rate (bear the risk).” – see further s33 below 交付数量少于约定，可拒收；如果接受，须按合同约定费率付钱。
* S32(2) “Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole. If the buyer accepts the whole of the goods so delivered he must pay for them at the contract rate.” 交付数量多于约定，可拒收多出部分或全部；如果接受，则按合同约定费率付钱。
* Both subject to *de minimis最低限度；* exception - *Shipton, Anderson & Co v Weil Bros:* depends on the type of goods; 卖方交付比合同规定少了55磅，微不足道，符合*de minimis*原则，不影响合同履行，不构成根本违约，买方不能以此拒付；Does not warrant no payment because it is below the *de minimis* threshold, so doesn’t need there to be no payment under the entire agreement.

1. **Delivery of Mixed Goods**

* S32(3) “Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract the buyer may accept the goods which are in accordance with the contract and reject the rest, or he may reject the whole.” 货品混入未约定不同种货品，买方可拒收其余或全部货品；
* S32(4) “The provisions of this section are subject to any usage of trade, special agreement, or course of dealing between the parties.” 受行业惯例市场交易习惯限制

1. **Delivery by Instalments 分期交付**

* S33(1) “Unless otherwise agreed, the buyer of goods is not bound to accept delivery thereof by instalments.” 买方不必接受分期交付的货品，另有约定除外；S32出现比合同约定的货物少的情况，可以拒绝接收；
* *Behrend & Co v Produce Brokers Co* – discharged cargoes by instalments; The court held that when the delivery had begun, the buyer was entitled to receive the whole quantity that they had ordered before the ship left the port. In the circumstances, the buyer was entitled to keep the part actually delivered and to reject the balance and to be repaid the price of the balance that had been prepaid. Unless the parties agree that delivery can be made by instalments, then the buyer is not bound to accept delivery by instalments. 除非双方同意分期交付，否则买方不必接受货物。
* S33(2) “Where there is a contract for the sale of goods to be delivered by stated instalments, which are to be separately paid for, and the seller makes defective deliveries in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it is a question in each case depending on the terms of the contract and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract or whether it is a severable breach giving rise to a claim for compensation (damage) but not to a right to treat the whole contract as repudiated.” 双方约定分期交付，存在某期交付不妥、买方拒收或拒付，是否废除（repudiate）合同或产生违约损害赔偿，视个案情况而定。
* *Maple Flock Co Ltd v Universal Furniture Products (Wembley) Ltd:* 第16次分期交付低于标准，买方想repudiation, 法院认为只能damage. *the sellers conduct did not show an intention to throw away the contract and therefore the buyer should have to be contended with damages for defective goods.*
* the quantitative ratio which the breach bears to the contract as a whole
* the degree of probability that such a breach will be repeated: In Decrowall International S.A. v. Practitioners in Marketing Ltd., the Court of Appeal pointed out “that to constitute repudiation, a breach of contract must go to the root of the contract… This constitutes the test even where there are recurring breaches- producing different results according to the degree of non-compliance… Notice that a breach is likely to occur or recur cannot, of course, be treated as being repudiation unless it would have that effect when it did occur or recur” 要看违约行为是否会反复发生

1. **Deemed Acceptance—even remain silence (for the certainty of transaction) 视为接受**

* S37(1) Subject to subsection (2) (有机会检查货物之后), the buyer is deemed to have accepted the goods—

1. when he intimates (notifies) to the seller that he has accepted them; 告知卖方已接收货物

*- Clegg v Anderson* – asking for further information 没记笔记

1. when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller. –cannot revert/return the goods like resale/consume 货品已交付，买方作出与卖方的拥有权不相符的行为，如二次卖出、使用、消费。

- S37(6) “The buyer is not by virtue of this section deemed to have accepted the goods merely because the goods are delivered to another under a sub-sale or other disposition.” 买方不仅因转售或交付另一人就被视为已接受货品 ask the seller deliver to sub-buyer?

1. **Deemed Acceptance—Right to Examine 买方验货的权利**

* S36(2) “Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he (seller) is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract.” 卖方在买方要求下必须给合理的验货机会
* S37(2) “Where goods are delivered to the buyer, and he has not previously examined them, he is not deemed to have accepted them … **until he has had a reasonable opportunity of examining them for the purpose**—

(a) of ascertaining whether they are in conformity with the contract; and

(b) in the case of a contract for sale by sample, of comparing the bulk with the sample”

* S37(4) SOGO “The buyer is also deemed to have accepted the goods when after the lapse of a reasonable time he retains the goods without intimating to the seller that he has rejected them.” 一段合理时间后，买方保留货品且未告知卖方其拒绝收货，则视为接受货品。
* S37(5) SOGO “The questions that are material in determining for the purposes of subsection (4) whether a reasonable time has elapsed include whether the buyer has had a reasonable opportunity of examining the goods …. “ (4)中的合理时间涉及是否满足(2)中的检验货品机会

## Neglect or Refusal to Take Delivery 买方忽略或拒绝提货的相应责任

* S39 “When the seller is ready and willing to deliver the goods and requests the buyer to take delivery, and the buyer does not within a reasonable time after such request take delivery of the goods, he is liable to the seller for any loss occasioned by his neglect or refusal to take delivery, and also for a reasonable charge for the care and custody of the goods: Provided that nothing in this section shall affect the rights of the seller where the neglect or refusal of the buyer to take delivery amounts to a repudiation of the contract.” 买方在卖方准备好后一段合理时间内不提货，则应承担损失、保管费等合理费用。

## Right of Cure/Request for Repair

* No general right of cure but if the time of delivery has not yet expired, seller is entitled to make a fresh tender (*The Kanchenjunga*) 无一般规则，但如果交付时间未到，卖方可重新投标（？）
* *J&H Ritchie Ltd v Lloyd Ltd –machine returned to the farmer; 企业有义务告诉farmer机器出了什么问题，但是企业没有履行该义务；Q: asking for repair=acceptance?*
* The question of whether requesting for repair amounts to acceptance of the goods.
* The SGA has since been amended – a new section (s35(6)(a) SGA) which expressly provides that **request for repair will not amount to acceptance of the goods.** HK does not have the equivalent provision. 要求维修并不构成接受货物

# Sale of Goods—Remedies of Seller

## Real Remedies—Unpaid Seller 未获付款的卖方

* S40(1) “The seller of goods is deemed to be an unpaid seller within the meaning of this Ordinance —

(a) when the whole of the price has not been paid or tendered; 全部货价未获支付

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

* S41 “Subject to the provisions of this Ordinance and of any enactment in that behalf, notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods as such, has by implication of law— 即使产权可能已转移给买方，未获付款的卖方仍有以下权利

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

(b) in case of the insolvency of the buyer, a right of stopping the goods in transitu (transit) after he has parted with the possession of them; 如买方无力偿还，卖方享有买方不管有货品后的途中停运权；

(c) a right of re-sale as limited by this Ordinance. 另售权”

* S42 “Where the property in goods has not passed to the buyer, the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to and co-extensive with his rights of lien and stoppage in transitu where the property has passed to the buyer.” 产权未转移给买方时，未获付款的卖方有扣货不交付的权利，类似产权已转移时的留置权和途中停运权。

## Real Remedies—Unpaid Seller’s Lien 未获付款的卖方的留置权

* S43 “(1) Subject to the provisions of this Ordinance, the unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price in the following cases, namely—

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

(b) where the goods have been sold on credit, but the term of credit has expired; 信贷期限届满

(c) where the buyer becomes insolvent.

(2) The seller may exercise his right of lien (right to retain) notwithstanding that he is in possession of the goods as agent or bailee for the buyer.” 卖方即使以买方代理人或受托人身份管有货品，仍可行使留置权。

* S2(3) “A person is deemed to be insolvent无力偿债 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.” 交易过程中无力偿还债务，无需被认定为破产，不需要通过法院裁定。
* S44 “Where an unpaid seller has made part delivery of the goods, he may exercise his right of lien or retention on the remainder, unless such part delivery has been made in such circumstances as to show an agreement to **waive the lien or right of retention**.” 已交付部分货品，可以对余下货品行使留置权，但如果某次交付之后已经发现买方insolvent, 仍然继续交付，此时卖方不能留置剩下的货物
* S45 “(1) The unpaid seller of goods loses his lien or right of retention thereon— 终止留置权

(a) when he delivers the goods to a carrier or other bailee for the purpose of transmission to the buyer, without reserving the right of disposal of the goods; 货品交承运人，未保留对货品的处置权；

(b) when the buyer or his agent lawfully obtains possession of the goods; 买方或其代理人合法取得占有

(c) by waiver thereof. 卖方放弃权利

(2) The unpaid seller of goods, having a lien or right of retention thereon, does not lose his lien or right of retention by reason only that he has obtained judgment for the price of the goods. 留置权不因获判价款而丧失”

## Real Remedies—Stoppage in Transit 途中停运权

* S46 “Subject to the provisions of this Ordinance, when the buyer of goods becomes insolvent, the unpaid seller who has parted with the possession of the goods has the right of stopping them in transitu, that is to say, he may resume possession of the goods as long as they are in course of transit, and may retain them until payment or tender of the price.” 买方无力偿债、不占有货品，则未获付款的卖方有途中停运权，可重新占有货品，直至获得价款。
* Duration of Transit 运送期 S47 (1) (6)
* 如何途中停运？S48 (1) “The unpaid seller may exercise his right of stopping in transitu either by taking actual possession of the goods or by giving notice of his claim to the carrier or other bailee in whose possession the goods are. Such notice may be given either to the person in actual possession of the goods or to his principal. In the latter case the notice, to be effectual, must be given at such time and in such circumstances that the principal, by the exercise of reasonable diligence, may communicate it to his servant or agent in time to prevent a delivery to the buyer.” 卖方可通过占有或向承运人发通知来行使停运权； time should be reasonable to notify the agent.
* S48 (2) “When notice of stoppage in transitu is given by the seller to the carrier or other bailee in possession of the goods, he (carrier) must re-deliver the goods to, or according to the directions of, the seller. The expenses of such re-delivery must be borne by the seller.” 管有货品承运人收到途中停运通知时，必须将货品重新交付卖方，或按指示重新交货；费用卖方负担。

## Real Remedies—Resale by Seller 卖方的另售权

* S50(1) “Subject to the provisions of this section, a contract of sale is not rescinded by the mere exercise by an unpaid seller of his right of lien or retention or stoppage in transitu.” take back the goods, contract is still there and effective. 售卖合同不因未获付款的卖方行使留置权/保留权/途中停运权而撤销；
* S50(3) “Where the goods are of a perishable nature, or where the unpaid seller gives notice to the buyer of his intention to re-sell, and the buyer does not within a reasonable time pay or tender the price, the unpaid seller may re-sell the goods and recover from the original buyer damages for any loss occasioned by his breach of contract.” 易毁消性质物品，或未获付款卖方通知买方其要另售，而买方未在合理时间内付款，则卖方可另售，并可向原买方请求违约损害赔偿。
* S50(4) “Where the seller expressly reserves a right of re-sale in case the buyer should make default, and on the buyer making default, re-sells the goods, the original contract of sale is thereby rescinded, but without prejudice to any claim the seller may have for damages.” 卖方明确保留另售权利，并在买方不履行责任时另售，原售卖合同即撤销，且不影响卖方损害赔偿请求权。
* S50(2) “Where an unpaid seller who has exercised his right of lien or retention or stoppage in transitu re-sells the goods, the buyer acquires a good title thereto as against the original buyer.” 未获付款卖方已行使留置权/保留权/途中停运权且另售，则新的买方取得good title（妥善所有权）。——an exception to Nemo du Rule, to protect 2nd buyer.

*e. g.* seller (physically has the goods, but title passed to 1st buyer) ——1st buyer——seller got back the goods——2nd buyer (resale: terminate the 1st contract)

## Personal Remedies (suing for price/damage)—Action for Price 卖方就货价可诉

* s51就货价而提出的诉讼 (1) “Where, under a contract of sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may maintain an action against him for the price of the goods.” 产权转移给买方，买方未履行付款义务，卖方有权起诉追讨货价。
* s51(2) “Where, under a contract of sale, the price is payable on a day certain irrespective of delivery, and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed, and the goods have not been appropriated to the contract.” 如根据合同约定，未交付货品时也应当支付价款，尽管产权未转移且货品未拨归该合同，仍可追讨。

## Personal Remedies—Damages 卖方可要求损害赔偿

* s52(1) “Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance. 可提出因货品不被接受而要求损害赔偿
* (2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer’s breach of contract…. 损害赔偿指因买方违约造成的损失估计”

# Sale of Goods—Remedies of Buyer

## Right to Reject

* S13(2) (Breach of Condition) “Whether a stipulation in a contract of sale is a condition, the breach of which may give rise to a right to treat the contract as repudiated, or a warranty, the breach of which may give rise to a claim for damages but not a right to reject the goods and treat the contract as repudiated, depends in each case on the construction of the contract. A stipulation may be a condition, though called a warranty in the contract.”违反条件，可产生废除合同的权利；违反保证条款，可产生损害赔偿请求权。
* S32 Delivery of wrong quantity
* S33 Delivery by instalments
* S38 Buyer not bound to return rejected goods: 买方有权拒绝接受货品的情况下拒绝接受货品，无需退回卖方，只需通知卖方他拒绝接受货品。

## Damages for Non-delivery vs Specific Performance

* S53(1) 卖方未交货，买方可提出因不获交付货品的损害赔偿诉讼；(2) 损害赔偿是因卖方违约造成的损失估计；
* S54 specific performance 强制履行：违约不交付特定货品specific goods或经确定货品ascertained goods，法院可判决强制履行并让被告人在履行损害赔偿后无权保留货品。

## Damages for Breach of Warranty

* S2 Definition of Warranty 违反保证条款可产生损害赔偿请求权，但无权拒收货物或废除合同
* S13(1) “Where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive the condition, or may elect to treat the breach of such condition as a breach of warranty, and not as a ground for treating the contract as repudiated.” 合同约定卖方须符合某项condition, 买方可以放弃该condition，或选择违反该condition只获得违反warranty的后果，而非废除合同。
* S55 Remedies for breach of warranty 违反保证条款的补救

# Sale of Goods—Retention of Title Clause 所有权保留条款

## Retention of Title Clause (ROT Clause)

* Where there is a retention of title clause, seller retains title until full payment is received.
* S21(1) “Where there is a contract for the sale of specific goods, or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled. In such case, notwithstanding the delivery of the goods to the buyer, or to a carrier or other bailee for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled.” 特定物或拨归合同的货物，卖方可保留货品的处置权，直至满足产权转移条件。
* S3(1) “A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price. There may be a contract of sale between one part owner and another.” retain title literally retain property, require a transfer of property or has the risk that the contract would out of this ordinance. 根据该条规定，contract of sale需要卖方转移或双方合意转移物权，并以金钱为对价；如果存在所有权保留条款，可能致使合同无法落入SOGO约束范围。
* S51(1) “Where, under a contract of sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may maintain an action against him for the price of the goods.” 该条中，卖方就货价提出诉讼的前提是产权已转移给买方，但根据所有权保留条款，产权未转移，因此无法通过该条主张货款

## Effect of ROT Clause

* *FG Wilson v John Holt & Co* – could not claim price independently of S51, 因为产权未转移。
* *PST Energy 7 Shipping LLC v OW Bunker Malta Ltd (the “Res Cogitans”)*
* ROT clause may cause an entire transaction to fall outside scope of s51; or is this a *sui generis* contract?
* cast doubt as to whether seller can sue for price outside scope of s51
* 判决结果：Since the **retention of title (ROT) clause** prevented the transfer of ownership before payment, and the contract allowed the shipowners to **use the fuel before paying**, the court found that **SOGA did not apply**. 总之是SOGA不适用

## ROT Clause—Characterisation 性质

* *Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd (the Romalpa case):* 双方订立铝箔所有权保留条款，且AIV的铝箔单独存放；后Romalpa破产，主张铝箔及产品属于浮动抵押物，应当用于偿还债务人， AIV则主张铝箔所有权仍归其所有，不应纳入破产财产分配。法院判决所有权保留条款有效。 …*the retention of title clause was effective. Aluminium Industrie Vaasen was still the owner of the aluminium foil and could trace the price due to them to the proceeds of the sale of the finished goods, ahead of Romalpa’s unsecured and secured creditors.*
* *Armour v Thyssen Edelstahlwerke AG—*an all liabilities clause: “Such a [retention of title] provision does in a sense give the seller security for the unpaid debts of the buyer. But it does so by way of a legitimate retention of title, not by virtue of any right over his own property conferred by the buyer.” 是一种担保。
* *Re Peachdart Ltd* – supply of leather to make handbags (claim back the leather. Recategorize the clause as a security interest. 法院重新定位，是所有权保留还是浮动抵押，最终认定为抵押权)
* *Borden (UK) Ltd v Scottish Timber Products Ltd* – sale of resin in manufacturing process (glue has been used during the process; good已经被consume, lose identity, cannot longer relied on that ROT clause. 货物已被消耗的案件中，不再适用ROT条款 )
* *Hendy Lennox (Industrial Engines) Ltd v Grahame Puttick Ltd* – sale of engines (尽管已经cooperate with buyers items, could still claim back seller’s good)

# Agency

## Concept of Agency

* Agency—a relationship that arises when a principal authorises an agent to act on his behalf in regard to a third party, and the agent agrees to do so. **Agency 是一种法律关系，**指一方（Principal 本人）授权代理人代表其与第三方打交道，并且代理人同意这样做。

## Theories Underlying Agency Law 代理的理论基础

* Consent theory—conferral of authority 权力来自于consent的授予
* Is it consensual in all cases? 任何情况下都是双方一致同意吗？
* Apparent authority? 表见代理的情况如何考虑
* Operation of law? 法律是否直接设定代理关系？

## Excluded Agents: 被排除在代理一般规则之外的代理人

* Brokers 经纪人，可能为多个客户撮合交易，不代表特定的principal
* Distributors 分销商，可能同时是代理人或委托人（principal）
* Travel Agents 旅行社
* Real Estate Agents 地产代理

## Creation of the Agency 代理关系的成立

* By express or implied agreement 协议，不一定通过合同，不需要对价/特定形式，只要合意达成一致。
* Consensual but need not be contractual (does not require consideration)
* No particular formality except those created under the Power of Attorney Ordinance
* By estoppel (under the doctrine of apparent/ostensible authority) 表见代理，Principal作出表示导致TP合理相信agent有代理权，Principal不得否认。
* By ratification (of unauthorised acts) by the principal. 经Principal事后追认Agent的行为
* By operation of law 法定代理

## Authority of Agent 代理权

* Actual Authority 有权代理
* Express authority 明确授权
* Implied authority 默示授权

1. Incidental authority 附带权限（？）
2. Usual authority 行业惯常权限（该行业中普遍的代理人具有相同的权限和地位）
3. Customary authority 依惯例（custom in the trade, industry, business; 不考，需要common sense）
4. Other situations where the facts of the case require an implication of authority 其他隐含授权

* Apparent (or Ostensible) Authority 表见代理（protecting TP by estoppel）
* *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480:

“*An "apparent" or "ostensible" authority ... is a legal relationship between the principal and the contractor (TP) created by a* ***(1) representation****, made by the principal to the contractor* ***((2) reliance)****, intended to be and in fact acted upon by the contractor, that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the "apparent" authority, so as to render the principal liable to perform any obligations imposed upon him by such contract* ***((3) TP suffers the detriment)****... The representation, when acted upon by the contractor by entering into a contract with the agent, operates as an estoppel, preventing the principal from asserting that he is not bound by the contract.*”

该案确立表见代理的基本三要素：1. Representation（由principal做出）；2. Reliance（TP信赖该表示）；3. Detriment（TP因此蒙受损失）。

* *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd*: 未经正式任命的董事被公司默许行使董事职能；其代表公司在未经授权的情况下聘请建筑师开发公司土地；company wanted to get out of the contract, 主张经理属于无权代理；Court: the company was bound.
* Apparent authority often coincides with actual authority (apparent authority could be wider). 表见代理的权力范围通常与有权代理权限重合，表见代理有时甚至适用越权代理权限。
* Relationship Between Actual and Apparent Authority 有权代理vs表见代理
* *Hely-Hutchison v Brayhead Ltd* [1968]: P是投资人，向D公司董事长控制的公司提供资金；D公司董事长未经授权，以D公司名义向TP提供担保；D公司拒绝承担责任，称董事长未经实际授权。
* Held: he did have authority, but it was actual authority because (like a “course of dealing” in contract law) the fact that the board had let Mr. Richards continue to act had in fact created actual authority. 虽然未经正式授权，但在实践中已经被默许长期以类似董事的身份行事，因此他有**隐含实际授权**（implied actual authority）来代表公司行事。
* *It is* ***implied*** *when it is inferred from the conduct of the parties and the circumstances of the case, such as when the board of directors appoint one of their number to be managing director. They thereby* ***impliedly authorise him to do all such things as fall within the usual scope of that office. Actual authority, express or implied, is binding as between the company and the agent, and also as between the company and others,*** *whether they are within the company or outside it.* 隐含实际授权，持续性行为+公司默许

## Apparent Authority –Representation by Principal: 表见代理中的要素*(1) representation*

* Types:
* Statement (oral/written) 口头、书面陈述
* Conduct 行为
* Passive allowance of an agent to assume position 被动（沉默）允许agent采取行动
* Representation by someone with actual authority (i.e. agent cannot clothe himself with authority). 表见代理中的representation必须由具有actual authority的人作出，agent不能“自封权限”。
* *Armagas Ltd v Mundogas SA* [1986]: 代理人是principal的租船/运输经理，受贿，代表公司订立三年租船合同，实际上无权订立该合同；对方主张apparent authority.
* TP know that the agent had no general actual authority to enter into the transaction in question. TP明知代理人越权代理（所以才主张表见代理）；
* TP could not rely on the agent’s own representation of his authority to enter into this particular transaction. TP不能根据代理人的representation来进行交易；
* It has been emphasized that a representation by the agent himself that he has authority is not sufficient to establish apparent authority. 代理人自己的representation不足以构成表见代理。
* *First Energy v Hungarian Intl Bank* [1993]: P向D银行寻求贷款，P知道经理没有权限批准贷款（贷款须由总行审批）但经理仍向P发出批准贷款的信，且仅由经理签署，银行内部规定需要两位授权人员签署；后银行拒绝提供贷款。
* First Energy argued the manager had authority not to approve the loan, but to communicate decisions of headquarters. P主张虽然经理无权批准，但有权传递消息。
* Holding: D was bound by senior manager’s action, because senior manager has apparent authority, by virtue of the usual authority associated with his position to **communicate** such an offer on behalf of the bank. Here, agent has **apparent authority to communicate** decisions. 银行应当受约束，虽然经理无actual authority批准贷款，但他有表见授权“传达总部决定”；银行给予其“职位上的权威外观”，使TP合理相信他有权传达总行决定。
* Agent can’t enter contract but can have right to communicate approval (making representation of approval). 代理人不能签订合同，但有权沟通批准（作出批准的representation）
* 出于commercial convenience考虑
* *British Bank of the Middle East v Sun Life Assurance Co of Canada* [1983]: D保险公司签给P的还款承诺追不回钱，因为只有一位manager签字，D内部规定至少要两人签字；P曾经还写信问过D总经理，分行经理代为回复，确认manager有权签署。
* Court ruled that a branch manager of an insurance company had no usual authority to represent to the P that a junior employee had actual authority to execute undertakings to pay money to the bank. 分行经理无权代表公司作出授权声明，没有usual authority确认其他员工的职权，因此其给银行的回复无法构成representation来触发apparent authority.
* 这里不能像*First Energy* case rely 是因为在First Energy, **senior manager** had usual authority to sign and send letters on the bank’s behalf, 但本案中branch manager没有, because of the limited nature of the branch manager’s usual authority. 表见代理不是任何“代理人外观”都可成立，必须结合职位的权限范围和行业惯例。
* *Kelly and others v Fraser* [2012]: 员工跳槽后欲转移养老金，须经由信托人批准，员工福利部门的职员（agent）向P表示转移已获批准；实际上信托人不知情，也未授权agent批准或传达。
* Held: The trustees were bound by what the head did. The agent did not have authority of any kind to approve the fund transfer, also lacked actual authority to inform the TP that the fund transfer had been approved (when in fact it was not approved). But the agent did have **apparent authority** to **communicate** to the TP (D) that the relevant approvals had been granted. 尽管agent没有actual authority批准转移，也没有actual authority to communicate, 但基于其职位和公司给予其的运作地位，他具有沟通代理权外观（apparent authority to communicate）去“传达”获得的信息。因此，信托人应为代理人的行为负责。

## Apparent Authority—Reliance: 表见代理中的要素*(2) Reliance*

* No actual or constructive knowledge of no authority or authority being exceeded (may be deem by law that the TP should have the knowledge) TP不知且不应知代理人越权
* Constructive knowledge—whether put on notice (should make an inquiry) 若有suspicious situation, TP有注意义务（inquiry duty）
* *HK Chinese Bank v Onlink Investments Ltd* [2003]: Bank did not make any inquiry despite the suspicious circumstances. A loan was for the benefit of the attorney not for principle →very suspicious. 女儿向银行抵押母亲的房产贷款，贷款不是为了母亲的利益而是为了女儿自己，银行过程中未提出疑问或调查该授权是否合理；
* Held: TP will not be able to rely on the representation if he knew, or ought to have known, of the restriction on the agent’s authority. 银行明知或应知该代理行为存在问题，却未履行合理的调查义务，无法通过表见代理来主张抵押贷款合同对母亲有约束力。
* Need to show reliance is actually rational. Key point: if reliance is not justified, can’t hold principal liable for agent’s unauthorised act. The test in this case is binding on HK courts. 必须存在合理的依赖，如果不合理，则principal对未授权行为不负责。See *Thanakhorn Kasikorn v Akai Holdings Ltd* (2013)13 HKCFAR

## Effects of Apparent Authority 表见代理的法律效果

* Apparent authority can operate to create authority
* where there was none before; 创设本来没有的授权
* to enlarge an agent’s actual authority; 扩大实际授权
* to clothe an agent with authority where he usually would have actual authority but for the existence of a restriction unknown to third party; 为agent通常拥有但实际存在限制且TP不知的权力披上权利外观外衣
* to extend an agent authorities beyond termination of the agency relationship 延伸授权至代理关系终止

## Ratification 追认

* Doctrine of ratification: “*That an act done, for another, by a person, not assuming to act for himself, but for such other person, though without any precedent authority (pre-act) whatever, becomes the act of the principal, if subsequently ratified by him, is the known and well-established rule of law. In that case the principal is bound by the act, whether it be for his detriment or his advantage, and whether it be founded on a tort or on a contract, to the same effect as by, and with all the consequences which follow from, the same act done by his previous authority*”. See *Wilson v. Tumman* (1843) 委托人对代理人未经授权的行为进行事后追认，使其具有法律约束力。
* Core elements:

1. The agent must have purported to **act on behalf of the principal**. See *Keighley Maxsted v Durant* [1901]

* P委托代理人按特定价格购买小麦，代理人未能以约定价格成交，遂以个人名义与D以更高价格购买，但未告知P. P一开始追认，后因价格过高反悔。
* Held: No ratification in law of the contract. An undisclosed principal can’t ratify a contract. 未披露委托人的情况下，追认需以代理人事前实际授权为前提。[[8]](#footnote-8)P无实际授权，因此不能追认。

1. The act must be something that the principal could have authorized **(legal capacity**). See *Kelner v Baxter*

* 授权时公司作为principal还未成立，no legal capacity at the time of contract. So, a newly incorporated company cannot ratify a prior contract made by its promoters. 所以新成立的公司不能追认发起人订立的合同。

1. The principal must have full knowledge of the facts (material fact) at the time of ratification. 要求principal追认时完全了解重要事实。
2. Clear manifestation (find an act which indicates) that the principal ratifies (Notification is not required). 要有明确的追认行为，不一定要通知。

* Effect of ratification:
* Validates the act retrospectively. See *Bolton Partners v. Lambert* (1889) 追认使代理人事先未经授权的接受要约行为溯及既往有效。
* Ineffective where the retrospective effect would be unfairly prejudicial to TP. See *Smith v Henniker-Major & Co* [2003] 损害第三方利益时追认无效。

## By Operation of Law 法定代理

* Agency by necessity
* Impossible for agent to communicate with principal 无法与委托人取得联系
* Action necessary for the benefit of principal 行为必须为委托人利益所必需
* Agent acts *bona fide* in the interest of principal
* Action taken by agent is reasonable and prudent 代理人需善意且行为合理
* Principal has not given agent express instructions to the contrary 委托人未明确禁止此类代理行为

## Undisclosed Principal 隐名代理

* Definition: “For present purposes the law can be summarised shortly. (1) An undisclosed principal may sue and be sued on a contract made by an agent on his behalf, acting within the scope of his actual authority. (2) In entering into the contract, the agent must intend to act on the principal’s behalf. (3) The agent of an undisclosed principal may also sue and be sued on the contract. (4) Any defence which the third party may have against the agent is available against his principal. (5) The terms of the contract may, expressly or by implication, exclude the principal's right to sue, and his liability to be sued. The contract itself, or the circumstances surrounding the contract, may show that the agent is the true and only principal.”

See *Siu Yin Kwan v Eastern Insurance Co* [1994]: 代理人以自己名义购买保险，未披露背后的船东（委托人）。法院允许未披露委托人介入合同并索赔，因为**保险合同的性质**不强调被保险人身份，只看保险利益是否存在。

* （1）委托人可被诉的条件：代理人订立合同时有actual authority；代理人主观意图代表委托人行事；
* Agent must have intended to act for the principal—TP did not know dealing with another person
* Agent must have actual authority (1. apparent authority never work, because TP did not know the real Principal; 2. Ratification not applicable). See *Keighley Maxsted v Durant* 上面ratification买小麦案
* （2）代理人的合同地位：代理人仍可作为合同一方起诉或被诉；TP can **only** sue either the principal or the agent (choose one). See *Priestly v Fernie* (1865)
* Agent签了提单，货物未送达，P诉agent，但agent在判决前破产了；If you choose one of them, then the election makes the other one off the hook.
* （3）TP对代理人的抗辩均可对抗委托人；TP cannot be deprived of the agent’s liability should he desire it (i.e. TP may raise defences he had against the agent prior to knowing about the principal).
* 例外规则：subject to exception—See *Cooke & Sons v Eshelby* (1887)
* 代理人为隐名principal售卖棉花给TP，TP没付钱；后来隐名principal破产，且agent也欠TP钱，TP就想将agent欠自己的钱和自己欠principal的钱set-off抵销。TP知晓代理人**有时以自己名义交易，有时代理他人交易**，但本次交易中未询问代理人身份。
* Held: No right to set-off. TP ought in common honestly to have asked in what character they sold the goods in question, if they bought the goods with a view to cover their own debt. TP自己应该要先问清楚，否则未披露委托人不受第三方对代理人债权的抵销权约束。
* Key point: undisclosed principal would not be bound by the TP’s rights of set-off against the agent unless the principal had misled the TP by allowing the agent to appear as the principal. 未披露的委托人将不受受托人对代理人的抵销权的约束，除非委托人通过允许代理人作为委托人出现而误导受托人。
* （4）合同条款的排除效力：若合同明示/默示排除他人介入，则委托人无权主张权利。Contract not intended to be confined to original parties 只有当合同未明确表示仅限于订立合同双方时才允许隐名代理。
* Assumption in ordinary commercial contracts—willingness to contract with a duly authorized agent. 一般商业合同默认接受代理人，只要未明确排除他人介入，通常不在意背后是否有principal。
* Except where identity of counterparty is important. 除非身份至关重要的合同，当合同明确要求与特定对象交易（身份是合同核心要素）时，未披露委托人不得介入。
* *Said v Butt* [1920]: 原告与被告剧院存在私人恩怨，托代理人购买门票，代理人未披露principal, 演出当日发现是原告，拒绝其进入。Held: 剧院如果知道，会拒绝；原告和代理人也知道该情况；If TP thinks the identity of counterparty is important, they should have provided that in the contract. Assumption that the identity of the party is not important can be rebutted. （且剧院不存在common law duty to supply public，可以自己决定卖不卖票）
* Key point: If the identity of the counterparty to the contract is a core element of the contract formation (such as personal reputation, specific relationship), and the TP explicitly refuses to trade with the principal, then the principal has no right to intervene in the contract without disclosure. 他人无权干预

## Effects of Agency

* Between Principal and TP
* Unidentified/unnamed principal: In the case of an unnamed principal, the determination of the agency relationship is centered on the **subjective intentions** of both the agent and the principal, but it needs to be verified in combination with objective evidence. The subjective understanding of a TP is not decisive. 未具名委托人（TP知道有委托人，但具体不知道是谁）情形下，代理关系的认定以代理人与委托人的主观意图为核心，但需结合客观证据验证。第三方的主观理解不具决定性。See *Lai Wo Heung v Cheung Kong Fur Fty Co Ltd* [2004]
* Disclosed/Unidentified principal vs undisclosed principal
* For the former, contract between principal and third party—agent drops out. TP知道代理人代表他人订立合同，但可能不知道委托人具体是谁；合同直接约束委托人与TP。
* For the latter, principal needs to intervene; agent personally liable. 未披露委托人/隐名代理，TP以为是在和代理人交易，委托人需要主动介入才能主张合同权利，否则合同仅约束代理人和TP。
* Between Principal and Agent
* Gratuitous agency 无偿代理
* Contractual agency 有偿代理
* Agent’s entitlement to remuneration and indemnification (cost) 代理人通过合同获得报酬
* Right of lien over goods held for principal if not paid 代理对未支付报酬的货物有留置权
* In either case, agent owes certain duties to principal 代理人对委托人也有义务
* Duties of Agent to Principal
* Duty of perform his undertakings and obey instructions under contract
* Duty of care and skill (*Chaudhry v Prabhakar* [1989]: P找朋友D帮忙买二手车，要没有出过事故的。D knows something about cars, though not a qualified mechanic. D found a car offered by sale by a car sprayer 推荐P买该车，后来发现是出过事故的开不了。Held: P win. Gratuitous agency; no contract here. But D still owed DOC to P. 尽管是无偿合同，D仍然负有duty of care. )
* Fiduciary duties (*Bristol and West Building Society v Mothew* [1998]: A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of the fiduciary. This core liability has several facets. 代理人须为委托人的利益尽到忠诚义务)

1. Must act in good faith 诚信行事
2. Must not, without informed consent of the principal:

* Place himself in a position where his duty and his interest may conflict 不得让自身利益与义务冲突 (*Armstrong v Jackson* [1917]: 代理人隐瞒身份将自己的股票出售给委托人；Held: The contract becomes voidable. No man can in this Court, acting as an agent, be allowed to put himself into a position in which his interest and his duty will be in conflict. The prohibition of the law (above) is absolute. It will not allow an agent to place himself in a situation which, under ordinary circumstances, would tempt a man to do that which is not the best for his principal. 代理人不得置身于利益与义务相冲突的地位，即使善意行事)
* Make secret profits 禁止秘密获利 (*Boardman v Phipps* [1967]: 代理人利用其身份和获取的信息进行投资获利，但也给委托人带来利益；其他受益人起诉，要求代理人返还个人获利，理由是获利源于其代理人身份；Held: the profit was made by reason of his fiduciary position as agent and opportunity and the knowledge which came to him as agent. Need to **obtain consent from the principal** even if the agent is acting in good faith.)

1. Remedies for breach (e. g. setting aside of contracts; account for profits)

* Between Agent and TP
* In general, agent not liable under the contract between principal and TP where:
* Agent acts within authority
* Unauthorized act has been ratified
* Principal being bound under doctrine of apparent authority
* However, depending on the circumstances, an agent may be personally liable. See *The Swan* [1968]
* Fact: 代理人是D，船主兼JD公司董事，以公司名义委托P公司修船，合同签名处仅写JD RODGER, Director. 后JD公司破产，P要求D承担责任；签名未明确排除代理人个人责任！
* Held: D is personally liable. If an agent wants to avoid personal liability, they must clearly express *only as an agent* (such as *on behalf of*) through a signature or terms; otherwise, they shall bear implied personal liability. 签名写清楚仅作为代理，否则默示承担个人责任。*Gadd v Houghton*
* Agent liable for breach of warranty of authority where the agent was not authorized. 代理人向TP明示或默示担保自己拥有actual authority，有权代表委托人缔约；若实际无权，则需赔偿TP因信赖该担保产生的损失。
* *Collen v Wright* (1857): 代理人D称代表土地所有人与P签订农场租赁合同，实际未被授权出租农村（误以为自己有权）；Held: agent was liable to P on a warranty of authority. If an agent makes a contract beyond the scope of his authority he is himself liable for damage so caused, on a breach of warranty of authority. 代理人构成权限担保违约，需对TP因无权代理产生的损失负责。
* *Yonge v Toynbee* [1910]: D在诉讼过程中突发精神疾病，代理关系依法自动终止，但律师未及时察觉，仍以D的名字进行诉讼，P发现后要求律师赔偿诉讼费用（因为律师已经无权代理）；Held: P win. Solicitor is liable upon an implied warranty that they had an authority which they had not. Once the principal becomes insane, the agency is terminated, even the agent (solicitor) didn't know that. And the TP can sue the agent for damages for breach of warranty even though the contract has been terminated. 且代理人的担保责任不依赖其主观善意或过失（whether fraudulent, negligent or innocent），仅需实际无权代理+TP合理信赖。
* Undisclosed principal? —just sue agent, already a contract between agent and TP.

## Termination of Agency 代理关系的终止

* Agent’s authority may be terminated by:
* Mutual agreement (with consent from both sides, 但通常来讲principal有单方revoke的权利）
* Revocation by principal (assumed) 委托人单方撤销代理
* Expiry of fixed period of appointment 代理期限届满
* Destruction of subject matter of agency 代理标的物灭失
* **Frustration** of agency rendering its performance illegal, impossible, or radically different from what the parties originally contemplated 合同落空
* Death, insanity or (for an individual) bankruptcy (individual), or (for a company, insolvency) winding-up or dissolution, of principal or agent 一方丧失法律能力
* Effects on liability （详见effect of agency）
* Liability of principal to TP—actual authority vs apparent authority
* Liability of agent to TP—see *Yonge v Toynbee*
* Termination of agent’s authority is prospective (not retroactive)—accrued rights/liabilities not affected. 代理关系终止仅对未来生效，不溯及既往，已获权利不受影响。
* Outside agency law—estoppel, principal estopped from denying the existence of an agency relationship.
* *Spiro v Lintern* [1973]: 妻子（代理人）擅自出售丈夫名下房产，丈夫知情但未反对；此处丈夫被禁止否认代理关系（estopped from denying agency）。Even though no apparent authority, the buyer is able to rely on the general rule of estoppel. \*Detrimental reliance is necessary for this type of estoppel.
* Estoppel依赖的是委托人事后行为，如沉默、默许，apparent authority依赖的是委托人事前表示。

# Credit and Security

## Meaning of “Credit”

* Can mean a person’s financial standing which affects his/her/its ability to borrow money.
* Legal meaning—financial accommodation of some kind i.e. provision of a benefit for which payment is allowed to be made at a later date
* Loans 贷款
* Sale credit 销售赊账
* Finance leasing 融资租赁
* Parties to a loan—lender (creditor) 债权人 vs borrower (debtor) 债务人
* Types of Loans
* Fixed sum loan (cannot reborrow unless a new agreement) vs Revolving loan (可分多次借款；信用卡)
* Fixed term loan (fixed period) 定期贷款vs “On-demand” loan 即时偿还贷款（活期）
* Secured (backed by security) loan 有担保贷款vs Unsecured loan 无担保贷款
* Loans and Security 贷款与担保
* Loan agreement/debentures/loan notes/bonds（债券）
* Form of security—financial collateral that the creditor could have recourse to: 担保的分类
* Real security—creditor has proprietary claim 实担保，债权人对借款人的资产优先受偿
* Personal of quasi security (technically not regarded as “security” but a contractual right, and lender is still an **unsecured** creditor). 形式性担保，仅是合同权利，不对特定财产有追索权
* Retention of title clause? 所有权保留条款，不等同于担保

## Real Security (Pledges, Liens, Mortgages, Charges)

* Real security 物保
* Creation: type and nature of security interests created 担保权的设立
* Perfection: making known to the outside world of the existence of the security interests 担保权的确立
* Enforcement: method of enforcing security (if the borrower pay in time, the security interest would be released.) 担保的执行

## Pledges 质押

* General
* Bailment (pledgee) for the purpose of security
* A form of possessory security占有的担保 (only be created over choses in possession适用于有形动产)
* Created by contract—subject to the pledgor’s right of redemption and no right of foreclosure 出质人拥有赎回权，但赎回权不会丧失，否则变成流质条款，质权人只能优先受偿。
* Types of property that can be pledged

1. Chose in possession?[[9]](#footnote-9) Yes.
2. Intangible property? See *Your Response Ltd v Datateam Business Media Ltd* [2015]: P为数据管理公司，D为出版公司，拥有数据内容；双方发生纠纷后，D拒绝交还数据库信息（电子形式），主张留置权/质押权。Held: CA refused to allow a common law possessory lien to be taken over an electronic database on the ground that it is not possible to take possession (i.e., physical control) of intangible property. 无形财产不适用占有型担保；质押需要交付（delivery）作为担保，留置权依赖于占有的保留（retention）——两者都不适用于无形资产。
3. Chose in action? See *Keller v Ying Wah Tak Holdings Ltd* [1997]: 当事人试图以银行账户作为担保物,设立质权pledge，以便出质人违约时质权人取回银行账户中的资金。Held: A pledge over a chose in action is ruled out by the fact that the concept of possession is inapplicable to mere rights. A bank account was a chose in action[[10]](#footnote-10), meaning a thing recoverable by action, as contrasted with a chose in possession, which was a thing of which a person could have, not only ownership, but also actual physical possession. 质押依赖于对质物的实际占有，银行账户属于chose in action, 是债权请求权，而非有形动产。
4. Documentary intangible? See *The Odessa* [1916]: 将提单质押给银行；bill of lading (title document) is a physical document, can creat a pledge over it.

* Classic example of operation of pledge—pawnbroking (governed by the Pawnbroking Ordinance)典当
* Perfection—by delivery of possession of pledged goods 通过交付质物使质押生效+对抗第三人
* Enforcement—sale of pledged property; no right of foreclosure—need to account to pledgor for surplus; 就合法出售质押财产所得价款优先受偿，不能获得质物所有权，且有义务将剩余款项返还出质人

## Liens 留置

* A right of a person to retain property which is in his possession but belongs to another, until certain demands of the person in possession are satisfied. 对自己合法占有的他人财产，在对方清偿债务前，有权保留该财产的占有权。
* Offers no rights in the property itself; no right to sell 无权处分
* Lien is lost once possession is returned to the owner 占有一旦失去，即失去留置权
* Types of lien
* Common law or contractual lien (contract is silent but could still apply common law) 普通法留置权
* Statutory lien (e. g. unpaid seller’s lien under SOGO) 法定留置权
* Equitable lien 衡平法留置权
* Maritime lien 海事留置权
* Lien can be specific or general 可以是该合同项下的标的，也可以是其他合同项下的标的
* Perfection—by possession (obtained by creditor under a contract for purposes other than the creation of security interest) –once lien created, it has been perfected already. 占有生效，并且是为履行合同而占有，不是为设立担保。
* Enforcement
* Right of retention only 仅保留占有
* No power of sale unless otherwise agreed in contract or provided for in statute. 无权出售

## Shortcomings of Possessory Security 占有式担保的缺点

* Cannot be created over intangible assets 无法在无形资产上设立
* The owner needs to part with possession of the relevant assets 需要转移财产占有权
* Cannot use the assets in their ordinary course of business 债务人无法继续在正常业务经营中使用
* Such locking-up of assets is economically inefficient 导致资产锁死，限制流动性

## Mortgages 按揭（所有权转移）[[11]](#footnote-11)

* A transfer of ownership/title to a creditor by way of security subject to equity of redemption. 资产所有权/物权转移给债权人作为担保，债务清偿后债务人有权赎回。
* S62(4) SOGO: “The provisions of this Ordinance relating to contracts of sale do not apply to any transaction in the form of a contract of sale which is intended to operate by way of mortgage, pledge, charge, or other security.” –contract relating to mortgage would not be subject to SOGO, nemo det exception does not apply. 如果形式上为买卖合同，实际上是担保合同，则不受SOGO管辖。
* Creation
* By contract 通过合同设立
* A type of security which involves transfer of ownership/title of the relevant property/asset to creditor subject to the equity of redemption 抵押是出于赎回目的，将资产的产权转让给债权人
* Until redemption, mortgagor (borrower/debtor) is entitled to possession of property 赎回之前，抵押人仍可保留占有权
* Perfection—registration under Companies Ordinance 登记确立生效
* Enforcemant
* Taking possession 抵押权人可以取回抵押财产的实际占有
* Sale (including the right to appoint a receiver) 出售抵押财产，包括委任接管人的权利
* Right of foreclosure (court order required to foreclose the property) 止赎权，需由法院发出命令，使抵押物完全归抵押权人所有，赎回权终结。

## Charges 抵押

* Right of creditor/chargee, created either by trust or by contract, to have a designated asset of the debtor/chargor appropriated to the discharge of the indebtedness of the debtor/chargor. 债权人在债务人指定资产上设定权利，要求该资产用于清偿债务。
* Confers a right to the realization of the charged assets under agreement or by court order. 可通过协议或法院命令实现资产上的抵押权
* Creation
* By contract
* An encumbrance on asset(s) which does not involve transfer of title or ownership 不转移所有权，仅创设权利负担（encumbrance）
* An equitable interest 衡平法上的权利
* Charge or equitable mortgage
* *Swiss Bank v Lloyds Bank* [1982]: P银行向TP第三方贷款购买证券，英国央行D要求贷款偿还需通过证券收益，于是TP将受益存入D银行账号。P和D均主张对TP存入的证券收益拥有担保权益（charge）。
* Key point: 不构成mortgage或charge. For there to be an equitable charge by equitable mortgage, there must be either expressed or inferred (objective) intention of the parties. P和TP之间未明示设立担保，TP没有义务一定用证券收益偿还贷款，Swiss Bank no specifically enforceable right.

## Fixed Charges 固定抵押

* Specific charge over identified and definite property or property capable of being ascertained or defined 涉及在设立担保时就已特定、已确定或可明确识别的资产。
* Borrower cannot dispose of charged assets without lender’s consent 借款人不得擅自处置该资产，除非获得贷款人同意
* 可以是future property, 但是必须sufficiently described as to be identifiable when acquired by the chargor.

## Characteristics of Floating Charges

* *Re Yorkshire Woolcombers Association Ltd*[1903]
* A charge on a class of assets (present and future) 针对一类资产设立担保
* The class of assets charged would change from time to time in the ordinary course of business of the company 资产类别会在日常业务中不断变化
* Until crystallization, the company may carry on its business in the ordinary way as far as it concerns the particular class of assets 结晶前，企业可在正常经营下自由使用该类资产。

## Floating Charge—Crystallization 浮动抵押中的“结晶”

* The process of the floating charge being converted into a fixed charge “结晶”是浮动抵押转化为固定抵押的过程，即对具体资产的担保权；一旦结晶，公司就不能自由处置被抵押的资产。
* Common law events （无需合同约定也会发生的情形）
* Cessation of business 停止营业，公司不再经营
* Winding-up 公司清盘，资产需明确分配
* Appointment of a receiver 委任接管人，接管人接管公司时必须知道哪些资产负有担保
* By agreement 合同约定情形
* Intervention by debenture holder, e. g. by notice 债权人干预（如通知）触发结晶
* Automatic crystallization (upon occurrence of specified events) 自动结晶条款（约定特定事件发生）
* Common event that triggers crystallization—债务人违约、资产被依法处置等
* Floating Charge—Effects of Crystallisation 结晶的作用
* As between charger and charge: charge has all the rights of a holder of fixed charge 抵押权人获得与固定抵押相同的权利
* As between chargee and TP/other creditors: question of priorities (next lecture) 浮动抵押权人与其他担保权人存在受偿优先次序问题

## Charges—perfection and Enforcement 抵押权的确立和执行

* Perfection—registration under CO
* Enforcement
* For floating charges only—a process of crystallization 浮动抵押需要“结晶”
* Sale 出售
* No right of foreclosure 无止赎权（抵押权人不能直接获得财产）

## Fixed Charge vs Floating Charge

## Charge over Book Debts 就应收账款设立抵押

* Book debts=receivables
* Fixed charge vs floating charge
* Control over：判断某个book debts charge是fixed还是floating，主要取决于借款人是否有控制权
* The ability to alienate uncollected book debts and to collect book debts 是否可以自由转让未收账款；
* The ability to use the proceeds of collected book debts 是否可以自由使用收回来的钱。
* ~~Previously (since 1970s), courts held that it was possible to create a fixed charge over uncollected book debts and a floating charge over the proceeds of collected book debts 曾经可以对未收回的应收账款设立fixed charge, 对收回来的钱只能floating charge。~~
* *Agnew v CIR* (or *Re Brumark Investments Ltd* case) [2001]: Brumark公司向银行贷款，并将book debts作为担保；合同载明“未收账款设为fixed charge，一旦收回账款设为floating charge”；实际上，公司可以自由收取应收账款并进行日常业务运作；后来公司破产，破产管理程序中就book debts产生优先次序争议。
* Issue: 当公司用应收账款作为担保时，如果它可以自由收取这些账款并使用所得款项，该担保是 fixed charge 还是 floating charge？
* Held: floating charge. Two-stage process:

1. Construe the instruments creating the charge to ascertain the nature of rights and obligations intended to be granted by the parties 解释合同文本，探究双方当事人意图；
2. Categorise the charge as a matter of law 根据对fixed/floating charge的定义判断性质，不看表明标签，而看实际效果；如果当事人安排的权利义务违背了fixed charge的本质，则即使合同中载明为fixed charge，法律上也只能是floating charge。

* Key point: Where a company (chargor) uses its book debts as security to borrow money, if the company (chargor) is free to collect the debts for its own account, that is inconsistent with the nature of fixed charge, and accordingly the charge is floating charge (even if the parties’ intended to the charge to be fixed charge). 如公司（抵押人）以其帐面债务作担保借款，如该公司可自行收取债务，则不符合固定抵押的性质，因此该抵押属浮动抵押（即使双方有意将抵押定为固定抵押）。
* *Re Spectrum Plus* [2005]: 公司向银行借款，订立debenture债权契约，约定公司不得在book debts上设定其他担保、转让或转卖，除非获得银行同意（看起来是fixed charge）；且公司被要求将收回的应收账款打入银行开设的账号，实际上公司可以自由使用账户中的款项。
* Key point: If the borrower is allowed to use the proceeds of the debts without restriction, a charge over a borrower’s debts CANNOT be a fixed charge.
* Held: Fixed charge is only possible where both the uncollected book debts and their proceeds after collection are under control of the chargee (i.e. the bank).
* 判断是否fixed charge: 1. 对资产有真正的control; 2. 资产已明确专门用于偿还借款；3. 借款人不能自由使用这些资产或其收益。

## Security over Book Debts 应收账款设立担保

* Bank’s commercial objectives: 银行的商业目的
* Enable debtor company to use proceeds sitting in its bank account in its ordinary course of business until occurrence of specified events (e. g. default in repayment of loan) 允许企业（债务人）在正常经营中使用账户资金，确保企业能够维持日常运营（有盈利才能还钱）
* Minimize administrative costs or procedures 最小化管理成本与程序（浮动担保管理成本较低）
* Obtain a security interest of higher priority (e. g. fixed charge) 获得更高优先级的担保权益（fixed charge在清偿顺序上优先于浮动担保）
* 问题：固定担保虽然优先级较高，但会限制企业资金流动性，影响经营；浮动担保优先级低，但灵活性高。
* Possible ways to overcome problems associated with floating charge
* “two accounts” arrangement—blocked account + regular account （blocked account存放应收账款收益，银行设定固定担保，企业不可动用；regular account内企业可自由支配资金）[[12]](#footnote-12)

## Perfection of Company Charge 公司抵押的确立

* Registration (TP should check whether the existing property has been charged)
* Registrable charges—positive listing approach 正面清单 （334, 哪些是可以登记抵押的）
* Filing/registration requirements 登记担保要求
* Statement of particulars of the charge + certified copy of the charge instrument 担保详情陈述+担保文书核证副本（333）
* Time limit: one month; time between creation and registration: “invisibility period” 规定公司登记担保的义务为1个月内（335.1）
* Certificate of registration: priority of a security interest determined by date of creation, not date of registration so long as registration is done within time. 担保权益的优先权取决于设立日期，而不是登记日期，只要登记是在规定时间内完成即可。（335）
* Keeping of register of charges and copies of charges by company
* 334.1.b/d/j, required learning
* b. a charge created or evidenced by an instrument that, if executed by a natural person, would require registration as a bill of sale; 法律文件之上设立担保
* d. a charge on book debts of the company; 应收账款担保
* j. a floating charge on the company’s undertaking or property. 浮动抵押
* Consequences of non-registration （337）未登记的后果
* Criminal offence (for the company and its responsible persons) 刑事处罚
* Charge void against the liquidator and other creditors 未登记担保对清算人和其他债权人无效（但仍对公司有效）
* Loan still valid but lender has option to terminate loan 贷款合同仍有效，但贷款人有权要求加速到期

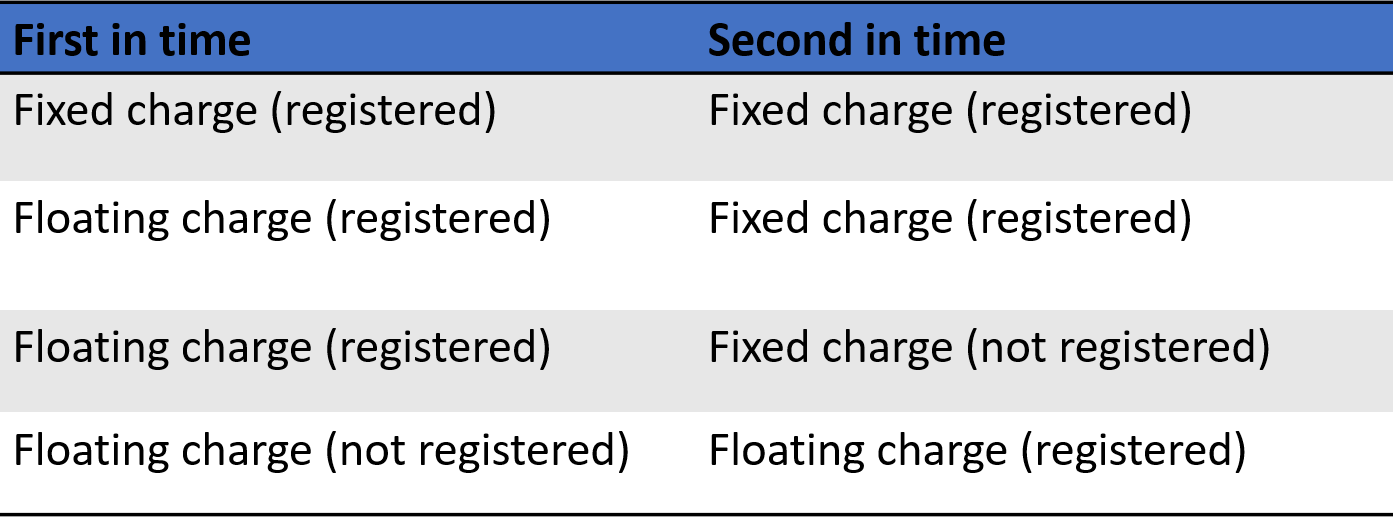
## Debenture—Main Provisions 债券担保

* Covenant to pay—the loan amount being secured 债券是发行人（公司）承诺按期偿还贷款的还款承诺
* Charging clause 担保条款
* Type of charge, e. g. fixed charge over certain assets + floating charge over rest of assets
* Order of the charge, e. g. first, second 明确担保顺位
* Restrictive covenants 限制性条款—保护债权人利益，限制债务人可能损害担保价值的行为
* Negative pledge clause—not to further encumber the security 消极担保条款，禁止在公司未取得债权人同意的情况下，为其他债务设立同等或更高优先级的担保。
* Non-alienation clause—not to sell or dispose of the assets subject to the security 禁止处置条款，禁止公司出售或转移已担保的财产。
* Events of default
* Automatic crystallization clause
* Appointment of receiver to deal with charged assets
* Receiver’s power
* Enforcement of debenture

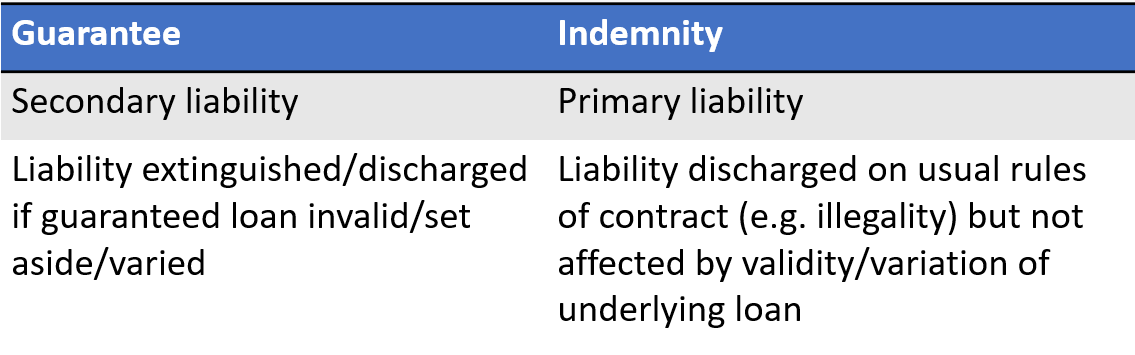
## Priorities of Security Interest 担保权益的优先顺序

* Priorities of Security Interests—general/default rules
* Legal interest prevail over equitable interests unless with notice of prior equitable interests 法定权益优先于衡平法权益[[13]](#footnote-13)
* As between competing equitable interest, the first in time prevails (subject to exception) 多个衡平法权益冲突时，设立时间在先者优先
* As between successive assignees of debts, the first assignee (without notice of earlier assignment) to give notice to debtor has priority over earlier assignee. 同一债务被多次转让，最先向债务人发出有效通知的受让人优先，即使其受让时间在后。(*Dearle v Hall*)

## Priorities between Fixed and Floating Charges 固定抵押与浮动抵押的优先顺序

* Fixed charge prevails over prior floating charge 固定抵押优先于浮动抵押，即使浮动抵押比固定抵押早设立 (*Wheatley v Silkstone and Haigh Moor Coal Co* (1885))
* Fixed charge postponed to earlier floating charge if: 固定抵押顺序可能会落后于先设立的浮动抵押
* Created with (actual or constructive) notice of negative pledge clause (not to further encumber the security) in floating charge; or 浮动抵押协议中已有规定公司不得对相同资产再设抵押；
* Created after crystallization of earlier floating charge. 固定抵押设立在浮动抵押“结晶”之后。
* First floating charge prevails over second floating charge (*Re Benjamin Cope & Sons Ltd* [1914]) 先设立的浮动抵押优先于后设立的浮动抵押
* Combination of common law rules an CO
* Broader Picture in Context of Personal Property Law
* *Nemo dat* rule 无权处分规则
* Retention of title 所有权保留
* Purchaser for value without notice 善意取得无瑕疵财产
* Set-off (outside scope of this course) 抵销（不考）

## Guarantee & Indemnity 保证与赔偿

* Guarantee
* Three-way relationship—guarantor promises to be responsible to the creditor for the due performance by the **principal debtor** of his obligations if the principal debtor fails to perform those obligations. 保证-三方关系：保证人向债权人承诺，若主债务人违约，其将履行义务。
* Secondary liability 次级责任
* Depends on default by principal debtor 取决于主债务人是否违约
* Guarantee invalidated if underlying loan invalid or set aside or varied without consent of guarantor 主合同无效，保证无效；主债务被取消或更改，但未经保证人同意，保证无效。
* No specific formality (usually in writing by way of deed) 无特定形式要求
* Indemnity 赔偿
* A contract by one party to keep the other harmless against loss. *Yeoman Credit v Latter* [1961] Indemnity是一种合同安排，由一方承担责任，以弥补另一方的损失。
* Primary liability in indemnity, totally independent, and regardless, of any third-party default. Indemnity中的赔偿义务是直接的、独立的，不依赖任何第三方违约。
* No specific formality (usually in writing by way of deed) 无特定形式要求
* E. g. A对B承诺：“只要你因C受到损失，我来赔。” 则不论C有没有违约，只要B损失了，A就必须赔偿

## Guarantee vs Indemnity

* A matter of construction/characterization: *Marubeni Hong Kong and South China Ltd v Mongolian Government* [2005] 如何定性
* “Unconditionally pledges to pay to you upon your simple demand all amounts payable under the contract if not paid when the same become due … further pledges the full and timely performance and observance by the buyer of all the terms and conditions of the agreement.” 改语言表明承诺人承担的义务不取决于原买方是否违约；“无条件地承诺支付”说明是独立的、主债务式的义务；因此不是guarantee, 而是indemnity.

1. Sale is a type of contract where the seller transfers ownership to the buyer. An agreement to sell is a contractual arrangement wherein the transfer of ownership will occur at a future date or upon fulfilling specific conditions. 买卖（Sale）是指货物的所有权**立即**从卖方转移给买方的合同，买方同时承担货物的风险和责任。而待售协议（Agreement to Sell）则是一种**未来买卖合同**，货物的所有权将在**未来某个时间点或满足特定条件后**才转移，风险在转移前仍由卖方承担。因此，买卖是已完成的交易，而待售协议则是一种承诺，只有在条件满足后才会完成所有权转移。 [↑](#footnote-ref-1)
2. 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. 货品处于买方根据合约必须收货的状态时，即处于*可交付状态* (deliverable state)。 [↑](#footnote-ref-2)
3. **delivery** means voluntary transfer of possession from one person to another (s2(1) SOGO); 交付，任何人自愿将管有权转让给另一人。 [↑](#footnote-ref-3)
4. **fault** means wrongful act or default (s2(1) SOGO) 指错误地作为或不履行责任 [↑](#footnote-ref-4)
5. S2(1) Factors Ordinance (‘FO’) “**mercantile agent** means a mercantile agent having, in the customary course of his business as such agent, authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods” 商业惯例中有权销售货物等的商业代理人 [↑](#footnote-ref-5)
6. condition 条件条款，这是合同的关键组成部分，关系着合同的目的是否能实现。如果违反condition，相当于导致合同的目的无法实现。那么受损害方可以寻求损害赔偿金也可以要求结束合同repudiation;

   warranty 附属条款，这项条款只是附属于合同的根本目的而存在。如果违反warranty，对合同的根本目的没有直接的影响。因此，受损害一方不能要求解除合同，但能寻求损害赔偿金damage. [↑](#footnote-ref-6)
7. 当**买方向卖方购买商品时，如果买方并不具备专业知识**，而是**依赖卖方的专业技能、经验或判断**来提供适合其需求的商品，那么法律会对卖方施加一定的责任，以确保商品符合买方的合理用途。此处“买方依赖卖方的专业技能或判断”是适用“货品需符合特殊用途目的”这一implied condition的要求之一。 [↑](#footnote-ref-7)
8. 如果允许P追认，等同于赋予代理人单方决定合同约束对象的权力（即订立合同后可自由选择由自己或委托人担责），这将破坏合同相对性原则，导致TP面临不可预见的风险（如突然被未披露的委托人追责）。追认仅适用于代理人明确以委托人名义行事的情形。 [↑](#footnote-ref-8)
9. 占有物权指的是一组只能通过持有占有物权的当事人通过法院提起诉讼来执行或主张的个人权利。 [↑](#footnote-ref-9)
10. 一种可以通过行为获得的东西；与之相对的是chose in possession，是一种一个人不仅可以拥有，而且可以实际占有的东西。 [↑](#footnote-ref-10)
11. 按揭（Mortgage）关系中，债务人将其财产所有权（title）转移给债权人，债权人并不占有该按揭财产，双方约定在债务清偿后债权人将按揭财产所有权返还给债务人。 [↑](#footnote-ref-11)
12. 未收回的应收账款放在blocked account, 其上设立fixed charge, 不可自由动用；收回来的应收账款也存入blocked account, 经银行同意企业可使用；企业日常经营的其他收入或自由现金流存放在regular account. 在冻结账户中的资金可证明银行对资金的绝对控制，避免降级为浮动担保。 [↑](#footnote-ref-12)
13. 普通法权益是对世权（Law against everyone），而衡平法权益是对人权（Equity Between Parties）。 [↑](#footnote-ref-13)