LAW OF SALE OF GOODS

Law applicable:

The Contract Act 2010.

Sale of Goods act Cap 82.

Principles of common law and equity.

Case law.

The Sale of Goods and Supply of Services Bill, 2015.

1. Historical Background of the law of sale of goods in Uganda.

The law of sale of goods in Uganda is principally governed by the Sale of Goods Act Cap 82 (SOGA). The Act is a codification of a long era common law judicial decisions from England.

The Sale of Goods Act Cap 82 which now applies in Uganda sets out the legal framework of sale of goods between a buyer and a seller. The Act merely reproduces the old United Kingdom Sale of Goods Act 1893 which was received in Uganda by virtue of the reception clause under the Uganda Order in Council, 1902, which made applicable to Uganda, Statutes of General application in force in the UK as on 2nd August, 1902.

The SOGA came into force on the 1st January 1932 by virtue of Ordinance No. 28 of 1930 and was codified as Chapter 79 which with time came to be Chapter 82, as of 2000.

Whereas the English Act from which the Ugandan Act derived its numerous provisions has been amended with the latest amendment being the one in 1994, the Ugandan Act has remained static. This has preempted various stakeholders to propose an amendment of the Act by proposing The Sale of Goods and Supply of Services Bill, 2015 currently before parliament.

The law of sale of goods concerns consensual transactions based on an agreement to buy and sell goods. This is what we call a contract of sale of goods.

The general principles that relate to contracts e.g. offer, acceptance, consideration and others apply to a contract of sale of goods and the parties are free to agree on the terms which will govern their relationship.

The Act on the other hand lays down principles that are intended to protect a party to such a contract as well a rules of general application where the parties fail to provide for contingencies which may interrupt the smooth performance of a contract of sale.

2. Contract of Sale of Goods.

A contract of sale of goods is defined in Section 2(1) of the SOGA as a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration called the price. Where the property in the goods is transferred from the seller to the buyer, the contract constitutes a sale.

However, where no transfer of property takes place and the same is to take place at a future date or is subject to some further condition then this is called an agreement to sell under S.2(4) of the Act.

3. Characteristics of a Contract of sale.

The definition given in S.2 of the SOGA has some essential characteristics that make up a contract of Sale of goods. The essential characteristics being:

i) The existence of two distinct parties to the contract that is a buyer and a seller.

ii) Transfer of property; property in this context means ownership of the goods. The goods. The mere transfer of possession of the goods will not suffice as the seller must either transfer or agree to transfer the property in the goods to the buyer so that a contract of sale of goods is fully constituted.

iii) The subject matter of the contract must be goods. Goods are defined under **S.1 (h)** to include all chattels personal other than things in action and money, and all emblements, industrial growing crops, and things attached to or forming part of the land, which are agreed to be severed before sale or under the contract of sale.
Ps. Note: chattels, emblements and things in action. (Find the definition of each of these.)

iv) The consideration for a contract of sale of goods must be money termed as the price. Money in this context would include cash and cheques but would not include credit or some other form of consideration. (see **Aldridge v. Johnson (1857) 7 E & B 885, Court of Queen's Bench**)

v) No formalities to be observed; there are no formalities prescribed by the Act to be followed when the contract is being executed. However, consider **ss. 4(1)** and **5(1)** on the preposition that the contract may be in writing or orally made and that if it is above two hundred shillings or more, it shall not be enforceable by action unless the buyer shall accept part of the goods so sold, and actually receive them, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract is made and signed by the party to be charged or his or her agent for that purpose.

vi) It involves either "a sale or agreement to sell." Where the property in the goods is immediately transferred from the seller to the buyer at the time of making the contract, the contract is a sale. Whereas , where the transfer of property in goods is to take place at a future time or subject to a condition to

be fulfilled thereafter, then the contract is an agreement to sell. It's an executory contract. The agreement liable to becoming a proper sale upon lapse of time or fulfillment of the condition subject to which the property in the goods was or is to be transferred (**S.2(4)**).

3.1. Distinction between "a sale" and "an agreement to sell."

The following are the consequences which flow from a sale and an agreement to sell;

(a) ***Transfer of property (ownership);*** In a "sale", property in the goods passes to the buyer at the time of making the contract, with the result that the seller ceases to be the owner of the goods while the buyer becomes the owner thereof and the buyer acquires a *"jus in rem"* i.e. a right to enjoy the goods against the whole world. Whereas in "an agreement to sell", the property in the goods is not transferred to the buyer at the time of the contract, with the result that the parties acquire only a "*jus in personam"* i.e. a right to either the buyer or the seller against the other for any default in fulfilling his part of the agreement.

(b) ***Passing of Risk of Loss;*** The general rule is that unless otherwise agreed, the risk of loss prima facie passes with property; i.e. goods remain at the seller's risk until the property therein is transferred, whereupon the goods are held at the buyer's risk. Thus, in case of a "sale, if the goods are destroyed, the loss falls on the buyer, even though he may never have taken possession of them. On the other hand, in the case of "an agreement to sale", the loss will be borne by the seller even though the goods are in possession of the buyer.

(c) ***Effect/Consequences of Breach;*** In case of a "sale", if the buyer wrongfully neglects or refuses to pay the price of the goods, the seller can sue for the price, even though the goods are still in his (seller's) possession. Whereas in the case of "an agreement to sell", if the buyer fails to accept and pay for the goods, the seller can only sue for damages and not for the price, even though the goods are in the buyer's possession.

(d) ***Right of Resale;*** In case of a "sale", the property passes to the buyer and as such, the seller in possession of the goods after sale cannot resell them. If he does so, the subsequent buyer who has knowledge of the previous sale does not acquire a title to the goods and the original buyer can sue as owner of the goods and recover them from the third person/subsequent buyer. The original buyer can also sue the seller for breach of contract or in tort for conversion. However, the right to recover the goods from the third person is lost if the subsequent buyer had bought the goods bonafide [in good faith] and without notice of the previous sale. ***See S.25***.

In "an agreement to sell", the property in the goods remains with the seller with the result that the seller can dispose of the goods as he wishes and the original buyer can only sue the seller for breach of contract. Under the circumstances, the subsequent

buyer acquires a good title to the goods, (irrespective) whether or not he had knowledge of the previous sale.

(e) ***Insolvency of buyer before payment for the goods;*** In case of a sale, "the seller" will be required to deliver up the goods to the official receiver, whereas in the case of "an agreement to sell", the seller may refuse to deliver the goods to the official receiver unless they have been paid for. (f) ***Insolvency of seller before delivering the goods but after the buyer has already paid the price;*** In case of a "sale", the buyer would, in the circumstances, be entitled to recover the goods from the official receiver since the property in the goods rests with him. However, in case of "an agreement to sell", the buyer would only be able to claim as a creditor but he cannot claim the goods because property in them still rests with the seller.

4. A SALE CONTRACT DISTINGUISHED FROM OTHER TYPES OF CONTRACTS

A contract of sale of goods needs to be distinguished from several other transactions which are normally quite different from a sale of goods but if care is not exercised could be confused with a sale of goods contract. This is so because they have some resemblance. According to Atiyah's Sale of Goods these contracts are[1]:

i) Contracts for barter or exchange;
ii) A gift;
iii) A contract of bailment;
iv) A contract of hire-purchase;
v) A contract of loan on the security of goods;
vi) A contract for the supply of services;
vii) A contract of agency; and
viii) Licences of intellectual property such as 'sales' of computer software

4.1. Sale and Exchange

As already noted above, the consideration for a contract of sale of goods is money. The fact that consideration for goods must be money and the term "goods" as defined under **S.1 (h)** excludes money clearly serves to distinguish barter trade from a sale of goods contract ordinarily.

A problem however could arise where a coin which is a collector's item may be both a "good" and at the same time legal tender and there may be a sale of such a coin. In such an event, the coin does not possess the usual negotiable qualities of money, and if the sale is by a thief he cannot pass a good title.

[1] Twelfth edition (2010).

In his *Commentaries on the Laws of England*, William Blackstone defined money as "... *the medium of commerce.... Money is an universal medium, or common standard, by comparison with which the value of all merchandise may be ascertained; or it is a sign, which represents the respective values of all commodities. Metals are well calculated for this ... and a precious metal is still better calculated....*"

In ***Moss v Hancock*** **([1899] 2 QB 111,** Justice Darling adopted these words: "*Money ... (is) that which passes freely from hand to hand throughout the community in final discharge of debts and full payment for commodities, being accepted equally without reference to the character or credit of the person who offers it and without the intention of the person who receives it to consume it or apply it to any other use than in turn to tender it to others in discharge of debts or payment of commodities.*" Therefore, since barter is an exchange of goods for goods and does not involve money then it is not a contract of sale.

The position becomes more complicated where goods on the one hand are exchanged for goods plus money on the other, as is common where people exchange and older product say a phone for a newer one. This will raise the question of whether this is a sale or an exchange.

In **Aldridge v. Johnson (1857) 7 E & B 885**, the parties exchanged 52 bullocks valued at £192 for 100 quarters of barley valued at £215, the balance of £23 being paid in cash, it being held that the parties intended the arrangement to be for reciprocal sales of the goods, effectively two contracts of sale with the proceeds being offset against each other.

In such a case as above, the English courts have held that the determining factor of whether such a contract is a sale or exchange is to consider whether the money constitutes the substantial part of the contract consideration and also the intention of the parties so long as this intention does not include provisions manifestly inconsistent with the intended nature of the transaction. (see **Street v Mountford [1985] AC 809** an **AG Securities v Vaghan [1988] 3 ALL ER 1058**, where the House of Lords applied the equity maxim "Equity looks at the content rather than the form". the court settled the approach to be adopted in the analogous case of an agreement designed to be a lease but dressed up to look like a licence.)

It would seem that a transaction relating to exchange of an old car for a new one would amount to a sale even though no money actually passes if, as is usual, the parties fix a notional price which is set off against the price of the new car. However look at the case of **Flynn v. Mackin [1974] 1 IR 101** before the Irish Supreme Court.

4.2. Sale and gift.

Ordinarily, no problems arise in distinguishing a sale from a gift. A gift is a transfer of property without any consideration and as such it is not binding while it remains executory unless made under a deed.

If there is truly no consideration provided for the gift then clearly there cannot be a contract of sale or, indeed, any other contract. However, the situation is different where the provision of the gif is dependent upon the purchaser entering a contract for the purchase of something else, as is often the case in marketing campaigns.

The precise nature of the contract under which the 'free gift is provided was considered by the House of Lords in the much quoted decision in **Esso Petroleum Ltd v. Commissioners of Customs and Excise [1976] 1 All ER 117**. In this case, 'World Cup Coins' (to celebrate the England football team's appearance in the 1970 World Cup Finals) were given free by Esso with every four gallons of petrol sold. The issue for the court was whether the coins attracted purchase tax (now VAT) under a contract of sale. It was held by the House of Lords that although the transaction was not a gift, inasmuch as the garage was contractually bound to supply the coin to anyone buying the four gallons of petrol, it was not a sale of goods either. Lord Simon was of the opinion that this constituted a collateral contract in which the consideration for the free coin was the purchase of the petrol, a view shared by Lord Wilberforce. However, this view was not shared by all of the Law Lords.

4.3. Sale and bailment.

A bailment is contract is a transaction under which goods are delivered by one party (the bailor) to another (the bailee) on such terms which would require the bailee to hold the goods and ultimately redeliver them to the bailor or in accordance with his or her directions.

In such a contract, the property in the goods is not intended and will not pass on delivery to the bailee, though the parties may intend that in the due course of their dealings, the property should pass.

In a contract that indicates that upon delivery, the property in the goods should pass there and then, then that is a sale and not a bailment.

In **South Australian Insurance Co v Randell (1869) PC** A farmer left corn with a miller on terms that he could claim at any time the return of the same quantity of corn or its market value. The corn was mixed with other corn deposited with the miller. The mill and its contents were destroyed in a fire. The miller's insurance company refused to pay out in respect of the deposited corn. They claimed that it belonged to the farmer and so the mill held it under a contract of bailment.it was held by the Privy Council that there was no stipulation that the farmer should be entitled to have returned the actual corn deposited, only the same amount, or its value. Therefore there was a transfer of property to the mill owner and this was not a contract of bailment. The insurance company were liable to pay out in respect of that corn.

A similar case is that of **Chapman Bros v Verco Bros & Co. Ltd (1933) 49 CLR 306** where farmers delivered bags of wheat to a company carrying on business as millers and wheat

merchants. The wheat was delivered in unidentified bags which were identical to those in which other farmers delivered wheat to the company. The terms of the transaction required the company to buy and pay for the wheat on request by the farmer or failing such request, on a specified date, to return identical bags. Although the contract referred to the company as 'storers', it was held by the Australian High Court that this transaction as necessarily one of sale as the property passed to the company on delivery.

4.4. Sale and Hire purchase.

Contracts of hire-purchase are similar to sale contracts in a number of ways. This is so because in most cases or rather in all case of hire-purchase, the ultimate sale of goods is the actual object of the transaction.

Under a hire-purchase transaction, the goods are delivered to the hire purchaser for his or her use at the time of the agreement but the owner of the goods agrees to transfer the property in the goods to the hire purchaser only when a certain fixed number of installments of the price are paid by the hirer. This means that that no agreement to buy exists at the time the hire purchase agreement is made but rather there is a bailment of the goods coupled with an option to purchase them which option may or may not be exercised.

Where a person lets out a commodity to another, where the hirer is to pay a specified amount of money in a specified number of installments, possession of the goods passes to the hirer who reains possession but does not become a buyer or owner of the commodity until he or she exercises the option to purchase.

In **Christine Bitarabeho vs. Dr. Edward Kakonge CACA No.4 of 1999**, the plaintiff and his wife imported into Uganda from Japan the Suit vehicle in 1990. The vehicle was registered in the names of the Plaintiff. The wife of the plaintiff, Dr. Mrs. Zalah Kakonge, endorsed the log book has a co-owner in order to protect her interest in the vehicle. The defendant's husband (Paul Bitarabeho) showed interest in the vehicle and agreed to buy it only if he would persuade his wife, the defendant to sell the second hand pajero. The wife (now defendant) did not comply and the sale was not executed. When Paulo Bitarabeho failed to raise the purchase price he entered into a rental agreement for one year at a cost of 50,000 for which he paid an advance of 11 million. Sadly Mr. Paulo Bitarabeho died while the car was still in his possession. His widow, the defendant started driving the vehicle without the authorisation of the plaintiff since at the time of the husband's death the advance payment had been exhausted. The widow claimed that the late husband had actually purchased the vehicle.

It was held by the Court of Appeal that the evidence on record clearly showed that Paulo Bitarabeho was interested in the purchase of the vehicle if he could persuade his wife, the defendant, to sell their old Pajero. That would have enabled him to raise the purchase price. That did not materialise because the defendant refused to consent. As a

result Paulo Bitarabeho was unable to raise the purchase price. As he had been using the vehicle for some time, he agreed to hire it via a hire-purchase contract and that after the deposit had been exhausted, the appellant was required to return the car and the claim for the car by the respondent was a valid one.

Where the buyer or "hirer" is bound to buy the good on the outset but the payments are in installments, the courts have held this to be a credit sale which is actually a sale of goods within the Act as was the case in **Lee v Butler [1893] 2 QB 318.** In this case, furniture was supplied to Lloyd on a 'hire and purchase' agreement: Lloyd would pay 'rent' for the goods over a three month period and property would only pass when all the payments had been made. The issue arose as to whether that was a contract of sale or one of hire. It was held by the Court if Appeal that although described as a 'hirer', Lloyd was bound to buy the goods from the outset; the buyer paid by instalments and property passed when the price was fully paid. Both parties were committed to the sale from the outset, so it was a contract of sale and the Sale of Goods Act applied.

The payment of the entire amount due under the installments as agreed under the hire-purchase agreement does not necessarily pass the property in the goods unless all the terms of the agreement have been complied with.

In **Helby v Mathews [1895] AC 471**, Brewster agreed to hire a piano from Helby on terms that if Brewster paid 36 monthly instalments the piano would become his property. Brewster could, however, return the piano at any time during the hire period. The issue arose as to whether Brewster had 'bought or agreed to buy' the goods or had only 'hired' them.

Lord Watson in his holding said that: "*the stipulations, in my opinion, constitute neither more nor less than a contract of hiring terminable at the will of the hirer, coupled with this condition in his favour, that if he shall elect to retain it until he has made thirty-six monthly payments as they fall due, the piano is then to become his property. The only obligation which is laid upon him is to pay the stipulated monthly hire so long as he chooses to keep the piano. In other words, he is at liberty to determine the contract in the usual way, by returning the hired thing to its owner. He is under no obligation to purchase until the hirer actually exercises the option given to him.*" It was therefore held that Brewster had not agreed to buy the piano from the outset; he only had an option to buy. Therefore he had not 'bought or agreed to buy' the goods: this was a 'hire-purchase' contract and not covered by the SOGA.

4.5. Sale and loan on security.

Many a time, parties enter into, or go through the motions of entering into a contract to sell goods with the intention of using the goods as security for a loan of money.

This usually happens where one party may borrow money from another and offer some property on the understanding that the borrower will repay what is borrowed, failure of

which, he lender will gain possession of the property. This could be by way of charge or mortgage on the particular property. This transaction is what we call a loan on security.

While analyzing the nature of this transaction, the courts have always insisted that the substance of the transaction and no merely its form must be examined. Look at ***Kingsley v. Sterling Industrial Securites Ltd*** **[1967] 2 QB 747**, where Winn LJ said:

In my definite view the sole or entirely dominant question upon that part of the appeal to which I have so far adverted is whether in reality and upon a true analysis of the transactions and each of them, and having regard in particular to the intention of the parties, they constituted loans or sales. It is clear upon the authorities that if a transaction is in reality a loan of money intended to be secured by, for example, a sale and hiring agreement, the document or documents embodying the arrangement will be within the Bills of Sale Acts; it is equally clear that each case must be determined according to the proper inference to be drawn from the facts and whatever the form the transaction may take the court will decide according to its real substance.

Under **S.58(4)** of the Act, it is provided that the provisions under the Act relating to contracts of sale do not apply to any transaction in the form of a contract of sale which is intended to act by way of mortgage, pledge, charge or other security. This therefore means that if the aim of the transaction was to obtain a loan by means of a security, then there was never a sale.

A contract for a loan on security is different from one of hire purchase in that, a loan on security contract enables one who already owns goods to borrow money on the security of the goods, whereas a hire purchase enables one to obtain goods on credit.

4.6. Sale and agency.

Sometimes it may seem unnecessary to distinguish a contract of sale from one of agency since the distinction seems straight forward however, in a certain type of case the distinction may well be a fine one by no means easy to draw.

Where, for example, A asks B, a commission agent, to obtain goods for him from a supplier or from any other source, and B complies by sending the goods to A, it may well be a fine point whether this is a contract under which B sells the goods to A, or is a contract under which B acts as A's agent to obtain the required goods from other sources.

In agency the principal appoints the agent to act on his behalf in line with the Latin maxim quic facit per alium facit perse, that is he who acts through another acts himself.

The common distinctions between agency and a sale of goods contract are;

1) Privity of contract. In an agency, there can be privity of contract between the buyer and the agent's supplier so as to enable the buyer to sue the supplier. However in a sale, such privity does not exist.
2) Passing of property. In a sale of goods contract, the buyer in possession of the goods can pass a good title to a third party who has bought in good faith for value without notice of the defects in the title of the goods, however under agency, the agents requires the permission of the principal either actual, apparent or implied before he or she can vest good title in a third party.

4.7. Sale of goods and supply of services.

Goods may, of course, be acquired as an integral part of a different category of contract with the property in the goods being transferred thereby.

An obvious example is contracts for the provision of services, sometimes referred to as contracts for works and materials, in which the contractual performance necessitates the provision of some goods.

Thus, an artist commissioned to paint a portrait will ultimately produce the picture and transfer it to the client but the essence of the contract is 'an undertaking by the artist to exercise such skill as he was possessed of in order to produce for reward a thing which would ultimately have to be accepted by the client'.

Similarly, when a builder employed a sub-contractor to construct the roof on a building, including the purchase of the requisite roof tiles, it was held that the contract was one for services despite the purchase of the materials.

However, it would be wrong to suggest that the line between contracts for the sale of goods and contracts for the provision of services is an easy one to draw, despite the dicta in **Robinson v. Graves [1935] 1 KB 579, 588** per Greer LJ that the determining factor is the 'substance' of the contract. If the substance is the skill and labour of the supplier, it is for services, if it is goods to be provided, it is a sale.

5. SUBJECT MATTER OF THE CONTRACT.

The subject matter of a contract of sale of goods is provided for under ss 6,7 and 8 of the SOGA. The subject matter of a contact of sale of sale of goods are goods. Goods are defined under S 1(1) (h) of the Act.

Section 6(1) provides that the subject matter of the contract may be either existing or future goods. These maybe specific, ascertained or unascertained goods.

5.1. Existing goods.

These are goods which are physically in existence and which are in the seller's ownership and/or possession at the time of entering into or making the contract of sale.

Existing goods may either be specific or unascertained

5.1.1. Specific Goods/ Ascertained goods.

They are defined under S 1(1) (n) as "goods identified and agreed upon at the time a contract of sale is made".

Property in such goods does not pass until the goods are ascertained.

5.2. Future goods.

Future goods include goods not yet in existence but not yet acquired by the seller. It is therefore worth noting that future goods can never be specific under the Act. This is true in line to those provisions of the Act that deal with passing of property.

They are defined under S 1(g) of the Act as goods to be manufactured or acquired by the seller after the making of a contract of sale.

5.2.1. Unascertained goods

They are goods that are not separately identified or ascertained at the time of making the contract.

Unascertained goods fall before 3 categories i.e.:-

- Goods to be manufactured or grown by the seller, which are necessarily future goods.
- Purely generic goods, e.g. 1000 tons of wheat or like which must also be future goods, at least where the seller does not already own sufficient goods of the description in question which can be appropriated to the contract.
- An unidentified part of a specified whole e.g. 1000 tones out of the particular load of 2000 tons of wheat. These may be either future or existing goods within the meaning of the SOGA.

6. THE PRICE

In a contract of sale, the irreducible minimum of obligations is for the seller to deliver the goods and the buyer to pay the price. This section considers the rules about the ascertainment of the price.

Sections 9 and 10 of the SOGA deal with how price ascertained. As already noted, the consideration for a contract of sale must be paid in money. It is for this reason that a contract will not be one of sale of goods if the consideration in some other form.

6.1. The parties say nothing about the price

The fact that no price has been agreed might be good evidence that the parties had not completed a contract, but it is clear that, in practice, people often make binding contracts without having agreed on the payment terms. In such a case, it is clear that there is a contract to buy at a reasonable price (**s 9(2)**).

Section **9(3)** of the SOGA provides that what is a reasonable price is a question of fact. If the seller is in business, evidence of his or her usual prices will be good evidence of what is a reasonable price but, in theory at least, it is not decisive.

Where the seller is not in business or not in the business of selling goods of the kind sold, there will be no seller's standard price to appeal to and the court will have to do the best it can with such evidence as the parties present to it.

6.2. The parties fix the price in the contract

This is the simplest and probably most common situation. Obviously, the parties may fix the price in a number of different ways. I may sell my car for UGX 3,000,000 but, if I take the car to the petrol station, I would ask for as much petrol as was needed to fill the tank at 3680 shs per litre; in the first case a global price and in the second a unit price.

6.3. The price is left to be fixed in a manner agreed by the contract

Section 9(1) of the Sale of Goods Act clearly contemplates that the contract may leave the price to be fixed later in an agreed manner.

One such manner would be third party valuation, but this is expressly dealt with by **s 10**. The Act is silent on other methods of price-fixing. One possibility is that the contract may provide for the price to be fixed by the seller (or the buyer).

In **May and Butcher Ltd v R [1934] 2 KB 17**, Lord Dunedin said: 'With regard to price it is a perfectly good contract to say that the price is to be settled by the buyer.'

Rather than leave the price to be fixed by one party, the parties may agree that the price shall be fixed by agreement between them later. This is a common but potentially dangerous course.
There is no problem if the parties do agree on a price, but difficulties arise if they do not. It might be thought that, in that case, **s 9(2)** would apply and a reasonable price would be due.

However, in **May and Butcher v R (1934)**, the House of Lords held otherwise. In that case, there was a contract for the sale of tentage at a price to be agreed between the parties. The parties failed to agree and the House of Lords held that there was no contract. The argument which was accepted was that **s 9(2)** only applied where there was no agreement as to the price so that its operation was excluded where the parties had provided a mechanism for fixing a price which had not worked. This decision has never been overruled and is still in theory binding. Nevertheless, the courts have not

always followed it.
In **Foley v Classique Coaches [1934] 2 KB 1**, the plaintiffs sold land to the defendants who agreed as part of the same contract to buy all their petrol from the plaintiffs 'at a price to be agreed between the parties in writing and from time to time'. The transfer of the land was completed and the defendants later argued that the agreement to buy the petrol was not binding as the price was uncertain.
There is therefore a good chance that a court will hold, where the parties do not agree, that they intended the price to be a reasonable one. This is particularly likely where the goods have actually been delivered and accepted by the buyer.
Nevertheless, it remains imprudent for the parties to make such an agreement, granted that courts sometimes hold such agreements to be inadequately certain. These dangers can be avoided entirely by providing machinery for dealing with those cases where later agreement proves impossible or by simply providing that the price 'shall be such as the parties may later agree or in default of agreement a reasonable price'.

6.4. Fixing the price by third party valuation

Price-fixing by third party valuation is dealt with by **s 10** of the Sale of Goods Act.

Price-fixing by third party valuation is valid but dependent on the third party actually undertaking the valuation.

If one party prevents the valuation, that party is said to be liable to an action. Presumably, it would be the seller who would usually prevent the valuation by not making the goods available. It is worth noting that the result of such obstruction by the seller is not a contract to sell at a reasonable price, as is the case where the goods are delivered and no valuation takes place, but an action for damages.

This may not make much difference in practice, since what the buyer has been deprived of is the chance to purchase the goods at the price the valuer would have fixed and a court would almost certainly hold this to be the same as a reasonable price.

An important question is what, if anything, sellers can do if they think the valuation is too low, or buyers if they think it is too high. No doubt the valuation is not binding, if it can be shown that the valuer was fraudulently acting in concert with the other party.

Apart from this instance, it would seem that the valuation is binding as between seller and buyer. However, the party who is disappointed with the valuation will have an action against the valuer if it can be shown that the valuation was negligent.

This was clearly accepted by the House of Lords in ***Arenson v Casson (1977)***, a case involving the sale of shares in a private company at a price fixed by valuation.

7. FORMALITIES OF THE CONTRACT OF SALE

According to **Section 4** of the Act, a contract of sale may be in writing, by word of mouth or partly by word of mouth or it may be implied from the conduct of the parties.

Section 5(1) of the Act unrealistically provides that for any contract above the value of 200 shs or of 200 shs to be binding or enforceable, the buyer must accept ad receive part of the of the goods sold or should give something in earnest to bind the contract or pays partly or some note or memorandum should be made and signed for him or her or his agent in that behalf.

This is unrealistic in that the value of 200shs needs to be amended as soon as possible. However, if this section is read with the Contracts Act 2010, the figure would be 500,000 Ugs.

8. TERMS OF A CONTRACT

Contractual terms are generally thought to fall into two principle classes namely; conditions and warranties.

Terms of a contract refer to statements made by parties or practices normally followed by parties which govern them in a contractual relationship. Parties are free and must be left free to make their own contract, however unfair or unpalatable the terms might be so long as it is absolutely clear that the words of the exemption clause were designed to cover the circumstances that have occurred.

8.1. Fundamental terms.

It should be noted here that at the time when the Sale of Goods Act was enacted, the law anticipated the existence of only two types of terms of a contract of sale of goods as already highlighted above

However, in the 1950s and 1960s, it came to be suggested in a number of decisions that the distinction between a condition and a warranty was not exhaustive. This development took two forms.

On the one hand it came to be said that there were terms more important even than conditions these are called fundamental terms.

On the other hand it was also said that there were other terms that were mid-way between the condition and the warranty, these came to be known as innominate or intermediate terms.

Practically speaking, it mattered little whether a term was called a condition or fundamental term. It followed that in either event, the breach of any term of the contract, however minor, justified the innocent party in repudiating his or her own obligation towards the contract and treating the same as discharged.

Fundamental terms were devised principally to deal with the growing menace of the unfair and unreasonable exemption clause. It was held in a large number of decisions that an exemption clause, no matter how sweeping and no matter how broadly drafted its language, could not protect a guilty party from liability for breach of a fundamental term of the contract.

The House of Lords in ***Suisse Atlantique Societe d'Armament SA v NV Rotterdamsche Kolen Centrale [1967] 1 AC 361*** cut down this doctrine of fundamental breach. It was held that the doctrine of fundamental term was nothing more than a rule of construction. The court further noted that, there is no rule of law which prevents parties to a contract agreeing to limit their respective liabilities.

It is a question of the construction of the particular clause as to whether it applies to a fundamental breach or not. The court doubted the value of continuing the doctrine of fundamental breach or breach of a fundamental term. Exemption clauses may be held inapplicable to certain breaches of contract as a matter of construction of the contract. The court will be reluctant to ascribe to an exemption condition a meaning which effectively absolves one party from all duties and liabilities. It is not necessary for parties to a contract, when stipulating a condition, to spell out the consequences of breach.

Lord Upjohn said: '*A fundamental term of a contract is a stipulation which the parties have agreed either expressly or by necessary implication or which the general law regards as a condition which goes to the root of the contract so that any breach of that term may at once and without further reference to the facts and circumstances be regarded as a fundamental breach . . . . there is no magic in the words 'fundamental breach'; this expression is no more than a convenient shorthand expression for saying that a particular breach or breaches of contract by one party is or are such as to go to the root of the contract which entitles the other party to treat such breach or breaches as a repudiation of the whole contract. Whether such breach or breaches do constitute a fundamental breach depends on the construction of the contract and on all the facts and circumstances of the case*.'

It should be noted that the doctrine of fundamental breach met its demise in the land of its birth in England from which the Ugandan legal system ascribes most of its decisions. Whereas, in England legislation exists in regard to fundamental and unfair contract terms,

the same do not exist in Uganda. However, it is comfortable to say that after the ***Suisse Atlantique*** case, the courts even in Uganda will apply the construction approach to determine whether the term breached by a party is a fundamental term or not.

8.2. Conditions.

The Sale of Goods Act does not define what a condition is. However, **S.12 (1)** of the Act does a good job at explaining it legal effect. It is one whose breach gives the innocent party a right to repudiate the contract or treat the particular breach as a breach of a warranty and not repudiate the contract.

It is right to say therefore a condition like a fundamental term is over vital importance that its breach goes to the root of the transaction.

A condition is important in a contract of sale of goods in that if its breach is committed by the seller, the buyer may have a right to reject the goods completely and to decline to pay the price for the goods and if they already paid, they may recover the same.

8.3. Innominate terms.

The innominate term approach was established in the case of ***Hong Kong Fir Shipping v Kawasaki Kisen Kaisha*** **[1962] 2 QB 26** . Rather than classifying the terms themselves as conditions or warranties, the innominate term approach looks to the effect of the breach and questions whether the innocent party to the breach was deprived of substantially the whole benefit of the contract. Only where the innocent party was substantially deprived of the whole benefit, will they be able to treat the contract as at an end.

In ***Hong Kong Fir Shipping,*** the plaintiffs had recently acquired the ship the 'Hong Kong Fir' and contracted to charter it to the defendants, but being late in delivering it, the defendants cancelled the charter-party contract. The plaintiffs said the repudiation was wrongful, and that the ship was fit to charter. It was held verbatim that, '*authority over many decades and reason support the conclusion in this case that there was no breach of a condition which entitled the charterers to accept it as repudiation and to withdraw from the charter. It was not contended that the maintenance clause is so fundamental a matter as to amount to a condition of the contract. It is a warranty which sounds in damages.' and 'If what is done or not done in breach of the contractual obligation does not make the performance a totally different performance of the contract from that intended by the parties, it is not so fundamental as to undermine the whole contract.*'

It should therefore be noted that even if the parties expressly state a term to be a condition, the courts can hold breach of such a term as a minor breach that does not entitle the innocent party to repudiate the contract. This has been criticized and in general the case of ***Hong Kong Fir Shipping*** as one that sacrifices the principle of certainty of the terms of a contract.

8.4. Warranties.

They are defined as an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of such contract, the breach of which gives rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated.

The law requires that the parties to a contract can only rely on reasonable terms and not unreasonable and unconscionable terms.

In the case of **George Mitchell (Chesterhall) Ltd v. Finney Lock Seeds Ltd. (1983) 2 AC 803;**

The plaintiff farmer ordered from the defendant who were merchants a quantity of "Finney's late Dutch special cabbage seeds", but were unfortunately supplied instead with an inferior type of seed which was indeed not a "late" seed at all, and proved quite unsuitable to the plaintiff's needs.

The clause in the contract of sale was to the effect that the defendant's liability was limited to the cost of replacing or refunding the price of the seeds sold; this is a relatively trivial sum. The House of Lords held the term as unreasonable and unenforceable since the goods supplied were totally of a different character and the term was held to be unacceptable.

8.5. Representations.

The terms of a contract must be distinguished from mere statement made by the parties during the time of contracting. Representations in the law of sale of goods do not defer from those under Contract and as such, your notes on misrepresentation under contract law will be of much help in this area.

Whether or not a statement is or is not part of the contract is said to depend upon the intention of the parties.

Whether representations made by a seller constitute a warranty is frequently a matter of extreme difficulty to decide. Mere loose words of commendation, even though they may induce a purchaser to buy, do not therefore amount to a warranty, as if a seller were to say: "I can fully recommend this horse," or "I would sell it to my dearest friend".

The courts have most of the time been prepared to treat oral statements as overriding the written terms of a contract depending as already noted on the parties' intention at the time of contracting.

This tendency of the courts can be illustrated by illustrating the two English cases of **Hopkins v Tanqueray (1854) 15 CB 130** and **Couchman v Hill [1947] KB 554.** In the former case, on the day before the sale, while the plaintiff was looking at the horse in the stable, the defendant came in and said to the plaintiff: "You have nothing to look for, I assure you; he is perfectly sound in every respect," and the plaintiff replied: " If you say

so, I am satisfied," and bought the horse, presumably on the strength of the defendant's representation. In an action on the assumed warranty the court ruled that there was no warranty. This case confirms the age old English principle that for a statement to amount to a warranty, must be made during the time of concluding the contract; antecedent representations in no way affect the validity of the sale.

In the latter case, the plaintiff purchased from the defendant at auction a heifer which was described in the sale catalogue as 'unserved'. Later, having been found to be in calf, she died as a result of carrying it at too young an age. It was held that the description of the heifer as unserved constituted a condition of the contract. Scott LJ said, 'as a matter of law, I think every item in a description which constitutes a substantial ingredient in the 'identity' of the thing sold is a condition'

The courts these days tend to apportion liability on a party where the court thinks it is reasonable to impose such liability in damages on the person making the statement and vice versa.

Therefore, a finding that a statement is a term of the contract without assessing and finding out what its effect is, is like putting the cart before a horse.

Where however, on the other hand, the seller who is in the business of selling a particular commodity makes representations as to the state of his goods, the courts have held such a statement to be a term of the contract.

Look at **Dick Bentley (productions) Ltd v Harold Smith (motors) Ltd [1965]2 ALLER 65** and **Oscar Chase Ltd v Williams [1957] 1 WLR 370**.

Where the seller has made statements about the goods but the court has held that these statements are not terms of the contract, such statements may give rise to liability in misrepresentation. (Read **Non Performing Assets Recovery Trust vs. S.R. Nkabula & Sons Ltd, Court of Appeal Civil Appeal No. 34 of 2005, UG**)

9. EXPRESS AND IMPLIED CONDITIONS AND WARRANTIES.

Terms of a contract may either be express or implied; *Express terms* are those which are inserted in the contract at the will of the parties, while *implied terms* are those presumed to exist in a contract by operation of law even though they have not been provided for/stipulated by the parties in the contract. However, implied terms may be negatived or varied by express agreement or by course of dealing between the parties or by usage of trade - **S.54, SOGA**.

9.1. Implied Conditions.

The implied conditions can be found in sections 13–16 of the Sale of Goods Act and are at the heart of the statutory controls over the right to sell, sale by description,

satisfactory quality and fitness for purpose of goods and compliance with sample in contracts of sale.

As these sections are implied into all contracts of sale, it follows that they apply irrespective of the monetary value of the goods in question or their nature and character.

9.1.1. Right to sell. (S.13(a)) SOGA

Section 13 of the Sale of Goods Act, which is implied into all contracts of sale irrespective of whether the seller is in business or is a private seller; is arguably the most fundamental of the implied conditions, for without the right to sell the goods, the remaining conditions relating to description, quality and compliance with sample cease to be relevant. The right to sell the goods is the starting point.

9.1.1.1. Meaning of 'right to sell'

Section 13(a) talks about the right to sell and not about the transfer of ownership. There are cases where the seller has no right to sell, but does transfer ownership because it is one of the exceptional cases where a non-owner seller can make the buyer owner. In such cases, the seller will be in breach of s 13(a).

In most cases, the seller will be entitled to sell, either because they are the owner or the agent of the owner or because they will be able to acquire ownership before property is to pass (as will be the case with future goods).
Perhaps, surprisingly, it has been held that even though the seller is the owner, she may, in exceptional circumstances, not have a right to sell the goods.

This is well illustrated by the leading case of **Niblett v Confectioner's Materials [1921] 3 KB 387,** where the plaintiffs bought tins of milk from the defendants. Some of the tins of milk were delivered bearing labels 'Nissly brand', which infringed the trademark of another manufacturer. That manufacturer persuaded Customs and Excise to impound the tins and the plaintiffs had to remove and destroy the labels, before they could get the tins back. It was held that the defendants were in breach of s 13(a) because they did not have the right to sell the tins in the condition in which they were, even though they owned them. This was clearly reasonable, as the plaintiffs had been left with a supply of unlabelled tins which would be difficult to dispose of.

9.1.2. To what remedy is the buyer entitled if the seller breaks his obligation under s 13(a)?

The buyer can certainly recover, by way of damages, any loss which he has suffered because of the breach. Further, the seller's obligation is stated to be a condition and the buyer is generally entitled to reject the goods when there is a breach of condition. In practice, however, it will very seldom be possible to use this remedy because the buyer

will not usually know until well after the goods have been delivered, that the seller has no right to sell.

In ***Rowland v Divall*** **[1923] 2 KB 500**, the Court of Appeal held that the buyer had a more extensive remedy. In that case, the defendant honestly bought a stolen car from the thief and sold it to the plaintiff, who was a car dealer, for £334. The plaintiff sold the car for £400. In due course, some four months after the sale by the defendant to the plaintiff, the car was repossessed by the police and returned to its true owner. Clearly, on these facts, there was a breach of [s 13(a)] and the plaintiff could have maintained a damages action, but in such an action it would have been necessary to take account not only of the plaintiff's loss, but also of any benefit he and his sub-buyer had received by having use of the car. The Court of Appeal held, however, that the plaintiff was not restricted to an action for damages, but could sue to recover the whole of the price. This was on the basis that there was a total failure of consideration; that is, that the buyer had received none of the benefit for which he had entered the contract, since the whole object of the transaction was that he should become the owner of the car.

Atkin LJ observed:

The buyer has not received any part of that which he contracted to receive- namely, the property and right to possession- and, that being so, there has been failure of consideration.

Also read: **Butterworth v Kingsway Motors Ltd [1954]1 WLR 1286**.

9.2. Condition in a sale by description.

The implied condition as to sale by description is provided for under S.14 of the Act, 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. Thus, "If you contract to sell peas, you cannot oblige a party to take beans."

In Bowes v. Shand, 1877 App.Cas.455, it was held that if the description of the article tendered is different in any respect, it is not he article bargained for and the other party is not bound to take it.

We should also note that the section involves a paradox. If one contracts to sell a horse and delivers a cow, one might say that the cow does not fit the description of the horse contained in the contract and s 14 applies. But, one might also say that, the failure to deliver a horse is a breach of an express term of the contract.

This was recognised in ***Andrews Bros*** **ltd** ***v Singer*** **Cars [*** ***1934*** **] 1 KB 17**. In this case, the seller contracted to deliver a new Singer car under a standard printed form in which the seller sought to exclude liability for implied terms. The Court of Appeal said that the exclusion of implied terms was ineffective to exclude the seller's obligation to deliver a 'new Singer car' because that was an express term of the contract. The section obviously

assumes that there will be cases in which a description is attached to the goods which is not an express term but becomes an implied condition by virtue of [s 14]

This raises two central questions: what is a sale by description?; and what words are to be treated as forming part of the description?

9.2.1. What is a sale by description?

The Act contains no definition of one. In the 19th century, it was often assumed that sales by description were to be contrasted with sales of specific goods.

However, this distinction has not been maintained. In ***Varley v Whipp*** **[1900] 1 QB 513**, it was held that a contract to buy a specific second hand reaping machine which was said to have been 'new the previous year' and very little used was a sale by description. In that case, though the goods were specific, they were not present before the parties at the time that the contract was made; however, in **Grant v Australian Knitting Mills (1936)**, the Privy Council treated the woolen undergarments which were the subject of the action as having been sold by description, even though they were before the parties at the time of the contract.

The effect of this development is that virtually all contracts of sale are contracts for sale by description except for the very limited group of cases where the contract is not only for the sale of specific goods but no words of description are attached to the goods. This makes the second question (what is the description?) very important.

9.2.2. What words are to be treated as forming part of the description?

It might be the law that, if the contract is one of sale by description and words of description are used, then they inevitably form part of the description.

In the first place, it has been held that this phrase must apply to all cases where the purchaser has not seen the goods but is relying on the description alone. Hence, it follows that a sale must be by description if it is of future or unascertained goods. But in addition, the term applies in many cases even where the buyer has seen the goods.

The early doubts as to whether an ordinary sale in a shop could be a sale by description were soon set to rest. Lord Wright in **Grant v Australian knitting Mills Ltd** said:

It may be pointed out that 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. woolen undergarments, a hot water bottle, a second hand reaping machine, to select a few obvious illustrations.

Note that **s 14** is wide enough to cover such instances. However, it is clear that not all words which could be regarded as words of description will be treated as part of the description of the goods for the purpose of **s 14**.

An important case is ***Ashington Piggeries v Christopher Hill*, [*1972*] Ac 441**. In this case, the plaintiff was in the business of compounding animal feedstuffs according to formulae provided by its customers. It was invited by the defendant to compound a vitamin fortified mink food in accordance with a formula produced by the defendant. The plaintiff made it clear that it was not expert in feeding mink but suggested substitution of herring meal for one of the ingredients in the defendant's formula. Business continued on this footing for about 12 months and the plaintiff then began to use herring meal which it bought from a supplier under a contract which stated that it was 'fair average quality of the season' and was to be taken 'with all faults and defects ... at a valuation'. In fact, unknown to any of the parties, this meal contained a chemical produced by chemical reaction which was potentially harmful to all animals, and particularly to mink.

These facts raised the questions of whether the plaintiff was liable to the defendant and whether the supplier was liable to the plaintiff. The House of Lords held that as between the plaintiff and defendant it was not part of the description that the goods should be suitable for feeding mink.
As between the plaintiff and its supplier, the House of Lords held that the goods did comply with the description 'Norwegian herring meal' which was part of the description but it was not part of the description that the goods should be 'fair average quality of the season'. The goods could not have been correctly described as 'meal' if there was no animal to which they could be safely fed. Why were the words 'fair average quality of the season' not part of the contractual description?
The answer given by the House of Lords was that these words were not needed to identify the goods.
A sale is not by description where the buyer makes it clear that he is buying a particular thing because of its unique qualities and that no other will do, or where there is absolutely no reliance by the buyer on the description.

In ***Harlington* & *Leinster v Christopher Hull Fine Art* [1991] 1 QB 564**, both the defendant and the plaintiff were art dealers. In 1984, the defendant was asked to sell two oil paintings which had been described in a 1980 auction catalogue as being by Gabriele Münter, an artist of the German expressionist school. The defendant contacted the plaintiff amongst others and an employee of the plaintiff had visited the defendant's gallery. Mr Hull made it clear that he was not an expert in German expressionist paintings. The plaintiffs bought one of the paintings for £6,000 without making any more detailed enquiries about it. The invoice described the painting as being by Münter. In due course, it was discovered to be a forgery. The majority of the Court of Appeal held that it had not been a sale by description.
The principal test relied on by the Court of Appeal was that of reliance. It was pointed out that paintings are often sold accompanied by views as to their provenance. These statements may run the whole gamut of possibilities from a binding undertaking that the

painting is by a particular artist to statements that the painting is in a particular style. Successful artists are of course often copied by contemporaries, associates and pupils. It would be odd if the legal effect of every statement about the identity of the artist was treated in the same way. This is certainly not how business is done, since much higher prices are paid where the seller is guaranteeing the attribution and the Court of Appeal therefore argued that it makes much better sense to ask whether the buyer has relied on the seller's statement before deciding to treat the statement as a part of the description. On any view, this case is very close to the line.
It appears plausibly arguable that the majority did not give enough weight to the wording of the invoice or to the fact that the buyers appear to have paid a 'warranted Münter' price. It should be noted that the buyers did not argue, as they might have done, that it was an express term of the contract that the painting was by Münter.
In this last case, the Court of Appeal held that as the attribution to Münter was the only piece of potentially descriptive labelling attached to the painting it was not a sale by description. In other cases, such as the *Ashington Piggeries* case, it would be clear that some of the words attached are words of description but it may be held that other words are not.

For this reason therefore, a sale of a manufactured item will nearly always be one by description except where it is second hand because articles made to an identical design are not generally bought as unique goods but as goods corresponding to that design.

Note that reliance on the seller's description is a crucial point in determining whether a sale by description is in existence as was the case in a purchase of a second hand car which was fully examined by the buyer. It was held in this case to be a sale by description because the buyer relied in part on a newspaper advertisement issued by the seller. (See **Beale v Taylor**)
Whether one is asking the question, 'Is there a sale by description?' or the question, 'What is a description?', the issue of whether the words are used to identify the goods and are relied on by the buyer will be a highly relevant factor.

Where there has been a sale by description, the court then has to decide whether or not the goods correspond with the description. In a number of cases, courts have taken very strict views on this question.
An extreme example is ***Re Moore and Landauer*** **[1921] 2 KB 519**. That was a contract for the purchase of Australian canned fruit. It was stated that the cans were in cases containing 30 tins each. The seller delivered the right number of cans but in cases which contained only 24 tins. It was not suggested that there was anything wrong with the fruit or that it made any significant difference whether the fruit was in cases of 30 or 24 cans.

Nevertheless, it was held that the goods delivered did not correspond with the contract description.

Similarly, in ***Arcos v*** **Ranaasen [*1933*] AC 470**, the contract was for a quantity of staves half an inch thick. In fact, only some 5% of the staves delivered were half an inch thick, though nearly all were less than nine-16ths of an inch thick. The evidence was that the staves were perfectly satisfactory for the purpose for which the buyer had bought them, that is, the making of cement barrels, but the House of Lords held that the goods did not correspond with the description.

9.3. Condition on a sale by sample (s. 16)

Sales by sample are common in the sale of bulk commodities because a seller can display to the buyer a sample of what he has and the buyer can agree that he or she will take so many pounds or tons.

When a sale by sample is agreed upon by the parties to the contract, the implied conditions are;

That the buyer shall have a reasonable opportunity of comparing the bulk with the sample.

That the bulk of the goods to be supplied by the seller should correspond with the sample a far as quality is concerned. This is so because here, the sample here, in effect, largely replaces the need for any description by words of the goods.

In ***James Drummond & Sons v E.H. Van Ingen & Co (1887) 12 App.Cas. 284,*** Cloth was sold by sample to Van Ingen for the known purpose of making into clothes. The cloth in every way corresponded to the sample. However, a latent fault in the cloth caused the manufactured clothes to part at the seams under moderate strain. The buyers sued, claiming that the cloth was not fit for the purpose. The sellers argued that as the cloth corresponded with the sample there was no case to answer. It was held that, the question is how far does the examination of the sample exclude the warranty that goods will be fit for the purpose. The purpose of the examination is to confirm the subject matter of the contract and not to make scientific tests to reveal every aspect of the article's construction, latent defects included. Thus the warranty that the goods would be fit for the purpose was not, in this case, excluded because the goods corresponded with the sample. Lord Macnaghten said:

After all, 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 imperfection of language, it may be difficult or impossible to express in words. The sample speaks for itself. But it cannot be treated as saying more than such a sample would tell a merchant of the class to which the buyer belongs, using due care and

diligence, and appealing to it in the ordinary way and with the knowledge possessed by merchants of that class at the time. No doubt the sample might be made to say a great deal more. Pulled to pieces and examined by unusual tests which curiosity or suspicion might suggest, it would doubtless reveal every secret of its construction. But that is not the way in which business is done in this country. Some confidence there must be between merchant and manufacturer, in matters exclusively within the province of the manufacturer, the merchant relies on the manufacturer's skill.

It should be noted that the fact that the buyer has examined the goods will not release the seller of liability where the examination was one which could not have reasonably shown the defect complained of.

In ***Godley v Perry*** [*1960*] **1 WLR 9** a retailer purchased plastic catapults from a wholesaler. He tested a sample by pulling back the elastic; they proved satisfactory. However, in normal use they snapped; this was because of a latent defect in the plastic. The buyer sued under **s 16(2) (c)** which provides that the goods should be free from defects (rendering them unmerchantable) not apparent on reasonable examination. It was held that **s 16** provides for a 'reasonable' examination, not a 'practicable' one. The buyer had made a reasonable examination and so he succeeded.

9.3.1. Condition in a sale by sample as well as by describe.

Where goods are sold by sample as well as by description, there is an implied condition that the bulk of the goods shall correspond both with the sample and with the description. If the goods supplied correspond only with the sample and not with the description, or vice versa, the buyer is entitled to reject the goods. The bulk of the goods must correspond with both.

Read: **Wallis v Pratt (1911) AC 394** and **Nichol v Godts (1854) 10 EX 191**.

9.4. Condition as to fitness for purpose.

Ordinarily there is no implied condition or warranty that the goods supplied by the seller should be fit for the particular purpose of the buyer.

The rule *Caveat emptor* applies instead. It means that while buying it is the responsibility of the buyer to ensure that the goods correspond to the particular purpose he wants them to meet. However in the following situations, the responsibility of the fitness as to Goods falls on the seller;

a) The buyer makes known to the seller the particular purpose for which he requires goods,
b) The buyer and seller relies on the skill and judgment of the buyer; and,
c) The sellers business is to supply such goods whether he is the manufacturer or producer or not.

Note that, the particular purpose for which goods are required must be known to the seller at the time of contracting. This may be done either explicitly or by implication from the contract of sale.

If the goods can be used for many purposes, the buyer should make known the specific purposes to the seller; otherwise the condition as to fitness would not apply.

In ***Re Andrew Yule &Co, AIR 1932 Calcutta 879,*** a buyer ordered for Hessian cloth which is generally used for packing purposes the cloth was supplied accordingly, on receiving the cloth, the buyer found that the cloth was not suitable for packing food products as it had unusual smell He wanted to reject the cloth. The court observed that the buyer had no right to reject the cloth because although it was not fit for the specific purpose, it was fit for the purpose of packing otherwise for which it was commonly used. There was no breach of condition of fitness in this case. In this case had the buyer have informed to the seller that he needs the cloth for the packing of food products, situation would have been different.

It is not necessary that the purpose should be expressed in words only. If the goods could only be used for one purpose only, it is implied that the seller had knowledge about the purpose for which the buyer need the goods.

It is now well settled that the word 'particular' as used in the Act was used in the sense of 'specified' rather than in contradistinction to 'general' as expressed by Lord Wilberforce in **Kendall v Lillico [1969] 2 AC 31** at 123.

In **MacGill v Talbot 2002 GWD 12-382,** a classic car collector advised a commercial car dealer that he wished to buy a Rolls Royce that was reasonably fit for the purpose of economic restoration,. The dealers provided a car which it was estimated would cost about £23,500 to restore; in fact it cost £85,000 to £100,000. It was held that the buyer had made known a particular purpose, in the light of previous dealings between the parties.

The word 'particular' does not exclude cases where the goods can only be used for one purpose.

In **Priest v Last (1903)2K.B.148,** B went to S a chemist and demanded a hot water bottle from him, S gave a bottle to him telling that it was meant for hot water, but not boiling water. After few days while using the bottle B's wife got injured as the bottle burst out, it was found that the bottle was not fit to be used as hot water bottle. The court held that the buyer's purpose was clear when he demanded a bottle for hot water bottle, thus the implied condition as to fitness was not met in this case by the seller. This was so because though there was only one ordinary purpose for a hot-water bottle, the buyer had required one for a particular purpose within the Act.

As Lord Wright said in **Grant v Australian Knitting Mills Ltd [1936] AC 85, 99;**

There is no need to specify in terms the particular purpose for which the buyer requires the goods, which is nonetheless the particular purpose within the meaning of the section, because it is the only purpose for which anyone would ordinarily want the goods.

Secondly, the buyer must have relied upon the skill and judgment of the seller. B asked S, he need a car for touring purpose, S supplies a car which is not fit for touring. A breach of condition has been committed here. Lord Wright in **Grant v Australian Knitting Mills Ltd [1936] AC 85 at 97** had this to say;

The reliance will seldom be express it will usually be by implication from the circumstances; thus to take a case like that in question, of a purchase from a retailer the reliance will be in general inferred from the fact that a buyer goes to the shop in the confidence that the tradesman has selected his stock with skill and judgement.

The buyer's duty here is in the first instance to show that he has made known the purpose for which the goods are being bought. At this point, reliance will be presumed unless the seller can show it to have been unreasonable.

However mere mention of a particular trade name by the buyer does not mean that he has ordered for the product of that trade name only. He may still rely upon the skill and judgment of the seller.

Thirdly, the seller should be a dealer of the kind of products transacted.

Also note that the implied condition as to fitness for purpose only applies in cases of sale to a normal buyer. Where the buyer is suffering from an abnormality, he or she should make known to the seller of such special abnormality or else the seller will be discharged from this duty.

In **Griffith v Peter Conway Ltd**, the plaintiff contracted dermatitis from wearing a tweed coat which she had bought from the defendant. The issue before court was whether the plaintiff had made her purpose clear to the seller so as to be able to sue or reject the coat for not conforming to the purpose. It was held that since she had a sensitive skin and the coat was not known to cause that disease among the normal skin users, she had failed to make known to the seller the purpose for which the coat was required in the relevant sense.

Section 15(a) has a proviso for **sale under Patent or trade name.** In such a case, there is no implied condition as to the fitness of such a commodity. This is because the buyer does not rely on the seller's skill and judgement but relies on the good reputation which the goods have acquired and buys on the strength of that reputation. The seller's duty therefore is limited to supplying the goods of the same trade name as demanded by the buyer. There is no implied condition for any particular purpose. (Read the US decision of, **Halterman V. Louisville Bridge & Iron Co. 254 S.W.2d 493 (1953),** Milliken J.)

9.5. Condition as to Merchantability.

The legal need for quality in goods is traceable back into common law with the often quoted dicta of Lord Ellenborough in **Gardinerv. Gray (1815) 4 Camp. 144**, that a buyer does not buy goods simply 'to lay them on a dunghill'.

The condition meant little more than that the goods were commercially saleable. **Section 15 (2)** states that where goods are bought by description from a seller who deals in goods of that description whether he is not the producer or manufacturer or not, there is an implied condition that the goods shall be of merchantable quality

The above provision reveals that the condition of merchantability is applicable when,

a) The goods are sold by description
b) The seller deals with such goods

There was no standard interpretation of the phrase 'merchantable quality', although two different approaches developed: the 'acceptability' approach as illustrated in **Grant v. Australian Knitting Mills [1936] AC 85** and the 'usability' approach evidenced in **Kendall v. Lillico[1969] 2 AC 31**.

The former depends on whether the buyer:
fully acquainted with the facts, and therefore knowing what hidden defects exist and not being limited to their apparent condition would buy them without abatement of price obtainable for such goods if in a reasonable sound order and condition and without special terms. (See also Manning J in **Doola Singh and Sons v Uganda Foundry and Machinery Works 12 EACA 33**)

This approach considers quality from the perspective of the reasonable buyer while, by contrast, the usability approach adopted in ***Kendall*** considers it from the perspective of the use of the goods, such that the House of Lords held that the animal feed in question was merchantable as it was suitable for feeding to cattle even though it was toxic when the plaintiff fed it to his pheasants.

But where the buyer examines the goods and the defects are such which can be revealed by ordinary examination, the condition of merchantability does not apply to the extent of such defects. Note however as was stated in **Drummond v Van Ingen (1887)** by the **House** of Lords, the purpose of the examination is to confirm the subject matter of the contract and not to make scientific tests to reveal every aspect of the article's construction, latent defects included.

In **Thornet v. Beers, (1919) 1 KB 486,** B wanted to purchase some glue. The glue was stored in the seller's warehouse in barrels. B was given every facility to open the barrels and inspect them but B did not open the barrels. Liter on the glue was found to have defects which B could have noted if he had opened the Barrels. The court held that there is no breach of implied condition as to merchantability in this case and B was not entitled to any relief.

In **Grant v. Australian Knitting Mills**, B bought underwear from S, B examined it while purchasing .Later on it turned out to be harmful for his skin because of the presence of hidden sulphites in the underwear which could not have been revealed by ordinary examination. The court held that the implied condition of merchantability is applicable in this case.

Now what amounts to an examination is a question of fact in each case. In Thornet's case the buyer had the product before him to examine but he chose not to examine it. Here as against the seller the examination is deemed to be made by the buyer.

Packing of goods is an equally important consideration in judging their merchantability.

In **Morreli v Fitch &gibbons (1928) 2 K.B.636,** M asked for a bottle of Stones Ginger Wine at S's shop which was licensed for the sale of wines. While M was drawing the cork, the bottle broke and M was injured. It was held that the sale was by description and M was entitled to recover damages as the bottle was not of merchantable quality.

9.6. Condition as to wholesomeness.

This condition is only applicable in the sale of eatables. In the case of food products the condition of fitness or merchantability requires that the goods should be wholesome, that is, it should be fit for consumption.

In **Chapronier v. Mason (1905) 21 TLR 633,** C brought a Bun from a baker's shop .The bun contained a stone which broke one of C's teeth. The court held that the seller was liable to pay damages as he breached the condition of wholesomeness.

9.7. Condition implied by custom.

An implied condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.

Section 15(c), provides for instances where the purpose of purchasing goods may be ascertained from the conduct of parties to the sale. Or from the nature of description of the thing purchased. For, example if a water bottle is purchased the purpose for which it is bought is implied in it; in that case the buyer need not tell the seller the purpose for which he buys it as already noted above.

In **Dr.Baretto v. T.R.Price, AIR 1939 Nag 19**, A bought a set of false teeth from a dentist. The set did not fit into A's mouth. It was held that A could reject the set as the purpose for which anybody would buy it was implicitly known to the seller, here the dentist.

Also read: **Priest v Last (1903)2K.B.148.**

10. IMPLIED WARRANTIES

The law will incorporate into a contract of sale of goods implied warranties where there are no express agreements to the contrary.

10.1. Warranty of quiet possession.

Section 13(b) provides greater opportunity for use. It contains a continuing warranty that the buyer will enjoy quiet possession, with a limitation period running from the date of any interference with that right.

It is possible for the seller to be in breach, as in the much quoted decision of ***Rubicon Computer Systems Ltd*** **v.** ***United Paints Ltd (2000) 2 CLY 899, CA.*** The facts were that the seller supplied a computer system to the defendants. During a dispute about payment, the seller, who still had access to the system, installed a time lock, which it subsequently triggered, denying the defendants access to their system. It was held that the seller had breached the section 12(2)(b) (the equivalent of S.13(b) of the Ugandan Act.) warranty of quiet possession.

The next question left, is to ask yourself to what extent the seller can be held liable for the interference by a third party with the quiet possession of the buyer. Reason demands that the seller should not be held liable if a third party unlawfully disrupts the quiet possession of the buyer, even though that may give rise to strange situations.

Hence, it can be argued that in a *nemo dat* situation, the seller, who would be liable under section 13(a) for not having the right to sell, should not be held liable under section 13(b) if the original owner of the goods seeks to interfere with the rights of the innocent buyer who, having acted in good faith, has acquired valid title to the goods.

The seller may be liable here as long as the right that the third party is seeking to enforce existed at the time the contract was made. If the right has arisen subsequently, the seller will not be responsible, as held in ***The Barenbels*** **[1985] 1 Lloyd's Rep. 528** where the rights of the third party arose from a court case heard after the relevant contract of sale had been concluded. (Compare this statement with the decision in ***Microbeads AG*** **v.** ***Vinehurst Roadmarkings Ltd [1975] 1 All ER 529***)

10.2. Warranty of freedom from encumbrances.

This warranty is implied on the seller. The goods sold by the seller should be free from any charge or encumbrances in favour of any third party which was not made known to or declared to the buyer before or at the time of making the contract of sale.

The breach of this warranty will only occur when the buyer in fact discharges (pays) the amount of the encumbrance and he had no notice of that encumbrance at the time of making or entering into the contract of sale.

Knowledge of the encumbrance by the buyer at the time of contracting can substantially discharge the seller of liability under this provision.

10.3. Warranty of disclosing the dangerous nature of goods to the ignorant buyer.

In case the seller is selling goods of a dangerous nature, the law implies a warranty on them to disclose to an ignorant buyer the possible hazard such a good has on them.

The buyer will therefore be entitled to claim for compensation from the seller who breaches this warranty for compensation.

In Clarke v. Army and Navy Cooperative Society Ltd. (1903) 1 KB 155, X purchased a tin of disinfectant powder which required to be opened with special care. X's wife while opening the tin was injured as the powder flew into her eyes. It was held that the seller was liable for the injury sustained by X's wife because of breach of warranty. Romer J said: *I think that apart from any question of warranty, there is a duty cast upon a vendor, who knows of the dangerous character of goods which he is supplying and also knows that the purchaser is not, or may not be aware of it, not to supply the goods without giving some warning to the purchaser of that danger.*

11. Other implied terms

The terms set out in ss 13–15 of the Sale of Goods Act are the basic implied terms. In principle, there seems to be no reason why the general principles about implication of terms in the general law of contract should not apply. So, if a contract of sale is made against a background of a particular trade or local custom, it will be open for one party to seek to show that the custom exists, is reasonable and contracts of sale made in this particular context are regarded by those in the trade or living in the locality as subject to this implied term.

Similarly, there is no reason why a party should not seek to show that in a particular contract a term is to be implied in order to give business efficacy to the contract.

Perhaps, the best example of an implied term which is not explicitly set out in the Act but which has been recognized is shown in **Mash & Murrell v Joseph I Emmanuel (1961)**. In this case there was a contract for the sale of Cyprus potatoes cif Liverpool. On arrival in Liverpool the potatoes were found to be uneatable but the evidence was that they were eatable on loading in Limassol. Diplock J said that liability turned on the reason why the potatoes were uneatable. There were various possible reasons such as bad stowage or inadequate ventilation during the voyage. These would not have been the seller's fault and the risk of these possibilities would pass to the buyer on shipment, leaving the buyer to an action against the carrier. However, one possibility was that the potatoes, although eatable when shipped, were not in a fit state to withstand a normal voyage from Cyprus to Liverpool. Diplock J said that it was an implied term of the contract in the circumstances that the goods would be fit to withstand an ordinary journey. The Court

of Appeal differed with the conclusion that Diplock J reached but not with his analysis of this point.

12. THE DOCTRINE OF CAVEAT EMPTOR

In a sale of goods transaction it is the duty of every buyer to be careful while buying goods of his or her requirements and also the seller is under an obligation to allow the buyer to examine the goods prior to entering into contract.

It is not mandatory for the seller to disclose every defect of his or her goods in absence of any inquiry or asking by the buyer. The buyer should examine the goods thoroughly for his expected purpose and while doing so if he or she makes a mistake and chooses defective goods or if the goods are not suitable for his or her purpose, he or she cannot accuse the seller or cannot shift his or her own fault on the shoulder of the seller. Such obligation and judgment of the buyer is known as "caveat emptor" (buyers beware).

When a buyer takes anything depending on his skill and judgment, he himself is responsible. It is based on the judgmental premise that once a buyer ratifies himself as the suitability of the product for him, he would subsequently have no right to reject the same.

In contract of sale it is an obligatory duty on the seller's part to allow the buyer to examine the goods to be sold before entering into contract of sale this right being subject to **Section 34** of the Act which requires that such examination should be reasonable.. On the other hand, it is the buyer's duty to select the goods of his requirements. "It was for the buyer to make him acquainted with the quality and defects of the goods which he contemplated purchasing".

Where such a buyer does not make any inquiry regarding the goods he is purchasing, the seller is not bound to disclose every defect in the goods of which he may be cognizant. **Section 15** of the Act make this clear as it states;

Subject to the provisions of this Act and of any other Act in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale…

It means the seller is not bound by law to supply the goods which are fit for any particular purpose or possess any particular quality unless it fell within the exceptions under section 15 for the seller to do so. It is the duty of the buyer to make himself acquainted with qualities and defects of the goods which he contemplates at the time of purchasing.

In ***Goustar Enterprises vs. John Kokas Oumo*, Supreme Court Civil Appeal No. 8 of 2003,** the Supreme court which agreed with the Court of Appeal's decision in the case whose facts on appeal where that, the appellant was a member of the Uganda National Farmers Association. The association paid a deposit of shs. 53,584,500 to the respondent

towards the purchase of tractors with specification contained in the memorandum of understanding. Upon the supply, two of the tractors were found to be defective. The appellant brought the suit claiming a refund of shs. 25,421,340 from the respondent. The respondent averred that the tractors were tested and found suitable for use. At the trial, the defendant was ordered to deliver one of the two tractors, refund shs. 7,244,685 and each party to bear its own costs. Dissatisfied with the judgment an appeal was lodged and a cross-appeal filed.

The Court of Appeal rightly held that, *the communication by the buyer to the seller of the purpose for which he/she requires the goods is sufficient to show the seller that the buyer relies on the seller's judgment. In the instant case the seller was given the required specifications. That being the case, the appellant relied on the respondent's judgment and skill to supply tractors fit for purpose. The defects were seen barely two months after tractors had been supplied and yet the respondent had given the appellant a warrant of 12 months. The respondent was in breach of its contractual duty of supplying tractors fit for a particular purpose.*

12.1. EXCEPTIONS TO THE CAVEAT EMPTOR RULE:

The common law rule that the buyer should beware or take the initiative to ascertain what he purchases is limited situations hereunder; thus the buyer shall not be construed to be ware under the following circumstances.

1. Where the seller makes a misrepresentation and the buyer relies on it, the doctrine of caveat emptor does not apply. Such a contract being voidable at the option of the innocent party, the buyer has a right to rescind the contract.
2. Where the seller makes a false representation amounting to fraud and the buyer relies on it or where the seller actively conceals a defect in the goods so that the same could not be discovered on a reasonable examination, the doctrine does not apply, and the contract is voidable at the option of the buyer. He may avoid the contract and also damages for fraud.
3. Where the goods are purchased by description and they do not correspond with such description.
4. Where the goods are purchased by description from a seller who deals in such class of goods and they are not of a "merchantable quality" the doctrine does not apply.
5. Where the goods are bought by sample apply, the doctrine does not apply if the bulk does not correspond with the sample, or if the buyer is not provided an opportunity to compare the bulk with the sample or if there is any hidden or latent defect in the goods.
6. Where the goods are bought by sample as well as by description, and the bulk of the goods does not correspond with the sample and with the description, the buyer is entitled to reject the goods and the doctrine does not apply.

7. Where the buyer makes known to the seller the purpose for which he requires the goods and relies upon the seller's skill and judgment but the goods supplied are unfit for the specified purpose, the doctrine does not protect the seller and he is liable in damages.
8. Where the trade usage attaches an implies condition or warranty as to quality and fitness and the seller deviates from that the, the doctrine of caveat emptor does not apply and the seller is liable in damages.

13. PASSING OF PROPERTY IN GOODS:

The basic rules as to the passing of property are set out in **ss 17** and **18** of the Sale of Goods Act. Section 17 deals with the passing of property in unascertained goods while section 18 deals with passing of property in ascertained goods.

It is for this reason that passing of property in goods under a sale of goods contract can be analysed under two categories;

Passing of property in specific or ascertained goods;

Passing of property in future or unascertained goods.

13.1. Passing of property in specific or ascertained goods

Section 18(1) provides that where there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

Section 18(2) provides that for the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case.

The intention of the parties may be to pass property at once at the time when the contract of sale is made or when the goods are delivered or when the goods are paid for.

Where the intentions of the parties cannot be determined from either the contract or conduct or other circumstances, it can be determined from the rules set out in **Section 19** of the Act.

Rules of ascertaining the intention of the parties:

13.1.1. Rule 1 (S.19(a)): *where there is an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery or both are postponed*:

The catch phrases conditions to be met under this rule are, "deliverable state", "unconditional contract" and "sale of specific goods". Here property in the goods passes from the seller to the buyer where the contract for sale is unconditional.

The *locus classicus* case on "deliverable state" is **Tarling v Baxter (1827) 6 B & C 360,** in this case, a farmer sold a haystack, which remained on his farm to be collected in the spring. Before collection, the stack was destroyed. It was held on the facts that ownership had passed to the buyer and therefore, bore the loss.

The above case shows us that for goods to be in a deliverable state if they are in such a state that the buyer is bound to take them (also look at **S.1 (4)** of the Act) and as such, it is a question of fact. Like Holroyd J stated in ***Tarling***;

…if nothing remains to be done on the part of the seller, as between him and the buyer, before the thing purchased is to be delivered, the property in the goods immediately passes to the buyer, and that in the price to the seller; but if any act remains to be done on the part of the seller, then the property does not pass until that act has been done.

The case of **Dennant v Skinner and Collom [1948] 2 KB 164** is another case that can be considered on this point. At auction, a van was bought by cheque. When paying the buyer signed a statement stating that ownership would not pass to him until the cheque was cleared. He sold the car to a third party and there was a dispute regarding ownership of the car. It was held that the contract was complete when the auctioneers hammer fell, the third party therefore had good title to the car. Therefore the statement was made too late. This case can also explain the condition of "unconditional contract". Also look at the case of ***McPherson, Thom, Kettle & Co v Dench Bros*** **[1921] VLR 437**) where it was stated that a sale is unconditional if, it is not subject to any condition suspensive of the passing of property.

The locus case on the condition of "specific goods" is the case of **Kursell v Timber Operators & Contractors Ltd [1927] 1 KB 298**, the seller agreed to sell all merchantable timber defined in the agreement. The contract was to remain in force for 15 years. Forest expropriated by Latvian Government. Seller sued buyer for the price, but to succeed, had to prove that property had passed. The seller argued that the goods were specific, and that property had passed at the time the contract was made as per s. 23(2) the equivalent of our S. 19(a). It was held that the goods had not been identified at the time of the contract. Only trees conforming to certain measurements could be cut. This was because merchantable timber was subject to change over time as the trees grew, and there was no identification of which trees were included.

13.1.2. Rule 2(s.19(b)): Where there is a contract for the sale of <u>specific goods</u> and the <u>seller is bound to do something to the goods, for the purpose</u>

of putting them into a deliverable state the property does not pass until such thing be done, and the buyer has notice thereof

Where the good is specific but certain steps have to be taken to put the good into a deliverable state, except if such steps have been undertaken no property will pass.

The case of **Underwood Ltd v Burgh Castle Brick and Cement Syndicate [1922] 1 KB 343** is instructive on this rule. The owners of a horizontal condensing engine agreed to sell it at a price free on rail in London. It weighed thirty tons and was bolted to and embedded in a flooring of concrete. Before it could be delivered on rail it had to be detached and dismantled. The seller detached it, but in loading it on a truck they damaged it by accident, so that the buyers refused to accept it. Plaintiffs argued property passed when contract was made. It was held that that the property in the engine had not passed to the defendants. Bankes LJ said:

Did the property in that engine pass on the contract of sale? No general rule can be laid down which will answer the question when the property passes in every contract of sale. In many sales of specific articles to be delivered the property passes on the making of the contract. A man may select and agree to buy a hat and the shop man may agree to deliver, it at the buyer's house, There notwithstanding the obligation to deliver the hat, the property passes at the time of the contract. But that is far from this case. Considering the risk and expense involved in dismantling and moving this engine, I have no hesitation in holding that the proper inference to be drawn is that the property was not to pass until the engine was safely placed on rail in London… But was this engine in a deliverable state in its position at Millwall? The appellants contended that where a specific article is complete in itself, for example a complete engine or a complete cart-that is to say, where nothing more has to be done to make it an engine or a cart-it is then in a deliverable state within the meaning of s. 18, r. 1, and if the owner agrees to sell it the property passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed. I do not accept that test. A " deliverable state " does not depend upon the mere completeness of the subject matter in all its parts. It depends on the actual state of the goods at the date of the contract and the state in which they are to be delivered by the terms of the contract. Where the vendors have to expend as much trouble and as much money as the appellants had to expend before this engine could be placed on rail, I cannot think that the subject matter can be said to be in a deliverable state.

13.1.3. Rule 3(S.19(c)): *Where there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test, or do some other acts or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or thing be done, and the buyer has notice thereof.*

The act of weighing, measuring and any other requirement under this rule must be done by the seller before property passes (***Turley v Bates*** **(1863) 2 H&C 200)**). However, this should be expressly stated in the contract as a condition precedent to the passing of property before the court can rule thus.

In **Nanka-Bruce v Commonwealth [1926] AC 77,** the appellant arranged to consign cocoa to one L. by rail at 59s. per load of 60 lbs. L. was to resell the cocoa to merchants and to transfer to them the railway consignment notes; the merchants were to check the weights, and L. was to pay according to the weights so checked. The appellant consigned 160 bags of cocoa to L., and he sold it to the respondents, transferring to them the consignment note. The respondents bought and took delivery in good faith, and credited L. with the purchase price against a large debt due to them from him. The appellant brought an action in the Supreme Court of the Cold Coast to recover from the respondents damages for conversion of the cocoa. It was held that the checking of the weights by the merchant was not a condition precedent to the passing of the property to L., that the respondents having bought in good faith obtained a good title against the appellant, and, accordingly, that the action failed. Lord Shaw who delivered the full judgement of the court said;

Their Lordships agree that the provision as to the weight of the goods being tested was not a condition precedent to a sale. The goods were transferred, their price was fixed, and the testing was merely to see whether the goods fitted the weights as represented, but this testing was not suspensive of the contract of sale or a condition precedent to it. To effect such suspension or impose such a condition would require a clear contract between vendor and vendee to that effect. In this case there was no contract whatsoever to carry into effect the weighing, which was simply a means to satisfy the purchaser that he had what he had bargained for and that the full price claimed per the contract was therefore due.

13.1.4. **Rule 4(S.19(d))**: *Where goods are delivered to the buyer on approval or "on sale or return" or other similar terms, the property therein passes to the buyer—*

(i) when he signifies his approval or acceptance to the seller or does any other act adopting the transaction;

(ii) if he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time, and if no time has been fixed, on the expiration of a reasonable time. (refer also to S.55 of the Act on what reasonable time is.)

- **"on approval or "on sale or return-** the person to whom the goods have been delivered has the option of buying the goods or not as he chooses, and until he has bought them (or deemed by rule4 to have done so), property in the goods remains with the seller. Therefore no sale is exercised until such an option is exercised.
- **adopting the transaction-** where the buyer does any act inconsistent with his or her being a buyer that is they become a purchasor, then they have adopted the contract of sale. This may be implied from the conduct of the buyer.
  It is not sufficient for the seller simply to show that the buyer is unable to return the goods.
  In **Elphick Vs Barnes, 1880(5) CPD 321,** A, delivered a horse to B on the terms of 'sale or return' within 8 days.' The horse died on the third day without any fault on the part of B. it was held that A was to bear the loss as the horse was still his property when it perished.
  Where the buyer sells or pledges the goods then this can be seen as an act of adoption.
  In ***Kirkham v Attenborough*** [1897] 1 QB 201, a jewellery manufacturer forwarded jewels to a seller on sale or return. The seller then pledged them to a pawnbroker. Lord Lopes who was in agreement with Rigby and Esher LLJ said;

  The position of a person who has received goods on sale or return is that he has the option of becoming the purchaser of them, and may become so in three different ways. He may pay the price, or he may retain the goods beyond a reasonable time for their return, or he may do an act inconsistent with his being other than a purchaser. The words of the Act are difficult to construe; but it seems to me that if the recipient of the goods retains them for an unreasonable time he does something inconsistent with the exercise of his option to return them, and thereby adopts the transaction. So if he does any other act inconsistent with their return, as if he sells them or pledges them, because if he pledges them he no longer has the free control over them so as to be in a position to return them. In all these cases he brings himself within the words of the section by adopting the transaction, and the property in the goods passes to him. If that is the state of the law, applying it to this case, it is clear that the plaintiff is not entitled to recover from the defendant either the goods or their price, and the judgment in favour of the plaintiff cannot be supported.
- **Notice of rejection** –In the absence of a contrary intention, a notice rejecting unsold goods does not have to be in writing or to identify with certainty the goods to which it related, but it suffices if it identifies them generically so long as the generic description enabled them to be identified with certainty. (read ***Atari Corporation (U.K.) Ltd. v. Electronics Boutique stores (U.K.) Ltd.,*****[1998] QB 539 (CA)**, where the plaintiffs were manufacturers of computer games; the defendants owned a large number of retail outlets. The defendants wanted to test the market

for the plaintiff's games. They took a large number on the basis that they were given until 31 January 1996 to return them. On 19 January 1996, they gave notice that sales were unsatisfactory and that they were arranging for the unsold games to be brought to a central location for return. This was held to be an effective notice, even though the games to be returned were not specifically identified or ready for immediate return.

If also, the buyer does not signify approval or acceptance, property passes when he retains the goods beyond the agreed time or if no time was agreed, beyond a reasonable time.

In **Poole v. Smiths car sales Ltd (1962) 2 ALLER 482**; The seller left his car with the buyer on "sale or return" terms in August 1960. After several requests, the buyer returned the car in November 1960, in a badly damaged state due to use by the buyer's employees. It was held that since the car had not been returned within a reasonable time the property in it has passed to the buyer and he was accordingly liable to pay the price agreed.

13.2. Passing of property in unascertained goods.

In the sale of unascertained goods, property cannot pass until the goods are ascertained, even if the parties were to try to agree otherwise.

Until the goods are ascertained or appropriated, there is merely "an agreement of sell".

The default rule in S.19 (e) (rule 5) provides that where there is a contract for the sale of unascertained or future goods by description, and goods of that description, and in a deliverable state, are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be express or implied, and may be given either before or after the appropriation is made.

The process of ascertainment as Lord Atkin put it in **Re Wait [1927] 1 Ch 606** takes place where the goods become '*identified in accordance with the agreement after the time a contract of sale is made*'. In this case, 500 tons of wheat were sold from a cargo of 1000 tons that was on board a ship, Challenger. When the seller went into liquidation, the court held that the sale was of unascertained goods and so under [s.16] property had not passed to the buyer at the time of the contract. The buyer could not, therefore, claim the goods and merely joined the other general creditors.

Ascertainment or appropriation consists of earmarking or setting apart/aside goods of which are the subject matter of the contract. This basic principle was recently reaffirmed by the Privy Council in **Re Goldcorp Exchange Ltd (in receivership) [1995] 1 AC 74**. In this case, a New Zealand company dealt in gold and sold to customers on the basis that the company would store and insure the gold free of charge. They issued certificates to the customers. No specific gold was set aside for any specific customer though there were assurances (which were not kept) that a sufficient supply of gold would be held at all

times to meet orders for delivery by customers. In fact, the company became hopelessly insolvent and had inadequate supplies of gold. The Privy Council held that it was elementary that property had not passed from the sellers to the buyers because the company was free to decide what bullion to allocate to a particular investor.

This case can be usefully contrasted with ***Re Stapylton Fletcher Ltd*** **[*1995*] 1 WLR 1181**. In this case, wine merchants bought and sold wine and also sold it on the basis that they would store it for customers until it was fit to drink. In this case, the wine merchant kept the boxes of wine which they were holding for customers in a separate unit. This unit contained nothing but wine which was being stored for customers and, at all times, the right quantities of vintages were in stock and the total was in strict compliance with the customers' storage records. On the other hand, the wine merchant did not mark individual cases of wine with the customer's name, since where, as was usually the case, there was more than one case of a particular vintage, it was convenient to supply customers off the top of the pile which necessarily meant that individual cases were not allocated. The wine merchants became insolvent. In this case, it was held that the wine was sufficiently ascertained for the customers to become tenants in common of the stock in the proportion that their goods bore to the total in store for the time being. This decision is very important because it shows that the ascertainment rule does not prevent two or more owning goods in common where there is an undivided bulk.

Ascertainment usually flows from the act of one or both parties to the contract or someone designated by them. It may also be automatic that is where goods are capable of prospective identification.

The difference between ascertainment and appropriation is that whereas ascertainment can be a unilateral of the seller, that is he alone may set the goods apart the goods, "appropriation" involves the element of mutual consent of the buyer and the seller. Ascertainment must be brought to the knowledge of the buyer.

In some cases, ascertainment and appropriation may take place at the same time. This was so in ***Karlshamns Oljefabriker v. Eastport Navigation*** **[The Elafi], [*1982*] 1 All E.R. 208**, where 22,000 tons of copra were loaded on board a ship in the Philippines, of which 6,000 tons were sold to a Swedish buyer. The ship called at Rotterdam and at Hamburg on its way to Sweden and 16,000 tons were unloaded at these two ports. It was held that these 6,000 tons for Sweden became ascertained at the end of unloading in Hamburg. This is quite likely to be the case where the goods are appropriated by delivery to a carrier as happens, particularly in international sales (though in such sales there are often express agreements as to the passing of property). So, if the seller contracts to sell 1,000 tons Western White Wheat cost, insurance and freight (cif) Avonmouth and puts 1,000 tons of Western White Wheat aboard a ship bound for Avonmouth this may both ascertain and appropriate the goods. In many such cases, however, the seller will load 2,000 tons having sold 1,000 tons to A and 1,000 tons to B.

In such a case, the goods will not be ascertained until the first 1,000 tons are unloaded at the destination. Even where the seller puts only 1,000 tons on board this will not necessarily constitute appropriation because he may not at that stage have committed himself to using that 1,000 tons to perform that contract.

This was clearly decided in **Carlos Federspiel & CO SA v Charles Twigg and Co Ltd [1957] 1 Lloyd's Rep 240** where the seller had agreed to sell a number of bicycles to the buyer. The seller had packed the bicycles, marked them with the buyer's name and told the buyer the shipping marks. The seller then went insolvent. The buyer argued that the bicycles had been appropriated to its contract and that property had passed to it. This argument was rejected on the grounds that the seller could properly have had a change of mind and appropriated new bicycles to the contract.
It is essential that there is a degree of irrevocability in the appropriation. It is this which makes delivery to the carrier often the effective act of appropriation.

14. EXCLUSION OF SELLER'S LIABILITY THROUGH EXEMPTION CLAUSES

A clause may be inserted into a contract which aims to exclude or limit one party's liability for breach of contract or negligence. However, the party may only rely on such a clause if (a) it has been incorporated into the contract, and if, (b) as a matter of interpretation, it extends to the loss in question.

Section 54 of the sale of goods Act provides that where any right, duty or liability would arise under a contract of sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by usage, if the usage is such as to bind both parties to the contract. And S.15 of the SOGA provided that an express warranty or condition does not negative a warranty or condition

The purpose of an exclusion clause(s) is to totally exclude any liability from arising at all. They usually exist in standard contracts.

1. Incorporation;

The party relying on an exclusion clause must show that it formed part of the contract. An exclusion clause can be incorporated in the contract by signature, by notice or by course of dealing.

1.1. Signed documents:

If the party signs a document having contractual effect containing an exclusion clause, it will automatically form part of the contract, and he is bound by its terms. This is so even if he has not read the document and regardless of whether he understands it or not.

In ***L'Estrange v Graucob*** **[1934] 2 KB 394** the claimant purchased a cigarette vending machine for use in her cafe. She signed an order form which stated in small print 'Any

express or implied, condition, statement of warranty, statutory or otherwise is expressly excluded'. The vending machine did not work and the claimant sought to reject it under the Sale of Goods Act for not being of merchantable quality. It was held that in signing the order form she was bound by all the terms contained in the form irrespective of whether she had read the form or not. Consequently her claim was unsuccessful.

However, even a signed document can be rendered wholly or partly ineffective if the other party has made a misrepresentation as to its effect. (See **Curtis v Chemical Cleaning Co [1951] 1 KB 805**)

1.2. **By Notice:**

The seller must show that the buyer had reasonable notice of the existence of the clause and that it was intended to be an integral part of the contract. Notice depends on the interpretation of the contract.

In ***Olley v Marlborough Court*** **[1949] 1 KB 532**, the claimant booked into a hotel. The contract was made at the reception desk where there was no mention of an exclusion clause. In the hotel room on the back of the door a notice sought to exclude liability of the hotel proprietors for any lost, stolen or damaged property. The claimant had her fur coat stolen. It was held that the notice was ineffective. The contract had already been made by the time the claimant had seen the notice. It did not therefore form part of the contract.

In **Thompson v LMS Railway [1930] 1 KB 41,** the claimant was injured whilst stepping off a train. The railway company displayed prominent notices on the platforms excluding liability personal injury and damage to property due to negligence. The tickets also stated they were subject to terms and conditions displayed on the platform. The claimant was illiterate and could not read the signs. She argued that the exclusion clause was not incorporated into the contract as the railway company had not brought the clause to her attention at the time the contract was made. It was held that the clause was incorporated. There is only a requirement to take reasonable steps to bring the clause to the attention of a reasonable person. There was no duty to ensure that every traveler was aware of the clause. The claimant was therefore unsuccessful in her claim for damages.

What is reasonable is a question of fact depending on all the circumstances and the situation of the parties. The courts have repeatedly held that attention should be drawn to the existence of exclusion clauses by clear words on the front of any document delivered to the plaintiff, e.g. "For conditions, see back". It seems that the degree of notice required may increase according to the gravity or unusualness of the clause in question.

1.3. **By course of dealing between the parties:**

Even where there has been insufficient notice, an exclusion clause may nevertheless be incorporated where there has been a previous consistent course of dealing between the parties on the same terms. The parties may raise an implication that certain terms are or are not to be included in the contract if these have or have not implied on previous occasions.

The party relying on the past dealing defence must prove to court they have been a consistent course of dealing in which the same terms have been regularly incorporated in the past.

In **McCutcheon v MacBrayne [1964] 1 WLR 125**, the claimant's car sank in a car ferry owned by the defendant. The claimant had used the car ferry on a few occasions previously. Sometimes he had been asked to sign a document containing an exclusion clause sometimes he had not been asked to sign a form. On this occasion he had not been asked to sign a document. The defendant sought to rely on the exclusion clause claiming it had been incorporated through previous dealings. It was held that there was no consistency in the course of dealings and therefore the clause was not incorporated. The defendant was liable to pay damages.

In **Hollier v Rambler Motors [1972] 2 WLR 401,** the claimant had used the services of the defendant garage on 3-4 occasions over a five year period. Each time he had been asked to sign a document excluding liability for any damage. On this occasion the contract was made over the phone and no reference to the exclusion clause was made. The garage damaged the car during the repair work and sought to invoke the exclusion clause through previous dealings. It was held that there was not a sufficient number of or regularity of transactions to amount to a previous course of dealings capable of incorporating the exclusion clause. It was not reasonable to expect the claimant to remember the clause from one transaction to the next. Consequently the garage was liable to pay for the damage.

Also read the case of ***Air Transworld Limited v Bombardier Inc Air Transworld Limited v Bombardier Inc [2012] EWHC 243.***

2. **Limitations imposed by the common law on the effectiveness of exemption clauses.**

The principal tool used by common law to control exemption clauses has been the process of construction, that is, the process by which the court construes (decides the meaning of) the contract. Courts have traditionally approached this process of construction by making a number of assumptions.

These assumptions may often overlap but are probably analytically distinct. So, it is assumed that it is unlikely for one party to agree that the other party shall not be liable even where she is negligent; similarly, it is thought that, the more serious a breach of

contract has been committed by one party, the less likely it is that the other party will have agreed in advance that such a serious breach does not matter.

The thrust of both of these assumptions is that, if one party wishes to exclude its liability for negligence or a serious breach of the contract, it needs to say so in clear terms.
A third assumption which overlaps with these two but may have separate application is the *contra proferentem* principle, which says that, if one party has drafted or is responsible for the drafting of a document and the document is ambiguous, then any ambiguities should be resolved in favour of the other party.

It has also been said that, where one party has only entered into the contract because she has been misled by the other about the effect of the exclusion clauses, then the exclusion clauses are without effect. This principle would obviously apply where the misrepresentation was fraudulent but it seems to apply even if the misrepresentation was entirely innocent (see **Curtis v Chemical Cleaning and Dyeing Co (1951)**).

It is not clear whether the principle that surprising clauses should be specifically drawn to the attention of the other party applies where the document is signed.
The cases in which it has arisen have not been cases of signed documents but the underlying rationale would seem to be equally applicable in such a case.

15. RISK AND FRUSTRATION

15.1. RISK

The general rule is that prima-facie the risk passes with the property unless otherwise agreed; the goods remain at the seller's risk.

S.21 provides that until the property in them is transferred to the buyer, the goods are at the seller's risk whether delivery has been made or not.

The principal tool used to allocate the loss which arises where the goods are damaged or destroyed after the contract is made is the doctrine of risk. This is a special doctrine developed for the law of sale, unlike the doctrine of frustration which is a general doctrine of the law of contract.

The parties can and frequently do separate the passing of risk and property. So, in standard conditions of sale, the seller will often provide that risk is to pass on delivery but that property is not to pass until the goods have been paid for.

This is because the seller does not wish to be bothered with insuring the goods once he or she has delivered them, but is anxious to retain ownership of the goods as security against not being paid in full.

There seem, however, to be at least two kinds of case where risk may pass at a different time from property even though there is no expressed or implied agreement.

The first arises in the case of sales of unascertained goods. As we have seen, property cannot pass in such a case until the goods are ascertained. However, there may be cases where property is not ascertained because the goods form part of an unascertained bulk but, nevertheless, fairness requires that risk should pass.

The classic example is ***Sterns*** **Ltd** ***v Vickers*** **Ltd [*1923*] 1 KB 78,** where the sellers had some 200,000 gallons of white spirit in a tank belonging to a storage company. They sold to the buyers some 120,000 gallons of the spirit and gave the buyers a delivery warrant. The effect of the delivery warrant was that the storage company undertook to deliver the white spirit to the buyers or as the buyers might order. In fact, the buyers sub-sold, but the sub-purchaser did not wish to take possession of the spirit at once and arranged with the storage company to store it on his behalf, paying rent for the storage. Clearly, although there had been a sale and a sub-sale, ownership was still in the hands of the original sellers since the goods were still unascertained. While the bulk was unseparated, the spirit deteriorated. The Court of Appeal held that although there was no agreement between the parties, the risk had passed as between the original seller and buyer to the buyer. The reason for this was that as soon as the buyers had the delivery warrant, they were immediately able to obtain delivery of the spirit and therefore risk should pass to them even though they chose not to take immediate possession of the goods.

The second situation is illustrated by the case of **Head v. Tattersall (1870) LR 7 EX 7**. In this case, the plaintiff bought a horse from the defendant who warranted that it had been hunted with the Bicester hounds. The contract provided that the horse might be returned by a certain day if it appeared that it had not in fact been hunted with the Bicester hounds. The horse had in fact not been hunted with the hounds and the plaintiff chose to return it before the agreed date. On the face of it, the plaintiff was clearly entitled to do this, but before the horse had been returned it had been injured while in the plaintiff's possession, although without any fault on his part. The court held that the plaintiff was entitled to return the horse. Cleasby B expressly stated that property had passed to the plaintiff and then revested in the defendant. The same conclusion is implicit in the other two judgments.

The general rule stated in **s 21** of the Sale of Goods Act is subject to the qualifications contained in sub-ss (a) and (b). Sub-section (a) means that if the seller is late in making the delivery or the buyer is late in accepting delivery, this may mean that the incidence of risk is different from what it would otherwise have been.This would be so, however, only if the loss is one which might not have occurred if delivery had not been delayed.

However, the onus will be on the party who is in delay to show that the loss would have happened in any event. Sub-section (b) is really no more than a specific example of the general principle that the passing of risk is to do with the allocation of the risk of damage which is not the fault of either party.

The most important example of this is where the risk is on one party, but the other party is in possession of the goods and fails to take good care of them.

We should also note **s 33** of the Sale of Goods Act, which provides:

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.

15.1.1. What is the effect of the passing of risk?

It is important to emphasise that the doctrine of risk does not operate to bring the contract of sale to an end. It may, however, release one party from their obligations under the contract. So, for instance, if the goods are at the seller's risk and they are damaged or destroyed, this would in effect release the buyer from their obligation to accept the goods, but it would not release the seller from the obligation to deliver them.

Conversely, if the goods are at the buyer's risk and are damaged or destroyed, he/she may still be liable to pay the price even though the seller is no longer liable for not delivering the goods.
In some cases where the goods are damaged, this would be the fault of a third party and that third party may be liable to be sued.

15.2. The doctrine of frustration

The doctrine of frustration is part of the general law of contract. In principle, there can be no doubt that this doctrine applies to contracts for the sale of goods like any other contract.

15.2.1. When does the doctrine of frustration apply?

Section 8 of the Act contains a provision which deals expressly with frustration. This provides:

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 avoided.

This section is clearly a very incomplete statement of the doctrine of frustration as applied to contracts of sale. It deals only with specific goods and it deals only with goods which perish, whereas frustration may involve many other events than the destruction of the goods.
For instance, where goods are sold internationally, there is often a requirement to obtain an export or import licence. Failure to obtain such a licence would not normally be a frustrating event because the parties would know at the time of the contract that the licence was required and the contract would often expressly or impliedly require one of the parties to obtain (or at least to use their best endeavours to obtain) the licence.

However, it might be that after the contract was made a government introduced a wholly new export or import licensing system which was unforeseen. There might be plausible arguments in such a case that the contract was frustrated.

It is also possible to argue that a contract for the sale of unascertained goods is frustrated, but of course such goods cannot usually perish (except for the special case of sale of part of a bulk as discussed below). In practice, the courts, although admitting the possibility that sales of unascertained goods can be frustrated, have been very slow in fact to hold them frustrated.

In ***Howell v Coupland (1876)*** **1 QBD 258**, a farmer sold in March for delivery upon harvesting the following autumn, 200 tons of potatoes to come from his farm. In fact, only 80 tons were harvested. The buyer accepted delivery of the 80 tons and brought an action for damages for non-delivery of the balance of 120 tons. It was held that the unforeseen potato blight which had affected the crop released the seller from his obligation to deliver any more than had in fact been grown. It should be noted that in fact the buyer was perfectly happy to accept and pay for the 80 tons; it was certainly arguable that if the potato blight released the seller, it also released the buyer from any obligation to take the potatoes at all. Obviously, there could be commercial situations in which if the buyer could not obtain the full 200 tons from one source, it was perfectly reasonable of him to refuse to accept any delivery at all. The case does not decide that a buyer could not elect to do this.

In **HR & S Sainsbury Ltd v Street (1972) 1 WLR 834**, the farmer contracted to sell to a corn merchant 275 tons of barley to be grown on his farm. In this case, there was a generally poor harvest and only 140 tons were harvested on the defendant's farm. The defendant argued that the contract was frustrated and sold the 140 tons to another merchant. (The reason no doubt being that, because of the generally poor harvest, barley prices were higher than expected and the defendant was then able to get a better price from another merchant.) McKenna J held that the farmer was in breach of contract by not delivering the 140 tons which had actually been harvested, although the bad harvest did relieve him of any obligation to deliver the balance of 135 tons.
Again, it should be noted that in this case the buyer was willing and indeed anxious to take the 140 tons and the case does not therefore decide that the buyer in such a case was bound to take the 140 tons, although the doctrine of frustration where it operates, does normally operate to release both parties from future performance of the contract.

15.2.2.The effect of frustration

If a frustrating event takes place, its effect is to bring the contract to an end at once and relieve both parties from any further obligation to perform the contract. This is so, even though the frustrating event usually only makes it impossible for one party to perform. So, the fact that the seller is unable to deliver the goods does not mean that the buyer is

unable to pay the price, but the seller's inability to deliver the goods relieves the buyer of the obligation to pay the price.

This rule is easy to apply where the contract is frustrated before either party has done anything to perform it, but the contract is often frustrated after some acts of performance have taken place.

At common law, it was eventually held in the leading case of ***Fibrosa*** **Spolka Akcyjna *v* *Fairbairn* Lawson Combe Barbour Ltd [1942] UKHL 4**, that if a buyer had paid in advance for the goods, he could recover the advance payment in full if no goods at all had been delivered before the contract was frustrated. However, that decision is based on a finding that there had been a 'total failure of consideration'; that is, that the buyer had received no part of what it expected to receive under the contract.

If there was a partial failure of consideration, that is, if the buyer had received some of the goods, then it would not have been able to recover an advance payment of the price even though the advance payment was significantly greater than the value of the goods which it had received. This, obviously, appears unfair on the buyer.

The decision in the *Fibrosacase* was also potentially unfair on the seller. Even though the seller has not delivered any goods before the contract is frustrated, it may well have incurred expenditure where the goods have to be manufactured for the buyer's requirements and some or perhaps even all of this expenditure may be wasted if the goods cannot easily be resold because the buyer's requirements are special.

In light of this case, the law on frustration is need of immediate amendment in order to give the courts a wider discretion to order repayment of prices which had been paid in advance or to award compensation to a seller who had incurred wasted expenditure before the contract was frustrated.

16. TRANSFER OF TITLE WHERE THE SELLER IS NOT THE OWNER

In this section, we consider cases where the seller was not, in fact, the owner nor the authorised agent of the owner at the time of the sale. This situation may arise in a range of cases running from the situation where the seller has stolen the goods all the way to a case where the seller honestly believes that he is the owner of the goods but has himself been misled by a previous seller.

In this type of case there is a conflict of interest between that of the original owner of the goods who is seeking to recover them or their value and the ultimate buyer who has paid good money for goods which he believed the seller was entitled to sell to him. In general, it is desirable to protect the interests both of the owners of property and of honest buyers who pay a fair price.

The principle is that, the seller cannot normally transfer any better rights than he himself has. This is often put in the form of the Latin maxim ***nemo dat quod non habet*** (roughly, no one can transfer what he does not have).

This rule is the subject of a substantial number of exceptions. Most of the exceptions are set out in **ss 22–27** of the Sale of Goods Act.

In **Cundy v Lindsay (1878)** HL, Blenkiron were a well-known and respected firm who carried on business at 123 Wood Street, Cheapside. A rogue, called Blenkarn, from 37 Wood Street, impersonated the neighbouring firm and ordered a quantity of linen from Lindsay. Lindsay sent the linen on credit believing that they were dealing with the firm, Blenkiron. Blenkarn (the rogue) then sold some of the linen to Cundy. Lindsay brought a claim in conversion against Cundy. It was held that the contract between the rogue and Lindsay was void for mistake. Consequently, the rogue had no title to pass to Cundy and Lindsay would succeed.

In **Jerome v Bently (1952)** Jerome entrusted a diamond ring to a stranger, Tatham, with authority to sell it for over £550; Tatham could keep any surplus and if he could not sell it within seven days he should return it. After 12 days, Tatham sold the ring to Bently for £175, who took it in good faith believing that Tatham was the owner. Jerome brought an action in conversion against Bently.it was held that Tatham, having no authority to convey title in the ring, could not pass good title to Bently, and so Jerome succeeded.

The exceptions to the nemo dat rule include;

16.1. Estoppel

Section 22(1) of the Act provides:

> *Subject to this Act, where goods are sold by a person who is not their owner, 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, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell.*

The operation of the doctrine is to prevent (estop) a party from advancing an argument which he/she would otherwise be entitled to put forward. So, for instance, a party may be prevented from putting forward an argument because it has been the subject matter of a previous judicial decision on the same facts which is binding on them.

It is common in analysing the operation of estoppel in this area to distinguish between estoppel by representation, which arises where it could be said that the true owner has represented that someone else has authority to sell the goods, and estoppel by negligence which arises where the true owner has behaved carelessly in respect of the goods in such a way as to enable the goods to be dealt with in a way which causes loss to a third party.

However, in practice, the courts have been very cautious in applying either limb of the doctrine. In particular, it is clear that the owner does not by the mere act of putting his goods into the hands of someone else represent that that person has authority to sell them; nor is it negligent to do so unless it is possible to analyse the transaction in such a way as to support the argument that the true owner owed a duty of care in respect of the goods to the party who has been deceived.

The narrow scope of both estoppel by representation and estoppel by negligence is shown by ***Moorgate Mercantile*** **Co Ltd** ***v Twitchings*** **[*1977*] AC 890** in which the majority of the House of Lords rejected the application of both doctrines. In this case, McLorg took a car on hire-purchase. The hire-purchase company (Moorgate) were, therefore, the new owners of the car. However, they failed to register the agreement with Hire Purchase Information Ltd (HPI). HPI hold a register upon which hire-purchase companies may record agreements, which enables potential purchasers of a car to check if it actually belongs to a hire-purchase company and not the seller. Nearly all car dealers used this service. McLorg offered the car to the defendant dealer, who checked the HPI register. As the car was not recorded on the register the dealer bought the car. Moorgate then sued the dealer for conversion asserting the nemo dat rule. The dealer argued that Moorgate were estopped because they owed a duty of care to car dealers to register all hire purchase agreements. They were in breach of that duty by their negligent omission to register the agreement.
Held (3:2) that as HPI was a voluntary scheme no duty of care was owed to the defendant by Moorgate. The minority said that as in practice 98% of hire- purchase companies used the HPI register, it was foreseeable the dealer would suffer loss.

Another restriction of the scope of s 22(1) was revealed by the decision in ***Shaw v Comr of Police*** **[*1987*] 1 WLR 1332**. A student, Mr Natalegawa, advertised for sale his Porsche car in a newspaper. A rogue calling himself London replied stating that he had a buyer for the car. Natalegawa gave London possession of the car, its registration document (log book) with the notice of sale slip signed, and a signed disclaimer of legal responsibility for the car. In return London gave Natalegawa a post-dated cheque for £17,250. By doing this, Natalegawa was 'backing both ways': London had agreed to purchase the car himself in the event of the initial deal falling through. However, Shaw, a car dealer, agreed to buy the car from London and gave him a bankers' draft for £10,000; London then gave Shaw possession of the car. London failed to cash the bankers' draft and disappeared. The fraud was discovered and the police impounded the car. Both Shaw and Natalegawa claimed ownership. Natalegawa based his claim on the nemo dat rule. Shaw claimed that Natalegawa was estopped by his conduct, that is, clothing London with apparent ownership of the car.
Held Natalegawa's conduct amounted to a representation that London was the owner of the car. However, s 21 the equivalent of S.22 in Uganda, of the SGA, which puts this estoppel on a statutory basis, states: 'Subject to this Act, where goods are sold by a

person who is not their owner …' In this case there was no 'sale' between London and Shaw, only an agreement to sell: the bankers' draft was never cashed and so no property in the car ever passed to Shaw. Consequently, the car still belonged to Natalegawa.

16.2. The consent of the owner also sell by agent:

Where the goods are sold with the express authority of the owner, the ordinary rules of principal and the agent apply and no special difficulty arises. If the buyer, not being in possession, resells the goods and the seller assents to such sale, the sub buyer obtains a good title free from the first seller's lien or right of stoppage in transit. The effect of such assent on the part of the seller is very similar to that of estoppel, but the difference seems to be that whereas estoppel can only operate if the assent is communicated to the sub buyer, the seller may assent to the resale even though he only communicates his assent to the buyer.

Further, the buyer must have been acting in good faith without notice of the lack of authority of the agent.

The consent of the owner is crucial and is binding on the owner even if consent was given as a result of a fraud perpetrated by the agent, as long as consent has actually been given.

In **Stadium Finance v. Robbins[1962] 2 QB 664**, the agent was asked to obtain offers for a car with the owner retaining the key but accidentally leaving the registration book in the glove compartment. The agent acquired a second key, found the registration book and sold the car.

Similarly, in **Pearson v. Rose & Young [1951] 1 KB 275**, the agent obtained the registration document by tricking the owner into leaving it behind with the car. He likewise sold the vehicle. In both instances, the court held that the seller had possession of the goods in his capacity as an agent but in neither case had the consent of the owner been given.

In *Stadium Finance*, there was no consent as regards possession of either the car or the document, while in *Pearson*, there was no consent to possession of the registration book.

In neither case was the agent able to pass good title to the innocent third party buyer, which may seem unduly harsh on the buyer given that in neither case was there anything that should have put the buyer on notice of the irregularity.

16.3. Sale under a voidable title

This exception is provided for under S.23 of the sale of goods Act.

This exception applies where the seller, instead of having no title at all, has a title which is liable to be avoided. The most obvious example would be where the seller had obtained possession of the goods by fraud.

Where a contract is induced by one party's fraud the result is not that the contract is void but that it is voidable, that is liable to be set aside by the deceived party.

Where an owner of goods has parted with them to a fraudulent buyer, he is entitled to set aside the contract and, if he acts in time, can recover the goods. However, if the fraudulent person has meanwhile sold the goods on to an innocent buyer, that innocent buyer will obtain a title which is better than that of the original owner.

A critical question, therefore, is what does the original owner have to do to set the voidable contract aside? Telling the fraudulent person or taking the goods from her would certainly do but, in practice, the fraudulent person and the goods have usually disappeared.

In ***Car and Universal Finance*** **Co** ***Ltd v Caldwell*** **[*1965*] 1 QB 525**, the Court of Appeal of UK held that it was possible to avoid the contract without either telling the fraudulent person or retaking possession of the goods by immediately informing the police and the motoring organisations.

16.4. Seller in possession after sale

This exception is provided for under **S.25** of the Act.

It is easy to apply this section to the case where the seller simply sells goods to A and then, without ever having delivered them to A, sells the same goods to B.

Difficulties have arisen, however, because the section talks of the seller who continues or is in possession of the goods. Suppose that a car dealer sells a car to A who pays for it and takes it away and then, the following day, brings it back for some small defect to be rectified. While the car is at the dealer's premises, the dealer sells it to B. It would be possible to read the section as giving B's rights precedence over those of A but it is quite clear that if A had taken his car to any other dealer who had sold it to B, A's rights would have prevailed over those of B. It would be very odd to make the positions of A and B depend on whether A takes his car for service to the person from whom he has bought it or to someone else.

In fact, the courts have not read the section in this way but they have given different explanations for not doing so.

In ***Staffordshire Motor Guarantee v British Wagon [1934] 2 KB 305***, a dealer sold a lorry to a finance company who then hired it back to him under a hire purchase agreement. The dealer then, in breach of the hire purchase agreement, sold the lorry to another buyer. It was held that the rights of the finance company prevailed over those of the second buyer. The explanation given was that, for s 25 to apply, the seller must continue in possession 'as a seller'. However, this view was later rejected by the Privy Council on appeal from **Australia in Pacific Motor Auctions v Motor Credits (1965)** and by the Court of Appeal in **Worcester Works Finance v Cooden Engineering (1972)**. In these cases, it

was said that the crucial question was whether the seller's possession was physically continuous. If it was, as in the **Staffordshire Motor Guarantee** case, then s 25 applied.

16.5. Buyer in possession after sale

The exception is provided for under **S.25 (2)** of the Act.

It will be seen that this section is in a sense the reverse of s 25(1), since it deals with the situation where possession of the goods has passed to the buyer before ownership has passed to him and permits such a buyer to transfer ownership to a sub-buyer. The wording talks of 'a person having bought or agreed to buy goods'.

Normally, if the buyer has bought the goods, there would be a complete contract of sale and property would have passed to them. In that case, of course, they would be in a position to transfer ownership to a sub-buyer without any question of s 25(2) arising.

The section is concerned with the situation where the buyer has obtained possession of the goods (or the documents of title to the goods) with the consent of the seller but without becoming owner.

The section does not apply where someone has obtained goods without having agreed to buy them.

So, in **Shaw v Comr of Police (1987)**, a car had been obtained from the owner on the basis that the person obtaining it might have a client who might be willing to buy it. It was held that he was not a buyer within the meaning of s 25(2) and was not, therefore, in a position to transfer ownership to a sub-buyer.

In the same way, a customer under a hire purchase agreement is not a buyer for the purpose of s 25(2) because, in such a case, the customer has only agreed to hire the goods and is given an option to buy the goods which he is not legally obliged to exercise, even though commercially it is extremely likely that he will. On the other hand, a customer who has agreed to buy the goods but has been given credit is a buyer within s 25(2), even though the agreement provides that he is not to become the owner until he has paid for the goods.

Section 25(2) has important effects on the reasoning contained in **Car and Universal Finance v Caldwell (1965)** discussed above.

In some cases of this kind, although the buyer's voidable title would have been avoided, he would still be a buyer in possession within s 25(2).

This was shown in **Newtons of Wembley Ltd v Williams (1965)**, where the plaintiff agreed to sell a car to A on the basis that the property was not to pass until the whole purchase price had been paid or a cheque had been honoured. A issued a cheque and was given possession of the car but in due course his cheque bounced. The plaintiff took immediate steps to avoid the contract, as in the Caldwell case, and after he had done this

A sold the car to B in a London street market and B sold the car to the defendant. The Court of Appeal held that, although the plaintiff had avoided A's title, A was still a buyer in possession of the car and that B had, therefore, obtained a good title from A when he bought from him in good faith and had taken possession of the car. It was an important part of the Court of Appeal's reasoning that the sale by A to B had taken place in the ordinary course of business of a mercantile agent.

16.6. Sale by court order.

The court can order the sale of goods which any just and sufficient reason it may be reasonable to have sold at once. E.G they are perishable by nature.

16.7. Sale in a Market Overt.

This is a very old, indeed the oldest, exception to the general rule. It started from the perception that a dishonest person is less likely to sell goods that she does not own in an open market than in a private sale. This rule reflects the supervision given to markets in the middle Ages and may well have been historically true. This rationale has little place in modern business condition.

A market overt is an open public legally constituted market usually held at periodical intervals in some particular place for the sale of particular goods.

17. PERFORMANCE OF THE CONTRACT OF SALE

It is the duty of the seller under **S.27** of the Act to deliver the goods and of the buyer to accept and pay for them in accordance with the terms of the contract of sale.

Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions. This is provided for under **S.28** of the Act.

17.1. Delivery

Delivery means voluntary transfer of possession from one person to another.

17.1.1. Rules as to delivery.

In many cases, the parties will expressly agree the place of delivery or it will be a reasonable inference from the rest of their agreement that they must have intended a particular place.

If there is no express or implied agreement then the position is governed by **s 29(2)** of the Act which provides:

The place of delivery is the seller's place of business if he has one, and if not, his residence; except 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.

- **Time of delivery.**

It is very common, particularly in commercial contracts, for the parties expressly to agree the date for delivery. This may be done either by selecting a particular calendar date, for example, 1 May 2002, or by reference to a length of time, such as six weeks from receipt of order. In this respect, it is worth noting that the law has a number of presumptions about the meaning of various time expressions, so that a year prima facie means any period of 12 consecutive months; a month means a calendar month; a week means a period of seven consecutive days and a day means the period from midnight to midnight (the law in general takes no account of parts of a day).

The parties might agree that delivery is to be on request. This could happen, for instance, where the buyer can see the need for considerable volume over a period of time and does not wish to risk having to buy at short notice.

If the buyer lacks storage facilities he may leave the goods with the seller and call them up as required. A typical example might be a builder who is working on a housing estate and can see how many bricks, doors, stairs, etc, will be needed but does not want to store them for long periods on site. In this situation, the seller must deliver within a reasonable time from receiving the request and, since the goods should have been set on one side, a reasonable time would be short.

The parties may completely fail to fix a date. The position will then be governed by **s 29(3)** of the Sale of Goods Act, which provides:

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.

17.1.2. Rules as to quantity delivered

Section 30 of the Sale of Goods Act contains a number of rules which deal with problems which arise where the seller delivers the wrong quantity.

The basic rule is that the buyer is entitled to reject if the seller fails to deliver exactly the right quantity. Section **30(1)** deals with the simplest case and provides:

> *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.*

At first sight, it seems obvious that the buyer is not bound to accept short delivery but there is an important practical consequence of this rule and the rule that the seller cannot deliver in instalments unless the contract expressly provides for delivery in that manner. It follows that, if the seller delivers part of the goods and says that the balance is following, the buyer is entitled to reject. What happens in this situation if the buyer accepts the part delivery?

It is probable that he has waived the right to reject but that this waiver is conditional on the seller honouring the undertaking to deliver the balance. If the seller fails to do so, it seems probable that the buyer can reject after all. If he has meanwhile sold or consumed the part delivery, it will not be possible to reject since rejection depends on returning the goods.

Section 30(2) deals with delivery of too much and provides:
(2) When the seller delivers to the buyer a quantity of goods larger than he or she contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole.; where the seller delivers to the buyer a quantity of goods larger than he contracted to sell and the buyer accepts the whole of the goods so delivered he must pay for them at the contract rate.

It will be seen that buyers are entitled to reject, not only if sellers deliver too little, but also if they deliver too much. In this case, therefore, buyers have three alternatives: they may reject the whole delivery; they may accept the contract amount and reject the balance; or they may accept the whole delivery and pay pro rata.

Section 30(3) of the Sale of Goods Act provides:
> *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.*

It will be seen that the rules stated in s 30(1)–(4) of the Sale of Goods Act 1979 impose a very strict duty on the seller to deliver the correct quantity of goods. It is open to the parties to modify this and this is expressly recognised by **s 30(4).**

17.1.3. Delivery by instalments

Section **31(1)** of the Sale of Goods Act provides:
> *Unless otherwise agreed, the buyer of goods is not bound to accept delivery of them by instalments.*

The Act does not expressly say so, but it must surely also be the case that the buyer is not entitled to call on the seller to deliver by instalments, unless otherwise agreed.

It seems desirable to say something here about defective performance of installment contracts. Either party can bring an action for damages for loss resulting from a defective performance in relation to one installment.

The critical question is whether faulty performance in relation to one installment entitles a party to terminate the contract.

In other words, can a seller refuse to deliver a second installment because the buyer has not paid for the first one or, conversely, can the buyer treat the contract as at an end because the goods delivered under one installment are faulty?

Where there are a series of separate contracts, it is not possible to refuse to perform a second contract because the other party failed to perform the first. This rule does not apply to a single contract performable in instalments even where the contract provides 'each delivery a separate contract' since the House of Lords held in **Smyth v Bailey (1940)** that these words did not actually operate to divide the contract up.

In the case of installment contracts, it is undoubtedly open to the parties explicitly to provide that defective performance by one party in relation to any one installment entitles the other party either to terminate or at least to withhold performance until that defect is remedied. Even if the parties do not explicitly so provide, defective performance in relation to one installment may still have this effect because of **s 31(2)** of the Sale of Goods Act.

Sub-section (2) does not expressly cover all the things which may go wrong with installment contractors. Nevertheless, these situations seem to be covered by the test laid down which is that everything turns on whether the conduct of the party in breach amounts to a repudiation by that party of his obligations under the contract.

In practice, the courts are very reluctant to treat defective performance in relation to a single installment as passing this test.

An accumulation of defects over several instalments may do so, as in **Munro v Meyer(1930)** where there was a contract to buy 1,500 tons of meat and bone meal, delivery at the rate of 125 tons a month. After more than half had been delivered, the meal was discovered to be defective. It was held that the buyer was entitled to terminate and reject future deliveries.

On the other hand, in **Maple Flock Co Ltd v Universal Furniture Products (Wembley) Ltd (1934)**, it was held that the fact that the first of 19 deliveries was defective could not be treated as a repudiation because the chances of the breach being repeated were practically negligible.

The case of **Regent OHG Aisenstadt v Francesco of Jermyn Street (1981)** revealed that there is a conflict between **ss 30(1)** and **31(2)** of the Act. In this case, the sellers were manufacturers of high class men's suits and contracted to sell 62 suits to the buyers. Delivery was to be in instalments at the seller's option. The sellers in fact tendered the suits in five instalments. For reasons which had nothing to do with this contract, the parties fell out and the buyers refused to accept delivery of any of the instalments. This was clearly a repudiation and the sellers would have been entitled to terminate. In fact, the sellers did not do so and continued to tender the suits. Shortly before tendering the fourth installment, the sellers told the buyers that because a particular cloth was not available the delivery would be one suit short. This shortfall was not made up in the fifth and final delivery so that the sellers ended up by tendering 61 suits instead of 62. It was clear that if the contract had been for a single delivery of 62 suits, the case would have

been governed by **s 30(1)** and the buyer would have been entitled to reject delivery which was one suit short. Equally clearly, however, the seller's conduct did not amount to repudiation within the test laid down by **s 31(2)** for delivery by instalments. It was held that, in so far as there was a conflict between **ss 30(1)** and **31(2)**, the latter must prevail and that the buyer was accordingly not entitled to reject.

17.1.4. Acceptance

Section 27 of the Sale of Goods Act, refers to the seller's duty to deliver the goods and the buyer's duty to accept.

At first sight, one might think that the buyer's duty to accept is the converse of the seller's duty to deliver, that is the duty to take delivery. However, it is quite clear that, although acceptance and taking delivery are connected, they are not the same thing. In fact, 'acceptance' is a sophisticated and difficult notion.

According to **s 35**, the buyer is deemed to have accepted the goods when he does one of three things:
(a) intimates to the seller that he has accepted them;
(b) after delivery, he does any act in relation to the goods which is inconsistent with the ownership of the seller; or
(c) after lapse of a reasonable length of time, heretains the goods without intimating to the seller that he rejects them.

This section does not so much define acceptance as explain when it happens. It is implicit in the section that acceptance is the abandonment by the buyer of any right to reject the goods. (This by no means involves the abandonment of any right to damages.) The buyer may be entitled to reject goods for a number of different reasons; for instance (as we have already seen), because the seller delivers too many or too few goods or, sometimes, delivers them late. Other grounds for rejection, such as defects in the goods, will be dealt with later.

Section 35 of the Act tells us that buyers can abandon the right to reject the goods, that is 'accept' them in a number of different ways. Before examining these, it is worth noting that buyers cannot be under a duty to accept in this sense since they would be perfectly entitled to reject the goods in such cases. Buyers can only be under a duty to accept when they have no right to reject. In s 27, therefore, the word 'accept' must mean something different from its meaning in s 35, that is, something much closer to a duty to take delivery.

The reason for the elaboration of s 35 is that, in this area, the law of sale appears to be slightly different from the general law of contract.

The buyer's right of rejection is analogous to the right of an innocent party to terminate, in certain circumstances, for the other party's breach of contract.

Under the general law of contract, it is not usually possible to argue that a party has waived the right to terminate unless it can be shown that he knew the relevant facts which so entitled him but, in the law of sale, the buyer may lose the right to reject before knowing he had it. This is no doubt hard on the buyer but probably justified on balance by the desirability of not allowing commercial transactions to be upset too readily.

So, the buyer loses the right to reject not only by expressly accepting, but also by failing to reject within a reasonable time or by doing an act which is inconsistent with the ownership of the seller, such as sub-selling.

A key question here is what is a 'reasonable time'? In **Bernstein v Pamson Motors Ltd (1987)**, the plaintiff sought to reject a new motor car whose engine seized up after he had owned it for three weeks and driven it only 140 miles. Rougier J held that the car was not of merchantable quality but that a reasonable time had elapsed and the right to reject had been lost. He took the view that the reasonableness of the time did not turn on whether the defect was quickly discoverable but on:

> *What is a reasonable practical interval in commercial terms between a buyer receiving the goods and his ability to send them back, taking into consideration from his point of view the nature of the goods and their function, and from the point of view of the seller the commercial desirability of being able to close his ledger reasonably soon after the transaction is complete.*

This case has an impact on S.35 as it stands now under the Act and as such, the provision needs to be amended to enhance the opportunity of the buyer to be able to check the goods to see if they comply with the contract.

18. **Duties of buyers and sellers under a sale of goods contract.**
19. **Remedies of seller and buyer**.