CHAPTER 3

APPLICATION OF GENERAL CONTRACTUAL PRINCIPLES

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Introductory. A contract of sale of goods is a species of contract—indeed, it may be regarded as the paradigm contract—so that the law of sale, as codified in the Sale of Goods Act 1979 and elaborated in this work, is essentially no more than the application of the principles of the general law of contract to the special case of the selling and buying of goods, and the effect of these principles upon the property rights which are the subject of the transaction. In a number of sections, the Act expressly stipulates that a particular aspect of a contract of sale shall be regulated by the general rules of the law of contract,[1] and other sections are declaratory of common law principles which are of wider application than the sale of goods.[2] More generally, s.62(2) declares that: **3–001**

> "The rules of the common law, including the law merchant, except in so far as they are inconsistent with the provisions of this Act, and in particular the rules relating to the law of principal and agent and the effect of fraud, misrepresentation, duress or coercion, mistake, or other invalidating cause, apply to contracts for the sale of goods."

In this chapter are discussed both the topics mentioned in s.62(2) and also a number of other rules of the general law which are by the wide terms of the section made applicable to sales of goods.

[1] e.g. Sale of Goods Act ss.3, 11(6), 54.

[2] e.g. implied terms as to quality (Sale of Goods Act s.14) applied also at common law in contracts for the supply of goods generally, and have now been similarly codified, as regards such contracts, by the Supply of Goods and Services Act 1982 ss.4, 9: see above, para.1–031. For a general discussion, see the report of the Law Commission on *Implied Terms in Contracts for the Supply of Goods* (Law Com. No.95, HMSO, 1979).

1. AGENCY[3]

3–002 **General principles of agency applicable.** Section 62(2) preserves the common law rules relating to the law of principal and agent and declares them applicable to contracts for the sale of goods. Particular rules as to "mercantile agents" are contained in the Factors Act 1889, and these also are expressly declared by s.21(2)(a) of the Sale of Goods Act 1979 to be unaffected. The most important of the latter provisions are those which empower a mercantile agent in certain circumstances to transfer a good title to a bona fide purchaser or pledgee of the goods or documents of title to goods.[4]

3–003 Generally speaking, whatever a party may do in matters of contract may be done by means of an agent. A party to a contract of sale of goods is therefore bound by the agent's act, provided that it is within the scope of the agent's actual or apparent authority.[5]

3–004 **Particular types of agent.** A mercantile agent is one[6] having in the customary course of business as such agent authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods.[7] A factor, as traditionally defined, is a species of mercantile agent who is normally entrusted by a seller of goods with the possession either of the goods or of the documents of title representing them. The contract may be made in the factor's own name, and the factor may receive payment of moneys due from the buyer.[8] A broker, in contrast, usually acts as an agent for a buyer or seller without having such possession; the contract cannot be made in the broker's own name, and the broker cannot make or receive payment.[9] (This distinction between factors and brokers was, however, more important in nineteenth-century commerce than it is today, and the term factor in this sense is now little used.) An auctioneer sells at an open sale, either with or without having possession of the goods, to the bidder who offers the best price. The auctioneer has no implied authority to give warranties as to the goods.[10] A *del credere* agent is one who, usually for an extra commission, undertakes to indemnify the seller against the non-payment by the

[3] See generally *Chitty on Contracts*, 31st edn, Vol.2, Ch.31; *Bowstead and Reynolds on Agency*, 18th edn.
[4] Factors Act 1889 s.2; below, paras 7–032 et seq.; and see also ss.8, 9 (substantially re-enacted as ss.24 and 25 of the Sale of Goods Act), below, paras 7–055, 7–069.
[5] Under s.127(3) of the Consumer Credit Act 1974 a contract of hire-purchase, conditional sale or credit-sale which was a "regulated agreement" had to be signed by the debtor personally, or the agreement (and any contract of guarantee) could not be enforced, but this provision has been repealed by the Consumer Credit Act 2006 s.15 Sch.4 (with effect from April 6, 2007). See further above, para.2–023. For the position under the previous law, see Hire-Purchase Act 1965 s.5.
[6] The statutory definitions in fact here repeat the term "mercantile agent", confirming decisions given under earlier, repealed, Factors Acts that the employment should come within some known category of commercial agency: Chalmers, *Sale of Goods Act 1979*, 18th edn, p.291.
[7] Factors Act 1889 s.1(1); Sale of Goods Act s.26. For the special provisions of the Factors Act as regards dispositions of goods and documents of title by mercantile agents, see below, paras 7–032 et seq.
[8] *Chitty on Contracts*, 31st edn, Vol.2, para.31–009.
[9] *Chitty on Contracts*, 31st edn, Vol.2, para.31–009.
[10] *Chitty on Contracts*, 31st edn, Vol.2, para.31–011. For the provisions of the Act governing sales by auction, see above, para.2–004 and below, para.3–009. See also *Chelmsford Auctions Ltd v Poole* [1973] Q.B. 542 (action for price by auctioneer in own name).

buyer of the price or other sums for which the buyer may be liable under the contract.[11] A person may act as a principal in some respects and as an agent in others: thus, a confirming house (or "commission agent"), which provides agency services for an overseas buyer, may stand as principal (i.e. as the buyer of the goods) in relation to the seller, and at the same time be in the position of an agent vis-à-vis that overseas buyer.[12]

Civil law systems recognise a special category of commercial agent. Although such a distinct category of agency relationships has not traditionally been the subject of separate treatment by the common law, it has now become necessary to identify them because they are governed by an EC Directive,[13] which has been implemented in this country by domestic legislation.[14] A commercial agent is defined as:

> ". . . a self-employed intermediary who has continuing authority to negotiate the sale or purchase of goods on behalf of another person (the 'principal'), or to negotiate and conclude the sale and purchase of goods on behalf of and in the name of that principal".[15]

The legislation provides, inter alia, for the payment of compensation by the principal on termination of the agency relationship.[16]

3–005 **Dealers as agents in instalment credit transactions.**[17] Where a customer enters into a hire-purchase, conditional-sale or credit-sale agreement directly with a finance company through the medium of a dealer, who has displayed the goods, the dealer is to be taken as the agent of the finance company only to a limited extent at common law.[18] An agency may be inferred despite a denial in the

[11] *Chitty on Contracts*, 31st edn, Vol.2, para.31–010.
[12] *Ireland v Livingston* (1872) L.R. 5 H.L. 395 at 409; *Sobell Industries Ltd v Cory Bros & Co* [1955] 2 Lloyd's Rep. 82 at 90–91; *Anglo-African Shipping Co of New York Inc v J Mortner Ltd* [1962] 1 Lloyd's Rep. 610 at 616–617. cf. *Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd* [1976] 1 W.L.R. 676, below, para.5–141.
[13] Directive 1986/653 [1986] O.J. L382/17.
[14] Commercial Agents (Council Directive) Regulations (SI 1993/3053, as amended by SI 1993/3173 and SI 1998/2868).
[15] SI 1993/3053 reg.1(2).
[16] For a more detailed account, see *Chitty on Contracts*, 31st edn, Vol.2, paras 31–017 to 31–018, 31–147 et seq.; *Bowstead and Reynolds on Agency*, 18th edn, Ch.11; Randolph and Davey, *The European Law of Commercial Agency* (2010); Singleton, *Commercial Agency Agreements: Law and Practice* (2010).
[17] *Chitty on Contracts*, 31st edn, Vol.2, para.31–019.
[18] Guest, *The Law of Hire-Purchase* (1966), paras 365–367; *North Central Wagon & Finance Co Ltd v White and Powell* [1955] C.L.Y. 1204; *Campbell Discount Co Ltd v Gall* [1961] 1 Q.B. 431; *Bentworth Finance Ltd v White* (1962) 112 L.J. 140; *Financings Ltd v Stimson* [1962] 1 W.L.R. 1184 at 1188; *Yeoman Credit Ltd v Apps* [1962] 2 Q.B. 508; *Northgran Finance Ltd v Ashley* [1963] 1 Q.B. 476; *Car & Universal Finance Co Ltd v Caldwell* [1965] 1 Q.B. 525; *Mercantile Credit Co Ltd v Hamblin* [1965] 2 Q.B. 242 at 269; *Kingsley v Sterling Industrial Securities Ltd* [1967] 2 Q.B. 747; *Snook v London & West Riding Investments Ltd* [1967] 2 Q.B. 786; *Branwhite v Worcester Works Finance Ltd* [1969] 1 A.C. 552; *JD Williams & Co v McCauley Parsons & Jones* [1994] C.C.L.R. 78; *Woodchester Equipment (Leasing) Ltd v British Association of Canned, etc. Food Importers Ltd* [1995] C.C.L.R. 51; *Shogun Finance Ltd v Hudson* [2003] UKHL 62; [2004] 1 A.C. 919 at [51]; *Brewer v Mann* [2012] EWCA Civ 246 at [37]; [2012] R.T.R. 28; Guest, 79 L.Q.R. 33 (1963); Hughes, 27 M.L.R. 395 (1964); and see above, para.1–054.

agreement itself.[19] The dealer is not as a rule the hirer's or buyer's agent for any purpose.[20] Where such a transaction is a "regulated agreement"[21] under the Consumer Credit Act 1974, the dealer will, however, normally come within the statutory definition of "credit-broker",[22] and a credit broker, who conducts negotiations with the debtor ("antecedent negotiations"[23]) in relation to the goods, will be deemed to be the agent[24] of the finance company in respect of any representations[25] made by the credit-broker to the debtor and any other dealings between them.[26] Further, the finance company may be liable under the implied condition as to fitness for purpose if the particular purpose for which the goods are sold or supplied is made known to the dealer, expressly or by implication, by the debtor.[27] The dealer will also be the agent of the finance company for the purpose of receiving a notice of cancellation, notice of withdrawal and a notice rescinding the agreement.[28] Indeed, the Act goes further, and has the effect of imputing an agency in certain situations which at common law would be regarded as comprising two distinct and unrelated transactions. Where the dealer is the seller or supplier of goods and finance is provided by way of loan or other credit by a finance house in pursuance of arrangements with the dealer (e.g. where a credit card is used), antecedent negotiations in relation to the transaction financed are deemed to be conducted by the dealer both as agent for the creditor and as seller, so that the creditor will be liable for any misrepresentations and contractual statements made by the dealer.[29]

3–006 **Agency of necessity.**[30] In certain circumstances of emergency a power is conferred by law upon one person to act on behalf of another, either where no contract of agency exists, or where the authority already given to an agent is inadequate to meet the situation. Under this principle the master of a ship may sell a cargo in order to protect the ship or cargo, as may any carrier of perishable goods;

[19] *Financings Ltd v Stimson* [1962] 1 W.L.R. 1184; contrast *Bentworth Finance Ltd v White* (1962) 112 L.J. 140.
[20] Guest, *The Law of Hire-Purchase*, paras 371–372; *Branwhite v Worcester Works Finance Ltd* [1969] 1 A.C. 552. cf. *British Ry Traffic & Electric Co Ltd v Roper* (1939) 162 L.T. 217; *Spencer v North Country Finance Co Ltd* [1963] C.L.Y. 212; *United Dominions Trust Ltd v Western* [1976] 1 Q.B. 513.
[21] For the meaning of regulated agreement, see above, para.1–022. (The provisions discussed in this paragraph are not affected by the Consumer Credit Act 2006.)
[22] For definition, see Consumer Credit Act 1974 ss.145(2), 189(1).
[23] For definition, see Consumer Credit Act 1974 s.56.
[24] Such agency cannot be excluded: see Consumer Credit Act 1974 s.56(3).
[25] Defined in Consumer Credit Act 1974 s.189(1) to include any condition or warranty, and any other statement or undertaking, whether oral or in writing.
[26] Consumer Credit Act 1974 s.56; *Black Horse Ltd v Langford* [2007] EWHC 907 (QB); [2007] R.T.R. 38.
[27] Sale of Goods Act s.14(3); Supply of Goods (Implied Terms) Act 1973 s.10(3); Supply of Goods and Services Act 1982 s.4(4).
[28] Consumer Credit Act 1974 ss.57(3), 69(1), (6), 102(1).
[29] Consumer Credit Act 1974 s.56(2). See also the substantive provisions of s.75, making the creditor jointly and severally liable with the dealer in respect of such claims. The sections are discussed below, paras 14–179 et seq.
[30] *Chitty on Contracts*, 31st edn, Vol.2, paras 31–034 et seq.; *Bowstead and Reynolds on Agency*, 19th edn, Ch.4; Goff and Jones, *The Law of Unjust Enrichment*, 8th edn, paras 18–50 et seq.; and see *China Pacific SA v Food Corp of India* [1982] A.C. 939; *ENE 1 Kos Ltd v Petroleo Brasileiro SA Petrobas (The Kos)* [2012] 2 A.C. 164.

and a carrier or bailee of animals may incur expense in maintaining them. The doctrine of agency of necessity will apply only where the property is in the possession of the agent as the result of an existing legal relationship, such as a contract of bailment, there is a real emergency (as distinct from mere inconvenience[31]), communication with the principal is impossible, and the action is undertaken in good faith and is reasonable, proportionate and in the interests of the principal.[32]

Agency of a married woman. There is a rebuttable presumption that a wife **3–007** has authority to purchase necessaries, and to pledge her husband's credit for the purpose, during cohabitation.[33] This presumption ceases if the parties are separated, but the wife may then still have her husband's express or implied authority to contract on his behalf.[34]

2. FRAUD AND MISREPRESENTATION

Application of common law principles. Section 62(2) of the Sale of Goods **3–008** Act 1979 preserves the application of the rules of the common law[35] relating to fraud and misrepresentation to contracts for the sale of goods, save in so far as they are inconsistent with the provisions of the Act itself. The important issues which are likely to arise in this context are those concerning statements made by the seller as to the description or quality of the goods sold.[36] These questions are discussed in a later chapter.[37] In other respects, the topics of fraud and misrepresentation do not call for special consideration in relation to contracts for the sale of goods, and reference should be made to standard works on the law of contract.[38]

Fraud at auction sales. In relation to goods sold by auction, s.57(4) of the **3–009** Sale of Goods Act 1979 provides that:

[31] cf. *Sachs v Miklos* [1948] 2 K.B. 23; *Munro v Willmott* [1949] 1 K.B. 295 (sale of goods by bailee when owner untraceable: liable in conversion. See Torts (Interference with Goods) Act 1977 s.12); *Infolines Public Networks Ltd v Nottingham City Council* [2009] EWCA Civ 708; [2010] P.T.S.R. 594.
[32] *Prager v Blatspiel, Stamp and Heacock Ltd* [1924] 1 K.B. 566; *China-Pacific Sa v Food Corp of India (The Winson)* [1982] A.C. 939; *Industrie Chimiche Italia Centrale and Cerealfin SA v Alexander G Tsavliris & Sons Maritime Co (The Choko Star)* [1990] 1 Lloyd's Rep. 516.
[33] *Blades v Free* (1829) 9 B. & C. 167. Since the presumption of authority arises from cohabitation, it can be applied to a man who pledges the credit of a woman or another man, or a woman who pledges the credit of another woman. See also, above, para.2–042.
[34] *Chitty on Contracts*, 31st edn, Vol.2, para.31–049; *Bowstead and Reynolds on Agency*, 19th edn, paras 3–040 et seq. Note that a wife's former power to bind her husband as his agent of necessity has been abolished: Matrimonial Proceedings and Property Act 1970 s.41(1).
[35] For a discussion of the meaning of this context of the expression "the common law", see above, para.1–008.
[36] But see *Riddiford v Warren* (1901) 20 N.Z.L.R. 572; and *Goldsmith v Rodger* [1962] 2 Lloyd's Rep. 249, where the misrepresentation was made by the buyer. A claim against an auctioneer alleging that goods had been misdescribed in the sale catalogue failed in *Thomson v Christie Manson & Woods Ltd* [2005] EWCA Civ 555; [2005] P.N.L.R 38.
[37] Below, Ch.10 and Ch.12.
[38] e.g. *Chitty on Contracts*, 31st edn, Vol.1, Ch.6.

". . . . where a sale by auction is not notified to be subject to a right to bid by or on behalf of the seller, it is not lawful for the seller to bid himself or to employ any person to bid at the sale, or for the auctioneer knowingly to take any bid from the seller or any such person".

Any sale contravening this rule may be treated as fraudulent by the buyer.[39] The Act further provides by s.57(3) that:

". . . . a sale by auction may be notified to be subject to a reserve or upset price, and a right to bid may also be reserved expressly by or on behalf of the seller";

and subs.(6) continues:

". . . . where, in respect of a sale by auction, a right to bid is expressly reserved (but not otherwise) the seller or any one person on his behalf may bid at the auction".

It would appear to follow from these provisions that where more than one person bids on behalf of the seller at an auction, the transaction is voidable on the grounds of fraud, and perhaps also void for illegality.[40]

An agreement between bidders to form a "ring" or "knockout"—that is, to refrain from bidding in competition with each other in order to depress the price—is not illegal at common law,[41] but where one of the parties to such an agreement is a dealer,[42] it is now provided by statute that the contract of sale is voidable at the seller's option,[43] and further that, if the buyer has obtained possession of the goods and restitution is not made to the seller, the parties to the agreement are to be jointly and severally liable to make good any loss sustained by the seller by reason of the operation of the agreement.[44]

3. DURESS AND UNDUE INFLUENCE

3–010 **Duress and undue influence.** The common law principles of duress (including economic duress[45]), and the wider equitable doctrine of undue influence, appear to apply without any special qualification to contracts for the sale of goods.[46]

[39] Sale of Goods Act s.57(5). The common law rule appears to have been the same: *Bexwell v Christie* (1776) 1 Cowp. 395 at 396; *Thornett v Haines* (1846) 15 M. & W. 367; *Green v Baverstock* (1863) 14 C.B.(N.S.) 204. "Shill bidding", which involves a trader bidding on their own goods, may be an offence under the Consumer Protection from Unfair Trading Regulations 2008 Pt.3.

[40] *Mortimer v Bell* (1865) 1 Ch. App. 10 (fraud); cf. *Scott v Brown Doering McNab & Co* [1892] 2 Q.B. 724 (conspiracy to inflate share prices held illegal).

[41] *Rawlings v General Trading Co* [1921] 1 K.B. 635; *Cohen v Roche* [1927] 1 K.B. 169.

[42] A dealer is defined for the purposes of the section (by reference to s.1(2) of the Auctions (Bidding Agreements) Act 1927) as follows: "a person who in the normal course of his business attends sales by auction for the purpose of purchasing goods with a view to reselling them".

[43] Auctions (Bidding Agreements) Act 1969 s.3(1).

[44] Auctions (Bidding Agreements) Act 1969 s.3(2).

[45] *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd (The "Atlantic Baron")* [1979] Q.B. 705; *Atlas Express Ltd v Kafco (Importers & Distributors) Ltd* [1989] Q.B. 833; *CTN Cash & Carry Ltd v Gallagher Ltd* [1994] 4 All E.R. 714.

[46] Sale of Goods Act s.62(2). For these topics, see *Chitty on Contracts*, 31st edn, Vol.1, Ch.7; Enonchong, *Duress, Undue Influence and Unconscionable Dealing*, 2nd edn.

4. MISTAKE[47]

3–011 **Application of common law rules.**[48] Section 62(2) expressly preserves the rules of the common law relating to the effect of mistake on contracts for the sale of goods, except in so far as they are inconsistent with the provisions of the Act. The concept of mistake traditionally embraces a number of disparate principles many of which are capable of explanation on other grounds[49]: there can be little doubt, however, that all of such principles are, in theory, applicable to sales of goods—even if, as will appear, their practical operation has been markedly restricted by trends in the law in recent years. These separate aspects of the subject of mistake at common law may be enumerated as follows. First, a mistake as to the identity of a party or as to the terms being offered may operate so as to negative consent, that is, to show that there has been no certain agreement to which one party can hold the other bound, and the supposed transaction is accordingly void. Secondly, although the parties have reached agreement in the same terms on the same subject-matter, if their agreement is based on a fundamental assumption of fact which turns out to have been mistaken, the courts may treat such a mistake as avoiding the bargain which had apparently been made. Thirdly, a document mistakenly signed by a party may sometimes be held void under the special plea known as non est factum. In each of these situations the effect of the mistake, if operative, is to render the transaction void at common law. In equity, mistake may be a ground for refusing an order for specific performance. It is also the basis of the special remedy of rectification of a written contract, and it may justify a decree of rescission. The application of these different topics to contracts of sale will be examined in turn.

3–012 **Mistake of identity.**[50] It is only in special circumstances that the identity of the person with whom a contract is made is material. Where the identity of a party is not material, or is not regarded by the other party as material, a mistake will not of itself affect the validity of the contract.[51] In most cash sale transactions, one customer is as good as another,[52] and the same is true at a public auction.[53] But if identity is material, no contract will be brought into existence where someone purports to accept an offer that, as is known or ought to be known, was not intended to be made to that person.[54] Where an offer meant for A is purportedly accepted by B, the apparent contract is void, and can confer no rights on anyone.

[47] See generally *Chitty on Contracts*, 31st edn, Vol.1, Ch.5; Macmillan, *Mistakes in Contract Law* (2010).

[48] On the (now limited) scope of equitable principles and remedies in relation to mistake, see below, paras 3–025 to 3–026.

[49] See, e.g. Slade, 70 L.Q.R. 385; and cf. below, para.3–021.

[50] See *Chitty on Contracts*, 31st edn, Vol.1, paras 5–089 et seq.

[51] *Lewis v Averay* [1972] 1 Q.B. 198 at 209, citing Cheshire and Fifoot, *The Law of Contract*, 7th edn, pp.213–214; cf. *Newborne v Sensolid (Great Britain) Ltd* [1954] 1 Q.B. 45 at 47, 51–52; *Fawcett v Star Car Sales Ltd* [1960] N.Z.L.R. 406; *Midland Bank Plc v Brown Shipley & Co Ltd* [1991] 1 Lloyd's Rep. 576 (mistake as to identity of messenger).

[52] *Ingram v Little* [1961] 1 Q.B. 31 at 57.

[53] *Chitty on Contracts*, 31st edn, Vol.1, para.5–090; *Dennant v Skinner and Collom* [1948] 2 K.B. 164.

[54] *Boulton v Jones* (1857) 2 H. & N. 564; 6 W.R. 107.

The most likely circumstances in which this question will be of importance in the context of the sale of goods are where the owner is induced to sell by a fraudulent misrepresentation of identity by the buyer, who then purportedly resells them to an innocent third person. The first transaction is, of course, voidable at the option of the original seller on the grounds of fraud, but if effective steps have not been taken to avoid it before the resale, the third person may have obtained a good title to the goods under the provisions of s.23 of the Sale of Goods Act 1979.[55] It is only where the first transaction was void and inoperative because of the mistake of identity that the original owner will be able to claim the goods as never having relinquished title to them.[56]

3–013 **Identity distinguished from attributes.** It is usually said[57] that to be operative the mistake made by a contracting party must be as to the identity of the other party and not merely as to some attribute of that person, e.g. solvency. It may be inferred from this that there must, as a general rule, be an identified third person with whom the contract was in fact believed to have been made.[58] In *Cundy v Lindsay*,[59] a letter was written by a fraudulent person named Blenkarn ordering a quantity of handkerchiefs from the respondents; he signed his name in a way which allowed it to be confused with an established firm named Blenkiron & Co who carried on business in the same street. The goods were sent to Blenkiron & Co at the address given by Blenkarn, who received them and sold them to the appellants. It was held that there was no contract between Blenkarn and the respondents, for their intention had been to deal only with Blenkiron & Co, and so the property in the handkerchiefs had remained throughout with the respondents. In contrast, in *King's Norton Metal Co Ltd v Edridge, Merrett & Co Ltd*,[60] one Wallis sent an order for wire to the claimants and used for the purpose the name of "Hallam & Co", which was represented on the notepaper as a firm of considerable substance, whereas in reality it existed only in name. Again, the goods were sent on credit and disposed of by resale to the innocent defendants, but this time there was held to have been no operative mistake since the claimants had intended to contract with the writer of the letter, and had been mistaken not as to his identity but as to his creditworthiness. The transaction was in consequence only voidable for fraud, and not void, and Wallis was accordingly able to confer a good title on the defendants.

[55] Below, paras 7–023 et seq.
[56] The Law Reform Committee in 1966 recommended that contracts which under the present law are void because of mistake of identity should be treated as voidable so far as third parties are concerned (Cmnd.2958 (1966), para.15). No legislation to this effect has been introduced.
[57] But see below, para.3–015.
[58] See, however, Treitel, *The Law of Contract*, 13th edn, p.335.
[59] *Cundy v Lindsay* (1878) 3 App.Cas. 459; cf. *Hardman v Booth* (1863) 1 H. & C. 803.
[60] *King's Norton Metal Co Ltd v Edridge, Merrett & Co Ltd* (1897) 14 T.L.R. 98. The case of *Sowler v Potter* [1940] 1 K.B. 271 is difficult to reconcile with this decision and must be regarded as no longer good law. It was criticised in *Solle v Butcher* [1950] 1 K.B. 671 at 691; *Gallie v Lee* [1969] 2 Ch. 17 at 33, 41, 45 (affirmed *sub nom. Saunders v Anglia Building Society* [1971] A.C. 1004); and *Lewis v Averay* [1972] 1 Q.B. 198 at 206.

Mistake inter praesentes.[61] The same distinction must be made where parties negotiate face-to-face, but here there is a strong presumption[62] that the party intended to contract with the physical person actually present and not with another. So, in *Lewis v Averay*[63] a person calling himself Green and claiming to be a well-known actor of that name called at Lewis's home in response to an advertisement and induced the latter to sell him a car and to allow him to take it away in exchange for a cheque which proved worthless. By the time the fraud was discovered, the car had been purchased in good faith by Averay. The Court of Appeal was unanimously of the opinion that the first transaction was not void for mistake, so that the principle of *King's Norton Metal Co Ltd v Edridge, Merrett & Co Ltd*[64] was applied and that of *Cundy v Lindsay*[65] not followed. A similar decision had been reached many years earlier in *Phillips v Brooks Ltd*,[66] but in the more recent case of *Ingram v Little*[67] the Court of Appeal had, by a majority, held the contrary on facts which are difficult to distinguish from *Lewis v Averay*. In *Ingram v Little* the owners of a car had first refused to allow a would-be buyer calling himself Hutchinson to take it away against an uncleared cheque, but later agreed to do so after he had given them the initials and address of a real Mr Hutchinson whose existence they were able to verify by consulting a telephone directory. The majority of the Court of Appeal held that, "in the very special and unusual facts of the case",[68] the presumption of an intention to deal with the person physically present was rebutted. Such special facts, if they are to be found in *Ingram v Little*,[69] must have been constituted by the initial refusal to deal further with the *soi-disant* Hutchinson until the genuineness of the name and address given by him had been established, which made his identity as that person a matter of vital importance to the contract which was thereafter concluded.[70] It is submitted that it will only be in very rare cases that such special facts will be found.

In *Shogun Finance Ltd v Hudson*[71] a rogue, giving the name and address of a real person named Patel and producing a driving licence in the name of Patel as identification, induced a motor dealer to arrange for him to acquire a Shogun vehicle on hire-purchase from the claimant finance company. The company authorised the dealer to complete the transaction after satisfying itself as to the creditworthiness of the real Patel. The rogue signed a hire-purchase agreement[72]

[61] In *Shogun Finance Ltd v Hudson* [2003] UKHL 62; [2004] 1 A.C. 919 the House of Lords rejected an argument that the cases discussed in this paragraph were relevant to a written contract.
[62] *Ingram v Little* [1961] 1 Q.B. 31 at 61, 66 (citing Benjamin, *Sale of Personal Property*, 8th edn, p.102); *Edmunds v Merchants Despatch Co* (1883) 135 Mass. 283; *Phelps v McQuade* (1917) 220 N.Y. 232; *Lewis v Averay* [1972] 1 Q.B. 198.
[63] *Lewis v Averay* [1972] 1 Q.B. 198.
[64] *King's Norton Metal Co Ltd v Edridge, Merrett & Co Ltd* (1897) 14 T.L.R. 98; above, para.3–013.
[65] *Cundy v Lindsay* (1878) 3 App.Cas. 459; above, para.3–013.
[66] *Phillips v Brooks Ltd* [1919] 2 K.B. 243; contrast *Lake v Simmons* [1927] A.C. 487.
[67] *Ingram v Little* [1961] 1 Q.B. 31.
[68] *Lewis v Averay* [1972] 1 Q.B. 198 at 208.
[69] Lord Denning M.R. in *Lewis v Averay* [1972] 1 Q.B. 198 was of opinion that *Ingram v Little* could not in fact be distinguished: see his judgment at 206.
[70] *Lewis v Averay* [1972] 1 Q.B. 198 at 209.
[71] *Shogun Finance Ltd v Hudson* [2003] UKHL 262; [2004] 1 A.C. 919.
[72] The claim of the defendant depended on being able to establish an exception to the principle nemo dat quod non habet under the statutory rule in the Hire-Purchase Act 1964 s.27: see below, para.7–087.

CHAPTER 14

CONSUMER PROTECTION

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1. INTRODUCTION

Introduction. The contract of sale to which most of this work refers is one in which buyer and seller are assumed to be in a position of general equality, so that the main function of the law is to work out the appropriate consequences of what may be assumed to be the common intention of the parties. It is obvious, however, that in a very large number of sales this is by itself an unsuitable technique. The buyer may by virtue of haste, ignorance, gullibility, inferior bargaining position or simple imprudence enter into a transaction in which the goods supplied, or the terms of the contract, or both, are unsatisfactory to him: and in many circumstances it may be felt that he is deserving of protection. The protection required may be specific, i.e. there may be a need for a private remedy in a particular situation; or general, i.e. it may be desirable to control unacceptable practices of a particular type. A seller may also, though less often, appear to require such protection against the buyer. The civil law has on the whole, save in the case of conscious deception, taken little account of these problems: its outlook is indeed sometimes expressed by the maxim caveat emptor. Even where there is a remedy, its exercise may be troublesome or risky for the consumer. But the general problem has in fact **14–001**

been the subject of attention for many centuries. Attempts to regulate the price of staple commodities (e.g. bread), and to control measurements and measuring equipment (e.g. in the sale of beer and coal) date back to the Middle Ages.[1] More recently, however, the movement towards the protection of the consumer, who may in this context be roughly defined as a private buyer from a commercial seller,[2] and who is the person thought most in need of such protection, has increased greatly in strength and prominence. Statutes and regulations have sought to protect consumers; officials have been appointed who have consumer protection as their function or among their functions; organisations of consumers seek to promote their interests; studies are conducted into the problems of consumer protection; and the various organs of the European Union and its predecessors have since 1975 taken a vigorous interest in consumer affairs.[3] Indeed, the European Community is committed to seeking to ensure "a high level of consumer protection" and to contributing:

[1] See Harvey and Parry, *Law of Consumer Protection and Fair Trading*, 6th edn, Ch.1.

[2] There is no general definition of "consumer": but see; Consumer Credit Act 1974 s.8 ("consumer credit agreement"), s.15 ("consumer hire agreement"); Unfair Contract Terms Act 1977 s.5(2)(a) ("consumer use"), s.12 ("deals as consumer"); Consumer Protection Act 1987 s.5(3) ("damage giving rise to liability"), s.10(7) ("consumer goods"); Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999/2083) reg.3(1) ("consumer"); Consumer Protection (Distance Selling) Regulations 2000 (SI 2000/2334) reg.3(1) ("consumer"); Enterprise Act 2002 s.210(2)(6) ("consumer"); Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277) reg.2(1) ("consumer"); Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (SI 2013/3134) reg.4 ("consumer").

[3] This stems from a Council Resolution of April 14, 1975: [1975] O.J. C92/1: see Close, 8 Eur.L.Rev. 221 (1983). Examples of EEC activity appear at various points in the text and notes. They include Council Directive 1984/450 on misleading advertising, below, para.14–165; Council Directive 1985/374 on liability for defective products, below, para.14–094; Council Directive 1990/314 on package travel, package holidays and package tours, below, para.14–054; Directive 2001/95 on general product safety, below, para.14–133; Council Directive 1993/13 on unfair terms in consumer contracts, below, para.14–033; Directive 1997/7 on the protection of consumers in relation to distance contracts (repealed and replaced as from June 13, 2014 by Directive 2011/83/EU), below, para.14–063; Directive 1998/27 on injunctions for the protection of consumers' interests (repealed and replaced as from December 29, 2009 by Directive 2009/22), below, para.14–153; Directive 1999/44 on certain aspects of the sale of consumer goods and associated guarantees, below, paras 14–009 et seq.; Directive 2005/29 concerning unfair business-to-consumer commercial practices in the internal market, below, paras 14–139 to 14–148. For a discussion of some issues, see the European Commission's Green Paper, *European Union Consumer Protection* (COM(2001) 531 final); Decision 1926/2006 establishing a programme of Community action in the field of consumer policy (2007–2013) [2006] O.J. L404/39 and the Commission's Green Paper on the *Review of the Consumer Acquis* COM(2006) 744 final (2007/C 61/01); and for wide-ranging proposals from the Commission for a programme of Community action in the field of health and consumer protection, see COM(2005) 115 final of April 6, 2005 and Regulation (EU) No 254/2014 on a multiannual consumer programme for the years 2014–2020 [2014] O.J. L84/42. A recent, and potentially highly important, contribution is contained in Directive 2011/83/EU on consumer rights [2011] O.J. L304/64, which will apply to contracts concluded after June 13, 2014 (art.28.2). In its original form the Directive was envisaged as being one which would lay down maximum and not only minimum rights: see COM (2008) 614/3 published on October 8, 2008. However, this approach was modified in important respects such that the principle of maximum harmonisation now has a more limited application. For a detailed analysis of the original proposal, see the Report of the House of Lords European Union Committee, *EU Consumer Rights Directive: getting it right* (18th Report, 2008–09). See, generally, Reich, 14 Sydney L.R. 23 (1992); Lonbay (ed.), *Enhancing The Legal Position of the European Consumer* (1996); Weatherill, *EU*

"... to protecting the health, safety and economic interests of consumers, as well as promoting their right to information, education and to organise themselves in order to safeguard their interests."[4]

A work on sale of goods which included no reference to consumer protection would give an inaccurate picture, in that the law which it expounded would be misleading, or at best incomplete, for a large number of daily sale transactions. At the same time to give a full account of the law and of the administrative and other measures protecting consumers requires an entirely separate approach, especially if the full economic and regulatory aspects of the subject are to be considered. The area of consumer protection is therefore rightly made the subject of specialised works, to which the reader is directed.[5] At present, the principal rights of a consumer buyer under a contract for the sale of goods or some similar transaction are located in the same enactments as his commercial counterpart, albeit with some important modifications.[6] In future, it may well be that they will be hived off into separate legislation covering consumer sales and perhaps services.[7] In that event more detailed treatment may be required, albeit that it will overlap to a considerable extent with that accorded to commercial sales. Meanwhile, the main purpose of this present part of the work is to draw attention to the particular problems raised by the application of the normal principles of contract and tort to cases involving consumers (many of which are also referred to at the appropriate places

Consumer Law and Policy (2005); Howells and Wilhelmsson, *EC Consumer Law* (1997); Parry, *"The Impact of the European Community on the UK Consumer"* in Meisel and Cook (eds), *Property and Protection* (2000), Ch.10; Micklitz, Stuyck, Terryn (eds), *Consumer Law, Ius Commune Casebooks for the Common Law of Europe* (2008); Howells, [2006] Sydney L.R.4; 28 Sydney L.R. 63 (2006); Howells and Schulze (eds), *Modernising and Harmonising Consumer Contract Law* (2009). But as to the efficacy of this activity see Borrie, *The Development of Consumer Law and Policy-Bold Spirits and Timorous Souls* (1984), Ch.5. The Council of Europe has also been active in this field.

[4] Article 153 (ex art.129a) of the EC Treaty.

[5] There are two main looseleaf encyclopaedias: *Butterworth's Trading and Consumer Law*, and *Encyclopaedia of Consumer Law* (published by Sweet & Maxwell). See also such further general works as Harvey and Parry, *Law of Consumer Protection and Fair Trading* (6th edn); Cranston's *Consumers and the Law* (2000, Scott and Black); *Woodroffe & Lowe's Consumer Law and Practice* (9th edn); Oughton and Lowry, *Textbook on Consumer Law*, 2nd edn; Miller, Harvey and Parry, *Consumer and Trading Law: Text, Cases and Materials* (1998); Howells and Weatherill, *Consumer Protection Law* (2005); Ramsay, *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets*, 2nd edn; Howells et al., *The Yearbook of Consumer Law 2007, The Yearbook of Consumer Law 2008*, and *The Yearbook of Consumer Law 2009*. For earlier material, see *The Final Report of the (Molony) Committee on Consumer Protection* (1982), Cmnd.1781; Cranston, *Regulating Business: Law and Consumer Agencies* (1979). Product liability and consumer credit are separate subjects with a literature of their own: see below, paras 14–075, 14–090 et seq and 14–167 et seq., respectively.

[6] The modifications or variations include those contained in the Sale of Goods Act 1979 s.14, as amended (above, paras 11–033 to 11–037, below, para.14–011) and Pt 5A (ss.48A–48F) remedies (above, paras 12–073 to 12–120, below, paras 14–024 to 14–031), together with those contained in the Unfair Contract Terms Act 1977 s.12 (above, paras 13–073 to 13–084, below, para.14–032). Also, the Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999/2083, as amended) apply only to "contracts concluded between a seller or supplier and a consumer" (reg.4(1); see below, paras 14–033 to 14–041).

[7] See Bridge, 119 L.Q.R. 173 (2003).

elsewhere), and to statutes, statutory instruments and other regulatory techniques which are relevant in the context of a consumer sale. A relatively short account of the provisions of Pt I of the Consumer Protection Act 1987 has also been included. The general assumption of the chapter is that it is the buyer who is the consumer: but, as already has been said, it should not be forgotten that similar problems can arise where a private person sells to a commercial concern, e.g. in part exchange.

14–003 This chapter therefore begins by considering in outline the consumer's rights under the civil law; it briefly draws attention to the ways in which these rights can be enforced; it goes on to the protection conferred by the criminal law; it then considers the administrative functions of the Competition and Markets Authority; and finally refers to certain indirect forms of protection, such as control of advertising, and to consumer credit legislation, which is a separate subject in itself. It will be seen that the overall picture is one of considerable complexity.

2. RIGHTS UNDER THE CIVIL LAW

(a) *Rights of Buyer Against Seller*

14–004 **Unordered goods.** It has not been uncommon for sellers to send to consumers goods which have not been ordered, with accompanying literature perhaps indicating that the goods will be taken as having been purchased unless the receiver notifies the sender within a certain time. This technique is sometimes known as "inertia selling". Such goods may be treated under general principles as the offer of a contract, which the receiver is entitled to accept without notifying the seller. He may therefore examine them, and try them out, if this is appropriate in the circumstances, to a limited extent: if he goes further than this, he may accept the offer by conduct and must pay any price stipulated. He is under no obligation to return them.[8] If he decides not to keep the goods, he becomes an involuntary bailee, and (probably) owes no duty to the sender beyond one not to act wilfully or recklessly with regard to them.[9] However, the practice of "inertia selling" has long since been controlled by provisions now contained in the Consumer Protection from Unfair Trading Regulations 2008.[10] Regulation 27A applies where a trader engages in the unfair commercial practice of inertia selling as

[8] See *Capital Finance Co Ltd v Bray* [1964] 1 W.L.R. 323 at 328–329.
[9] But the position is not entirely clear. See Paton, *Bailment in the Common Law* (1952), Ch.5; Palmer, *Bailment*, 3rd edn, Ch.13.
[10] SI 2008/1277 reg.27A, as inserted by the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (SI 2013/3134) reg.39, which came into force on June 13, 2014 and which applies in relation to contracts entered into on or after that date (reg.1(1) and (2)). Previously, the relevant provisions were contained in the Consumer Protection (Distance Selling) Regulations 2000 (SI 2000/2334) reg.24, and before that in the Unsolicited Goods and Services Act 1971 s.1 (rights of recipients of unsolicited goods).

described in para.29 of Sch.1 to the 2008 Regulations.[11] In any such case, the consumer is exempted from any obligation to provide consideration for the products supplied by the trader and the absence of a response from the consumer following the supply does not constitute consent to the provision of consideration for, or the return or safekeeping of, the products.[12] Regulation 27A(4) further provides that: "In the case of an unsolicited supply of goods, the consumer may, as between the consumer and the trader, use, deal with or dispose of the goods as if they were an unconditional gift to the consumer". Until recently there were associated offences, which included demanding or asserting a right to payment in respect of such unsolicited goods (or services) or threatening to bring legal proceedings in respect of them.[13] However, the relevant provisions have now been revoked and replaced by the general provisions of the Consumer Protection from Unfair Trading Regulations 2008.[14]

14–005 **Non-delivery.** At least historically, the remedy for complete non-delivery of goods has almost always been an action for damages[15]: specific performance has been the exception rather than the rule, although it is available in the case of objects of unique character.[16] It is possible that, as a result of the new Pt 5A remedies introduced into the Sale of Goods Act 1979[17] in order to give effect to Directive 1999/44,[18] specific performance may be more readily available in future

[11] 2008 Regulations Sch.1 para.29 describes the practice of inertia selling in the following terms: "Demanding immediate or deferred payment for or the return or safeguarding of products supplied by the trader, but not solicited by the consumer". The definition reflects the amendment of para.29 as originally introduced by the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (SI 2013/3134) reg.47, Sch.4 para.9 and subsequently corrected by the Consumer Protection (Amendment) Regulations 2014 (SI 2014/870) reg.9 (5)(b), which came into force on June 13, 2014 (reg.1(2)).
[12] 2008 Regulations reg.27A(2) and (3).
[13] Consumer Protection (Distance Selling) Regulations 2000 reg.24(4) and (5)(a). Also, it was an offence to place or threaten to place a name on a list of defaulters or debtors or to invoke or threaten to invoke any other collection procedure (reg.24(5)(b) and (c)).
[14] See SI 2008/1277 reg.30(3) Sch.2 Pt 2, revoking reg.24(4), (5), (7), (8) and (9) of the Consumer Protection (Distance Selling) Regulations 2000. Note that Directive 2005/29/EC art.5.5, Annex I, point 29 designates inertia selling to consumers as a commercial practice which is in all circumstances considered unfair and is hence prohibited. See also Administration of Justice Act 1970 s.40 (punishment for unlawful harassment of debtors) which has been amended by inserting a new subs.(3A), so that subs.(1) "does not apply to anything done by a person to another in circumstances where what is done is a commercial practice within the meaning of the Consumer Protection from Unfair Trading Regulations 2008 and the other is a consumer in relation to that practice" (see reg.30(1) Sch.2 Pt 1 para.13 to the 2008 Regulations). As to unsolicited directory entries, see the Unsolicited Goods and Services Act 1971 s.3, as amended most recently by the Regulatory Reform (Unsolicited Goods and Services Act 1971) (Directory Entries and Demands for Payment) Order 2005 (SI 2005/55) and the Unsolicited Goods and Services Act 1971 (Electronic Commerce) (Amendment) Regulations 2005 (SI 2005/148)). Various requirements covering such matters as particulars of the directory or proposed directory and conditions applying to invoices or similar documents are contained in Sch.1 to SI 2005/55.
[15] Unless property has passed to the buyer, in which case an action in conversion may be appropriate.
[16] Sale of Goods Act 1979 s.52: below, paras 17–096 et seq.
[17] See the Sale and Supply of Goods to Consumers Regulations 2002 (SI 2002/3045) reg.5, inserting Pt 5A (ss.48A–48F). The new s.48E(2) is particularly relevant.
[18] Directive 1999/44 [1999] O.J. L171/12.

where, in the case of a sale to a consumer, the goods do not conform to the contract at the time of delivery. The matter is considered further elsewhere.[19] These remedies do not apply where the complaint is of non-delivery, as opposed to a non-conforming delivery, but a greater willingness to order the repair or replacement of non-conforming goods might conceivably be reflected in a less restrictive approach to specific performance where the complaint is of simple non-delivery.

14–006 **Late Delivery.** The Sale of Goods Act does not contain any presumptions about responsibility for arranging carriage in a case where the buyer is not collecting the goods.[20] This will depend on the terms of the contract, express or implied. Assuming that the seller is responsible for arranging carriage, the delivery of ordered goods at a time later than that stipulated, or, if no time is stipulated, at a time which is later than might reasonably have been anticipated, is a breach of contract,[21] although the consequences of the breach and, in particular, whether the time of delivery is of the essence of the contract will again depend on its terms, express or implied.[22] In commercial contracts schedules of timing for performance are often laid down, and compliance with each provision may be held a condition, any breach of which entitles the buyer to treat the contract as discharged[23]: such a schedule may also be held to require punctual performance in related matters as to which no time is specifically stipulated.[24] Consumer contracts are less likely to contain time schedules, and it is doubtful whether they would be subjected to the same overall strict interpretation. Consequently, in many consumer contracts, the application of the general provisions of the Act will mean that late delivery will not be a breach serious enough to entitle the buyer to reject unless the delay is long enough to frustrate the object of the contract.[25] The consumer may well be confined to a remedy in damages: and since his loss is likely to consist primarily of inconvenience or disappointment (or both) he may not always find it easy to recover in respect of this.[26]

[19] See above, para.12–116 and below, para.14–026; also the commentary in *Benjamin's Sale of Goods: Special Supplement to the 6th edition* (2003), pp.66–69.
[20] Sale of Goods Act 1979 s.29(1). Above para.8–019.
[21] Sale of Goods Act 1979 s.29(3); above, paras 8–037 et seq. For an example in the case of services (car repairs) see *Charnock v Liverpool Corp* [1968] 1 W.L.R. 1498.
[22] Sale of Goods Act 1979 s.10(2).
[23] e.g. *Bunge Corp v Tradax Export SA* [1981] 1 W.L.R. 711; *Cie Commerciale Sucres et Denrées v C Czarnikow Ltd (The Naxos)* [1990] 1 W.L.R. 1337, above, paras 10–032, 10–034 et seq.
[24] e.g. *Toepfer v Lenersan-Poortman NV* [1980] 1 Lloyd's Rep. 143 (tender of documents).
[25] Above, paras 8–037, 10–033 et seq.
[26] See below, Ch.17. The buyer may derive help from the loss of holiday cases, e.g. *Jarvis v Swans Tours Ltd* [1973] Q.B. 233; *Jackson v Horizon Holidays Ltd* [1975] 1 W.L.R. 1468; *Ichard v Frangoulis* [1977] 1 W.L.R. 556; *Leitner v TUI Deutschland GmbH & Co KG* (C-168/00) [2002] E.C.R. I-2631 (in the context of package holidays); but cf. *Milner v Carnival Plc (t/a Cunard)* [2010] EWCA Civ 389; from *Chaplin v Hicks* [1911] 2 K.B. 786 (loss of opportunity to enter beauty contest); from such cases as *Bernstein v Pamson Motors (Golders Green) Ltd* [1987] 2 All E.R. 220 (new car breaking down); *Ruxley Electronics and Construction Ltd v Forsyth* [1996] A.C. 344 (swimming pool not of stipulated depth); *Farley v Skinner* [2002] 2 A.C. 732 (aircraft noise: lack of accurate information by surveyor); *Haysman v Mrs Rogers Films Ltd* [2008] EWHC 2494 (QB) (Derek Sweeting QC) (house owner registered with a film location agency entitled to a modest amount of damages for distress and inconvenience following damage to property caused during film location agreement); and from dicta as to distress and inconvenience such as those in *McCall v Abelesz* [1976] Q.B. 585 at 594; *Heywood v Wellers* [1976] Q.B. 446, at pp.458, 461; and *Cox v Philips Industries Ltd* [1976] 1 W.L.R. 638. As to the contrasting position in a commercial context, see *Hayes v James & Charles Dodd (a firm)* [1990] 2 All E.R. 815 (motor repair business and solicitor). See also Treitel, *The Law of Contract*, 13th edn, paras 20–083 to 20–090; Phang, [2003] J.B.L. 341. See also below, para.14–021, n.119.

14–007 The general provisions of the Sale of Goods Act 1979 as summarised above have been largely superseded in relation to consumer contracts by the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013,[27] the purpose of which is to implement Directive 2011/83/EU (the "Consumer Rights Directive").[28] The Regulations apply to any sales contract[29] concluded between a consumer and a trader[30] on or after June 13, 2014.[31] The first significant point to be noted is that, in the absence of an agreement to the contrary, the contract is to be treated as including a term that the trader must deliver the goods to the consumer.[32] In other words, there is a presumption that it is for the trader to deliver the goods and not for the consumer to take steps to secure possession of them. Secondly, in the absence of an agreed time or period for delivery, the contract is to be treated as including a term that the trader must deliver the goods "(a) without undue delay, and (b) in any event, not more than 30 days after the day on which the contract is entered into".[33] If the goods are not delivered within this period, or at the agreed time or within the agreed period, the consumer may treat the contract as at an end provided that certain requirements are met. These are that (a) the trader has refused to deliver the goods; (b) delivery at the agreed time or within the agreed period is essential, taking into account all the relevant circumstances at the time the contract was entered into; or (c) the consumer had told the trader before the contract was entered into that delivery "without undue delay" and, in any event, not more than 30 days after the date the contract was entered into, or at the agreed time or within the agreed period, was essential.[34] If these circumstances are not present the consumer may still specify a period that is "appropriate in the circumstances" and require the trader to deliver before the end of that period and, in the event of a failure to do so, treat the contract as at an end.[35] Assuming that the consumer has satisfied these requirements and treated the contract as at an end, the trader must "without undue delay" reimburse all payments made under the contract.[36] If in such circumstances the consumer

[27] The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (SI 2013/3134), reg.42.
[28] Consumer Rights Directive [2011] O.J. L304/64, arts 18 and 28.2. Note that the Directive is one of maximum, and not only minimum, harmonisation (art.4).
[29] "Sales contract" means a contract under which a trader transfers or agrees to transfer the ownership of goods to a consumer and the consumer pays or agrees to pay the price, including any contract that has both goods and services as its object." (reg.5).
[30] "Consumer" means "an individual acting for purposes which are wholly or mainly outside the individual's trade, business ,craft or profession"; and "trader" means "a person acting for purposes relating to that person's trade, business, craft, or profession, whether personally or through another person acting in the trader's name or on the trader's behalf" (reg.4).
[31] Although the point is unlikely to be significant, the corresponding provision in the Directive refers to contracts concluded after the relevant date, but not "on" it (art. 28.2).
[32] See reg.42(2).
[33] See reg.42(3). In relation to an "agreed" time or period for delivery, see also reg.42(4).
[34] See reg.42(5),(6).
[35] See reg.42(7),(8).
[36] See reg.42(9).

decides not to treat the contract as at an end (although entitled to do so) the consumer may still cancel the order for any of the goods or reject goods that have been delivered—in which case the trader must "without undue delay" reimburse all payments made under the contract in respect of any goods for which the consumer cancels the order or which the consumer rejects.[37] Special provision is made for goods which form part of a "commercial unit".[38]

14–008 **Title.** If the goods supplied under a contract of sale do not belong to the seller, the buyer will acquire no title unless one of the exceptions to the rule *nemo dat quod non habet* applies.[39] The rules as to the passing of title are exactly the same for consumers as for commercial buyers except in one respect. By virtue of Pt III of the Hire Purchase Act 1964 as amended[40] the "private purchaser" of a motor vehicle from a seller ("debtor") who held on hire-purchase or conditional sale may acquire title if he has acted in good faith; and when such a seller sells to a trade purchaser and the goods are subsequently sold on, the first private purchaser may similarly acquire title. However, such protection is less than complete and the House of Lords has held that the private purchaser is not protected when he buys the vehicle from a rogue who has impersonated a creditworthy individual and thereby gained possession of the vehicle from a dealer. Such a rogue is not a "debtor" within the meaning of s.27(1) of the Act.[41] When the buyer does not acquire title the seller is of course in breach of a condition of the contract by virtue of s.12 of the Sale of Goods Act[42]: and the wording of this provision is applicable to all sales whether commercial, consumer or purely private. The buyer may therefore reject the goods unless he is too late to do so: and if he does so may recover the price.[43] In any case he may claim damages.[44] It seems that the right to reject and to reclaim the full price is less easily lost in the case of this stipulation.[45] Difficulties may arise where a consumer has improved the item bought and seeks to recover the cost of the improvements from the true owner who claims it. In such a case the improver may, if sued in conversion, be entitled to an allowance

[37] See reg.42(10).

[38] In such cases if any of the goods form part of a commercial unit, then the consumer cannot reject or cancel the order for some of those goods without also rejecting or cancelling the order for the rest. For this purpose a unit is a "commercial unit" if division of the unit would materially impair the value of the goods or the character of the unit: reg.42(11) and (12).

[39] Above, Ch.7.

[40] Above, paras 7–087 et seq. New wording was substituted by Sch.4 to the Consumer Credit Act 1974.

[41] See *Shogun Finance Ltd v Hudson* [2004] 1 A.C. 919, above, para.7–090; also, Elliott, [2004] J.B.L. 381. Nor is a person within the exception if he purchases motor vehicles as a business venture intending to sell them on at a profit: see *GE Capital Bank Ltd v Rushton* [2006] 1 W.L.R. 899. Similarly, the exception will not apply where the acquisition is by way of a settlement of a debt, as opposed to a purchase: see *VFS Financial Services Ltd v JF Plant Tyres Ltd* [2013] 1 Lloyd's Rep. 462. For a case illustrating the complex relationship between the exception and the rules governing the passing of property in unascertained goods, see *Kulkarni v Manor Credit (Davenham) Ltd* [2010] EWCA Civ 69.

[42] Above, paras 4–002 et seq.

[43] Above, paras 4–006 et seq.

[44] Above, paras 4–006 et seq. For the position with respect to exemption clauses and unfair contract terms, see above, paras 4–018 et seq. below, paras 14–032 et seq.

[45] *Rowland v Divall* [1923] 2 K.B. 500; above, paras 4–006 et seq.

under the Torts (Interference with Goods) Act 1977[46]: but if the chattel is simply retaken he may have to rely on the common law.[47]

14–009 **Implied obligations as to quality, etc.: background and the EC Directive on Consumer Sales.** Historically, English law has not distinguished, at least at a formal level, between implied obligations as to quality, etc. in consumer, as opposed to commercial or "business to business", sales.[48] The same terms have been implied, although the ability to exclude or modify them has long since been much more extensively controlled where sales to consumers are concerned.[49] However, the implementation of Directive 1999/44 on certain aspects of the sale of consumer goods and associated guarantees[50] required such distinctions to be drawn in future and in all probability will introduce areas of uncertainty into the law. The implementation has been carried out by the Sale and Supply of Goods to Consumers Regulations 2002[51] made under s.2(2) of the European Communities Act 1972 and it is mainly in the form of amendments to the Sale of Goods Act 1979.[52] Hence,

[46] Torts (Interference with Goods) Act 1977 s.6(1); above, paras 4–007 and 7–005.

[47] See *Greenwood v Bennett* [1973] Q.B. 195; Goff and Jones, *The Law of Restitution*, 7th edn, pp 244–248.

[48] See above, paras 11–001 to 11–072. See, however, the modifications to the right to reject in the Sale of Goods Act 1979 s.15A, which apply only in non-consumer cases.

[49] Notably by the Unfair Contract Terms Act 1977 s.6(2) and the Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999/2083); above, paras 13–064 et seq and below, paras 14–032 to 14–044.

[50] Directive 1999/44 [1999] OJ L171/12. For discussion of the Directive and its implementation, see *Benjamin's Sale of Goods: Special Supplement to the 6th edition* (2003); *Blackstone's Guide to Consumer Sales and Associated Guarabovees* (2003); Bianca and Grundmann (eds), *EU Sales Directive* (2002); Whittaker, *Liability for Products* (2005), Ch.19; Willett, Morgan-Taylor and Naidoo, [2004] J.B.L. 94; and *DTI Consultation Papers on the Sale of Goods Directive* of January 4, 2001 and February 26, 2002; as to the Directive, see also Watterson, (2001) 9 Euro. Rev. of Private Law 197; Twigg-Flesner and Bradgate, [2000] Web J. C.L.1; Twigg-Flesner, [1999] Consum. L.J. 177. The Directive had its origins in a much more ambitious Green Paper on *Guarantees for Consumer Goods and After-Sales Services* COM(93) 509 final. For comments on an earlier draft, see the *Report of the House of Lords Select Committee on the European Communities, Consumer Guarantees* (1996–97 H.L. 57); Bradgate, [1995] Consum. L.J. 94; Beale and Howells, 12 J.C.L. 21 (1997); Shears, Zollers and Hurd, [2000] J.B.L. 262. The scope of the Directive and various issues which arise in relation to it, including the position with respect to recurring defects, the burden of proof and remedies, are under consideration in the Commission's Green Paper on the *Review of the Consumer Acquis* COM(2006) 744 final (2007/C 61/01). The Commission had originally proposed that Directive 1999/44/EC be repealed and replaced: see the Proposal for a Directive of the European Parliament and of the Council on consumer rights: COM(2008) 614/3 published on October 8, 2008. However, the proposal was not proceeded with and was replaced by limited reporting requirements: see Directive 2011/83/EU, art.33.

[51] Sale and Supply of Goods to Consumers Regulations 2002 (SI 2002/3045). Implementation was required (but not achieved) by January 1, 2002 (art.11.1), whereas the Regulations came into force only on March 31, 2003 (reg.1(1)) and accordingly apply only to contracts concluded on or after that date (see Interpretation Act 1978 s.4(a)). The failure to transpose the Directive by the prescribed date gave rise to a possibility of a claim in tort for damages against the UK Government at the suit of a claimant who has incurred loss as a result of the delayed implementation (see, generally, *Francovich and Bonifaci v Italy* (C-9/90) [1991] E.C.R. I-5357; *Dillenkofer v Germany* (C-178/94) [1997] Q.B. 259; [1996] E.C.R. I-4845).

[52] However, there are also parallel amendments to the Supply of Goods and Services Act 1982 and, in the case of the implied terms as to quality, to the Supply of Goods (Implied Terms) Act 1973 and further amendments to the Unfair Contract Terms Act 1977 s.12 (see above, paras 13–073 et seq and below, para.14–032). A free-standing provision in reg.15 covers consumer guarantees (see below, paras 14–084 et seq.).

› separate body of legislation covering consumer sales as such, it is ıt the principal discussion of the implied obligations and associated their breach should be reserved for other chapters of this work.[53] The pter seeks to do no more than state the position in broad outline and : comparisons between the provisions of the 1979 Act and those of the . Two preliminary points should, however, be made. The first is that whe… s the Directive refers to the beneficiary of its provisions as "the consumer",[54] the process of implementation in English law has generally been linked to a person who "deals as consumer",[55] an expression which is defined by s.61(5A) of the 1979 Act by reference to its meaning in Pt I (s.12) of the Unfair Contract Terms Act 1977.[56] The second preliminary point is that it is important to note that the Directive sets out minimum requirements only and expressly allows Member States to "adopt or maintain in force more stringent provisions, compatible with the Treaty, to ensure a higher level of consumer protection".[57] In other words, assuming compatibility with the Treaty, English law would not be open to challenge if it provides a higher level of protection to consumers or extends such protection to a wider category of persons than those who would be within the scope of the Directive. Problems would arise only if the minimum requirements are not met.

14–010 **Correspondence with description.** The condition as to correspondence with description of s.13 of the Sale of Goods Act[58] is potentially applicable in many consumer contracts, for example when goods are acquired by mail order or in response to an advertisement in a catalogue or elsewhere.[59] The condition is implied in all contracts for the sale of goods by description, including private sales.[60] However, the obligation is a limited one and goods may correspond with the contract description and yet be of very poor quality and indeed unsafe.[61] Historically, the strictest application of the rules has been in commercial sales and indeed in consumer transactions it is arguable that the standard of conformity has sometimes been set too low.[62]

[53] See, especially, above, paras 11–001 to 11–072 and 12–040 to 12–120; and below, paras 17–047 to 17–080.
[54] As to which, see art.1.2(a), and below, para.14–012.
[55] The exception is that the implementation of art.6 (Guarantees) by the Sale and Supply of Goods to Consumers Regulations 2002 (SI 2002/3045) reg.15, refers to the beneficiary as "a consumer", a term which is defined by reg.2 in a way which is similar (although not identical) to art.1(2)(a) of the Directive. See further, below, paras 14–084 to 14–089.
[56] As to which, see above, paras 13–073 to 13–084 and below, para.14–032.
[57] Directive 1999/44 article 8.2.
[58] Above, paras 11–001 to 11–023. Section 13 was amended by the Sale and Supply of Goods Act 1994 s.7 Sch.2 para.5. The implied term is designated a "condition" only as regards England and Wales and Northern Ireland: s.13(1). For such contracts the controls of the Consumer Protection (Distance Selling) Regulations 2000 (SI 2000/2334) will also be relevant; see below, paras 14–063 et seq.
[59] However, s.13 may similarly apply where goods are exposed for sale and selected by the buyer, as in a typical sale in a supermarket: see s.13(3).
[60] See, e.g. *Beale v Taylor* [1967] 1 W.L.R. 1193 (private sale of Herald convertible car).
[61] As in *Smith v Lazarus* unreported 1981 CA, but extracted in Miller, Harvey and Parry, *Consumer and Trading Law: Text, Cases and Materials* (1998), pp.93–94 (motor car). But consumers are less likely to be affected by the limitations on the scope of s.13 associated with the decision in *Harlingdon & Leinster Enterprises Ltd v Christopher Hull Fine Art Ltd* [1991] 1 Q.B. 564 CA.
[62] Above, paras 11–005, 11–020.

14–011 **Satisfactory quality and fitness for purpose.** The implied conditions as to satisfactory quality and fitness for purpose contained in s.14 of the Act apply only where goods are sold "in the course of a business".[63] They are of considerable importance for the protection of consumers no less than for commercial buyers. Before the amendments introduced by s.1 of the Sale and Supply of Goods Act 1994 the relevant standard of "merchantable quality" was linked to a test of fitness for purpose. Goods were of "merchantable quality" if they were as fit for the purpose or purposes for which goods of that kind are commonly bought as it was reasonable to expect.[64] The functional overtones of this test were seen by many as being less than apt to cover cases where consumer goods worked adequately and yet were poorly finished or generally shoddy in appearance.[65] Under the new test of "satisfactory quality" fitness for purpose is relegated to being an aspect of the quality of goods and the standard is defined by reference to what "a reasonable person would regard as satisfactory, taking account of any description of the goods, the price (if relevant) and all the other relevant circumstances".[66] A more recent amendment introduced to comply with the Directive on consumer sales[67] provides that, where the buyer "deals as consumer",[68] the circumstances which are relevant when determining whether the goods meet the statutory standard of satisfactory quality generally include:

"any public statements on the specific characteristics of the goods made about them by the seller, the producer or his representative, particularly on advertising or on labelling."[69]

In addition to fitness for purpose, other specified aspects of the quality of goods include, in appropriate cases, the goods' appearance and finish, freedom from minor defects, safety and durability[70] and no doubt accompanying instructions to

[63] See above, paras 11–027 to 11–028. The implied terms are designated "conditions" only as regards England and Wales and Northern Ireland: see s.14(5).
[64] 1979 Act s.14(6).
[65] But see *Rogers v Parish (Scarborough) Ltd* [1987] Q.B. 933 at 944, per Mustill L.J.; and above, para.11–038.
[66] Sale of Goods Act 1979 s.14(2A). For a decision applying this provision in a consumer context, see *Bramhill v Edwards* [2004] EWCA Civ 403; [2004] 2 Lloyd's Rep. 505 (mobile home of satisfactory quality even though strictly speaking it was not by virtue of its width lawful to use it on the road); noted by *Twigg-Flesner, 121 L.Q.R. 205 (2005)*. See also *Jewson Ltd v Boyhan [2003] EWCA Civ 1030; [2004] 1 Lloyd's Rep. 505*; *Egan v Motor Services (Bath) Ltd [2007] EWCA Civ 1002; [2008] 1 W.L.R. 1589*; *Ward v MGM Marine Ltd [2012] EWHC 4093 (QB)* (luxury motor yacht exploding 15 minutes after delivery) and generally, above, paras 11–031 to 11–050.
[67] See the Sale and Supply of Goods to Consumers Regulations 2002 (SI 2002/3045) reg.3.
[68] As noted above, the words "deals as consumer" are defined by s.61(5A) of the Act by reference to their meaning in Pt I (s.12) of the Unfair Contract Terms Act 1977 (see, generally, above, paras 13–073 to 13–084 and 14–009; and below, para.14–032).
[69] See s.14(2D). This is subject to qualifications (s.14(2E) and (2F)). The corresponding provisions in the Directive are contained in arts 2.2(d) and 2.4. For further discussion, see above, paras 11–033 to 11–037.
[70] 1979 Act s.14(2B). For helpful and detailed discussion, see the Report of the Law Commission and the Scottish Law Commission, *Sale and Supply of Goods* (Law Com. No.160; Scot. Law Com. No.104) (Cmnd.137, 1987), pp.22–35.

CHAPTER 19

C.I.F. CONTRACTS

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1. NATURE OF A C.I.F. CONTRACT

Importance of tender of documents. A c.i.f. contract is an agreement to sell[1] goods at an inclusive price covering the cost of the goods, insurance and the **19–001**

[1] See *Henry Kendall & Son v William Lillico & Sons Ltd* [1969] 2 A.C. 31 (where, however, such a contract was held to be a "sale" within Fertilisers and Feeding Stuffs Act 1926 s.2(2); see now Agriculture Act 1970 s.72).

freight payable for the carriage of the goods to the destination specified in the contract.[2] The essential feature of such a contract is that a seller, having shipped, or bought afloat, goods in accordance with the contract, can (and must) fulfil his part of the bargain by tendering to the buyer the proper shipping documents[3]: if he does this, he is not in breach even though the goods have been lost before such tender.[4] In the event of such loss the buyer must nevertheless pay the price on tender of the documents,[5] and his remedies, if any, will be against the carrier or against the underwriter,[6] but not against the seller on the contract of sale.

19–002 The statement that the seller performs his obligations by tendering documents assumes that he has previously shipped, or bought afloat, goods in accordance with the contract. His failure to do this may lead to inability to tender proper shipping documents; and it has been held that it is then the failure to ship, or buy afloat, which is the real or substantial breach.[7] If, on the other hand, the seller *has* shipped goods in the country of origin, but fails to prepare proper shipping documents, then that failure will lead to his inability to tender documents in the country specified in the contract for such tender; and in such a case the "principal breach" occurs in the latter country.[8]

It follows from the statement that the seller performs his part of the bargain by tendering documents, that he is not obliged actually to deliver the goods at the agreed destination[9]; he is only under a negative duty not to prevent the goods from being delivered to the buyer at that destination, by (for example) diverting them elsewhere, or by ordering the carrier not to deliver them to the buyer.[10] If the contract does impose an affirmative obligation on the seller to deliver the goods at the agreed destination, or in respect of their discharge there,[11] it is not a c.i.f.

[2] For further provisions as to the destination of goods sold on c.i.f. terms, see below, paras 19–088, 19–090.

[3] *Manbré Saccharine Co Ltd v Corn Products Co Ltd* [1919] 1 K.B. 198 at p.202.

[4] Below, paras 19–002, 19–060.

[5] Below, paras 19–060, 19–081. The position stated in the text above is supported by *Scottish & Newcastle International Ltd v Othon Ghalanos Ltd* [2006] EWCA Civ 1750; [2007] 2 Lloyd's Rep. 341 at [34]; apparently conflicting statements at [33] refer to the rejected hypothesis that the contract had been converted by the terms of a pro forma invoice into an ex ship contract; as to the passing of risk under such a contract, see below, para.21–021. When the decision of the Court of Appeal was affirmed by the House of Lords ([2008] UKHL 11; [2008] 1 Lloyd's Rep. 462) the contract was classified as an f.o.b. contract: see below, para.20–010.

[6] *Ireland v Livingston* (1871) L.R. 5 H.L. 395 at p.407. These remedies may yield a different measure of recovery from remedies against the seller.

[7] *Johnson v Taylor Bros* [1920] A.C. 144; below, para.19–008. *cf.* Vienna Convention on Contracts for the International Sale of Goods (above, para.1–024) Arts 30, 32(1) and 34.

[8] *Union Transport Plc v Continental Lines SA* [1991] 2 Lloyd's Rep. 49 at p.51, affirmed without reference to this point [1992] 1 W.L.R. 15.

[9] *Parker v Schuller* (1901) 17 T.L.R. 299; *cf. Bowden Bros & Co Ltd v Little* (1907) 4 C.L.R. 1364; as to deterioration in transit see above, paras 18–287 *et seq*.

[10] *Peter Cremer v Brinkers Groudstoffen NV* [1980] 2 Lloyd's Rep. 605; *Empresa Exportadora de Azucar v Industria Azucarera Nacional SA* (*The Playa Larga*) [1983] 2 Lloyd's Rep. 171; *Gatoil International Inc v Tradax Petroleum Ltd* (*The Rio Sun*) [1985] 1 Lloyd's Rep. 351; *Etablissements Soules et Cie v Intertradex SA* [1991] 1 Lloyd's Rep. 379 at p.386; *Birkett Sperling & Co v Engholm & Co* (1871) 10 M (Ct. of Sess.) 170 at p.174; below, paras 19–008, 19–074.

[11] *Soon Hua Seng Co Ltd v Glencore Grain Ltd* [1996] 1 Lloyd's Rep. 398 at p.401; *Y P Barley Ltd v E C Robertson Pty Ltd* [1927] V.L.R. 194 at pp.199–202, where the expression "c.i.f." was said at p.200 to be "nothing more . . . than a provision as to price".

contract even though the letters "c.i.f." occur in the contract. The question whether a contract obliges the seller to deliver goods or only to tender documents depends on the construction of the contract as a whole. Thus, on the one hand, it has been said that "Not every contract which is expressed to be a c.i.f. contract is such."[12] On the other hand, a contract for the sale of goods "*delivered* Harburgh, cost freight and insurance" has been held to be a c.i.f. contract, so that the seller's obligations were performed by tender of documents even though the goods did not arrive.[13]

A contract which gives the seller the option of tendering documents *or* goods is not a c.i.f. contract, so that a contract on such terms does not oblige the seller to tender documents.[14] Conversely, a true c.i.f. contract does not give the seller this option: he *must* tender documents and cannot perform by instead tendering goods alone, even though they may be in conformity with the contract.[15] Nor, if shipment to the c.i.f. destination becomes impossible or illegal, can the seller be required to deliver the goods at some other place.[16]

19–003 **Provisions for tender of delivery order.** In the ordinary case of a c.i.f. contract, the documents to be tendered will include a bill of lading.[17] But the contract may expressly stipulate for tender of a delivery order, or give the seller the option of tendering a delivery order; and it is a question of construction, depending in particular on the form of delivery order contemplated by the parties, whether a contract of this kind is one for the delivery of goods at the agreed destination, or a c.i.f. contract. The mere fact that the contract allows the seller to substitute a delivery order for a bill of lading does not, as a general rule, import any obligation to deliver the actual goods so as to prevent the contract from being a true c.i.f. contract.[18] But in *The Julia*[19] a contract for the sale of rye "c.i.f.

[12] *The Julia* [1949] A.C. 293 at p.309; *Manbré Saccharine Co Ltd v Corn Products Co Ltd* [1919] 1 K.B. 198; *Gardano and Giampieri v Greek Petroleum Co* [1962] 1 W.L.R. 40; as to this case, see para.18–155, n.1335. *cf. Scottish & Newcastle International Ltd v Othon Ghalanos Ltd* [2008] UKHL 11; [2008] 1 Lloyd's Rep. 462 where invoices referred to "delivery . . . cost and freight Limassol". In the Court of Appeal, Rix L.J. had said ([2006] EWCA Civ 1750 at [9]) that "the contract differed very little from a form of F.O.B. contract although it was expressed to be CFR" (*i.e.* cost and freight, or c. & f.: see at [3]). Some of his later discussion (*e.g.* at [23]) is based on the assumption that the contract was a c. & f. contract; except in the respect discussed in para.21–012 below, such contracts are governed by the same rules as c.i.f. contracts. In the House of Lords, the contract in the *Scottish & Newcastle* case was classified as an f.o.b. contract: see [2008] UKHL 11; [2008] 1 Lloyd's Rep. 462 at [33] and [36] and below, paras 19–008 and 20–010.

[13] *Tregelles v Sewell* (1862) 7 H. & N. 574.

[14] *Holland Colombo Trading Soc. Ltd v Alawdeen* [1954] 2 Lloyd's Rep. 45; *cf.* below, para.19–060.

[15] *Harper v Hochstim* 278 F. 102 (1921); *cf. Manbré Saccharine Co Ltd v Corn Products Co Ltd* [1919] 2 K.B. 198 at p.202 ("by delivery of documents and not by the actual physical delivery of goods"). The rules that the buyer is entitled to continuous documentary cover whether he needs it or not (below, para.19–027) and to an insurance policy even though the goods arrive safely (below, para.19–042) seem to be based on the same principle.

[16] See below, para.19–073 at n.501.

[17] Below, para.19–024. If the Rotterdam Rules (above para.18–011) are given the force of law in the United Kingdom, a "transport document" (above para.18–123) which was "negotiable" (above, para.18–126) and which was also a document of title in the common law sense (above, paras 18–132 to 18–134) would seem to be capable of serving the same function, in the present context, as a bill of lading.

[18] *Re Denbigh Cowan & Co and R Atcherley & Co* (1921) 90 L.J.K.B. 836.

[19] [1949] A.C. 293.

Antwerp" gave the seller the option of tendering bills of lading or delivery orders. The seller shipped rye in bulk and tendered a delivery order in respect of a quantity smaller than the entire shipment; this order was directed to the seller's agent at Antwerp and was merely a preliminary step in a complicated procedure for securing the release of the goods.[20] It was held that the contract was not a c.i.f. contract but one for the delivery of the goods at Antwerp, and, as the goods were not so delivered, there was a total failure of consideration.[21] This was the case even though the contract provided for payment in exchange for the documents. The House of Lords laid stress on the fact that the seller had purported to perform by tendering a delivery order, and on the form of the delivery order tendered. It was, in particular, significant that this order was of such a kind that it required further acts to be done by or on behalf of the seller at the port of destination in order to secure delivery of the goods to the buyer; a more normal delivery order addressed to, or issued by, the carrier would not have imposed any such requirement and would not have deprived the contract of its nature as a c.i.f. contract.[22] If, moreover, the seller in *The Julia* had chosen to tender a bill of lading he would, it seems, have been held to have performed his obligations. The contract was therefore a c.i.f. or delivery contract at the option of the seller and its true nature could not be determined until that option had been exercised.

19–004 **Provision as to destination.** A contract may be a c.i.f. contract even though the destination specified in it is not merely a port but a particular point (such as a wharf or terminal) within that port. Such a provision in a c.i.f. contract merely obliges the seller to make, or procure, a contract for the carriage of the goods to that point: it does not oblige him to deliver them there.[23]

19–005 **Provision for performance guarantee.** A contract on c.i.f. terms may stipulate for the tender of the normal shipping documents but go on to provide that, if some of these documents are "missing", the buyer must nevertheless pay if in lieu of such documents the seller provides a performance guarantee[24] or a letter of indemnity against missing documents.[25] In spite of the fact that the buyer may, when such a clause comes into operation, find himself without any remedy against the carrier or the underwriter, the contract retains many of the normal features of a c.i.f. contract: for example, the characteristics of the bill of lading to be tendered under the contract are determined in accordance with the rules to be discussed later in this chapter.[26]

[20] See *ibid.*, at p.311.
[21] Contrast *Calcutta etc. Steam Navigation Co v De Mattos* (1863) 32 L.J.Q.B. 322; 33 L.J.Q.B. 214 (where, the contract being a true c.i.f. contract, a similar claim to recover money paid against documents failed). And see below, paras 21–015, 21–016.
[22] See above, para.18–212; below, para.19–024.
[23] See, *e.g. Marshall Knott & Barker Ltd v Arcos Ltd* (1933) 44 L. LL. Rep. 384 (below para.19–031); *American Sugar Refining Co v Page* 16 F. 2d 662 (1927); *Warner Bros & Co Ltd v Israel* 101 F. 2d 59 (1939). For the seller's duty not to prevent delivery at the contractual destination, see above, para.19–002, below, paras 19–008, 19–076.
[24] *e.g. SIAT di dal Ferro v Tradax Overseas SA* [1980] 1 Lloyd's Rep. 53.
[25] *e.g. Enichem Anic SpA v Ampelos Shipping Co Ltd* (*The Delfini*) [1990] 1 Lloyd's Rep. 252.
[26] Below, paras 19–026 to 19–040, and esp. paras 19–031, 19–034, 19–038.

19–006 **Provisions affecting risk.** A contract may be a c.i.f. contract although it postpones the *time* of payment either wholly or in part until arrival or delivery of the goods,[27] thus varying the normal rule that the buyer must pay on tender of documents[28]; and although it makes the amount payable depend on the quantity of goods which actually arrive,[29] or provides that the contract is to be void if the ship carrying the goods is lost.[30] The effect of such provisions is to some extent to leave the risk of loss, which under a normal c.i.f. contract passes to the buyer on or as from shipment,[31] with the seller during transit. For this reason Lord Merriman P. said in *The Gabbiano* that a provision of this kind was "inappropriate to a c.i.f. contract proper".[32] But he added that the contract might "remain a c.i.f. contract with variations"; for, if the circumstances thus provided for did not arise, the contract "would, in normal conditions, be performed according to its tenor as an ordinary c.i.f. contract". Here again the question whether the contract is to be regarded as a c.i.f. contract cannot be finally determined when the contract is made, but may depend on subsequent events. A contract providing for payment on arrival of the goods could, moreover, retain the characteristics of a c.i.f. contract, in defining the obligations of the seller, though not those of the buyer: that is, if the goods or part of them failed to arrive as a result of some accident or of some breach of the contract of carriage, the seller would not, for that reason alone,[33] be in breach of the contract of sale: the failure of the goods to arrive would merely provide the buyer with an excuse for not paying the price against documents. Such a clause may also be narrowly construed. It has, for example, been said that a clause by which the amount to be paid was to be based on "full outturn weight at port of destination" would apply only in respect of "weight differences arising in . . . ordinary circumstances"[34] (such as evaporation during the voyage)

[27] *Calcutta, etc. Steam Navigation Co v De Mattos*, above, n.21 *Dupont v British South Africa Co* (1901) 18 T.L.R. 24; *Arnhold Karberg & Co v Blythe, Green, Jourdain & Co* [1916] 1 K.B. 495; *Stein, Forbes & Co v County Tailoring Co* (1916) 115 L.T. 215; *Plaimar Ltd v Waters Trading Co Ltd* (1945) 72 C.L.R. 304; *cf. Houlder Bros & Co Ltd v Commissioners of Public Works* [1908] A.C. 276 at p.280 where this type of contract was said not to be a "normal c.i.f. contract".
[28] Below, para.19–076.
[29] *Calcutta, etc. SN Co v De Mattos* (1863) 32 L.J.Q.B. 322; 33 L.J.Q.B. 214; *Dupont v British South Africa Co*, above, n.27; *Arnhold Karberg & Co v Blythe, Green, Jourdain & Co* [1915] 2 K.B. 370 at pp.379–380 (c.i.f. contract "with . . . variation"); affirmed [1916] 1 K.B. 495; *Warner Bros & Co Ltd v Israel* 101 F. 2d 59 (1939); *cf.* the contract in *The Aramis* [1989] 1 Lloyd's Rep. 213; contrast *The Julia* [1949] A.C. 293, where one reason why the contract was held not to be a c.i.f. contract was that the seller was "to pay for deficiency in Bill of Lading weights"; *Produce Brokers New Company (1924) Ltd v Wray, Sanderson & Co Ltd* (1931) 39 Ll. L.R. 257, where the price depended on "delivered weight"; *Krohn & Co v Mitsui & Co Europe GmbH* [1978] 2 Lloyd's Rep. 419 (c. & f. contract); and see below, para.19–120.
[30] *Karinjee Javinjee & Co v William F Malcolm & Co* (1926) 25 Ll. L.R. 28; *Re Denbigh Cowan & Co and R Atcherley & Co* (1921) 90 L.J.K.B. 836.
[31] Below, para.19–111.
[32] [1940] P. 166 at p.174; *Houlder Bros & Co Ltd v Commissioners of Public Works* [1908] A.C. 276 at p.291; *Peter Cremer v Brinkers Groudstoffen NV* [1980] 2 Lloyd's Rep. 605 at p.606 ("rather hybrid c.i.f. contract"); *Congimex Companhia Geral, etc. SARL v Tradax Export SA* [1983] 1 Lloyd's Rep. 250 at p.252 ("not a classic c.i.f. contract").
[33] For the position where the failure of the goods to reach the agreed destination results from the seller's interference with the contract of carriage, see below, paras 19–008, 19–074.
[34] *Soon Hua Seng Co Ltd v Glencore Grain Ltd* [1996] 1 Lloyd's Rep. 398 at p.405; the buyer however escaped liability as proper shipping documents had not been tendered: see below, para.19–027.

and not where the goods were lost through an accident during the voyage. The contract therefore retained its character as a c.i.f. contract. On the other hand a contract putting the whole risk (of deterioration as well as of loss) on the seller until actual delivery is probably not a c.i.f. contract.[35]

19–007 **Passing of property.** In *The Julia* Lord Simonds said that it was a "salient characteristic" of a c.i.f. contract "that the property not only may but must pass by delivery of the documents against which payment is made".[36] This characteristic is, however, not peculiar to c.i.f. contracts. A contract might provide for passing of property on delivery of documents against payment, and also oblige the seller to deliver the actual goods. Such a contract would not be a c.i.f. contract. Conversely, a contract may be a c.i.f. contract even though property passes before delivery of documents or payment; *e.g.* (occasionally) on shipment[37]; and even though property does not pass on such delivery or on payment.[38]

19–008 **Whether sale of goods or documents.** It has from time to time been said that a c.i.f. contract is not a sale of goods but a sale of documents.[39] This view is based on the rule that a c.i.f. seller, who has shipped or bought afloat goods which are in conformity with the contract, performs his part of the bargain by tender of documents; and on the fact that c.i.f. contracts often provide for payment in exchange for the documents. What the buyer buys, on this view, are the rights of action against the carrier and the underwriter, evidenced by, or contained in, the shipping documents[40]; in other words he buys not goods, but things in action. If this were so, c.i.f. contracts would not be governed by the Sale of Goods Act at all, since things in action are not goods.[41] This conclusion would not, perhaps, be as startling as might at first sight appear since in the case of c.i.f. contracts the provisions of the Act are very frequently excluded by contrary agreement, whether express or inferred from the nature of the transaction.

Although the statement that a c.i.f. contract is a sale of documents "contains more than a grain of truth"[42] it is "not wholly true".[43] The prevailing view is that a c.i.f. contract is not a sale of documents but a sale of goods[44] or a contract for the sale of goods to be performed by delivery of documents,[45] or "a contract for the

[35] Below, para.19–120.
[36] [1949] A.C. 293 at p.317.
[37] Below, para.19–100; *The Albazero* [1977] A.C. 774 at pp.794, 840; above, para.18–253.
[38] See, for example, below, para.19–105.
[39] *e.g.*, in *Arnhold Karberg & Co v Blythe, Green, Jourdain & Co* [1915] 2 K.B. 379 at p.388; affirmed [1916] 1 K.B. 495.
[40] *Lloyd v Fleming* (1872) L.R. 7 Q.B. 299 at p.303.
[41] Sale of Goods Act 1979 s.61(1) ("goods"). *cf.* Vienna Convention on Contracts for the International Sale of Goods (above, para.1–024) Art.2(d).
[42] *SIAT di del Ferro v Tradax Overseas SA* [1978] 2 Lloyd's Rep. 470 at p.495; affirmed [1980] 1 Lloyd's Rep. 53; *cf. Soules CAF v PT Transcap of Indonesia* [1999] 1 Lloyd's Rep. 917 at p.918 ("essentially a documentary transaction").
[43] *SIAT* case [1978] 2 Lloyd's Rep. 470 at p.495; *cf. Warner Bros & Co Ltd v Israel* 101 F. 2d 59, at p.60 ("an unduly broad generalisation").
[44] *Ross T Smyth & Co Ltd v TD Bailey, Sons & Co* [1940] 3 All E.R. 60 at p.68; *The Gabbiano* [1940] P. 166 at p.174.
[45] *Arnhold Karberg & Co v Blythe, Green, Jourdain & Co* [1916] 1 K.B. 495 at p.510; *Hindley & Co Ltd v East Indian Produce Co Ltd* [1973] 2 Lloyd's Rep. 515 (c. & f. contract); *Trasimex Holdings SA v Addax BV* [1999] 1 Lloyd's Rep. 28 at p.32.

sale of documents representing goods"[46] (and not merely rights of action). It has been said that the difference between the two views "is one of phrase only"[47] but there may be cases in which it cannot be dismissed so lightly. Thus if the agreed destination of the goods becomes, after the making of the contract, enemy territory, the contract may be discharged by supervening illegality even though the documents were to be tendered in England.[48] Again, where a seller fails to ship goods of the contract description, this, and not his consequent inability to tender documents, is the "substantial breach", so that if he fails abroad to ship goods under a contract providing for shipment of the goods to, or tender of documents in, this country the "substantial breach" does not take place in this country.[49] Similarly, if no goods have been shipped but the seller nevertheless tenders documents good on their face, he is in breach even though those documents may give the buyer a right of action against the carrier.[50] The seller is similarly in breach if, having shipped goods to the c.i.f. destination, he then interferes with the performance of the contract of carriage, *e.g.* by ordering the ship to carry them to a place other than that destination[51]; or by ordering her to leave that destination without having delivered the goods to the buyer[52]; or by simply ordering her (in purported exercise of an unjustified lien) not to make such delivery.[53] In all these cases, the seller, as well as the carrier, is in breach; for a c.i.f. contract "contemplates that the [buyer][54] is to

[46] *Congimex Companhia Geral, etc. SARL v Tradax Export SA* [1983] 1 Lloyd's Rep. 250 at p.253; *Bangladesh Export Import Co Ltd v Sucden Kerry SA* [1995] 2 Lloyd's Rep. 1 at p.5 (c. & f. contract) *Cargill International SA v Bangladesh Sugar & Food Industries Corp* [1996] 4 All E.R. 563 at p.565, affirmed [1998] 1 W.L.R. 461.
[47] *Manbré Saccharine Co Ltd v Corn Products Co Ltd* [1919] 1 K.B. 198 at p.203; *cf. Malmberg v H & J Evans & Co* (1924) 30 Com.Cas. 107 at p.112.
[48] *Duncan, Fox & Co v Schrempft & Bonke* [1915] 1 K.B. 365; 3 K.B. 355; below, para.19–138.
[49] *Wancke v Wingren* (1889) 58 L.J.Q.B. 519; *Parker v Schuller* (1901) 17 T.L.R. 299; *Johnson v Taylor Bros* [1920] A.C. 144; *Seaver v Lindsay Light Co* 135 N.E. 329 (1922); above, para.19–002. *cf. Scottish & Newcastle International Ltd v Othon Ghalanos Ltd* [2006] EWCA Civ 1750; [2007] 2 Lloyd's Rep. 341 where goods were sold c. & f. Limassol and shipped "at Liverpool for Limassol" (at [1]) under straight bills (see above, para.18–024) naming the buyer as consignee and the bills were sent to the buyer at Limassol. It was held that, for the purpose of Art.5(1)(b) of the Judgments Regulation (Council Regulation (EC) 44/2001; OJ 2001 L12 p.1) the place at which "the goods were delivered" was in England, not in Cyprus, so that the contract was, for this purpose, treated as one for the sale of goods, not as one for the sale of documents. Rix L.J. left open the question what would be the place of "delivery" within Art.5(1)(b) "in the typical case of goods shipped by a seller to seller's order" (at [47]), venturing "only the opinion, but no more, that the solution may be to look to what has been described as provisional delivery" (at [48]), *i.e.*, again to the place of shipment: see below, para.19–073. It may also have been significant that the contract contained no provision for payment against documents but gave credit to the buyer: see above, para.18–252. When this decision was affirmed ([2008] UKHL 11; [2008] 1 Lloyd's Rep. 462) the contract was classified as an f.o.b. contract (below, para.20–010), so that the speeches in the House of Lords have no bearing on the nature of c.i.f. or c. & f. contracts.
[50] *Hindley & Co Ltd v East Indian Produce Co Ltd* [1973] 2 Lloyd's Rep. 515 (c. & f. contract). There would now be a right of action against the carrier on the facts of this case if the requirements of Carriage of Goods by Sea Act 1992 (above paras 18–055 and 18–142 *et seq.*) were satisfied.
[51] *Peter Cremer v Brinkers Groudstoffen NV* [1980] 2 Lloyd's Rep. 605; below, para.19–074.
[52] *Empresa Exportadora de Azucar v Industria Azucarera Nacional SA* (*The Playa Larga*) [1983] 2 Lloyd's Rep. 171 (c. & f. contract).
[53] *Gatoil International Inc v Tradax Petroleum Ltd* (*The Rio Sun*) [1985] 1 Lloyd's Rep. 351.
[54] *The Playa Larga*, above, n.52, at p.180. The report at this point has "seller"—an obvious misprint for "buyer". *cf. The Rio Sun*, above n.53, at p.362.

get physical possession of the goods through the contract of carriage that it is the seller's duty to arrange". Again, a c.i.f. contract may specify the rate at which the goods are to be discharged and provide that the buyer is to pay demurrage[55] to the seller if that rate is not attained: under such a provision the buyer owes a duty to the seller (and not merely to the carrier) with regard to the time taken in unloading the goods.[56] It is also possible for the seller to give a contractual undertaking as to the time of the arrival of the goods at the c.i.f. destination. He could then be in breach if the goods arrived there after the stipulated time.[57] All these rules suggest that the transaction is, in essence, a sale of goods; and the same view is perhaps also supported by the rule that a c.i.f. contract for the sale of specific goods is void if at the time of the contract the goods had perished, even though there was in existence at that time a set of shipping documents including a valid policy of insurance on the goods.[58]

19–009 **Provisions as to freight and insurance.** In the normal c.i.f. contract, the seller charges an inclusive price covering the cost of the goods, freight and insurance. If under the contract of carriage the freight is payable at the destination, it may in fact be paid by the buyer; but in that case it is simply deducted by the buyer from the price.[59] As between buyer and seller, responsibility for the cost of freight and insurance is the seller's: thus any increase in freight or insurance rates must be borne by the seller[60] and any decrease enures for his benefit. But these are not essential features of a c.i.f. contract. Thus a contract may be a c.i.f. contract even though it provides that variations in freight or insurance rates are for the buyer's account[61] or if this result is held to follow from a stipulation in the contract that freight is "payable on discharge", this being interpreted as an undertaking by the buyer "to discharge the freight, whatever it might be"[62]; or if the contract gives the buyer a choice of destinations and makes the freight charge, and hence the total amount payable by the buyer, depend on which destination he selects[63]; or if the contract provides that the buyer is to be liable for such demurrage as the seller

[55] Below, para.19–089.
[56] See *Etablissements Soules et Cie. v Intertradex SA* [1991] 1 Lloyd's Rep. 379.
[57] See *Cargill International SA v Bangladesh Sugar & Food Industries Corp* [1998] 1 W.L.R. 461 at p.465. On the other hand, the c.i.f. seller would not, it is submitted, be in breach of his undertaking as to the *time* of arrival if, as a result of some casualty (not due to any failure on his part to make a proper contract of carriage) the goods never arrived at all: see below, para.19–075.
[58] *Couturier v Hastie* (1856) 5 H.L.C. 673; Sale of Goods Act 1979 s.6 (above, para.1–124).
[59] See the form of invoice described in *Ireland v Livingston* (1872) L.R. 5 H.L. 395 at p.407; below, para.19–053.
[60] *Houlder Bros & Co Ltd v Commissioners of Public Works* [1908] A.C. 276 at p.290; *Oulu Osakayetio v Arnold Laver & Co* [1940] 1 K.B. 750.
[61] *Acetylene Corp of GB v Canada Carbide Co* (1921) 6 Ll. L.R. 410 at p.468; reversed on the issue of frustration (1922) 8 Ll. L.R. 456, CA; *Colin & Shields v Weddel & Co* [1952] 2 All E.R. 337; *Plaimar Ltd v Waters Trading Co* (1945) 72 C.L.R. 304; *DI Henry Ltd v Wilhelm C Clasen* [1973] 1 Lloyd's Rep. 159 ("Cape surcharge for buyer's account"). But by virtue of a provision of this kind the seller is entitled to charge the buyer only for increases in normal rates and not for the extra expense of, *e.g.* insuring shipment on a belligerent ship: *Oulu Osakayetio v Arnold Laver & Co*, above, n.60.
[62] *Modiano Bros & Sons v Bailey & Sons Ltd* (1933) 47 Ll. L.R. 134.
[63] As in *Tsakiroglou & Co Ltd v Transgrains SA* [1958] 1 Lloyd's Rep. 562; *Gatoil International Inc v Tradax Petroleum Ltd* (*The Rio Sun*) [1985] 1 Lloyd's Rep. 351.

may have to pay to the carrier.[64] Even a contract by which insurance was "to be covered by seller for buyer's account" has been described as a "modified c.i.f. contract"[65]: it was, presumably, not a c. & f. contract[66] because the seller was obliged to insure, though the whole cost of insurance had to be borne by the buyer.

Thus variations in the normal rules as to the cost of freight and insurance do not necessarily destroy the character of the contract as a c.i.f. contract. But if they are sufficiently far-reaching they may have this effect. In *The Parchim*[67] German sellers chartered a ship to carry a cargo of nitrate from Chile to a European port. They sold the cargo to Dutch buyers at a stated price

> ". . . cost and freight Channel . . . Insurance to be covered by the sellers . . . and the buyer has to accept the policy of insurance against payment of premium and costs".

The contract went on to provide that "The buyers have to take over the charter"; that if they made use of the option to cancel contained in the charter they would have to ship the goods by another vessel; that "any freight difference pro or contra is for account of the buyers", and that, if the ship were lost after part of the goods had been loaded, the contract was to be "cancelled for the balance". Under these provisions, the buyer had to pay for insurance effected by the seller; in certain events the buyer had to ship the goods and take the risk of fluctuations in freight rates; and loss of part of the goods after shipment could relieve him from liability. None of these consequences would normally follow from a sale on c.i.f. terms; and their cumulative effect was said to be that the contract was "not an ordinary c.i.f. contract" and that it had "far more of the characteristics of a contract f.o.b. Taltal [the Chilean port] than it had of a contract c.i.f. European port".[68]

2. DUTIES OF THE SELLER

In general.[69] The duties of a c.i.f. seller are, first to ship (or procure a shipment of) goods in accordance with the contract and, where necessary, to appropriate 19–010

[64] See *Bunge AG v Giuseppe Rocco & Figli* [1973] 2 Lloyd's Rep. 152; *Malozzi v Carapelli SpA* [1976] 1 Lloyd's Rep. 407; below, para.19–089.
[65] *Colin & Shields v Weddel & Co* [1952] 2 All E.R. 337 at p.342.
[66] Below, para.21–012.
[67] [1918] A.C. 157; and see below, para.20–008.
[68] [1918] A.C. 157 at p.163.
[69] For general statements of a c.i.f. seller's duties, see *E Clemens Horst Co v Biddell Bros* [1911] 1 K.B. 214 at p.220 (reversed [1911] 1 K.B. 934 but restored [1912] A.C. 18); *Johnson v Taylor Bros* [1920] A.C. 144 at p.155 (where "six things" seems to be a misprint for "five things": see *Petrofina SA v Aut Ltd* (*The Maersk Nimrod*) [1991] 1 Lloyd's Rep. 269 at p.272); *Shipton, Anderson & Co v John Weston & Co* (1922) 10 Ll. L.R. 762 at p.763; *Ross T Smyth & Co Ltd v TD Bailey, Sons & Co* [1940] 3 All E.R. 60 at p.68; *The Julia* [1949] A.C. 293 at p.308; *SIAT di del Ferro v Tradax Overseas SA* [1978] 2 Lloyd's Rep. 470 at p.492; affirmed [1980] 1 Lloyd's Rep. 53; *Gatoil International Inc v Tradax Petroleum Ltd* (*The Rio Sun*) [1985] 1 Lloyd's Rep. 351 at p.357; *Scottish & Newcastle International Ltd v Othon Ghalanos Ltd* [2006] EWCA Civ 1750; [2007] 2 Lloyd's Rep. 341 at [42], citing para.19–010 of the 7th edn of this book with apparent approval. The decision of the House of Lords in this case ([2008] UKHL 11; [2008] 1 Lloyd's Rep. 462) has no further bearing on the duties of a c.i.f. seller: see above, para.19–008 n.49. Para.19–010 of the 8th edition of this book is likewise

CHAPTER 26

CONFLICT OF LAWS

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1. PRELIMINARY CONSIDERATIONS

26–001 Scope and arrangement of this chapter. This chapter is concerned with the rules of choice of law[1] in sale of goods cases.[2] Very broadly speaking, these choice of law rules fall into two groups which reflect the dual aspect of a sale as both a contractual and proprietary transaction.[3] As to the first group therefore the chapter examines contractual choice of law rules in the light of their relevance to a contract of sale. Originally these choice of law rules were developed by the common law. Under those common law rules, contractual issues were governed by the "proper law" of the relevant contract. These common law rules were substantially reformulated, initially as a result of the implementation in the United Kingdom of the Rome (EEC) Convention on the Law Applicable to Contractual Obligations 1980 ("the Rome Convention") in the Contracts (Applicable Law) Act 1990.[4] The rules of that Convention, as implemented in the Act of 1990, apply to determine the law applicable to a contract of sale entered into after April 1, 1991 but before December 17, 2009.[5] For contracts concluded on[6] or after December 17, 2009, a new European

[1] See Plender and Wilderspin, *The European Private International Law of Obligations*, 3rd edn, Chs 4–15; Dicey, Morris and Collins, *The Conflict of Laws*, 15th edn, Chs 32 and 33; Bonomi (2008) 10 Yb. P.I.L. 165; Bonomi, (2008) 10 Yb. P.I.L. 285; Lein, (2008) 10 Yb. P.I.L. 177; Lagarde and Tenenbaum, 2008 Rev. Crit. 727; Ferrari and Leible (eds), *The Rome I Regulation* (2009); Briggs, (2009) 125 L.Q.R. 191; Crawford, [2010] S.L.T. 17; Calliess (ed), *Rome Regulations: Commentary on the European Rules of the Conflict of Laws* (2011); Van Calster, *European Private International Law* (2013), Ch.3; Fentiman, *International Commercial Litigation* (2010), Part III; Rogerson, *Collier's Conflict of Laws*, 4th edn (2013), Ch.10. See also (from a Scottish law perspective) Beaumont and McEleavy, *Anton's Private International* Law, 3rd edn (2011), Ch.10. For an exhaustive account of choice of law in relation to commercial, as opposed to consumer sales (pre-dating Regulation 593/2008 (the "Rome I" Regulation)), see Fawcett, Harris and Bridge, *International Sale of Goods in the Conflict of Laws* (2005), Chs 12–21.

[2] This chapter does not consider the distinct topic of the jurisdiction of English courts in sale of goods cases. For the general principles of English jurisdiction in personam see Fawcett, Harris and Bridge, *International Sale of Goods in the Conflict of Laws*, Chs 2–10; and generally, Dicey, Morris and Collins, *The Conflict of Laws*, 15th edn, Chs 11 and 12; Cheshire, North and Fawcett, *Private International Law*, 14th edn (2008), Chs 10–14; Fentiman, *International Commercial Litigation* (2010), Chs 7–15; Rogerson, *Collier's Conflict of Laws*, 4th edn (2013), Chs 5 and 6. Other topics omitted from this chapter, include the recognition and enforcement of foreign judgments as to sales (see Fawcett, Harris and Bridge, *International Sale of Goods in the Conflict of Laws*, Ch.11; and generally, Dicey, Morris and Collins, *The Conflict of Laws*, 15th edn, Chs 14 and 15; Cheshire, North and Fawcett, *Private International Law*, 14th edn, Chs 15–16; Fentiman, *International Commercial Litigation* (2010), Ch.18; and Rogerson, *Collier's Conflict of Laws*, 4th edn, Ch.8; and the conflicts aspects of arbitration of disputes arising out of sales contracts (see Dicey, Morris and Collins, *The Conflict of Laws*, 15th edn, Ch.16; and Cheshire, North and Fawcett, *Private International Law*, 14th edn, Ch.17).

[3] For choice of law in tort and restitutionary claims which may arise in connection with sales, see Dickinson, *The Rome II Regulation* (2008); Plender and Wilderspin, *The European Private International Law of Obligations*, Pt 3; for detailed discussion of the law prior to the entry into force of the Rome II Regulation, see Fawcett, Harris and Bridge, *International Sale of Goods in the Conflict of Laws*, Chs 17 and 19. For choice of law in the context of concurrent claims, see *International Sale of Goods in the Conflict of Laws*, Ch.20; see also Czepelak (2011) 7 J Priv. Int. L. 393.

[4] Throughout this chapter, the Convention is referred to as the Rome Convention. The Convention appears as Sch.1 to the Contracts (Applicable Law) Act 1990: see below, para.26–015.

[5] The date on which the Act entered into force: see Rome Convention art.17; below, para.26–015.

[6] The Regulation's art.28 was amended by a corrigendum to make it clear that it applied to contracts concluded on this date: [2009] O.J. L307/87.

Regulation, Regulation 593/2008 of on the Law Applicable to Contractual Obligations (the "Rome I" Regulation) has entered into force and replaces the Rome Convention.[7]

All this means that primary importance must now attach to the Rome I Regulation. Since, however, the Rome Convention will still be applied in the English courts to contracts concluded prior to December 17, 2009 and since many of the provisions in the Rome Convention are substantively unaltered in the Rome I Regulation, extensive reference is also made to the Convention in this chapter. In addition, it is too soon for case law on the Rome I Regulation to have developed. Hence, it is necessary to refer to authorities on the interpretation of the Rome Convention. The role of the common law is now essentially residual, for matters lying outside the scope of the Rome I Regulation (and Rome Convention).[8] Section 2 nonetheless provides a brief account of the common law[9] by way of background because some cases on the application of the Rome Convention have revealed, perhaps, a judicial tendency to reach the same or similar positions under the Convention as had been reached in the common law.[10] Section 3 contains a detailed account of the Rome I Regulation as it affects contracts for the sale of goods (and compares and contrasts it with the Rome Convention).[11] Section 4 gives an outline account of the application of the Rome I Regulation (as well as the Rome Convention and, where relevant, the common law), to the contracts most customarily ancillary to the contract of sale.[12] Sections 5 and 7–11 of the chapter deal with the various major issues arising in relation to a contract for the sale of goods.[13] Section 6 discusses the proprietary aspects of sale.[14] At common law, proprietary issues are generally referred to the law of the country[15] where the goods are situated at the relevant time (*lex situs*). The proprietary aspects of sale are generally untouched by the Rome I Regulation and the Rome Convention.[16] The chapter concludes in section 12 with a discussion of procedure as it affects contracts for the sale of goods.[17]

[7] Regulation 593/2008 on the Law Applicable to Contractual Obligations (the "Rome I" Regulation) [2008] O.J. L177/6. See also art.24(1) of the Regulation. Throughout this chapter, the Regulation is referred to as the "Rome I Regulation".

[8] Though see *Zebrarise Ltd v De Nieffe* [2005] 1 Lloyd's Rep. 154; *King v Brandywine Reinsurance Co* [2005] EWCA Civ 235; [2005] 1 Lloyd's Rep. 655.

[9] See below, paras 26–005 to 26–014. For a more detailed discussion, see the 4th edn of this work, paras 25–005 to 25–014. See also, Dicey and Morris, *The Conflict of Laws*, 11th edn, Ch.32.

[10] See, e.g. *Bank of Baroda v Vysya Bank Ltd* [1994] 2 Lloyd's Rep. 87 (below, para.26–087); *Egon Oldendorff v Libera Corp* [1995] 2 Lloyd's Rep. 64; *Egon Oldendorff v Libera Corp (No.2)* [1996] 1 Lloyd's Rep. 381 (below, para.26–031).

[11] Below, paras 26–015 to 26–079.

[12] Below, paras 26–080 to 26–088.

[13] Below, paras 26–089 to 26–130, 26–164 to 26–212.

[14] Below, paras 26–131 to 26–163.

[15] Here and generally in this chapter, "country" has its conflict of laws' meaning of "the whole of a territory subject under one sovereign to one body of law" (Dicey, Morris and Collins, *The Conflict of Laws*, 15th edn, paras 1–065 to 1–068). Thus, in relation to a federal nation, it generally means a state or province, not the nation as a whole: Dicey, Morris and Collins, *The Conflict of Laws*, 15th edn, para.1–066. For the meaning of "country" for the purposes of the Rome I Regulation (which is essentially identical) see below, para.26–021. See also Christandl, (2013) 9 J Priv. Int. L. 219.

[16] See below, para.26–134.

[17] See below, paras 26–213 to 26–216.

26–002 **Terminology.** It will be convenient to identify certain terminology used in this chapter. Throughout, the phrase "Rome I Regulation" refers to Regulation 593/2008 on the Law Applicable to Contractual Obligations. The term "Rome Convention" refers to the EEC Convention on the Law Applicable to Contractual Obligations 1980 as implemented in the United Kingdom by the Contracts (Applicable Law) Act 1990. The Rome I Regulation (and Rome Convention) do not adopt the term "proper law of a contract" as used in the common law, but this term is used in the discussion of the common law in s.2. After that section, the term proper law is dropped in favour of the Regulation and Convention usage, viz., variously "applicable law", "law applicable to the contract" and "governing law" or "law governing the contract". No substantive change is implied in this change of language.

26–003 **Role of choice of law in sale.** In England, choice of law issues are considered in cases involving sale of goods relatively infrequently. One reason for this may be that, in many respects, the law and practice in this area amongst individual countries have become standardised to a high degree.[18] A second reason is that if foreign law is to be applied in an English court, it must usually be pleaded: otherwise English law is applied.[19] There are indeed innumerable cases on sale of goods where the facts presented issues of conflict of laws, but they were never brought before the court because neither party saw fit to plead foreign law.[20] There is no real evidence that implementation of the Rome Convention and subsequently, the Rome I Regulation, has increased the problems of conflict of laws engendered by sales of goods, though the position may well change as resort to electronic commerce becomes ever more common.[21] The application of the Rome I Regulation (and the Rome Convention) to sales of goods inevitably involves a degree of speculation, not least because the Regulation and Convention are not a complete code of the applicable rules, so that reference has still to be made to the common law on which authority is often lacking. Accordingly, it is sometimes necessary to rely on arguments derived from general principles, academic writings, and foreign authorities in what follows.

[18] See, e.g. Murray, Holloway and Timson-Hunt, *Schmitthoff The Law and Practice of International Trade*, 12th edn (2012), Ch.2; Sundstrom, [1966] J.B.L. 122, 245. For attempts to unify international sales law, see above, para.1–024. This chapter does not discuss the Uniform Laws on International Sales Act 1967 which implemented in the UK the Uniform Law on International Sale of Goods 1964 (ULIS) and the Uniform Law on the Formation of Contracts for the International Sale of Goods 1964 (ULFIS). ULIS only applies to the contract of sale if it has been chosen by the parties (1967 Act s.1(3)) and in practice such a choice is rarely, if ever, made. For a discussion, see Graveson, Cohn and Graveson, *The Uniform Law on International Sales Act 1967* (1968).

[19] See generally, Dicey, Morris and Collins, *The Conflict of Laws*, 15th edn, Ch.9; Fentiman, *International Commercial Litigation* (2010), Ch.6; Cheshire, North and Fawcett, *Private International Law*, Ch.7. The position seems to be the same under the Rome Convention: see below, para.26–029.

[20] See, e.g. *Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd* [1976] 1 W.L.R. 676; above, paras 5–131 to 5–170 and below, paras 26–154 to 26–166. This phenomenon can be explained on several grounds: e.g. that neither party saw any advantage in pleading foreign law, or that the uncertainties and complexities involved in determining the relevant English choice of law rule and the relevant rule of foreign law were a sufficient deterrent, or simply that the parties' legal advisers wholly overlooked the matter of conflict of laws.

[21] See below, paras 26–053 to 26–058. On the compatibility of the English approach to the voluntary pleading of foreign law with the obligation to apply the Rome Convention and Rome I Regulation see para 26–029.

26–004 **The characterisation of "goods" in conflict of laws.** One final preliminary point remains, namely, to indicate how the English domestic law concept of "goods"[22] is treated in conflict of laws. In general, "goods" in this sense are characterised as "tangible movables" and are accordingly regulated by the choice of law principles applicable to this type of property, which are the principles discussed in this chapter. Some exceptional types of goods may, however, be differently characterised; for instance, a growing crop before harvest[23] could be considered to be immovable property, and commodities such as gas and electricity[24] could be considered to be intangible movables. In such doubtful cases, the law which resolves the issue of characterisation is the *lex situs* of the goods at the time at which the characterisation is relevant.[25] However, if goods are situated in England, the courts will not apply purely domestic categorisations, rather, the goods will be characterised in an international spirit for the purposes of the conflict of laws.[26] In the unlikely event that this law should prescribe a characterisation other than "tangible movables", choice of law principles different from those set out in this chapter would be applicable.[27] The *situs* of goods is ascertained by reference to English law as *lex fori*, by virtue of which goods are, in general, situated in the country where they are at the relevant time.[28]

However, when the court is deciding whether to apply the rules in the Rome Convention or the Rome I Regulation, the Court of Justice has consistently stressed the need for national courts to adopt a broad European approach to interpretation.[29] In particular, in the context of the art.4(1)(a) of the Rome I Regulation, it will be necessary to apply a European autonomous definition to the meaning of "sale of goods" for the purposes of identifying the applicable law in the absence of choice.[30]

[22] This concept of "goods" (discussed above, Ch.1) marks the limits of the type of property dealt with in this chapter, as in the rest of the work.

[23] This is within the English concept of "goods": Sale of Goods Act 1979 s.61(1).

[24] These may be "goods" (above, paras 1–085, 1–087).

[25] See *Turner v Barclay* (1854) 9 Moo. P.C. 264; *Freke v Carbery* (1873) L.R. 16 Eq. 461; *Re Hoyles* [1911] 1 Ch. 179; *Re Berchtold* [1923] 1 Ch. 192; Dicey, Morris and Collins, *The Conflict of Laws*, 15th edn, Ch.22. Where the goods are, in a conflicts sense, "in transit" at this time (see below, para.26–133), it is submitted that the law of the forum (*lex fori*) should determine this question of characterisation. Such an approach may also be justified in relation to certain types of computer software, where it may be unrealistic to try to ascribe a particular *situs*: see above, para.1–086. And see Fawcett, Harris and Bridge, *International Sale of Goods in the Conflict of Laws*, paras 21–211 to 21–238.

[26] Fentiman, *International Commercial Litigation* (2010), [3.194]. For example, in English domestic law the leading distinction is between personalty and realty, whereas in English conflict of laws, the key distinction is between moveables and immoveables.

[27] If they are characterised as immovables, the choice of law principles applicable are those set out in Dicey, Morris and Collins, *The Conflict of Laws*, 15th edn, Ch.23 and paras 33R–037 to 33–061. If they are characterised as intangible movables, the choice of law principles are those set out at paras 24R–050 to 24–079 of the same work.

[28] Dicey, Morris and Collins, *The Conflict of Laws*, 15th edn, paras 22R–023 to 22–056.

[29] For example, in deciding whether the rules in art.14 of the Rome I Regulation concerning contractual assignments apply, the court must adopt a European approach to the words of the Regulation itself and not start with any traditional distinction between questions relating to contract on the one hand and questions relating to property on the other: *Raiffeisen Zentralbank Österreich AG v Five Star GeneralTrading LLC* [2001] EWCA Civ 68; [2001] Q.B. 825. The European Commission's Proposal on a Common European Sales Law (CESL) COM (2011) 635 final (on which see para.26–217, below), art.2(h), defines goods as "any tangible moveable items" but excludes (i) electricity and natural gas; and (ii) water and other types of gas unless they are put up for sale in a limited volume or set quantity.

[30] See below, para.26–070.

In that respect, the correct approach is to have regard to the meaning of "sale of goods" in art.5(1)(b) of Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("the Judgments Regulation").[31] Recital (17) states this expressly. More generally, Recital (7) to the Rome I Regulation states that the scope of provisions of the Rome I Regulation should be consistent with their meaning and interpretation under the Judgments Regulation.[32]

2. COMMON LAW BACKGROUND: THE RELEVANCE AND ROLE OF THE PROPER LAW DOCTRINE

26–005 **The proper law doctrine.**[33] The proper law doctrine applied to determine the law applicable to contracts for the sale of goods which were entered into on or before April 1, 1991.[34] However, in so far as there are common law authorities on issues which also arise under the Rome I Regulation (and the Rome Convention), those common law cases may continue to provide English courts with helpful guidance. Although it has also been stressed that when considering the meaning of the Convention it is necessary to pay regard to its international character and to adopt an approach which will tend to produce uniformity of interpretation.[35] The common law approach is therefore set out in outline below.

At common law, a contract was governed by its "proper law". The expression "proper law" meant:

> ". . . the system of law by which the parties intended the contract to be governed, or, where their intention is neither expressed nor to be inferred from the circumstances, the system of law with which the transaction has its closest and most real connection".[36]

[31] Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] O.J. L12/1.

[32] As well as with the provisions of Regulation 864/2007 on the law applicable to non-contractual obligations (the "Rome II Regulation"). On the meaning of "sale of goods" in the context of the Judgments Regulation see *Car Trim GmbH v KeySafety Systems Srl* (C-381/08) unreported February 25, 2010, discussed below. See further Fawcett, Harris and Bridge, *International Sale of Goods in the Conflict of Laws*, paras 3.146–3.163; Cheshire, North and Fawcett, *Private International Law*, pp.238–239.

[33] See Dicey and Morris, *The Conflict of Laws*, 11th edn, Chs 32 and 33.

[34] The date on which the Rome Convention entered into force: see above, para.26–001 and below, para.26–015.

[35] See, e.g. *Crédit Lyonnais v New Hampshire Insurance Co* [1997] 2 Lloyd's Rep. 1; *Raiffeisen Zentralbank Österreich AG v Five Star General Trading LLC* [2001] EWCA Civ 68; [2001] QB 825; *Definitely Maybe (Touring) Ltd v Marek Lieberberg Konzertagentur GmbH* [2001] 1 W.L.R. 1745; *Samcrete Egypt Engineers and Contractors SAE v Land Rover Exports Ltd* [2001] EWCA Civ 2019; [2002] C.L.C. 533; *Kenburn Waste Management Ltd v Bergmann* [2002] EWCA Civ 98; [2002] F.S.R. 711; *Ennstone Building Products Ltd v Stanger Ltd* [2002] EWCA Civ 916; [2002] 1 W.L.R. 3059; *American Motorists Insurance Co v Cellstar Corp* [2003] EWCA Civ 206; [2003] I.L.Pr. 370; *FR Lürssen Werft GmbH & Co KG v Halle* [2009] EWHC 2607 (Comm); [2009] C.P. Rep. 11 (affirmed [210] EWCA Civ 587; [2011] 1 Lloyd's Rep 265). See also the ECJ's decision in *Intercontainer Interfrigo SC (ICF) v Balkenende Oosthuizen BV* (C-133/08) [2009] E.C.R. I-9687. See further below, para.26–073.

[36] Dicey and Morris, *The Conflict of Laws*, 11th edn, pp.1161–1162, r.180. For authoritative statements by the HL, see especially *James Miller and Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] A.C. 583; *Compagnie d'Armement Maritime SA v Compagnie Tunisienne de Navigation SA* [1971] A.C. 572; *Amin Rasheed Shipping Corp v Kuwait Insurance Co* [1984] A.C. 50. On whether it was possible for different laws to apply to different issues (i.e. the possibility of depeçage, discussed in para.26–034, below.) See *Lexington Insurance Co v AGF Insurance Ltd* [2009] UKHL 40; [2010] 1 A.C. 180 at [99]. See for a discussion of the position under the Rome Convention and Rome I Regulation Fentiman, *International Commercial Litigation*,(2010) [4.50]–[4.52].

Broadly speaking, the proper law of a contract for the sale of goods was determined in accordance with this general proper law doctrine and there were no principles which were specifically directed towards contracts for the sale of goods.[37]

26–006 **Power to choose.** At common law, the parties to the contract were permitted to nominate the law of a particular country as the proper law of the contract and if they did this their choice was normally conclusive.[38] That power to choose could, of course, be restricted by statute.[39] Further it was said, judicially (and somewhat obscurely), that the choice of law had to be "*bona fide* and legal".[40] And, clearly, "there must be no reason for avoiding [the choice] on the ground of public policy".[41] Subject to these restrictions, there appeared to be no requirement that the law chosen had to have some connection with the particular transaction in question.[42]

[37] See below, paras 26–011 to 26–013. For detailed discussion of the application of the general principle in the specific context of contracts for the sale of goods, see the 4th edn of this work, paras 25–005 to 25–019. See also Dicey and Morris, *The Conflict of Laws*, 11th edn, pp.1260 et seq. Rabel, *The Conflict of Laws*, 2nd edn (1964), Vol.3, Ch.36.

[38] The leading case is *Vita Food Products Inc v Unus Shipping Co Ltd* [1939] A.C. 277. See also *R. v International Trustee* [1937] A.C. 500 at 529 and *Perry v Equitable Life Insurance Society of the United States of America* (1929) 45 T.L.R. 468 at 470.

[39] See generally, *The Hollandia* [1982] Q.B. 872 CA; affirmed [1983] 1 A.C. 565. Further restrictions in the specific context of sale of goods were found and are still to be found in connection with essential validity of contracts of sale and implied undertakings. These are discussed in detail, below, paras 26–102 to 26–112, 26–172 to 26–174.

[40] *Vita Food Products Inc v Unus Shipping Co Ltd* [1939] A.C. 277 at 290. The meaning of this formula has never been determined in a reported case in England. It was contended in Cheshire and North, *Private International Law*, 11th edn, p.454 that its possible effect was that "the parties cannot pretend to contract under one law in order to validate an agreement that clearly has its closest connection with another law. If, after having discovered that one particular provision was void under the proper law, they were to try to evade its consequences by claiming that the provision was subject to another legal system, their claim should not be considered as a *bona fide* expression of their intention". The formula has never been applied by an English court to strike down a choice of law. For judicial consideration of the formula in Australia, see *Kay's Leasing Corp Pty Ltd v Fletcher* (1964) 116 C.L.R. 124 at 143–144; *Golden Acres Ltd v Queensland Estates Ltd* [1969] St. R. Qd. 378 (affirmed on different grounds *sub nom. Freehold Land Investments Ltd v Queensland Estates Ltd* (1970) 123 C.L.R. 418).

[41] *Vita Food Products Inc v Unus Shipping Co Ltd* [1939] A.C. 277 at 290. This is merely an example of the general principle that a foreign law will not be enforced if it offends English public policy: see below, para.26–046.

[42] *Vita Food Products Inc v Unus Shipping Co Ltd* [1939] A.C. 277; *British Controlled Oilfields v Stagg* [1921] W.N. 31; *WJ Alan & Co Ltd v El Nasr Export and Import Co* [1972] 2 Q.B. 189. cf. *Boissevain v Weil* [1949] 1 K.B. 482 (affirmed on other grounds [1950] A.C. 327); *Re Helbert Wagg & Co Ltd* [1956] Ch. 323 at 341. The absence of a connection between the contract and the chosen law may be evidence that the choice of law is not "bona fide and legal": see Cheshire and North, *Private International Law*, 11th edn, p.454. But it was (and still is) common for a contract of sale to have no connection with the law chosen, particularly where the parties deal on a standard form issued by a London commodity association (see Dicey, Morris and Collins, *The Conflict of Laws*, 15th edn, para.32–044). A choice of law clause must be distinguished from a clause which seeks to incorporate into a contract, as part of its terms and conditions, the provisions of a particular system of law regarding

26–007 **Implied choice of proper law.** Where there was no valid express choice of a proper law,[43] the court would consider whether the parties had, by implication, come to an agreement[44] as to what should be the proper law.[45] Probably the clearest instance[46] of such an "implied" choice of law occurred when the contract contained a clause naming a particular court, country, city or town[47] as the place where settlement of disputes arising out of the contract was to take place by litigation or arbitration.[48] This type of clause (much used in standard form contracts of sale)[49] was a strong indicator that the law of the country where litigation or arbitration was to occur had been chosen by the parties as the proper law.[50] The implication to be drawn from such a clause was not, however, conclusive[51] and could be outweighed by the presence of other factors.[52] A clause of this type could not, therefore, be regarded as a substitute for an express choice of law.[53]

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a particular aspect of sale. On this "incorporation by reference", see below, para.26–028. At common law a choice of law clause had to be capable of identifying the proper law at the time the contract was made. A "floating" choice of law clause was not permitted: *Dubai Electricity Co v Islamic Republic of Iran Shipping Lines (The Iran Vojdan)* [1984] 2 Lloyd's Rep. 380 at 385. See *Armar Shipping Co Ltd v Caisse Algerienne D'Assurance et de Reassurance (The Armar)* [1981] 1 W.L.R. 207; *The Mariannina* [1983] 1 Lloyd's Rep. 12; *Cantieri Navali Riuniti SpA v NV Omne Justitia (The Stolt Marmaro)* [1985] 2 Lloyd's Rep. 428 and the review of some of these cases in *Mauritius Commercial Bank Ltd v Hestia Holdings Ltd* [2013] EWHC 1328; [2013] 2 All E.R. (Comm) 898. [21]–[29].

[43] This included situations where the parties attempted to make an express choice but failed to do so with sufficient clarity: *Compagnnie d'Armement Maritime SA v Compagnie Tunisienne de Navigation SA* [1971] A.C. 572. As to what law determines whether a choice of law is valid, see below, para.26–035.

[44] It was said that there had to be actual agreement on the point: *James Miller and Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] A.C. 583 at 603.

[45] See in addition to the two cases last cited, *R. v International Trustee* [1937] A.C. 500 at 529–531; *Re United Railways of the Havana and Regla Warehouses Ltd* [1960] Ch. 52 (reversed in part on other grounds, *sub nom. Tomkinson v First Pennsylvania Banking and Trust Co* [1961] A.C. 1007); *Amin Rasheed Shipping Corp v Kuwait Insurance Co* [1984] A.C. 50.

[46] For other instances see below, paras 26–031 to 26–033.

[47] The reference had to be sufficient to indicate a system of law. Thus there was no implication as to the proper law where the clause provided, e.g. for submission of disputes to the Court of Arbitration of the International Chamber of Commerce or to an arbitrator nominated by a specified person such as the president of a trade association (see *James Miller and Partners v Whitworth Street Estates (Manchester) Ltd* [1970] A.C. 583). A clause specifying arbitration under ICC Rules in a particular country could, of course, raise the implication that the law of that country was the proper law: *Atlantic Underwriting Agencies Ltd v Compagnia di Assicurazione di Milano SpA* [1979] 2 Lloyd's Rep. 240.

[48] *Hamlyn & Co v Talisker Distillery* [1894] A.C. 202; *Spurrier v La Cloche* [1902] A.C. 446; *NV Kwik Hoo Tong Handel Maatschappij v James Finlay & Co* [1927] A.C. 604; *Compagnie d'Armement Maritime SA v Compagnie Tunisienne de Navigation SA* [1971] A.C. 572.

[49] See, e.g. *WJ Alan & Co Ltd v El Nasr Export and Import Co* [1972] 2 Q.B. 189 (London Cotton Trade Association's standard f.o.b. contract).

[50] See cases cited in n.45, above.

[51] *Compagnie d'Armement Maritime SA v Compagnie Tunisienne de Navigation SA* [1971] A.C. 572 at 609; disapproving *Tzortsis v Monark Line A/B* [1968] 1 W.L.R. 406, where such a clause was treated as creating a virtually conclusive presumption. The law governing the arbitration proceedings will be conclusively indicated by such a clause: *Compagnie d'Armement Maritime SA v Compagnie Tunisienne de Navigation SA* [1971] A.C. 572.

[52] See below, paras 26–009 to 26–010.

[53] cf. *Tzortsis v Monark Line A/B* [1968] 1 W.L.R. 406. In *Steel Authority of India Ltd v Hind Metals Inc* [1984] 1 Lloyd's Rep. 405 at 409, it was held that a clause stipulating for arbitration in England (which was not otherwise connected with the contract) constituted an implied choice of English law since it indicated the parties intended a "neutral" law to govern. See also *WJ Alan & Co Ltd v El Nasr Export and Import Co* [1972] 2 Q.B. 189.

Absence of express or implied choice. Where the proper law was not expressly or impliedly chosen, the proper law was to be taken to be the law of the country or the system of law[54] with which the transaction[55] had the "closest and most real connection".[56] 26–008

Examination of all relevant factors. In deciding in accordance with these rules whether the parties to a contract for the sale of goods had impliedly chosen a proper law, or what should be the proper law where no choice at all had been made,[57] the court was required to make a close examination of the terms of the contract and of all relevant circumstances surrounding its making.[58] No single aspect of the contract was decisive; instead, a wide range of different factors had to be taken into account, and their importance varied according to the type of sale in question and the individual circumstances of the case.[59] Thus, where the parties to the contract of sale had their place of business in the same country, that country's law had a strong claim to be the proper law of the contract by way of implied choice of the parties.[60] If there was no single country where the parties both carried on business or if there was some good reason for thinking that the law of such a country was not impliedly intended to be the proper law, the law of any country where all or a significant portion, of the obligations imposed by the contract, were 26–009

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[54] It has been said that whether it was the "system of law" of the "law of the country" that must be considered depended on the circumstances: *James Miller and Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] A.C. 583 at 603–604. However, most versions of the test refer to "system of law": see, e.g. *James Miller and Partners Ltd v Whitworth Street Estates (Manchester) Ltd* at 610–611, 615; *Compagnie d'Armement Maritime SA v Compagnie Tunisienne de Navigation SA* [1971] A.C. 572 at 587, 603; *Rossano v Manufacturers Life Insurance Co* [1963] 2 Q.B. 352 at 360–362; *Sayers v International Drilling Co NV* [1971] 1 W.L.R. 1176 at 1180–1181, 1183; *Coast Lines Ltd v Hudig and Veder Chartering NV* [1972] 2 Q.B. 34 at 44, 46; *Amin Rasheed Shipping Corp v Kuwait Insurance Co* [1984] A.C. 50 at 61, 69. As to the position under the Rome I Regulation and the Rome Convention, see below, para.26–021.

[55] The use of the word "transaction" instead of "contract" may be significant: *Coast Lines Ltd v Hudig and Veder Chartering NV* [1972] 2 Q.B. 34 at 46, 50. cf. the Rome I Regulation and the Rome Convention, below, paras 26–073 to 26–074.

[56] *Bonython v Commonwealth of Australia* [1951] A.C. 201 at 219; *Tomkinson v First Pennsylvania Banking and Trust Co* [1961] A.C. 1007 at 1068, 1081–1082; *James Miller and Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] A.C. 583 at 603, 605–606, 610–611; *Compagnie d'Armement Maritime SA v Compagnie Tunisienne de Navigation SA* [1971] A.C. 572 at 583, 587, 603; *Amin Rasheed Shipping Corp v Kuwait Insurance Co* [1984] A.C. 50. This three stage process was summarised by the House of Lords in *Lexington Insurance Co v AGF Insurance* Ltd [2009] UKHL 40; [2010] 1 A.C. 180 at [90]–[93]. Reference to the intention of the parties in these circumstances was to be avoided: *Amin Rasheed Shipping Corp v Kuwait Insurance Co* [1984] A.C. 50, though opinions could differ, however, as to whether a case presented an example of implied choice or no choice. Compare the views of Lord Diplock, at 62–65 with those of Lord Wilberforce at 69. In practice, the line was hard to draw. As to the position under the Rome I Regulation and the Rome Convention see below, para.26–032.

[57] Although these were strictly two distinct steps in the process of selecting the proper law, and conceptually distinct, they are for reasons of convenience treated together in the ensuing discussion. The clearest instance of an implied choice has already been discussed (above, para.26–007).

[58] *Jacobs v Crédit Lyonnais* (1884) 12 Q.B.D. 589 at 601–603.

[59] See generally Dicey and Morris, *The Conflict of Laws*, 11th edn, pp.1182 et seq.; Cheshire and North, *Private International Law*, 11th edn, pp.457 et seq.

[60] *Jacobs v Crédit Lyonnais* (1884) 12 Q.B.D. 589 at 601–602; *Mann, George & Co v James and Alexander Brown* (1921) 10 L.L.R. 221; cf. *AV Pound & Co Ltd v MW Hardy & Co Inc* [1956] A.C. 588.

to be performed had a claim to be the proper law.[61] If the various obligations were to be performed in different countries, it might not have been possible to say that any one country was of particular importance,[62] though there was a tendency to treat the country in which the act of physical delivery[63] by the seller took place as being particularly significant,[64] especially where it coincided with the place where the seller or buyer carried on business or the country of payment.[65]

26–010 Other relevant factors included the form,[66] language[67] and terminology[68] of the contract, the currency in which the price or any other money obligation was expressed or was to be paid or discharged,[69] the existence of other related

[61] *Jacobs v Crédit Lyonnais* (1884) Q.B.D. 589; *Chatenay v Brazilian Submarine Telegraph Co* [1891] 1 Q.B. 79; *Benaim & Co v Debono* [1924] A.C. 514; *NV Handel Maatschappij J Smits v English Exporters (London) Ltd* [1955] 2 Lloyd's Rep. 317 at 322.

[62] See *H Glynn (Covent Garden) Ltd v Wittleder* [1959] 2 Lloyd's Rep. 409 at 420.

[63] e.g. the act whereby in accordance with the contract, the seller or his agent places the goods at the disposition of the buyer, or of a carrier who is to transport them to the buyer or of some agent or bailee acting on behalf of the buyer. cf. Sale of Goods Act 1979 s.32(1); above, para.8–014; American Law Institute, *Restatement of the Law, Second, Conflict of Laws* (1971) (hereafter referred to as "*Restatement*"), para.191d. As to the various possibilities of the meaning of "delivery" see above, paras 8–002, 8–007 to 8–015.

[64] *Benaim & Co v Debono* [1924] A.C. 514; *NV Handel Maatschappij J Smits v English Exporters (London) Ltd* [1955] 2 Lloyd's Rep. 317 at 320; Dicey and Morris *The Conflict of Laws*, 11th edn, pp.1260–1261; cf. *Mendelson-Zeller Co Inc v T & C Providores Pty Ltd* [1981] 1 N.S.W.L.R. 366 at 371. The law of the country of delivery had no significance at all where the contract did not impose any obligations on the seller as regards physical delivery, e.g. a sale of goods afloat) or where the seller had the right to nominate the country of delivery since it could not reasonably be argued that he should thereby have the right to choose the proper law as well.

[65] See *Sanitary Packing Co Ltd v Nicholson and Bain* (1916) 33 W.L.R. 594 at 599 Supreme Court of Manitoba; cf. *Mendelson-Zeller Co Inc v T & C Providores Pty Ltd* [1981] 1 N.S.W.L.R. 366.

[66] *James Miller and Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] A.C. 583; *Amin Rasheed Shipping Corp v Kuwait Insurance Co* [1984] A.C. 50.

[67] *Chatenay v Brazilian Submarine Telegraph Co* [1891] 1 Q.B. 79 at 82; *NV Handel Maatschappij J Smits v English Exporters (London) Ltd* [1955] 2 Lloyd's at 323; *H Glynn (Covent Garden) Ltd v Wittleder* [1959] 2 Lloyd's Rep. 409 at Rep. 317 at 421; *Wahbe Tamare and Sons Co v Bernhard Rothfos* [1980] 2 Lloyd's Rep. 553 at 555; cf. *Re Helbert Wagg & Co Ltd* [1956] Ch. 323. But in commercial contracts, particularly in the maritime field, the use of the English language was and is of little significance because it was and is so commonly used; *The Metamorphosis* [1953] 1 W.L.R. 543 at 549; *Amin Rasheed Shipping Corp v Kuwait Insurance Co* [1984] A.C. 50; *The Komninos S* [1990] 1 Lloyd's Rep. 541; Dicey and Morris, *The Conflict of Laws*, 11th edn, p.1185.

[68] *The Industrie* [1894] P. 58; *Spurrier v La Cloche* [1902] A.C. 446 at 450.

[69] *The Assunzione* [1954] P. 150; *Rossano v Manufacturers Life Insurance Co* [1963] 2 Q.B. 352 at 369; cf. *Re Helbert Wagg & Co Ltd* [1956] Ch. 323; *NV Handel Maatschappij J Smits v English Exporters (London) Ltd* [1955] 2 Lloyd's Rep. 317 at 323. But this was less significant if the currency was an international one such as sterling: *Sayers v International Drilling Co NV* [1971] 1 W.L.R. 1176 at 1183, 1186.

[70] *Re United Railways of the Havana and Regla Warehouses Ltd* [1960] Ch. 52 (reversed in part on other grounds *sub nom. Tomkinson v First Pennsylvania Banking and Trust Co* [1961] A.C. 1007); *The Njegos* [1936] P. 90; *The Broken Hill Pty Co Ltd v Theodore Xenakis* [1982] 2 Lloyd's Rep. 304; *Illyssia Compania Naviera SA v Ahmed Abdul-Qawi Bamaodah (The Elli 2)* [1985] 1 Lloyd's Rep. 107; cf. *The Metamorphosis* [1953] 1 W.L.R. 543 at 548; *Forsikringsaktieselskapet Vesta v Butcher* [1989] A.C. 852. In the case of "string" contracts, i.e. successive contracts relating to the same goods, it is desirable to achieve uniformity as to the governing law by appropriately worded choice of law clauses in all the relevant contracts or through arbitration clauses: see *Compagnie d'Armement Maritime SA v Compagnie Tunisienne de Navigation SA* [1971] A.C. 572 at 609; below, para.26–078. If the various contracts are all concluded subject to the rules of the same commodity association, the same choice of law clause or arbitration clause is, in fact, likely to appear in all of them.

[71] See below, para.26–078.

agreements between the same parties[70] or involving the same subject-matter,[71] the general course of dealing and conduct of the parties up to the time of the contract, though not subsequent thereto,[72] considerations of business efficacy and convenience,[73] including the fact that the contract concerned a commodity dealt with internationally, in a particular market,[74] and the nationality[75] of each party. In borderline cases, all these matters may have had to be considered, and the list here given is not exhaustive as to all relevant considerations.[76]

F.o.b. contracts.[77] Although, in general, the proper law of a contract of sale f.o.b. was to be found in the application of general principles,[78] there was an observable tendency in the relatively few authorities to treat the country of shipment[79] as the place of performance by delivery on board the ship and to regard the contract as governed **26–011**

[72] *James Miller and Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] A.C. 583.

[73] *Lloyd v Guibert* (1865) L.R. 1 Q.B. 115 at 129; *The Adriatic* [1931] P. 241; *The Njegos* [1936] P. 90, above.

[74] *Wahbe Tamare & Sons Co v Bernhard Rothfos* [1980] 2 Lloyd's Rep. 553 (Robusta coffee dealt with on London Coffee Exchange, pointed to English law as the proper law).

[75] *Cood v Cood* (1863) 33 Beav. 314 at 322; *P and O Steam Navigation Co v Shand* (1865) 3 Moo. P.C. (N.S.) 272 at 290–291.

[76] The fact that one of the parties to the contract was a government or governmental agency of a particular country could be a factor suggesting (though not very strongly) that the law of that country should be the proper law: *R. v International Trustee* [1973] A.C. 500 at 557; *Bonython v Commonwealth of Australia* [1951] A.C. 501; *The Assunzione* [1954] P. 150. The *situs* of the goods and the place where property in them passed were not of particular relevance as such: *Mendelson-Zeller Co Inc v T & C Providores Pty Inc* [1981] 1 N.S.W.L.R. 366. If, to the knowledge of the parties, one or more terms of the contract would be valid under one of two possible governing laws but invalid (though not illegal) under the other, some authorities supported the view that the former law, rendering the term valid, was to be preferred as the proper law: *P and O Steam Navigation Co v Shand* (1865) 3 Moo.P.C. (N.S.) 272; *Re Missouri Steamship Co Ltd* (1889) 42 Ch. D. 321; *Hamlyn & Co v Talisker Distillery* [1894] A.C. 202 at 208, 215; *South African Breweries v King* [1900] 1 Ch. 273; *NV Handel Maatschappij J Smits v English Exporters (London) Ltd* [1955] 2 Lloyd's Rep. 317; *Sayers v International Drilling Co NV* [1971] 1 W.L.R. 1176 at 1184 (a pointer towards a validating law, but one the importance of which should not be exaggerated); *Coast Lines Ltd v Hudig and Veder Chartering NV* [1972] 2 Q.B. 34; *SCF Finance Co Ltd v Masri* [1986] 1 Lloyd's Rep. 293 at 304. For the contrary view, see *British South Africa Co v De Beers Consolidated Mines Ltd* [1910] 2 Ch. 502 (reversed on other grounds [1912] A.C. 52); *Monterosso Shipping Co v International Transport Workers Federation* [1982] 3 All E.R. 841 at 848.

[77] This discussion is applicable to "classic" f.o.b. contracts and to f.o.b. contracts "with additional duties", as described above, paras 20–002 to 20–007. On the other hand, any contract not imposing an obligation on the seller to consign the goods to the buyer from a specified place is excluded, even if it bears the label "f.o.b." For the position under the Rome I Regulation and the Convention, see below, para.26–076.

[78] *The Nile Co for the Export of Agricultural Crops v H & JM Bennett (Commodities) Ltd* [1987] 1 Lloyd's Rep. 555. For the position under the Rome I Regulation and the Rome Convention; see below, para.26–076.

[79] This might have been subject to an exception in the case of a "multi-port" f.o.b. contract (e.g. "f.o.b. UK port") giving the seller the right to choose a port of shipment out of a number of ports in different countries, since there was no identifiable country of shipment at the time the contract was concluded.

[80] *Benaim & Co v Debono* [1924] A.C. 514; *Re Viscount Supply Co Ltd* (1963) 40 D.L.R. (2d) 501 at 506–508; *Restatement*, para.191d. The conclusion if fortified by the fact that in an f.o.b. contract, the country of delivery may well coincide with the country of payment, as was the case in *Benaim & Co v Debono*, though the point is not mentioned in the judgments. cf. *Re Columbia Shirt Co* (1922) 3 C.B.R. 268; *Re Hudson Fashion Shoppe Ltd* [1926] 1 D.L.R. 199; *Clarke v Harper and Robinson* [1938] N.I. 162.