

BUTTERWORTHS HONG KONG

Contract Law
HANDBOOK

Fifth Edition



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Contract Law Handbook

Table of Contents

Table of Cases	xv
Table of Legislation	xcvii
Table of Other Sources	xxxxv
Glossary of Chinese Words and Phrases	cli
Sale of Goods Ordinance (Cap 26)	1
Factors Ordinance (Cap 48)	129
Control of Exemption Clauses Ordinance (Cap 71)	159
Misrepresentation Ordinance (Cap 284)	211
Supply of Services (Implied Terms) Ordinance (Cap 457)	233
Unconscionable Contracts Ordinance (Cap 458)	259
Contracts (Rights of Third Parties) Ordinance (Cap 623)	295
Law Amendment and Reform (Consolidation) Ordinance (Cap 23) (Sections 9, 11, 13-18, 21, 23 and 26)	337
Limitation Ordinance (Cap 347) (Section 4)	369
Electronic Transactions Ordinance (Cap 553) (Sections 17-19)	391
Companies Ordinance (Cap 622) (Sections 127-128)	401

disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner.

- (3) In this section, **mercantile agent** (商業代理人) has the same meaning as in the Factors Ordinance (Cap. 48). (Amended by 1912 s. 47; 5 of 1924 s. 13)

[27.01] Enactment history

This section was amended by s 47 of the General Revision Ordinance 1912 (1912) and s 13 of the Law Revision Ordinance 1924 (5 of 1924).

[27.02] United Kingdom comparison

Reference is made to ss 24 and 25 of the Sale of Goods Act 1979 (UK). Subsection (1) of the Sale of Goods Ordinance (Cap 26) is the same as s 24 of the Act; subsection (2) of the Ordinance is the same as s 25(1) of the Act. Subsection (3) of the Ordinance has no equivalent in the Act.

[27.03] Hong Kong comparison

Section 27(1) and (2) of the Sale of Goods Ordinance (Cap 26) is verbally identical with ss 9 and 10 of the Factors Ordinance (Cap 48) respectively, except that ss 9 and 10 of the Factors Ordinance (above) after the words 'or other disposition thereof' there follow the words 'or under any agreement for sale, pledge or other disposition thereof'.

[27.04] Person

See [2.05] above.

[27.05] Section 27(1): Continues or is in possession

This section does not apply when the seller, having parted with possession, later resumes it under a different title.

In *Olds Discount Co Ltd v Krett and Anor* [1940] 2 KB 117, [1940] 3 All ER 36 (KB), where the owner of goods sold them to a finance company which hired them out on a hire-purchase agreement and the original owner retook the goods as agent of the hire-purchase company and fraudulently resold them, it was held that the purchaser under the second sale was not protected. It was held in *Pacific Motor Auctions Pty Ltd v Motor Credits (Hire Finance) Ltd* [1965] AC 867, [1965] 2 All ER 105, [1965] 2 WLR 881 (a case decided under s 28(1) of the Sale of Goods

Act 1923–1953 (NSW), which is in the same terms as this section) that the words 'continues ... in possession' were intended to refer to the continuity of physical possession regardless of any private transaction between the seller and the purchaser which might alter the legal title under which possession was held. In that case, the decision in *Staffs Motor Guarantee Ltd v British Wagon Co Ltd* [1934] 2 KB 305, [1934] All ER Rep 322 (KB) was disapproved, and the decision in *Eastern Distributors Ltd v Goldring (Murphy Third Party)* [1957] 2 QB 600, [1957] 2 All ER 525, [1957] 3 WLR 237 (CA, Eng) was disapproved so far as it followed that case. In *Worcester Works Finance Ltd v Cooden Engineering Co Ltd* [1972] 1 QB 210, [1971] 3 All ER 708, [1971] 3 WLR 661 (CA, Eng), it was similarly held (not following *Staffs Motor Guarantee Ltd v British Wagon Co Ltd* and *Eastern Distributors Ltd v Goldring* (above), that the words 'continues ... in possession' in the forerunner of the present section referred to the continuity of physical possession and it was irrelevant whether the seller remained in possession as bailee or trespasser, or whether he was lawfully in possession or not. If, however, there is a substantial break in the continuity of possession by the seller, eg, if he actually delivers over the goods to a purchaser who keeps them for a time and then the seller gets them back, the section may not apply: *Worcester Works Finance Co Ltd v Cooden Engineering Co Ltd* (above) at 712, per Lord Denning MR. See also *Fadallah v Pollak* [2013] EWHC 3159 (QB).

This section is to be construed in conjunction with ss 9 and 10 of the Factors Ordinance (Cap 48), and contrasted with s 2(1) of that Ordinance, which contains the words '... is, with the consent of the owner, in possession ...': *Worcester Works Finance Ltd v Cooden Engineering Co Ltd* [1972] 1 QB 210, [1971] 3 All ER 708 at 713 and 714, [1971] 3 WLR 661 (CA, Eng), per Megaw LJ. Similarly, in *City Fur Manufacturing Co Ltd v Fureenbond (Brokers) London Ltd* [1937] 1 All ER 799, 81 Sol Jo 218 (KB), it was held that the word 'possession' in this section must be construed with reference to s 1(2) of the Sale of Goods Act 1889 (UK), and included possession by another person on behalf of the person whose possession was material.

[27.06] Documents of title to the goods

In s 2(1) above, the expression 'document of title' is defined as including:

any bill of lading, dock warrant, warehouse keeper's certificate, and warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorize, either by indorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented.

The registration book of a motor car is not a document of title: *Joblin v Watkins and Roseveare (Motors) Ltd* [1949] 1 All ER 47, 64 TLR 464 (KB).

[27.07] Delivery or transfer ... of the goods ... under any ... disposition

See *Michael Gerson (Leasing) Ltd v Wilkinson and Anor* [2001] QB 514, [2001] 1 All ER 148, [2000] 3 WLR 1645 (CA, Eng).

In *Worcester Works Finance Ltd v Cooden Engineering Co Ltd* [1972] 1 QB 210, [1971] 3 All ER 708, [1971] 3 WLR 661 (CA, Eng), where the purchaser of a car paid with a cheque which was dishonoured and the sellers retaken possession with the purchaser's consent, it was held that the retaking of the car constituted a 'delivery' by the purchaser since he had voluntarily acquiesced in the retaking of the car (the definition of 'delivery' in s 2(1) above) and that it was a delivery under a 'disposition' in that a new interest in the car had been effectually created since it was clear that in retaking the car the sellers had waived any right to sue on the purchaser's cheque in consideration of his surrendering to them his interest in the car. 'Disposition' extended to all acts by which a new interest (legal or equitable) in the property was effectually created: *Worcester Works Finance Ltd v Cooden Engineering Co Ltd* [1972] 1 QB 210, [1971] 3 All ER 708 at 712, [1971] 3 WLR 661 (CA, Eng), per Lord Denning MR, applying the definition given by Stirling J, in *Carter v Carter* [1896] 1 Ch 62 at 67, (1896) 65 LJ Ch 86.

Delivery must involve a voluntary transfer or handing over of possession (actual or constructive) by one person to another: see *Ladbroke Leasing (South-West) Ltd v Reekie Plant Ltd* (1983) SLT 155.

[27.08] Without notice of the previous sale

The word 'notice' here means actual notice, ie, knowledge of the sale or deliberately turning a blind eye to it: see *Worcester Works Finance Ltd v Cooden Engineering Co Ltd* [1972] 1 QB 210, [1971] 3 All ER 708 at 712, [1971] 3 WLR 661 (CA, Eng), per Lord Denning MR.

[27.09] Section 27(2): Agreed to buy

A person who has merely an option to buy is not 'a person who has agreed to buy' within the meaning of sub-s (2) above: *Belsize Motor Supply Co v Corbridge* [1911] 1 KB 244, [1911-1913] All ER Rep 1084 (KB), following *Helby v Matthews* [1895] AC 471, [1895-1899] All ER Rep 821 (HL).

A buyer has 'agreed to buy' within sub-s (2) above, when the sale is subject to a condition, even though the condition may not ultimately be fulfilled: *Marten v Whale* [1917] 2 KB 480, 86 LJKB 1305 (CA, Eng).

Note, however, the agreement to purchase the goods must exist before the buyer obtains possession of the goods. If he agrees to purchase the goods only after possession of the goods is obtained, this subsection will not apply: *Benjamin's Sale of Goods* (12th edn, Sweet & Maxwell 2024 Reissue) at para 7-073, referred to and applied in *S-J for Justice for and on behalf of the Comr of Police v Chan Ngai Jewellery Design Co Ltd (in compulsory liq) and Ors* [2017] 2 HKLRD 1114, [2017] HKCU 1036 (CFI) at para 26. See also *Fadallah v Pollak* [2013] EWHC 3159 (QB) at para 55.

[27.10] Consent of the seller

If possession of the goods is obtained by fraud, the section still applies unless the fraud induces a fundamental mistake so as to nullify the consent: see *London Jewellers Ltd v Attenborough Same v Robertsons (London) Ltd* [1934] 2 KB 206,

[1934] All ER Rep 270 (CA, Eng). See also *Du Jardin v Beadman Bros Ltd* [1952] 2 QB 712, [1952] 2 All ER 160 (QB).

[27.11] Documents of title to the goods

The documents transferred need not necessarily be the same documents as were obtained from the original seller: see *D F Mount Ltd v Jay & Jay (Provisions) Co Ltd* [1960] 1 QB 159 at 168, [1959] 3 All ER 307 at 311, [1959] 3 WLR 537 (QB). See *Ngai Kwong Suen t/a BOGA Trading Co v Dawin Shipping (Agencies) Ltd & Ors* [1985] 2 HKC 191 (HC) at 194, and also [27.06] above.

[27.12] Delivery ... of the goods ... under any ... disposition

cf. [27.07] above. See also *The Saetta, Forsythe International (UK) Ltd v Silver Shipping Co Ltd and Ors* [1994] 1 All ER 851, [1994] 1 WLR 1334, [1993] 2 Lloyd's Rep 268, referred to in *Maruken Kougyou Co Ltd v Hsin Chong Construction Co Ltd and Anor* [2016] HKCU 2994 (unreported, HCCT 19/2013, 12 December 2016) (CFI) at paras 72-73.

[27.13] Without notice of any lien, etc

cf. [27.08] above.

[27.14] Protection under this subsection

It was held in *Cahn and Mayer v Pockett's Bristol Channel Steam Packet Co Ltd* [1899] 1 QB 643, that this protection fell short of a sale in market overt: *The Koe Guan Co and Ors v The Yan On Marine & Fire Insurance Co Ltd and Anor* [1907] 2 HKLR 95 at 109, [1907] HKCU 5 (SC).

[27.15] Section 27(3): Merchantile agent

Mercantile agent is defined in s 2 of the Factors Ordinance (Cap 48) as 'a mercantile agent having, in the customary course of his business as such agent, authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods'.

[27.16] Definitions

For 'document of title to goods', 'goods', 'property', 'sale' and 'seller', see s 2(1) above; for 'in good faith', see s 2(2) above.

'Delivery' means voluntary transfer of possession from one person to another: s 2(1).

28. (Repealed 52 of 1987 s. 45)

[28.01] Enactment history

This section was repealed by s 45 of the Supreme Court (Amendment) Ordinance 1987 (52 of 1987), commencing 10 July 1987.

Part III**Performance of the Contract****29. Duties of seller and buyer**

It is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them, in accordance with the terms of the contract of sale.

[29.01] United Kingdom comparison

Reference is made to s 27 of the Sale of Goods Act 1979 (UK).

[29.02] Duty of the seller to deliver

For delivery, see s 30 and following below. For enforcement of the duty to deliver, see ss 53 and 54 below.

If the goods sold are in the possession of a third party, the seller undertakes that they shall be delivered in a reasonable time: *Buddle v Green* (1857) 27 LJ Ex 33 at 34, per Martin B.

It is normally sufficient to place the goods specified by the contract at the disposition of the buyer in a deliverable state without any reciprocal act on the part of the buyer. The performance of the seller's duty to deliver does not mean that delivery has in fact taken place if the buyer has not in fact taken possession of the goods: *Benjamin's Sale of Goods* (12th edn, Sweet & Maxwell, 2024 Reissue) at paras 8-001 to 8-002, referred to in *Luan Gang v Simpson Marine Ltd* [2016] HKCU 1208 (unreported, HCA 107/2011, HCAJ171/2011, 20 May 2016) (CFI) at para 53.

[29.03] Goods

ie, the goods contracted for. Thus, if they are existing goods, the seller cannot deliver similar goods acquired later: see *Thomson Brothers v Thomson* (1885) 13 R 88.

[29.04] Accept and pay

For the price, see ss 10 and 11 above. For acceptance, see s 37 below. For enforcement, see ss 51 and 52 below.

[29.05] Definitions

For 'buyer', 'goods' and 'seller', see s 2(1) above. For 'contract of sale', see ss 2(1) and 3(1) above.

'Delivery' means voluntary transfer of possession from one person to another: s 2(1).

30. Payment and delivery are concurrent conditions

Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer must be ready and willing to pay the price in exchange for possession of the goods.

[30.01] United Kingdom comparison

Reference is made to s 28 of the Sale of Goods Act 1979 (UK).

[30.02] Unless otherwise agreed

For example under a CIF contract where payment is to be made against shipping documents: *E Clemens Horst Co v Biddell Brothers* [1912] AC 18, [1911-13] All ER Rep 93 (HL); or where there is a credit sale: *Amos and Wood Ltd v Kaprow* (1948) 64 TLR 110, (1948) 92 Sol Jo 153 (CA, Eng) (discount offered for payment within seven days). See, further, *Chalmers' Sale of Goods* (18th edn, Butterworths 1981 Reissue) at 175-177.

[30.03] Delivery

For further provisions as to delivery, see s 31 and following, below. See also *Jebsen & Co Ltd v Asia Furniture* [1982] HKC 218 (HC) at 223.

[30.04] Ability to pay

This cannot be inferred merely from frequent demands for delivery. In *Zego Ltd v Valdivia Ltd* [1991] 1 HKC 11 (CA), it was held that the purchaser's obligation was to show it was ready and willing to pay the price in exchange for the possession of goods. As the purchaser had made no attempt to make attendance or tender despite knowing where the goods were, he had not done what was required on his part to show that the vendor had failed to meet his obligation to deliver.

[30.05] Concurrent conditions

In the case of instalment contracts, these concurrent conditions prima facie exist with respect to each instalment: see *Brandt v Lawrence* (1876) 1 QBD 344, 46 LJQB 237 (CA, Eng).

[30.06] Relationship with 'unconditional appropriation of goods'

The fact that payment and delivery are concurrent conditions of the contract does not prevent an unconditional appropriation of the goods to the contract from taking place prior to delivery within the meaning of s 20 r 5: *Kaga (HK) Electronics Ltd v Sun Cupid Technology (HK) Ltd* [2015] 2 HKC 375 (CA) at para 12.

[30.07] Definitions

For 'buyer', 'goods' and 'seller', see s 2(1) above.

'Delivery' means voluntary transfer of possession from one person to another: s 2(1).

31. Rules as to delivery

- (1) Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending in each case on the contract, express or implied, between the parties. Apart from any such contract, express or implied, the place of delivery is the seller's place of business, if he has one, and if not, his residence:

Provided that, if the contract is for the sale of specific goods which, to the knowledge of the parties when the contract is made, are in some other place, then that place is the place of delivery.

- (2) Where under the contract of sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time.
- (3) Where the goods at the time of sale are in the possession of a third person, there is no delivery by seller to buyer unless and until such third person acknowledges to the buyer that he holds the goods on his behalf:

Provided that nothing in this section shall affect the operation of the issue or transfer of any document of title to goods.

- (4) Demand or tender of delivery may be treated as ineffectual unless made at a reasonable hour. What is a reasonable hour is a question of fact.
- (5) Unless otherwise agreed, the expenses of and incidental to

putting the goods into a deliverable state must be borne by the seller.

[31.01] United Kingdom comparison

Reference is made to s 29 of the Sale of Goods Act 1979 (UK).

[31.02] Section 31(1): Residence

A person resides where in common parlance he lives, and a temporary absence is immaterial provided there is an intention to return and a house or lodging to which to return: see *R v St Leonard's Shoreditch (Inhabitants)* (1865) LR 1 QB 21; and *R v Glossop Union* (1866) LR 1 QB 227. The word reside implies a degree of permanence: *Levene v IRC* [1928] AC 217 at 222, 223, [1928] All ER Rep 746 (HL) at 749, and 750; *Fox v Stirk and Bristol Electoral Registration Officer* (HL) at 749, and 750; *Ricketts v Cambridge City Electoral Registration Officer* [1970] 2 QB 463 at 477, [1970] 3 All ER 7 at 13, [1970] 3 WLR 147 (CA, Eng); *Brokelmann v Barr* [1971] 2 QB 602, [1971] 3 All ER 29, [1971] 3 WLR 108 (DC, Eng), but a person may be resident in more than one place at the same time: *Levene v IRC* above; *Langford Property Co Ltd v Tureman and Anor* sub nom *Langford Property Co Ltd v Athanassoglou* [1949] 1 KB 29, [1948] 2 All ER 722 (CA, Eng); *Herbert v Byrne* [1964] 1 All ER 882, [1964] 1 WLR 519 (CA, Eng); and contrast *Beck v Scholz* [1953] 1 QB 570, [1953] 1 All ER 814, [1953] 2 WLR 651 (CA, Eng). Whether a person is resident in a particular place and whether that residence is permanent are questions of fact and degree and it is possible to be resident in accommodation such as a tent or a vehicle; moreover, the legality or lawfulness or otherwise of the residence is not generally a relevant consideration: see *Hipperson and Ors v Newbury District Electoral Registration Officer and Anor* [1985] QB 1060, [1985] 2 All ER 456, [1985] 3 WLR 61 (CA, Eng).

For the residence of incorporated bodies, see *Halsbury's Laws of Hong Kong* (2nd edn, 2024 Reissue) vols 14–15 on Companies and Corporations. The place of incorporation is not conclusive on the question of residence, which usually depends on where the central control and management of the company is located.

[31.03] Section 31(2): Time for sending

As to when stipulations as to time are of the essence of the contract, see s 12 above. If the time for delivery is postponed by agreement, time is no longer of the essence of the contract unless the buyer serves a notice making it so after the expiration of a reasonable time: see *Hartley v Hymans* [1920] 3 KB 475, [1920] All ER Rep 328 (KB); *Rickards (Charles) Ltd v Oppenheim (or Oppenheim)* [1950] 1 KB 616, [1950] 1 All ER 420 (CA, Eng), cited in *Hong Kong in Centaline Property Agency Ltd v Lee Po Chu Feona* [2023] HKCU 407, [2023] HKCFI 261.

[31.04] Reasonable time

This is a question of fact, see s 58 below and [20.11] above; for example, see *Protronics Co Ltd v Kouoi Vincent t/a Universel Enterprise Co* [2006] HKCU 627 (unreported, DCCJ 3234/2004, 13 April 2006) (DC).

[31.05] Section 31(3): Goods ... in the possession of a third person

See *Farina v Home* (1846) 16 M & W 119 at 123 (position pending attornment); see also *Mercuria Energy Trading Pte Ltd and Anor v Citibank NA and Anor* [2015] EWHC 1481 (Comm), [2015] 1 CLC 999 (holding that the tender of warehouse receipts without any attornment did not effect delivery under the English equivalent of this section) and *Halsbury's Laws of Hong Kong* (2nd edn, 2024 Reissue) vol 45 on Sale of Goods.

[31.06] Acknowledges to the buyer that he holds the goods on his behalf

For a case in point see *Wardar's (Import & Export) Co Ltd v W Norwood & Sons Ltd* [1968] 2 QB 663, [1968] 2 All ER 602, [1968] 2 WLR 1440 (CA, Eng).

[31.07] Section 31(4): What is a reasonable hour is a question of fact

This provision supersedes the rules laid down in *Startup v Macdonald* (1843) 1 Man & G 593. Previously, what was a reasonable hour was a question of law.

[31.08] Section 31(5): Expenses

The expenses referred to in sub-s (5) above are to be distinguished from the expenses of delivery itself. As to these, see *Halsbury's Laws of Hong Kong* (2nd edn, 2024 Reissue) vol 45 on Sale of Goods.

[31.09] Definitions

For 'business', 'buyer', 'document of title to goods', 'goods', 'seller' and 'specific goods', see s 2(1) above; for 'contract of sale', see ss 2(1) and 3(1) above; for 'deliverable state', see s 2(4) above.

'Delivery' means voluntary transfer of possession from one person to another: s 2(1).

32. Delivery of wrong quantity

- (1) Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts the goods so delivered, he must pay for them at the contract rate.
- (2) Where the seller delivers to the buyer a quantity of goods

larger than he contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole. If the buyer accepts the whole of the goods so delivered he must pay for them at the contract rate.

- (3) Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract the buyer may accept the goods which are in accordance with the contract and reject the rest, or he may reject the whole.
- (4) The provisions of this section are subject to any usage of trade, special agreement, or course of dealing between the parties.

[32.01] United Kingdom comparison

Reference is made to s 30 of the Sale of Goods Act 1979 (UK).

[32.02] Section 32(1): Delivers ... less than he contracted to sell

See *Behrend & Co Ltd v Produce Brokers Co Ltd* [1920] 3 KB 530, [1920] All ER Rep 125 (KB). Short delivery on one instalment did not give a right to reject the whole contract where it did not go to the rest of the contract; see *Regent OHG Alenstadt und Barig v Francesco of Jermyn Street Ltd* [1981] 3 All ER 327, [1981] Com LR 78 (QB).

[32.03] Buyer may reject them

The buyer may reject the goods where the seller delivers a quantity of goods less than he contracted to sell because every contract for a quantity of goods is prima facie an entire contract for that quantity: see *Mersey Steel and Iron Co v Naylor, Benzon & Co* (1884) 9 App Cas 434, [1881-5] All ER Rep 365 (HL) at 439, per Lord Selborne LC.

[32.04] Section 32(2): Delivers ... larger than he contracted to sell

The maxim de minimis non curat lex (the law takes no account of very trifling matters) applies to this rule: *Shipton, Anderson & Co v Weil Brothers & Co* [1912] 1 KB 574, 81 LJKB 910; and cf, *Margaronis Navigation Agency Ltd v Henry W Peabody & Co of London Ltd* [1965] 2 QB 430, [1964] 3 All ER 333, [1964] 3 WLR 873 (CA, Eng). Delivery of a larger quantity than ordered is in effect a proposal for a new contract: *Hart v Mills* (1846) 15 M & W 85 at 87, per Alderson B.

[32.05] Section 32(3): Mixed with

These words do not refer to physical confusion but are equivalent to 'accompanied by': *Moore and Co v Landauer and Co* [1921] 1 KB 73 at 76, affd re *Moore & Co and Landauer & Co's Arbitration* [1921] 2 KB 519, [1921] All ER Rep 466 (CA, Eng); *Dawood (Ebrahim) Ltd v Heath (Est 1927) Ltd* [1961] 2 Lloyd's Rep 512; but see the different view expressed obiter by Salter J in *Barker (William) (Junior) & Co Ltd v Ed T Agius Ltd* (1927) 33 Com Cas 120 at 131 and 132.

[32.06] Section 32(4): Usage

See [16.13] above. See also s 57 below.

[32.07] Definitions

For 'buyer', 'goods' and 'seller', see s 2(1) above.

'Delivery' means voluntary transfer of possession from one person to another: s 2(1).

33. Delivery by instalments

- (1) Unless otherwise agreed, the buyer of goods is not bound to accept delivery thereof by instalments.
- (2) Where there is a contract for the sale of goods to be delivered by stated instalments, which are to be separately paid for, and the seller makes defective deliveries in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it is a question in each case depending on the terms of the contract and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract or whether it is a severable breach giving rise to a claim for compensation but not to a right to treat the whole contract as repudiated.

[33.01] United Kingdom comparison

Reference is made to s 31 of the Sale of Goods Act 1979 (UK).

[33.02] Section 33(1): Delivery ... by instalments

In *Colonial Insurance Co of New Zealand v Adelaide Marine Insurance Co* (1886) 12 App Cas 128 at 138, per Sir Barnes Peacock:

An implication may arise from the circumstances of the contract that the delivery is to be made by instalments in many cases of contract to supply a quantity of goods to be delivered within a fixed period, the whole quantity

cannot, from the very nature of the case, be delivered at one time, and it must frequently happen, as in the case of supplies of provisions for the army or navy or any large establishments, that the quantities first delivered are appropriated and actually consumed by the persons to whom they are delivered before the expiration of the period within which the whole contract is to be performed.

Where the amount of the instalments is not specified in the contract, it is a question dependent upon its construction whether the instalments must be distributed rateably over the period appointed for the delivery of the whole quantity of the goods. If rateable instalments are not contemplated by the contract, the amount of any instalment tendered or demanded must be reasonable, having regard to the time and circumstances of such tender or demand, and in particular to the amount of the goods contracted for, and the period specified for complete delivery: *Calaminus v Dowlais Iron Co Ltd* (1878) 47 LJQB 575; *Coddington and Ors v Paleologo and Ors* (1867) LR 2 Exch 193 at 197.

The seller however may repudiate when the price is not apportioned, for in such a case the consideration for delivery is indivisible, and thus that a partial breach would amount to a total breach: see *Chanter v Lees and Ors* (1839) 5 M & W 698 (Ex Ch); *Kingdom v Cox* (1848) 5 CB 522.

See further *Halsbury's Laws of Hong Kong* (2nd edn, 2024 Reissue) vol 45 on Sale of Goods.

[33.03] Section 33(2): Repudiation of the whole contract

For the general rules as to the right to repudiate, see *Mersey Steel and Iron Co v Naylor, Benzon & Co* (1884) 9 App Cas 434, [1881-5] All ER Rep 365 (HL).

Whether a breach in respect of one instalment amounts to repudiation is a question of fact depending on the quantitative ratio of the instalment to the whole and the likelihood of repetition: *Maple Flock Co, Ltd v Universal Furniture Products (Wembley), Ltd* [1934] 1 KB 148, [1933] All ER Rep 15 (CA, Eng); see also *Ross T Smyth & Co Ltd v T D Bailey Son & Co* [1940] 3 All ER 60, 164 LT 102 (HL). The effect of the section is not excluded by a clause that each instalment is to be treated as a separate contract: *Robert A Munro and Co, Ltd v Meyer* [1930] 2 KB 312, [1930] All ER Rep 241 (KB).

Short delivery on a single instalment which does not go to the root of the contract does not amount to a repudiation of the whole contract: see *Regent OHG Aisenstadt and Barig v Francesco of Jermyn Street Ltd* [1981] 3 All ER 327, [1981] Com LR 78 (QB).

[33.04] Severable breach

There is no necessary inference that a partial breach is a severable breach: see *Millar's Karri and Jarrah Co (1902) v Weddel, Turner and Co* (1908) 100 LT 128, per curiam.

[33.05] Definitions

For 'buyer', 'goods' and 'seller', see s 2(1) above; for 'contract of sale', see ss 2(1) and 3(1) above.

'Delivery' means voluntary transfer of possession from one person to another: s 2(1).

34. Delivery to carrier

- (1) Where, in pursuance of a contract of sale, the seller is authorized or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer is prima facie deemed to be a delivery of the goods to the buyer.
- (2) Unless otherwise authorized by the buyer, the seller must make such contract with the carrier on behalf of the buyer as may be reasonable having regard to the nature of the goods and the other circumstances of the case. If the seller omits to do so, and the goods are lost or damaged in course of transit, the buyer may decline to treat the delivery to the carrier as a delivery to himself, or may hold the seller responsible in damages.
- (3) Unless otherwise agreed, where goods are sent by the seller to the buyer by a route involving sea transit, in circumstances in which it is usual to insure, the seller must give such notice to the buyer as may enable him to insure them during their sea transit, and, if the seller fails to do so, the goods shall be deemed to be at his risk during such sea transit.

[34.01] United Kingdom comparison

Reference is made to s 32 of the Sale of Goods Act 1979 (UK).

[34.02] Section 34(1): Carrier

The Post Office, in this connection, is a carrier like any other carrier: see *Badische Anilin und Soda Fabrik v Johnson & Co and Basle Chemical Works, Bindschedler* [1898] AC 200, 67 LJ Ch 141 (HL).

[34.03] Prima facie deemed to be a delivery ... to the buyer

The contract may, of course, impose further obligations with which the seller has to comply before delivery is deemed to take place.

As with any prima facie presumption this can be rebutted by a term in the contract

contradicting the effect of sub-s (1) as demonstrated in the judgment of Her Honour CB Chan J in *Kee Shing Industrial Products Ltd v Wah Lai Metal Artificial Jewellery Factory (a firm)* (華麗五金人造首飾廠) [2006] HKCU 831 (unreported, DCCJ 2115/2003, 24 May 2006) (DC) (the oral term that the defendant was to pay for the goods after the goods were delivered to one of the Defendant's factories in the PRC has the effect of displacing the presumption). See also *Kee Shing Industrial Products Ltd v Wah Lai Metal Artificial Jewellery Factory (a firm)* [2005] 2 HKC 325 (CA), where a retrial was ordered.

This section does not disturb the common law rule that the carrier is not normally taken to be the buyer's agent for the purpose of examining and accepting the goods: see *Norman v Phillips* (1845) 14 M & W 277; *Meredith v Meigh and Ors* (1853) 1 E & B 364.

[34.04] Section 34(2): Seller must make such contract with the carrier ... as may be reasonable, etc

The seller has an implied authority and it is his duty, to do whatever is necessary to secure the responsibility of the carriers for the safe delivery of the goods, and to put them into such a course of conveyance as that in case of a loss, the buyer may have his indemnity against the carriers: *Clarke v Hutchins* (1811) 14 East 475. If no route is specified, the seller must use that which is reasonable under the circumstances: see *Tsakiroglou & Co Ltd v Noblee Thorl GmbH* [1962] AC 93, [1961] 2 All ER 179, [1961] 2 WLR 633 (HL).

As to what is reasonable, see *Kee Shing Industrial Products Ltd v Wah Lai Metal Artificial Jewellery Factory (a firm)* (華麗五金人造首飾廠) [2006] HKCU 831 (unreported, DCCJ 2115/2003, 24 May 2006) (DC), where paras 8-015 and 8-016 of *Benjamin's Sale of Goods* (12th edn, Sweet & Maxwell 2024 Reissue) were quoted:

The duty of the seller under this subsection is, however, merely to make a reasonable contract on ordinary terms: it is not to ensure that the buyer will in any event have a remedy against the carrier. The seller is entitled to assume that the duration of the transit will not be prolonged beyond that which is usual, taking into account ordinary vicissitudes; and, although he is bound to possess reasonable knowledge of the characteristics of the goods he is selling and must ensure that the contract of carriage provides for the taking of any necessary precautions to preserve them during the transit in question, he need not stipulate for exceptional measures to be taken.

The duty to make a reasonable contract of carriage does not carry with it a duty to insure the goods during transit unless so agreed or unless it is customary for the seller to assume such a duty.

[34.05] Decline to treat ... as a delivery to himself

The effect of this, in these circumstances, is to throw the risk of transit on to the seller.

[34.06] Route involving sea transit

Subsection (3) above applies to FOB contracts: see *Northern Steel and Hardware Co Ltd v John Batt & Co (London) Ltd* (1917) 33 TLR 516 following *Wimble, Sons & Co v Rosenberg & Sons* [1913] 3 KB 743, 82 LJKB 1251 (CA, Eng).

[34.07] Definitions

For 'buyer', 'goods' and 'seller', see s 2(1) above; for 'contract of sale', see ss 2(1) and 3(1) above.

'Delivery' means voluntary transfer of possession from one person to another: s 2(1).

35. Risk where goods are delivered at distant place

Where the seller of goods agrees to deliver them at his own risk at a place other than that where they are when sold, the buyer must, nevertheless, unless otherwise agreed, take any risk of deterioration in the goods necessarily incident to the course of transit.

[35.01] United Kingdom comparison

Reference is made to s 33 of the Sale of Goods Act 1979 (UK).

[35.02] General observation

The section does not say 'where they are at the time of the contract', therefore the enactment seems to apply only where the property has passed. See also *Halsbury's Laws of Hong Kong* (2nd edn, 2024 Reissue) vol 18, para 355.174.

[35.03] At his own risk

For rules governing the question whether goods are at the seller's risk, see s 22 above.

[35.04] Deterioration ... necessarily incident to the course of transit

This section will not assist a seller of perishable goods who dispatches them in such a condition that they will inevitably deteriorate in the course of a normal journey. Such a seller may be in breach of the conditions implied under s 16(2) and (3) above: cf, *Beer v Walker* (1877) 46 LJQB 677, [1874-80] All ER Rep 1139; *Mash & Murrell Ltd v Joseph I Emanuel Ltd* [1961] 1 All ER 485, [1961] 1 WLR 862 (QB); revsd on the facts *Mash & Murrell Ltd v Joseph I Emanuel Ltd* [1962] 1 All ER 77n, [1962] 1 WLR 16n (CA, Eng). A seller will also bear in mind the risk of any unusual or extraordinary deterioration during transit: see *Bell v Robison* (1854) 10 Exch 342.

[35.05] Definitions

For 'buyer', 'goods' and 'seller', see s 2(1) above.

'Delivery' means voluntary transfer of possession from one person to another: s 2(1).

Buyer's right of examining goods

36. (Repealed 85 of 1994 s. 5)

(1) Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract.

[36.01] Enactment history

Subsection (1) was repealed by s 5 of the Sale of Goods (Amendment) Ordinance 1994 (85 of 1994) which commenced on 21 October 1994.

[36.02] United Kingdom comparison

Reference is made to s 34(2) of the Sale of Goods Act 1979 (UK).

[36.03] Unless otherwise agreed

For waiver of the right to examine the goods, see *Castle and Ors v Swarder* (1816) 6 H & N 828; *Van den Hurk v R Martens & Co, Ltd (in liq)* [1920] 1 KB 850, 89 LJKB 545 (KB).

[36.04] Tenders delivery

This applies where delivery is incomplete: see *Isherwood v Whitmore* (1843) 11 M & W 347.

[36.05] Reasonable opportunity of examining

The time and place of delivery is prima facie the time and place for examination: see *Perkins v Bell* [1893] 1 QB 193, [1891-4] All ER Rep 884 (CA, Eng). This rule may be expressly or impliedly displaced by the terms of the contract: see *Heilbutt and Ors v Hickson and Ors* (1872) LR 7 CP 438, 41 LJCP 228. See also *Lorymer v Smith* (1822) 1 B & C 1; *Bragg v Villanova* (1923) 40 TLR 154.

[36.06] Definitions

For 'buyer', 'goods' and 'seller', see s 2(1) above.

'Delivery' means voluntary transfer of possession from one person to another, s 2(1).

37. Acceptance of goods

- (1) Subject to subsection (2), the buyer is deemed to have accepted the goods—
 - (a) when he intimates to the seller that he has accepted them; or
 - (b) when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller.
- (2) Where goods are delivered to the buyer, and he has not previously examined them, he is not deemed to have accepted them under subsection (1) until he has had a reasonable opportunity of examining them for the purpose—
 - (a) of ascertaining whether they are in conformity with the contract; and
 - (b) in the case of a contract for sale by sample, of comparing the bulk with the sample.
- (3) The buyer who deals as consumer cannot lose his right to rely on subsection (2) by agreement, waiver or otherwise.
- (4) The buyer is also deemed to have accepted the goods when after the lapse of a reasonable time he retains the goods without intimating to the seller that he has rejected them.
- (5) The questions that are material in determining for the purposes of subsection (4) whether a reasonable time has elapsed include whether the buyer has had a reasonable opportunity of examining the goods for the purpose mentioned in subsection (2).
- (6) The buyer is not by virtue of this section deemed to have accepted the goods merely because the goods are delivered to another under a sub-sale or other disposition.

(Replaced 85 of 1994 s. 6)

[37.01] Enactment history

This whole section replaced the previous s 37 following the Sale of Goods (Amendment) Ordinance 1994 (845 of 1994), commencing 21 October 1994. It

sets out the circumstances in which a buyer is deemed to have accepted goods and may therefore have lost the right to reject the goods in the event of a breach of condition by the seller. Subsections (1)–(3) have particular effect in the case of signed 'acceptance notes' as the clauses provide that a buyer is not deemed to have accepted goods under s 37 unless he has had a reasonable opportunity of examining the goods.

[37.02] United Kingdom comparison

Reference is made to ss 34 and 35 of the Sale of Goods Act 1979 (UK). Subsections (1) and (4) are to the same effect as s 35(1) of the Act, sub-s (2) of the Sale of Goods Ordinance (Cap 26) is based on s 34(1). There is no equivalent of sub-ss (3), (4) and (5).

[37.03] General note

One of the principal effects of acceptance is that the buyer loses the right to reject the goods and must treat breaches of condition as breaches of warranty, where the contract is not severable, acceptance of part of the goods is acceptance of all: see s 18(3) above. It is otherwise if the contract is severable: *Jackson v Rotax Motor Cycle Co* [1910] 2 KB 937, 80 LJKB 38 (CA, Eng) (delivery of instalments).

Where the goods have been accepted and the right to reject them is barred, the right to rescind the contract is also barred: see *Leaf v International Galleries (a firm)* [1950] 2 KB 86, [1950] 1 All ER 693 (CA, Eng).

[37.04] Section 37(1): Intimates

The intimation may be oral or in writing: see *Abbott & Co v Wolsey* [1895] 2 QB 97 at 103, 64 LJQB 587 (CA, Eng) at 591, per Rigby LJ. A buyer may expressly accept goods even though he has not had an opportunity to examine them: see *Hardy & Co v Hillerns and Fowler* [1923] 2 KB 490 at 498, [1923] All ER Rep 275 (CA, Eng), per Atkin LJ.

An explanation does not amount to an intimation of acceptance: *Vaswani v Italian Motors (Sales & Service) Ltd* [1994] 2 HKC 753 (HC). It was also held that promising to complete registration form with a cheque by a certain date was not a clear and unequivocal acceptance. The trial judge's decision was overturned on appeal *Italian Motors (Sales & Services) Ltd v Vaswani* [1994] 2 HKC 767 (CA) on other grounds.

[37.05] Delivered to him

If the goods are delivered to a sub-purchaser at the request of the buyer, there is a constructive delivery to the buyer within the meaning of this section: see *E & S Ruben Ltd v Faire Brothers & Co Ltd* [1949] 1 KB 254, [1949] 1 All ER 215 (KB). In a CIF contract, the goods are 'delivered' when they are put on board a ship at the port of shipment: see *Kwei Tek Chao (t/a Zung Fu Co) v British Traders and Shippers Ltd* [1954] 2 QB 459, [1954] 1 All ER 779, [1954] 2 WLR 365 (QB).