The World of Maritime and Commercial Law

Essays in Honour of Francis Rose

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9

The Duty to Take Delivery of Goods

ANDREW TETTENBORN

I. Introduction

'It is the duty of the seller,' says section 27 of the Sale of Goods Act (SGA) 1979, 'to deliver the goods.' So far so good. But is there a corresponding duty in the buyer to take them, and if there is, what does it entail? That is a surprisingly awkward question; and it is the subject of this chapter.

Other legal systems and instruments regard the point as obvious. Article 60 of the UN Convention on Contracts for the International Sale of Goods obliges a buyer not only physically to take over the goods, but goes further, requiring him to do 'all the acts which could reasonably be expected of him in order to enable the seller to make delivery'.[1] German law is equally blunt: the buyer 'is obliged to pay the agreed price and to take the thing he has bought'.[2] The International Chamber of Commerce's Incoterms 2010 goes even further. In all of its 11 standard international sale contracts it does not simply oblige the buyer to take delivery, but in addition requires him, where appropriate, to collect the goods from the carrier who transports them to him, having taken them over from the seller.[3]

Curiously enough, however, the Sale of Goods Act (SGA) 1979 has no equivalent provision. The nearest it gets is one isolated sub-section, section 37(1), which runs as follows:

> When the seller is ready and willing to deliver the goods, and requests the buyer to take delivery, and the buyer does not within a reasonable time after such request take delivery of the goods, he is liable to the seller for any loss occasioned by his neglect or refusal to take delivery, and also for a reasonable charge for the care and custody of the goods.

This, it will be noticed, is highly restricted. It only deals with putting a foot-dragging buyer on notice, and not with the case where the contract provides a fixed date and time for delivery. Moreover, it merely gives a power to award compensation and/or a warehousing charge. It does not even say in so many words that the buyer is guilty of a breach of contract (though it might be argued that this is implicit). Further, although it preserves whatever rights the seller

[1] UNCITRAL, United Nations Convention on Contracts for the International Sale of Goods (CISG) (Vienna, 1980) Art 60.

[2] BGB, § 433: '*Der Käufer ist verpflichtet, dem Verkäufer den vereinbarten Kaufpreis zu zahlen und die gekaufte Sache abzunehmen*'.

[3] See Term B4 attached to each term in turn: 'The buyer must take delivery of the goods when they have been delivered … and receive them from the carrier at the named port of destination.' We return to the second part of this provision at section IV.D(ii) below.

otherwise has to treat non-take-up as a repudiation of the contract,[4] it says nothing about any other consequences.

It might be thought that the answer to the puzzle of the 'take-up' duty (or lack of it) in England lay in the second part of section 27 of the SGA 1979. This obliges a buyer of goods, as a corollary of the seller's duty to deliver them, to 'accept and pay for them, in accordance with the terms of the contract of sale'. Might this be read as incorporating a take-up duty?[5] Take-up and acceptance are, after all, closely related: for example, if a buyer is not bound to accept goods (for instance, because they are defective), it stands to reason that he can equally have no duty to take delivery of them. But it is suggested that matters are not as simple as this. The converse does not apply: the presence of an obligation to accept does not automatically imply a take-up duty.[6] True, *some* take-up failures will be breaches of section 27: if the seller of a car tenders it to the buyer in good time and condition, but the buyer declines the keys and documents and tells the seller to take the vehicle away, this must amount to non-acceptance. But not all will; it is, it is suggested, perfectly possible to accept goods *without* taking them over. Take another homely example. Imagine a buyer who chooses a satellite dish in a shop, pays for it, becomes owner and arranges for the dealer to hold onto it and install it in a week's time. He later tells the seller not to bother because his wife disapproves, and adds that he is quite happy for the seller to keep both the price and the dish. He may be foolish or even feckless; but having paid for the dish on the shelf and become owner of it he cannot, it is suggested, be guilty of non-acceptance.

II. Is there a Free-Standing Take-up Duty to Accept Delivery?

The question therefore remains. Outside the specific circumstances of section 37(1) of the SGA 1979, does the buyer have an implied duty to take up goods at the time and place specified for delivery, so that if he does this late or not at all he is in breach of contract?

Two plausible lines of reasoning might actually suggest that the answer is 'No'. One is a simple point of statutory interpretation: if the draftsman of the SGA 1979 imposed a restricted take-up duty under section 37(1), the courts should not second-guess this decision by conjuring up any more general duty free of the restrictions affecting that section. But this is unconvincing. Despite occasional suggestions to the contrary,[7] the Sale of Goods Acts 1893 and 1979 are not so much codes as a compilation of instances taken from those pre-1893 cases that happened to attract Sir Mackenzie Chalmers' notice; often, indeed, they look like little more than a hyper-organised student's lecture notes. There are plenty of cases where courts have essentially recognised this point. They have, for instance, extended specific performance from its section 52 boundaries

[4] See SGA 1979, s 37(2) ('Nothing in this section affects the rights of the seller where the neglect or refusal of the buyer to take delivery amounts to a repudiation of the contract').

[5] As suggested obiter by Burnyeat J the British Columbia Supreme Court in *Re Redfern Resources Ltd* 2011 BCSC 771, (2011) 88 BLR (4th) 29 [53] ('"Acceptance" means both the physical receipt of the goods by a buyer and the legal duty of the buyer to accept goods properly delivered by the seller – a duty the breach of which the seller may sue for damages for non-acceptance').

[6] A point made in M Bridge (gen ed), *Benjamin's Sale of Goods*, 10th edn (London, Sweet & Maxwell, 2017) para 9.003. It is submitted that the seemingly contrary suggestion in M Bridge, *Sale of Goods*, 3rd edn (Oxford, Oxford University Press, 2014) para 6.05 cannot be supported.

[7] 'It is well known that the Factors Acts of 1899 and 1890 and the Sale of Goods Act 1893, must for many purposes be treated as one code': *Worcester Works Finance Ltd v Cooden Engineering Co Ltd* [1972] 1 QB 210 (CA) 220 (Megaw LJ). See also *Re Wait* [1927] 1 Ch 606 (CA) 635–36 (Atkin LJ); *Michael Gerson (Leasing) Ltd v Wilkinson* [2001] QB 514 (CA) [35] (Clarke LJ).

(only for the buyer, and only for specific or ascertained goods)[8] to cover unascertained goods,[9] and also claims by sellers.[10] Again, more recently, the courts have accepted that section 49(1), under which the buyer's right to sue for the price of goods accrues when property passes, does not preclude such claims in other cases.[11] There is thus nothing implausible about the idea that section 37(1) simply reproduces what exiguous nineteenth-century authority there was on the duty to accept delivery,[12] rather than listing exhaustively the cases where the duty arises.

The second line of reasoning relies on the well-established principle that a contractor can always renounce the benefit of a term inserted solely for his advantage.[13] For example, I am not, it is suggested, in breach of contract if I tell my regular cleaner that she has a free day but I will still pay her for not working;[14] or if I sell you goods, deliver them and then refuse point-blank to take any payment. Why not regard the buyer's right to delivery in the same light? After all, if you can deliver goods and then refuse payment, it might seem a little odd that you cannot deliver payment and then decline the goods.

A closer look, however, shows that this argument equally will not work. Whatever the status of a promise to pay – where it is indeed hard to infer an obligation to take money one does not want – the duty to deliver goods cannot, it is submitted, be regarded as inserted solely for the buyer's benefit. A seller has a clear interest not only in being paid, but also in being disembarrassed of the goods he is selling, an interest that sounds both in convenience and very often in hard cash.[15] Indeed, it is not difficult to think of cases where the price, or even the willingness of the seller to sell at all, might vary according to the willingness of the buyer to take the goods away. Examples would be where a seller of trucks is short of showroom space, or the owner of land encumbered with a number of derelict cars wishes a timely disposal in order to develop the site.

With these obstructions cleared away, what about indications in favour of a take-up duty? Direct authority is, admittedly, almost entirely lacking. The only instance that comes to mind

[8] 'In any action for breach of contract to deliver *specific or ascertained goods* the court may, if it thinks fit, *on the plaintiff's application*, by its judgment or decree direct that the contract shall be performed specifically' (emphasis added). See the comments in *Re Wait* (n 7) 635–36 (Atkin LJ); *International Finance Corp v DSNL Offshore Ltd* [2005] EWHC 1844 (Comm), [2007] 2 All ER (Comm) 305 [50]; *Timmerman v Nervina Industries (International) Pty Ltd* [1983] 1 Qd R 1, 8.

[9] eg *Thames Valley Power Ltd v Total Gas & Power Ltd* [2005] EWHC 2208 (Comm), [2006] 1 Lloyd's Rep 441 [63]. See also G Treitel, 'Specific Performance in the Sale of Goods' [1966] *Journal of Business Law* 211, 216–17.

[10] See *Astro Exito Navegacion SA v Southland Enterprise Co (The Messiniaki Tolmi) (No 2)* [1983] 2 AC 787 (HL), esp 797 (Lord Roskill) (ship); *Record v Bell* [1991] 1 WLR 853 (Ch) (chattels where vendor of house obtained relief); *Shell-Mex Ltd v Elton Cop Dyeing Co Ltd* (1928) 34 Com Cas 39 (KB) 46 (Wright J).

[11] *PST Energy 7 Shipping LLC v OW Bunker Malta Ltd (The Res Cogitans)* [2016] UKSC 23, [2016] AC 1034 [40]–[58] (Lord Mance), overruling *FG Wilson (Engineering) Ltd v John Holt & Co (Liverpool) Ltd* [2013] EWCA Civ 1232, [2014] 1 WLR 2365 on this point.

[12] And the support was indeed remarkably thin. The traditional authority for s 37(1) is nothing more than an obiter dictum by Lord Ellenborough in *Greaves v Ashlin* (1813) 3 Camp 426, 427; 170 ER 1433, 1434.

[13] *Quilibet potest renunciare juri pro se introducto*. See eg *National Westminster Bank Ltd v Halesowen Presswork & Assemblies Ltd* [1972] AC 785 (HL) 808. Lord Simon in the *Halesowen* case, however, preferred the definition in the 10th edition of Broom, *Legal Maxims* (London, Sweet & Maxwell, 1939): 'Anyone may at his pleasure, renounce the benefit of a stipulation or other right introduced entirely in his own favour.'

[14] 'Provided I pay my cook her wages regularly she cannot complain if I choose to take any or all of my meals out': *Collier v Sunday Referee Publishing Co Ltd* [1940] 2 KB 647 (KB) 650 (Asquith J). Although this statement now has to be heavily qualified in the case of employment (eg *William Hill Organisation Ltd v Tucker* [1999] ICR 291 (CA), 297–301 (Morritt LJ)), there is no suggestion that this qualification affects independent contractors. Compare *Cohen & Co v Ockerby & Co Ltd* [1917] HCA 58, (1917) 24 CLR 288, 299 (Isaacs J): 'If I contract to pay a certain sum to carry my goods two miles, I may dispense with the carriage of them after a mile, provided I pay the agreed price and occasion no burden or inconvenience to the carrier.'

[15] eg storage expenses; and possibly for other reasons too: eg if the seller faces a tax or other charge based on the goods being under his control.

is an old case proceeding on the assumption that there would be a claim for demurrage where a buyer free on board (FOB) failed to ship the goods on time from a barge alongside, shipment in such a case being equivalent to delivery.[16] It is not entirely clear why authority should be so sparse, but one possible explanation is that in contracts where delayed take-up is likely to cause serious loss, such as commodity sales, provision is often expressly made for demurrage payments or carrying charges on the buyer's part.[17]

Nevertheless, there are several indirect arguments in favour of a take-up duty. The first, and perhaps the most obvious, comes from the decision in *Penarth Dock Co Ltd v Pounds*.[18] Lord Denning MR, sitting unusually at first instance, held that where a buyer had accepted and paid for a floating pontoon moored in the sellers' dock, he was under an implied contractual duty physically to take it away within a reasonable time.[19] It may be that this case is not strictly a case about failure to take physical delivery, since it is entirely possible that at the time the action was brought the buyer was already technically in possession of the pontoon.[20] Nevertheless it is a suggestive decision, especially in combination with the fact that the law has had no compunction in imposing contractual obligations on contractual bailors other than buyers to physically remove their goods within a given time.[21] If this is so, there seems no reason not to impose a take-up duty directly on buyers under the contract of sale itself.

Secondly, and less obviously, there is the decision in *Demby Hamilton v Barden*[22] concerning risk. Section 20(2) of the SGA 1979 supplements the rule in section 20(1) that risk presumptively passes with property by saying that 'where delivery has been delayed through the fault of either buyer or seller the goods are at the risk of the party at fault as regards any loss which might not have occurred but for such fault'. *Demby Hamilton* was a textbook application of this sub-section. A buyer of fruit juice delayed taking delivery for some weeks because of problems further down his own supply chain; the juice having gone bad meanwhile, it was held to be at his risk, so that he had to pay for it. The significance of this case lies in the word 'fault'. In this connection, it is submitted that this can only mean breach of contract. If the sub-section is there to prevent a party invoking the rules about transfer of risk if by so doing he is relying on his own wrong, it can hardly penalise a buyer who is not in breach in delaying delivery. And if that is so, then the only way the result in the *Demby Hamilton* case can be justified is that the buyer was regarded as having a contractual duty to take up the goods at the time stipulated for delivery.

Thirdly, there is a point about damages for non-acceptance. There is no doubt that these can, where appropriate, include an element for subsequent warehousing and similar costs incurred by the seller.[23] For instance, in *Vitol SA v Conoil plc*,[24] where buyers of oil failed to accept the necessary ship-to-ship transfers and thus repudiated the contract, damages included sums in

[16] See *All Russian Co-op Society Ltd v Smith & Sons* (1923) 14 Ll L Rep 351 (CA) (the claim failed only because the incurring of the expense was actually due to the seller's own breach).

[17] For coverage of such clauses, see *Benjamin's Sale of Goods* (n 6) para 19.089.

[18] *Penarth Dock Co Ltd v Pounds* [1963] 1 Lloyd's Rep 359 (QB).

[19] ibid 361.

[20] On the basis that there is no indication that the sellers, who had been paid, did not allow him access to it. Compare the case of a small yacht sold while moored in a marina: it must be possible for the seller to deliver it without untying it, by simply allowing the buyer to go on board and take charge.

[21] eg carriers. See eg *Metall Market OOO v Vitorio Shipping Co Ltd* [2013] EWCA Civ 650, [2014] QB 760 [70] (Sir Bernard Rix); *P&O Nedlloyd BV v Arab Metals Co (The UB Tiger) (No 2)* [2006] EWCA Civ 1717, [2007] 1 WLR 2288.

[22] *Demby Hamilton & Co Ltd v Barden* [1949] 1 All ER 435 (KB).

[23] Instances are *Harlow & Jones Ltd v Panex (International) Ltd* [1967] 2 Lloyd's Rep 509 (Com Ct) and *Vitol SA v Conoil plc* [2009] EWHC 1144 (Comm), [2009] 2 Lloyd's Rep 466.

[24] *Vitol* (n 23).

respect of demurrage incurred by the seller to the owners of the transferring vessel, together with the cost of storing what had become essentially unsaleable oil. An award under this head seems difficult to justify unless there is actually a duty on the buyer physically to take the goods off the seller's hands; if there is not, then it amounts to making the buyer liable in damages for failing to do what he was not bound to do in the first place, which is normally impermissible.[25]

Lastly, there is a point about specific performance. If, as seems to be the case, a contract to buy chattels can be specifically enforced at the seller's suit,[26] it is difficult to see what such an order requires the buyer to do, unless it is in some way physically to take over the goods.[27]

III. The Legal Basis of a Take-up Duty

These arguments in favour of a take-up duty are, it is suggested, convincing. If we accept them, what might be the legal basis for it? There are, it is suggested, two possibilities. The first is straightforward: a sale contract that excluded any duty to take delivery of goods would make little commercial sense,[28] and there is therefore a good reason to imply such a duty on the simple *Moorcock*[29] ground of business efficacy. Quite apart from this, however, there is a compelling argument for imposing such a duty on the basis of the general contractual duty to cooperate in achieving performance. Put simply, this is the rule stated by Lord Blackburn in *Mackay v Dick*:[30]

> where … it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect.[31]

Lord Atkin forcefully confirmed this rule in 1940: there was, he said, 'a positive rule of the law of contract that conduct of either promiser or promisee which can be said to amount to himself "of his own motion" bringing about the impossibility of performance is in itself a breach.'[32] Insofar as a seller agrees under section 27 of the SGA 1979 to deliver, and since delivery, in the sense of 'voluntary transfer of possession from one person to another',[33] cannot take place without the buyer's aid (or at least acquiescence), it must follow that the buyer is implicitly bound to give that aid, and accordingly is in breach and liable in damages if he fails to do so.

[25] '[A] defendant is not liable in damages for not doing that which he is not bound to do': *Abrahams v Herbert Reiach Ltd* [1922] 1 KB 477 (CA) 482 (Scrutton LJ).

[26] Such contracts were specifically enforced against buyers in *Record v Bell* (n 10), and earlier in *Timmerman* (n 8), both cases where the supposed restrictions contained in s 52 of the Sale of Goods Act 1893 (or, in the latter case, s 53 of the Queensland Sale of Goods Act 1896, which was word-for-word the same) did not apply. See also *The Messiniaki Tolmi (No 2)* (n 10) esp 797 (Lord Roskill); *Shell-Mex v Elton Cop Dyeing* (n 10) 46.

[27] The matter can be tested in this way: if no delivery is required, and there are no other formal requirements, as in the case of investment wine stored in a third party cellar, there would, it seems, be nothing whatever to enforce specifically. As soon as ownership passed under s 17, the seller could simply sue for the price, with no need for any further order.

[28] It would, it is suggested, fall within the words of Lord Salmon in *Liverpool City Council v Irwin* [1977] AC 239 (HL) 262. It at once becomes clear that the inclusion of the proviso renders this part of the contract 'inefficacious, futile and absurd'.

[29] See *The Moorcock* (1889) 14 PD 64 (CA).

[30] *Mackay v Dick* (1881) 6 App Cas 251 (HL).

[31] ibid 263 (Lord Blackburn). See also *Swallowfalls Ltd v Monaco Yachting & Technologies SAM* [2014] EWCA Civ 186, [2014] 2 All ER (Comm) 185 [32]–[33] (Longmore LJ).

[32] *Southern Foundries (1926) Ltd v Shirlaw* [1940] AC 701 (HL) 717.

[33] See SGA 1979, s 61; *Benjamin's Sale of Goods* (n 6) para 9.003.

Such a solution has the advantage of embracing the special case of section 37(1) and yet going beyond it, for example, to cases where there is a fixed date for delivery. It also has a further advantage, in that it can also help to explain the limits on any take-up duty. Some sale contracts, it is worth remembering, do not contemplate physical delivery. An example, discussed further below, is a sale of specific wine or gold bars held in the hands of some third party X. Here delivery is required, but only in the form of attornment by X;[34] conversely, this must exclude a physical take-up duty on the buyer (though possibly it leaves a duty not actively to refuse to accept X's attornment). Another example is sale and leaseback, where mere agreement between seller and buyer is sufficient to create a relationship of bailee and bailor that is regarded as equivalent to delivery.[35] It is also worth noting that at least one type of contract in regular use specifically ousts the duty to take physical delivery: the 'take-or-pay' contract commonplace in energy sales.[36]

IV. A Take-up Duty: Fault-Based or Strict?

The seller's duty to deliver goods, and to do it on time, is presumptively a strict liability obligation to see to it that the goods are there. Even if he entrusts the job of delivery to a third party, he still remains liable even though he is personally blameless for the latter's acts and omissions.[37] In principle, there is no reason not to apply the same reasoning to the buyer's take-up duty. True, insofar as this duty is based on reasonable cooperation, lack of fault may incidentally excuse the buyer (for instance, if he is not given adequate information about a delivery to enable him to take it up). But exceptional cases like that aside, his duty must be to see to it that the required cooperation is supplied. So, if he fails to collect goods at the stipulated time, he cannot escape liability to compensate the seller by arguing that the van he sent was involved in an unavoidable accident en route. Even if the van is owned by an independent contractor, the result should be the same. A seller agreeing to deliver to a buyer cannot excuse himself on the basis of the failure of a third party to whom he delegates the job; the buyer agreeing to collect from the seller should be in the same position. Only if there is an agreement for an exclusive mode of collection that later becomes impossible should there be any exception – for example, if a given firm of truckers is stipulated in the contract and a drivers' strike prevents it from collecting the goods.[38]

The question of liability for third parties could become particularly important in the case of sub-sales. Imagine a sale of a truck or caterpillar tractor by A to B, with B immediately sub-selling to C before delivery is due and A being happy to deliver direct to C. There is no doubt that such

[34] See SGA 1979, s 29(4): '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 the third person acknowledges to the buyer that he holds the goods on his behalf.'

[35] As in the decision in *Michael Gerson (Leasing)* (n 7). See also the fairly similar Australian case of *Gamer's Motor Centre (Newcastle) Pty Ltd v Natwest Wholesale Australia Pty Ltd* [1987] HCA 30, (1987) 163 CLR 236.

[36] See, eg B Holland, 'Enforceability of Take-or-Pay Provisions in English Law Contracts – Resolved' (2016) 34 *Journal of Energy and Natural Resources Law* 443. Specific discussion of such contracts in English law is largely limited to whether they amount to penalties (eg *M&J Polymers Ltd v Imerys Minerals Ltd* [2008] EWHC 344 (Comm), [2008] 1 Lloyd's Rep 541). That they do not is virtually certain since *Cavendish Square Holdings BV v Makdessi* [2015] UKSC 67, [2016] AC 1172.

[37] Including the case where the third party is his own seller. Thus, each seller in a string commodity contract guarantees to his buyer that delivery will be timeously and duly made, and that the goods have been shipped on time, even though he has no control over the matter. See *Profindo Pte Ltd v Abani Trading Pte Ltd (The MV Athens)* [2013] SGHC 10 [40]; *cf Great Elephant Corp v Trafigura Beheer BV* [2012] EWHC 1745 (Comm), [2013] 1 All ER (Comm) 415 [113] (Teare J) (appeal allowed on other grounds at [2013] EWCA Civ 905, [2013] 2 All ER (Comm) 992).

[38] *cf Nickoll & Knight v Ashton Edridge & Co* [1901] 2 KB 126 (CA) (analogous position as regards seller's duty to deliver: contract frustrated when stipulated ship unavailable).

direct delivery is regarded as amounting to delivery under both contracts: by delivering to C on B's order, A delivers to B, and B is taken to deliver to C through the agency of A.[39] But what happens if C delays in taking delivery, causing A to incur storage costs? C, having no contract with A, cannot be liable for these, but what about B? B might think that once he had paid A and sub-sold to C he was free of responsibility, but he would (it is suggested) be wrong. In actuality, B is in the converse position to that of the seller in a string contract who guarantees proper performance to his buyer: his duty is, it is submitted, not simply to take over the goods, but also to ensure that they are taken over by anyone downstream of him to whom they are delivered at his request. If authority is needed, it can come from the law on express clauses binding on a buyer, such as provisions in a CIF (cost, insurance and freight) contract stipulating the time for unloading the goods and requiring payment of demurrage in default.[40] There is no doubt that such clauses apply just as much against a buyer who has resold, and who thus has no part to play in the discharge process, as to a buyer who actually takes delivery.[41]

V. The Take-up Duty: Its Application to Specific Cases

A. Straightforward Scenarios: Seller Handing Goods Over to Buyer

In simple cases, the take-up duty should raise few difficulties. Insofar as goods are deliverable at the seller's place of business (the default position under section 29(2) of the SGA 1979), the buyer must presumably take steps to collect them at the stipulated time[42] or, in the absence of such a stipulation, on reasonable notice.[43] If a direct handover is arranged for somewhere else, for example in the street, then, again, the buyer must be on hand to take over the goods. If the seller undertakes to deliver to the buyer's premises, either using his own transport or using the services of a firm employed as his agent,[44] it is suggested that the duty will consist in the buyer ensuring that the goods are accepted on arrival, or, where this is not necessary, then at least acquiescing in their being left there and ensuring that it is physically possible to do so (for instance, by unlocking any security gates, or providing the seller with a key or other means of access).

B. Delivery Followed by Later Collection

It may be that goods are to be delivered, not at the buyer's or seller's premises, but at those of a third party intermediary X, with the buyer later collecting them from X. A straightforward commercial example is a contract on DAT[45] terms calling for delivery at, and later pickup from, a container terminal; a more domestic example is a contract requiring delivery of a necklace at a jeweller, or a shotgun at a firearms dealer, for later retrieval.

[39] See *Four Point Garage Ltd v Carter* [1985] 3 All ER 12 (QB) esp 15 (Simon Brown J).
[40] *Benjamin's Sale of Goods* (n 6) para 19.089.
[41] See eg the facts of *Gill & Duffus SA v Rionda Futures Ltd* [1994] 2 Lloyd's Rep 67 (Com Ct).
[42] *cf Demby Hamilton* (n 22) above.
[43] Which would be the case under SGA 1979, s 37(1) anyway.
[44] On which, see the fraud cases of *Galbraith & Grant Ltd v Block* [1922] 2 KB 155 (KB) and *Computer 2000 Distribution Ltd v ICM Computer Solutions plc* [2004] EWCA Civ 1634, [2005] Info TLR 147. In both it was held that sellers to someone with apparent authority at the buyer's premises fulfilled their obligations.
[45] 'Delivery At Terminal': see Incoterms 2010 (available as a booklet: *Incoterms 2010: ICC Rules for the Use of Domestic and International Trade Terms* (ICC, 2010).

At one level, cases of this sort raise essentially the same issue as with delivery to a third party sub-buyer. The seller performs his duty to deliver, in the sense of making a voluntary transfer of possession from one person to another, by handing the goods to intermediary X. It must follow that in such a case the buyer, having delegated the take-up function to X, must for his part see to it that the goods are not left on the seller's hands. However, there is an extra complication. Here the parties contemplate not one step in delivery but two: a handover by the seller to X, then another handover by X to the buyer. It has been suggested that the buyer guarantees a take-up at the first stage, but what about the second? The point may be significant: X, for example, may have insisted that the seller accept liability for storage or security charges pending ultimate collection.

The point is a difficult one. Logically, however, it would seem that the buyer's duty ought presumptively to be limited to the first stage; as regards the second, it is better regarded as a matter between the buyer and X alone. The reasoning runs thus. First, it is clear that section 37(1) – even if otherwise in point – cannot apply here, since the duty it imposes is to take delivery from the seller on demand, and the buyer, through X, has already done precisely this. Secondly, as regards any more general take-up duty, the underlying seller's obligation to deliver has already been satisfied by delivery to X, and the converse buyer's duty has been satisfied by acceptance on X's part.

This solution seems borne out by what authority there is. In the analogous case of goods in a carrier's hands, it seems clear that no duty exists to collect the goods on arrival unless expressly stipulated, even if as a result the seller suffers loss;[46] and there seems no reason why the same should not apply to any other intermediary.

All this, however, leaves a further possibility. What if parties stipulate delivery for later pickup at no one's premises? This is unlikely, but by no means impossible; imagine, for example, an owner of woodland arranging to leave cut logs at the side of the road for the buyer to collect in a truck the next day. Oddly enough, it is suggested that here the buyer is obliged actually to pick up the goods, and will be in breach if he does not. The logic runs like this. The buyer's take-up duty depends on the seller's delivery duty; leaving goods to be collected, in contrast to actually handing them over to an intermediary, is not delivery, since there is no transfer of possession; delivery therefore takes place when, and only when, goods are actually collected;[47] the buyer is therefore bound to collect.[48]

C. Goods Remaining in the Hands of Bailees

What of goods in the hands of bailees such as warehousemen? (We can leave carriers on one side here, since they raise particular problems that are considered separately in the next sub-section). Two situations need to be distinguished.

The first case is where the contract contemplates physical delivery to the buyer by the bailee on the seller's behalf. Here the buyer's duty must be the same as if the seller himself were making the delivery, and we need say no more.

The second case is less easy. What happens where parties contemplate the goods simply remaining passive in the hands of the bailee? Although one might think there could be no take-up

[46] See below, text at section IV.D(ii).

[47] See *Thomas v Times Book Co Ltd* [1966] 1 WLR 911 (Ch) 919 (Plowman J).

[48] Which may matter if, for example, charges are levied by authorities for materials left at the roadside, or questions arise of the liability of the goods owners to third persons.

duty in this situation, this would be an oversimplification. Delivery is, perhaps suprisingly, still required,[49] though in the form of attornment: that is, by the bailee acknowledging that he holds on behalf of the buyer.[50] Some such attornment must be shown,[51] even if in practice it is very readily inferred.[52] However, even here an important point arises: on principle, attornment requires the consent of both bailee and bailor, since a person cannot be made a bailor against his will.[53] It follows that the buyer is not entirely exonerated. But if so, what is his duty? If, as seems likely, assent in attornment cases can be inferred from acquiescence,[54] then the best way to express it is negatively, in the form of a duty not to render ineffectual any attornment on the part of the bailee by positively refusing the attornment.

Even this, however, might not be an adequate solution in all cases. Suppose that under the contract a document such as a warehouse receipt or delivery order had to be tendered by the seller. The handing over of such a document, even if accepted by the buyer, does not amount per se to a making of delivery;[55] there must be some input from the bailee as well.[56] If so, it is suggested that the buyer would be obliged to provide cooperation by at least presenting the document to the bailee with a view to obtaining an attornment from him.

The point, moreover, could matter. Although the seller's contract with the bailee governs the extent of his duty to pay storage charges, and how far this duty survives a change of bailor, it is perfectly conceivable that a late taking over by the buyer, or failure to accept liability for such charges, may prolong the seller's duty and cause loss to the seller. Indeed, the importance of the point goes further. Other duties attach to bailors for reward apart from payment: for example, to take the goods away on request,[57] or to pay for emergency measures to preserve them.[58] These are liabilities the seller will clearly wish to get rid of (or at least have accepted by the buyer as well). Insofar as the buyer fails to take what steps he can to effectuate the substitution, there is scope for substantial liability in damages.

D. Goods in the Hands of Carriers

Where independent carriers intervene between seller and buyer, matters unfortunately get somewhat complex. Here we need to distinguish two cases: (i) those involving bills of lading and

[49] Because of a combination of SGA 1979, s 27 (requiring delivery in all cases) and SGA 1979, s 29(4) (defining delivery as attornment in the case of goods in the hands of a bailee).

[50] SGA 1979, s 29(4).

[51] See *Benjamin's Sale of Goods* (n 6) para 8.013. Not sufficient is eg receipt of a delivery order by the bailee from the buyer without comment (*Laurie & Morewood v Dudin & Sons* [1926] 1 KB 223 (CA)); nor such an order sent by the seller to the buyer alone (*Alicia Hosiery Ltd v Brown Shipley & Co Ltd* [1970] 1 QB 195 (QB)).

[52] 'Very little will suffice to create an attornment': *Laurie & Morewood* (n 51) 237 (Scrutton LJ). See also *Woodley v Coventry* (1863) 2 H&C 164, 159 ER 68 (receipt of order by bailee coupled with intimation that order 'all right' suffices).

[53] See *Sale of Goods and Supply of Services*, Halsbury's Laws of England 91 (London, LexisNexis, 2012) para 261. See also cases such as *Whitehead v Anderson* (1842) 9 M&W 518, 152 ER 219 (no carrier's attornment accepted by buyer for purposes of stoppage in transit); *Bolton v Lancashire & Yorkshire Rly Co* (1865–66) LR 1 CP 431 (refusal of attornment by buyer).

[54] This seems to be the result of *Swanwick v Sothern* (1839) 9 Ad & E 895, 112 ER 1453.

[55] Because in the absence of attornment no document other than a bill of lading can in general transfer legal possession of goods in a third party's hands: see *Inglis v Robertson* [1898] AC 616 (HL); *Mercuria Energy Trading Pte Ltd v Citibank NA* [2015] EWHC 1481 (Comm), [2015] 1 CLC 999.

[56] See *Mercuria Energy* (n 55) (duty to redeliver metal under repo arrangement not satisfied by mere sending of delivery order addressed to warehouseman).

[57] See eg *P&O Nedlloyd* (n 21) (a case of contract, but equally, it is suggested, applicable to bailments).

[58] N Palmer (gen ed), *Palmer on Bailment*, 3rd edn (London, Sweet & Maxwell, 2009) paras 10.47–10.51. See also *China-Pacific SA v Food Corp of India* (*The Winson)* [1982] AC 939 (HL); *ENE Kos 1 Ltd v Petroleo Brasileiro SA (The Kos) (No 2)* [2012] UKSC 17, [2012] 2 AC 164.

other maritime documents of title, in particular CIF and FOB contracts; and (ii) others. I will deal first with the latter – that is, cases involving carriage by a non-sea carrier who is neither employed by, nor contracted to obey exclusively the instructions of, either party.[59]

(i) Carriers Other than Sea Carriers

Typically, this situation involves goods carried by an independent trucker from the seller's premises to the buyer's; but it could equally involve rail, air or inland waterway transport, or any combination thereof. The difficulty here is the same as that already touched on as regards other cases of delivery through an intermediary: the process of delivery is split, in this case between handing to and handover by the independent carrier. At what point, if at all, does the buyer's duty to take over the goods bite?

At first sight, the answer looks obvious: it must be the earlier point of handing to the independent carrier. Under section 32(1) of the SGA 1979, the seller prima facie satisfies his duty to deliver by handing the goods to the carrier; if so, the buyer's correlative obligation to cooperate must arise simultaneously. It is the same as any other nomination of a third party to take delivery. The carrier here is the nominee – indeed, section 32 is traditionally explained on the basis that he acts as the buyer's agent.[60] From this, it must follow that the buyer guarantees take-up by the carrier.

Unfortunately, this reasoning cannot be taken at face value. True, it works where the carrier is engaged by the buyer. But section 32 applies even where the carrier is engaged by the seller himself.[61] There is, to put it mildly, something queer about the idea that if a buyer orders goods and the seller engages and pays a trucker to transport them to him, the buyer should then be liable if the trucker refuses to take them over. It cannot be right.

The explanation, it is suggested, lies in the slightly peculiar nature of section 32(1). Although expressed in terms of delivery, it does not say that delivery to a carrier *is* delivery to the buyer (which it may not be),[62] but merely that in certain cases it may be *deemed* to be. In fact, it is suggested that section 32(1) is concerned with little more than the rules on risk and property: its classic expressions are the rule that, having shipped goods, the seller can recover the price whether or not the buyer ever gets them,[63] and that any inconveniences or expenses arising from events taking place after that time are prima facie for the buyer's account alone.[64] Furthermore, the view that section 32(1) is based on deemed agency, however venerable, is misleading. The carrier may of course be the buyer's agent in fact; indeed, this will be a strong inference if the carrier is appointed and paid by the buyer, and acknowledges no duty to anyone else.[65] But there

[59] If the carrier is merely the agent of either party, the case counts as one of direct delivery: see the fraud cases of *Galbraith & Grant* (n 44); *Computer 2000 Distribution* (n 44).

[60] See *Sale of Goods and Supply of Services* (n 53) para 186. See also cases at common law such as *Vale v Bayle* (1775) 1 Cowp 294, 98 ER 1094; *Dawes v Peck* (1799) 8 TR 330, 101 ER 1417; *Dunlop v Lambert* (1839) 6 Cl & F 600, 620; 7 ER 824, 831 (Lord Cottenham); *Wait v Baker* (1848) 2 Exch 1, 7; 154 ER 380, 383 (Parke B).

[61] See SGA 1979, s 32(1): 'Where … the seller is authorised or required to send the goods to the buyer, delivery of the goods to a carrier (*whether named by the buyer or not*) … is prima facie deemed to be a delivery of the goods to the buyer.'

[62] eg delivery to the buyer destroys the seller's lien: but despite SGA 1979, s 32(1), the seller retains his lien if he delivers to a carrier and retains ownership. See SGA 1979, s 43(1).

[63] An aspect of the rules relating to risk, but sometimes going further: *cf DL Electrical Supplies (Mitcham) Ltd v GL Group Ltd* 1987 SLT (Sh Ct) 36.

[64] To that extent, SGA 1979, s 32(1) is the other side of the coin to s 18, r 5(2) and the prima facie passing of risk at the time of despatch.

[65] The qualification is important. In *Wait v Baker* (n 60) it was held that a sea carrier who acknowledged no authority except that of the seller was not the agent of the buyer; hence, when the buyer refused the cargo, the seller was able to give good title to a third party.

is no need to use agency to explain the section; rather, it simply reflects the fact that a seller who is bound to make delivery to the buyer satisfies his obligation by delivery to the carrier as stipulated; once the seller has made such delivery, he is presumptively under no further liability.[66]

If this is right, then the extent of the buyer's take-up duty in these carriage cases becomes a good deal clearer. The relevant time is indeed the handover to the carrier; but, unlike the case of delivery to a named third party, this is not an instance of delegation. The buyer need merely cooperate in the handover to the carrier insofar as these matters are under his control, for instance by providing any necessary information about where goods are to be sent, and not actively hindering their dispatch. Provided he does this, there is no reason why, in the absence of an actual relationship of agency between him and the carrier, he should bear any further liability.

So much for the buyer's duty at the time of delivery to the carrier. Is there any scope for an additional obligation attaching at the point of arrival? The better view must be against any such duty, for the same reason as in the case of delivery to an intermediary.

(ii) Carriers by Sea

If carriers raise difficulties, they raise more intractable ones in connection with documentary sales on CIF or FOB terms, or for that matter any sales involving multimodal carriage with a large maritime element, where bills of lading are active in the process of documentary transfer. A bill of lading, it has to be remembered, symbolises possession of the goods it represents, and unlike other so-called documents of title, its physical transfer can produce the same legal effects as would have resulted from delivery of the goods themselves.[67]

Because of this, the application of section 32(1) of the SGA 1979 – whereby delivery is presumptively effected by delivery to the carrier – is problematical in such cases. The better view is that in all such cases the presumption contained in it is implicitly rebutted; if the seller cannot perform his obligation to deliver without handing over the bill of lading, it must follow that he does not satisfy it merely by shipping the goods.[68] Instead, the seller's duty to deliver is governed by the common law, and is bifurcated. He must ship the goods as required under the contract[69] (or, more accurately, warrant that they have been so shipped);[70] but he must also complete his performance by delivering the bill of lading.[71] (There is a third stage of delivery, namely final collection by the buyer;[72] but this is not relevant to the seller's duty,[73] since he notoriously

[66] Save for a limited duty not actively to prevent the buyer getting hold of the goods: eg *Empresa Exportadora de Azucar v Industria Azucarera Nacional SA (The Playa Larga and Marble Islands)* [1983] 2 Lloyd's Rep 171 (CA).

[67] '[W]hen the vessel is at sea and the cargo has not yet arrived, the parting with the bill of lading is parting with that which is the symbol of property, and which, for the purpose of conveying a right and interest in the property, is the property itself': *Meyerstein v Barber* (1869–70) LR 4 HL 317, 326 (Lord Hatherley). See also *E Clemens Horst Co v Biddell Bros* [1912] AC 18 (HL) 22–23 (Lord Loreburn).

[68] See eg *Scottish & Newcastle International Ltd v Othon Ghalanos Ltd* [2008] UKHL 11, [2008] 2 All ER 768 [20] (Lord Bingham). There is also another technical point, which is that in contracts CIF and FOB delivery consists in putting goods on board a vessel and not simply handing them over to the carrier: see *Benjamin's Sale of Goods* (n 6) para 8.014.

[69] *Hindley & Co Ltd v East Indian Produce Co Ltd* [1973] 2 Lloyd's Rep 515 (Com Ct) (seller liable to buyer in damages when goods covered by bill of lading never in fact shipped).

[70] As happened in *Kwei Tek Chao (t/a Zung Fu Co) v British Traders & Shippers Ltd* [1954] 2 QB 459 (QB). This is standard in the case of commodity trading, where each intermediate seller guarantees to his buyer the correctness of the date of shipment stated in the bill of lading.

[71] See eg *Hansson v Hamel & Horley Ltd* [1922] 2 AC 36 (HL) (shipment of goods but no proper bill of lading: no proper delivery).

[72] For descriptions of delivery CIF as involving three stages (shipment, documentary transfer and collection), see *E Clemens Horst Co v Biddell Bros* [1911] 1 KB 934 (CA) 955–59 (Kennedy LJ); *Schmoll Fils & Co Inc v Scriven Bros & Co* (1924) 19 Ll L Rep 118 (KB) 119 (Roche J).

[73] *Scottish & Newcastle International Ltd v Othon Ghalanos Ltd* [2006] EWCA Civ 1750, [2007] 1 All ER (Comm) 1027 [43] (Rix LJ).

makes no promise to make the goods available at their destination at any particular time[74] – or, indeed, at all.)[75]

If that is right, then it would seem that in this context the buyer's take-up duty is correspondingly bifurcated: he must do what is necessary to cooperate with the seller at the stages of both shipment and documentary transfer. In practice, however, any such duty is likely to be fairly undemanding. As regards shipment, this can in most cases be effected without any input from the buyer anyway. Moreover, when it comes to take-up of documents, the practical significance is again likely to be low, since refusal to take up a document of title will normally amount to non-acceptance,[76] and its late physical acceptance will in most cases cause the seller no loss. Nevertheless, this will not always be the case. For example, since delivery under a contract FOB is prima facie effected by shipping goods on a ship provided by the buyer,[77] this clearly requires timeous provision of a vessel to load the goods, and where delay in making shipping space available causes the seller loss, this will be recoverable by him.[78] Again, late take-up of shipping documents might cause loss. One example might arise out of an indorsee's statutory liability under a bill of lading based on his having demanded delivery of the goods it represents.[79] This liability disappears if the indorsee subsequently transfers the bill to someone else;[80] in which case, a late take-up could plausibly cause considerable loss to the seller.

It is submitted, however, that the buyer's duty is limited to the stages of shipment and documentary transfer. There is no reason to extend it to collection of the goods from the carrier, since there is no corresponding duty on the seller to deliver at that point. And, indeed, this seems to be the law:[81] if a seller wishes to have an indemnity against demurrage charges or some other provision in the nature of a 'demurrage clause', then he must stipulate for it.[82] It does need to be noted, however, that insofar as the contract expressly incorporates Incoterms, then the buyer is under a duty to collect from the carrier. Even though the seller makes no promises that the goods will arrive, if they do, the buyer is bound to 'receive them from the carrier at the named port of destination'.[83]

VI. Effect of Breach of the Take-up Duty

Assuming there is a free-standing take-up duty implied at common law, clearly any breach of it by the buyer, whether by refusal to take up goods or by delay in doing so, will make him liable to the seller in damages. Indeed, this is likely to be its most important consequence: in most cases, the disappointed seller will simply be claiming extra storage and other expenses incurred by the seller

[74] See eg *Vitol SA v Esso Australia Ltd (The Wise)* [1989] 2 Lloyd's Rep 451 (CA) 454 (Mustill LJ); *ERG Petroli SpA v Vitol SA (The Ballenita and The BP Energy)* [1992] 2 Lloyd's Rep 455 (Com Ct) 464.

[75] See *Manbre Saccharine Co Ltd v Corn Products Co Ltd* [1919] 1 KB 198 (Com Ct) 202 (McCardie J); *Bowden Bros & Co Ltd v Little* [1907] HCA 14, (1907) 4 CLR 1364, 1377 (Griffith CJ).

[76] *Gill & Duffus SA v Berger & Co Inc* [1984] AC 382 (HL). Such non-acceptance will on principle give a right to damages, but more importantly exonerates the seller from any further duty to perform: ibid 391.

[77] See *Benjamin's Sale of Goods* (n 6) paras 8.014, 20.015.

[78] *All Russian Co-op* (n 16) (where, however, the seller failed because he was to blame).

[79] On which, see the Carriage of Goods by Sea Act 1992, s 3(1).

[80] See *Borealis AB v Stargas Ltd* (*The Berge Sisar)* [2001] UKHL 17, [2002] 2 AC 205 [40]–[46] (Lord Hobhouse, with whom all other members of the House agreed).

[81] See C Debattista, 'Laytime and Demurrage Clauses in Contracts of Sale' [2003] *Lloyd's Maritime and Commercial Law Quarterly* 508, 511–12.

[82] See *Benjamin's Sale of Goods* (n 6) para 19.089.

[83] See Incoterms 2010, Rule B4 (stated to be applicable to contracts CIF, FOB, CIP, etc).

as a result of a buyer's failure to take over the goods, together with financing expenses in cases where the price is payable only on the taking of delivery. But what are the other effects of breach?

First, there is no reason why the take-up duty should not be specifically enforceable (assuming the remedy of specific performance is indeed available at the suit of the seller in a sale of goods contract).[84] Damages might well be regarded as an inadequate remedy if, for example, a buyer of scrap metal littering a building site declined to remove it as promised and there was no other person who could carry out a clear-up within a reasonable time. Again, the same might apply where goods were otherwise difficult to dispose of, as, for example, in the case of slightly hazardous waste. In *P&O Nedlloyd BV v Arab Metals Co (No 2)*,[85] a carrier was left with a mildly but inconveniently radioactive cargo whose owner wrongfully declined to collect it: the court regarded as distinctly arguable a claim for a specific order telling the owner to do so. By analogy, it is suggested that the same result might well follow in the case of a contract of sale.

Secondly, what might be the effect of breach of the buyer's take-up duty on the seller's own obligations? One point is obvious. Just as under section 28 of the SGA 1979 the duty to deliver is suspended unless and until the buyer is ready to pay the price, clearly the same thing must go for delivery and take-up: unless the buyer is ready and willing to take the goods over, he cannot complain of failure to deliver or to make the goods ready on time.

More important, however, is the question whether the seller faced with breach can go further and actually terminate the contract. In other words, assuming there is a presumptive take-up duty, what is its status on the condition/warranty/innominate term scale?[86]

Classification as a condition can be swiftly ruled out.[87] It would be curious, for example, if a refusal to take delivery of part of goods sold, accompanied by a willingness to pay for the whole, was automatically regarded as a repudiatory matter going to the root of the contract and allowing the seller in response to refuse to supply any goods at all. Indeed, there is clear authority that this is true of failure to *accept* part of the subject matter of a contract of sale,[88] and if this is true of failure to accept the goods, it must a fortiori be true of a failure to take physical delivery of them. So too with late take-up. It would be equally odd if the seller of a high-value car or truck, although paid, was entitled to return the money and cancel the sale on the simple basis that the buyer had wrongfully delayed collecting the goods for a few days.[89]

If we are left with a choice between a warranty and an innominate term, at first sight it might be thought difficult to justify anything more than a warranty. Cases are two-a-penny where refusal by a buyer to take and pay for goods has been held to be a breach justifying the seller in withdrawing from the contract. But these are really instances of repudiatory non-acceptance, which is something different. The same goes for the special case of section 48(3) of the SGA 1979, allowing

[84] See n 9 above.

[85] *P&O Nedlloyd* (n 21) (contract to take delivery of mildly but inconveniently radioactive cargo: no strikeout of specific performance claim). This case involved a claim by a carrier against a consignee, but its reasoning applies equally to a seller and buyer.

[86] The point is explicitly left open in cases where SGA 1979, s 37 applies: see s 37(2) ('Nothing in this section affects the rights of the seller where the neglect or refusal of the buyer to take delivery amounts to a repudiation of the contract'). See also *Francis v Lyon* [1907] HCA 12, (1907) 4 CLR 1023, 1034 (Griffith CJ).

[87] It is true that in commercial contracts the time of delivery is readily regarded as a condition (eg *Macpherson Train & Co Ltd v Howard Ross & Co Ltd* [1955] 1 WLR 640 (QB)). But the analogy with collection is not close. In the nature of commerce, the obtaining of goods is likely to be more important to a buyer than the getting rid of them is to the seller.

[88] See *Warinco AG v Samor SpA* [1977] 2 Lloyd's Rep 582 (Com Ct) 588 (Donaldson J) (reversed on other grounds, [1979] 1 Lloyd's Rep 450 (CA)). See also the careful discussion in the Australian decision in *Francis v Lyon* (n 86) 1033–37 (Griffith CJ); *Benjamin's Sale of Goods* (n 6) para 9.010.

[89] *cf* SGA 1979, s 10(2), stating that the status of stipulations as to time depends on the parties' intention; the sub-section draws no distinction between sellers' and buyers' obligations.

an unpaid seller to resell and cancel the contract if the buyer fails to come up with the money on reasonable notice;[90] failure not only to take up goods but also to pay for them will almost invariably be repudiatory. Where the only complaint by the seller is tardiness in collection, or refusal to take goods coupled with an expressed willingness to pay the price, this is much less likely to amount to a failure of the 'substance and foundation of the adventure',[91] such that damages would not amply vindicate the seller's interests.

Less likely indeed, but not impossible. Take, for example, the facts of *Penarth Dock Engineering Co v Pounds*.[92] Although the emphasis in that decision was on the measure of damages, the background to the case was, as the defendant well knew, that the claimants had sold him the pontoon with a view to getting rid of it quickly and thus allowing redevelopment of the site. In such a situation, it is entirely plausible to say that serious foot-dragging by the buyer would indeed deprive the seller of a major part of the consideration it had bargained for, and would justify the seller in finding someone else prepared to remove the offending dock instantly, returning the original buyer's money and closing with the new buyer there and then. It is not hard to think of other examples. One such might be a dealer in fashion items who sells last year's contents at a knock-down price in order to clear space in a very cramped warehouse for the new season: if the buyer fails to take the goods away, even after having paid, there is no reason why the seller should not return the price and sell to someone else.

If so, the obvious solution is to classify the obligation to take delivery as an innominate term. In the same way as failure to deliver on time may be, or may become, repudiatory depending on the parties' intentions, the same should go for failure to collect: insofar as circumstances show that this deprived the seller of a substantial part of the consideration he had contracted for, the failure to collect should allow the seller to cancel the contract.

VII. Conclusion

The conclusions of this chapter can be simply stated. Quite apart from the specific provision contained in section 37(1) of the SGA 1979, a buyer of goods presumptively owes a general duty in English law to take over physical possession of the goods. This duty, which exists in addition to the duty to accept the goods, arises at common law and is based on the implied duty of cooperation. It is closely tied to the seller's duty to make delivery, and obliges the buyer to do everything necessary to allow the seller to perform that duty.

Where goods are to be conveyed from seller to buyer by independent carrier, the duty applies at the time of dispatch, and in the case of contracts involving transfer of a bill of lading, also at the time of the transfer of documents; however, there is no presumptive duty to collect the goods physically on arrival in the absence of specific provision.

As regards status, the take-up duty is best regarded as an innominate term of the sale contract. In practice, most breaches of it are unlikely to be repudiatory. Nevertheless, in some cases, the seller may indeed be entitled to escape from his own obligations where the buyer refuses to have anything to do with collecting what he has bought.

[90] That such a resale cancels the contract on the basis that notice has made time of the essence is clear from *RV Ward Ltd v Bignall* [1967] 1 QB 534 (CA).

[91] Lord Esher's phrase in *Bentsen v Taylor, Sons & Co (No 2)* [1893] 2 QB 274 (CA) 281.

[92] *Penarth Dock* (n 18).