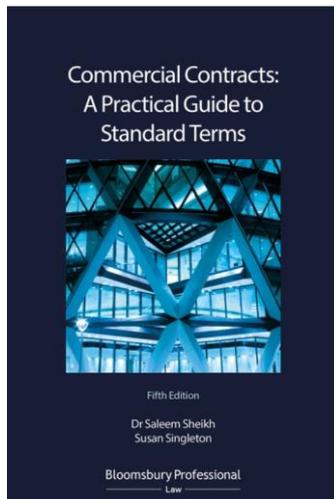


# Commercial Contracts: A Practical Guide to Standard Terms

Saleem Sheikh and Susan Singleton

ISBN: 9781526508331



## Sample Chapter - Section B:

### Business-to-Business Contracts

B1:

### Terms and Conditions for the Sale and Supply of Goods

#### At a glance

##### B1.1

- A contract for the sale of goods means a contract where property in those goods passes or transfers from one party to another for a consideration.
- Generally speaking, no formalities are required for a contract of sale of goods.
- Statute implies obligations as to title into contracts for the sale of goods.
- Statute also implies a requirement that goods must conform to their contract description.
- Statute further requires that goods supplied must be of a particular quality and capacity and fit for their purpose.

- The obligations as to description and quality are strict, meaning that blame or intention is irrelevant to the question of a breach.
- There are obligations incurred by the seller when the sale is a sale by sample.
- Exclusions are permitted from the obligations as to quality and capacity in certain well-defined circumstances.
- Apart from the above, statute places severe control on the use of exclusion or limitation clauses and addresses the fairness of such clauses.
- Exclusion clauses can be subject to a reasonableness test.
- There are statutory provisions as to when property and risk is to pass.
- These statutory provisions are, however, subject to the terms of the contract.
- It is a general rule that a person who has no title cannot himself pass a valid title, but there are exceptions to this rule.
- Prompt payment is not generally of the essence of the contract, although this is subject to the terms of the contract.
- Late payment can incur statutory interest.
- Duties are imposed on a seller as to delivery, and as to delivery of the right quantity of goods.
- A buyer has rights as to the examination of the goods, but these are subject to the terms of the contract.
- Acceptance of the contract goods carries with it the loss of the right to reject by the buyer.
- Acceptance is defined by law.
- An unpaid seller of goods has certain rights, such as a right to a lien and a right to stop the goods in transit.
- Such a seller also has rights of resale and to damages.
- Provision is also made for the seller to sue for the actual price.
- Statute also provides for the rights of the buyer, notably with regard to specific performance and damages.

## General

### B1.2

Many aspects of contract of sale and of purchase of goods are determined by the *Sale of Goods Act 1979 (SGA 1979)*. Contracts of supply other than sale are dealt with in like terms to the *Sale of Goods Act* by the *Supply of Goods (Implied Terms) Act 1973* – which deals with hire-purchase – and the *Supply of Goods and Services Act 1982* – all other contracts of supply and contracts for the provision of services. These enactments are limited to business-to-business contracts. In the case of consumer contracts, corresponding provisions are contained in the *Consumer Rights Act 2015*. In many ways, the distinction between a contract of sale and other contracts is academic in that legislation such as the *Supply of Goods (Implied Terms) Act 1973* and the *Supply of Goods and Services Act 1982* and the *Consumer Rights Act 2015*, imply terms into the contract identical in most respects to those implied by the *SGA 1979*.

#### **Case Example: *Cheeld v Alliot* [2013] EWCA Civ 508**

By an oral contract, X had engaged C to construct and install a metal porch at the front of their property at a cost of £6,500. X paid a deposit of £2,000. After the porch was installed, X sought to reject it. They did not pay C and he issued proceedings in the small claims court seeking to recover £4,250, a slight reduction on the contract price as the porch's installation had not been completed. X counterclaimed, seeking the return of their deposit. The deputy district judge accepted X's evidence that they were unhappy with the porch after its installation and had said to C that it might look better if it was painted. That painting work was carried out by a third party, but X remained dissatisfied with it. The deputy district judge found that there was a lack of symmetry in the frame of the porch and lack of

finish and that C was in breach of contract since X had expected and was entitled to expect goods of the highest quality in an ornamental feature at the front of their home. However, she concluded that the defective workmanship amounted to a breach of warranty rather than a breach of condition entitling X to reject it. The deputy district judge ordered X to pay C £2,000, a reduction on the £4,250 claimed to take account of the cost of remedying the defective workmanship. X appealed on the basis that the deputy district judge had wrongly held there was no breach of condition, and that the reduction of £2,250 was an arbitrary figure. The circuit judge allowed the appeal to the extent that he found no proper basis for assessing the cost of remedying the defects as £2,250, and he ordered the parties to file evidence in that respect. He rejected X's contention that C had breached a condition of the contract.

X contended that a further hearing in the small claims court was unnecessary and disproportionate and that the circuit judge should have held that there was a breach of condition, or left that issue open. They submitted that the monetary value of the defects arrived at by the deputy district judge as one-third of the contract's value indicated a breach of condition rather than a breach of warranty, and that by the *Sale of Goods Act 1979 s 14(2) and (6)*, 'satisfactory quality' was a condition entitling them to reject the defective porch and succeed on their counterclaim. C contended that the contract was not one for the sale of goods but a supply of skill and labour under the *Supply of Goods and Services Act 1982*. He asserted that since the finding of a breach of warranty was not perverse, the instant court should not interfere with it, and that X had, in any event, lost their right to reject by having the porch painted and affirming the contract.

The Court of Appeal held that the circuit judge should not have requested further evidence on the defective workmanship issue. The matter was to have been determined informally by the small claims procedure without expert evidence. The deputy district judge and the circuit judge had erred by failing to treat the defects found as a breach of condition. Not every defect in goods would amount to a breach of condition: it was a question of degree. Minor matters would amount to a breach of warranty, with a remedy in damages. Nothing turned on whether the contract fell under the 1979 or the 1982 Act: whichever Act applied, the nature of the defects, the cost of rectification, the practicalities of rectification and X's contractual expectation of work of the highest quality led to the clear conclusion that there had been a breach of a condition under s 14(6) of the 1979 Act or s 4(2) of the 1982 Act.

## *Definition of 'sale'*

### **B1.3**

*Section 2(1) of the SGA 1979* defines a 'sale' as a contract by which the seller 'transfers or agrees to transfer the property in goods to the buyer for a money consideration ...' This definition excludes contracts of hire purchase, contracts of hire, contracts for the supply of goods and services, and barter or exchange which are, respectively, covered by the 1973 and 1982 Acts.

### **Case Example: *Southwark London Borough Council v IBM UK Ltd [2011] EWHC 549***

The Borough had contracted with IBM for the provision of third-party software and associated consultancy services for the implementation of a 'master data management' system to rationalise information recorded on a number of the Borough's computer systems. The software was to be provided under licence from the manufacturer. A question arose as to whether this constituted a contract of sale. The court held that it did not. The contract specifically stipulated that 'title, copyright and all other proprietary rights in the software' remained vested in the manufacturer. Further, the termination provision required the Borough to return to the manufacturer or destroy all copies, forms and parts of the software covered by the licence, intimating that property remained vested in the manufacturer.

## *Formalities*

### **B1.4**

There are no formalities attached to a contract of sale, nor requirements as to copies. A contract can be made in any form (entirely oral, entirely written, or a combination). In commercial contracts, of course, a written agreement is, for practical purposes, essential and necessary to ascertain what the parties have agreed and to ensure that all key terms have been agreed before entering into a contractual relationship.

## *Implied terms as to title*

### **B1.5**

The following sections set out implied terms as to title in a business-to-business contract.

## **Conditions**

### **B1.6**

In a contract of sale, *section 12, SGA 1979* states that there is an implied condition that the seller has the right to sell the goods. A 'condition' is a major term of the contract which means that, on breach, the buyer can rescind the contract and claim damages (*Wallis, Son and Wells v Pratt and Haynes* [1910] 2 KB 1003). There are corresponding provisions in the 1973 and 1982 Acts.

## **Warranties**

### **B1.7**

The *Sale of Goods Act 1979* and the 1973 and 1982 Acts also imply warranties as to title. A 'warranty' can be regarded as a minor term of the contract, breach of which entitles the buyer to claim damages, but the contract remains valid and cannot be rescinded. The implied warranties are that:

- the goods are free from any charge or encumbrance not disclosed or known to the buyer when the contract is made; and
- the buyer will enjoy quiet possession of the goods except so far as it may be disturbed by the owner or other person entitled to the benefit of any charge or encumbrance so disclosed or known.

In many cases, the implied warranties will overlap with the implied condition.

### **Case Example: *Azzurri Communications Ltd v International Telecommunications Equipment Ltd* [2013] EWPC 17**

In 2010, C had entered into a major contract to supply a motoring association with large numbers of telephone handsets for its call centres. The contract was for specified handsets in respect of which the manufacturer (V) had registered trade marks. C acquired some of the handsets from the defendant supplier (S). C installed the handsets, but it emerged that those supplied by S were faulty. C approached V, which began to investigate the problem. However, V discovered a mismatch of the serial numbers and realised that the handsets were either refurbished or counterfeit. It emailed C, indicating that it refused to support the products in any way. C then approached S, which offered to carry out a warranty repair and asked for sample telephones for testing. Instead, C replaced all the handsets supplied by S with replacement handsets from an authorised distributor. V's solicitors wrote a letter before action to C, alleging that it had infringed V's trade marks. C settled any claim which V had against it and complied with V's request that it should deliver up the offending handsets to V. S admitted that it had infringed V's trade marks by selling the handsets to C.

It was held that the principal loss to C, caused by the breach of the implied terms in s 12(1) and s 12(2) of the Act, that the seller had a right to sell and that the buyer would enjoy quiet possession of the goods, was the cost of buying replacement telephones. Because C had delivered up the stock of handsets to V, that was the full cost and not just the difference between the total sum paid for the replacement handsets and the price paid to S. C was entitled to the sum paid for replacement telephones as damages for breach of either or both of the s 12(1) and s 12(2) terms.

### **Case Example: *Mason v Burningham* [1949] 2 KB 545**

The purchaser of a stolen typewriter was entitled to recover the cost of repairs for breach of the warranty as to quiet possession, when he could equally have succeeded in an action for breach of the implied condition.

At the same time, it is possible for there to be breaches of the warranties in circumstances when there would be no breach of condition.

### **Case Example: *Microbeads AG v Vinhurst Road Markings Ltd* [1975] 1 All ER 529**

This involved the sale of a product over which a third party had a patent and who could, therefore, seek delivery of the patented product.

**Case Example: *Rubicon Computer Systems Ltd v United Paints Ltd (2000) 2 TCLR 453***

A computer was installed with a time-lock device, which rendered the computer unusable, this being held to infringe the warranty of quiet possession.

It can be seen from the above cases that there can be a breach of the implied warranties without there being a breach of the implied condition as to the right to sell.

## Limited title

### B1.8

In those circumstances where it is to be inferred that the seller is transferring only such title as he or a third person may have, none of the foregoing implied conditions or warranties apply. Instead, there is an implied warranty that all charges and encumbrances known to the seller were disclosed to the buyer prior to the making of the contract, and an implied warranty that none of the following will disturb the buyer's quiet possession:

- the seller;
- the third party (in those cases where the seller is to transfer only such title as a third party might have); and
- anyone claiming through or under the seller or third party, except in relation to a charge of encumbrance disclosed or known to the buyer before the contract was made.

## *Implied terms as to description*

### B1.9

*Section 13, SGA 1979* implies a condition into contracts of sale by description that the goods will correspond with the description given. Corresponding provisions are found in the 1973 and 1982 Acts.

A contract is a sale by description when 'even though the buyer is buying something displayed before him on the counter; a thing is sold by description, though it is specific, so long as it is sold not merely as a specific thing but as a thing corresponding to a description' (*Grant v Australian Knitting Mills* [1936] AC 85 at 100).

A sale will, therefore, not be by description if the buyer makes it clear that he is buying a particular thing because of its own unique qualities and that no other will do. Nor will a sale be by description if it was not within the contemplation of the parties that the buyer will be relying on the description (*Harlingdon & Leinster Enterprises Ltd v Christopher Hull Fine Arts Ltd* [1991] 1 QB 564).

## Close conformity to description required

### B1.10

Any variation from the agreed description will cause an infringement.

**Case Example: *Arcos Ltd v Ronaasen and Son* [1933] AC 470**

A contract was for the supply of a quantity of staves for use in making cement barrels, and it stated that the staves were to be half an inch thick. A breach of the implied term arose when only 5% conformed to the description, even though all the staves remained fit for their intended use.

See too *Wilensko Slaski Towarzystwo Drewno v Fenwick & Co Ltd* [1938] 3 All ER 429.

**Case Example: *Hazlewood Grocery Ltd v Lion Foods Ltd* [2007] EWHC 1887**

The written contract between the parties provided that the food was to be free from foreign and extraneous matter. The chilli powder provided was contaminated by an industrial dye. Citing the *Arcos* case, the court said that the words 'free from' meant what they said: absolutely free from.

Microscopic variations will, however, be disregarded on the *de minimis* principle. This requires the courts to disregard anything which can be fairly regarded as too small or insignificant to be worthy of notice.

**Case Example: *Shipton Anderson & Co Ltd v Weil Bros & Co Ltd* [1912] 1 KB 574**

The sellers contracted to sell 4,500 tons of wheat, plus or minus 10%. In fact, the sellers delivered 4,950 tons 55lbs, but the sellers did not seek payment for the 55lbs. It was held that the excess was so slight that the *de minimis* rule applied.

**Case Example: *Moralice (London) Ltd v E, D & F Man* [1954] 2 Lloyd's Rep 526**

It was said that, where the price is payable by means of a documentary credit against shipping documents, the *de minimis* principle had no application as between seller and bank. The shipping documents were to comply strictly with the requirements of the letter of credit.

It should be noted that s 15A of SGA 1979 provides that, where a breach is so slight that it would be unreasonable to allow rejection, then only damages can be claimed because the breach is not treated as a breach of condition but as a breach of warranty. This is subject to the terms of the contract or unless a contrary intention appears in or to be implied from the contract, and it is for the seller to show that s 15A applies to the case in hand.

## **Breadth of 'description'**

### **B1.11**

The description can include the way in which goods are packed.

**Case Example: *Re Moore & Co and Landauer & Co's Arbitration* [1921] 2 KB 519**

It was held that packing tins in cases of 24, when the contract specified 30, infringed the implied condition even though the correct number of tins had been packed.

**Case Example: *Albright & Wilson UK Ltd v Biachem* [2001] 2 All ER (Comm) 537**

It was held that, where a buyer contracted with different sellers for the supply of different chemicals, but delivery was to be by the same firm, there was a breach of the implied term as to description where one supply of chemicals was accompanied by a delivery note referring to the other supply.

## **Strict liability**

### **B1.12**

There is a breach of s 13, SGA 1979, regardless of any element of blame and therefore one of strict liability. An infringement arises if the goods do not conform to the contract description, whether or not the breach was innocent or inadvertent.

# Checklist

## B1.62

- Are you sure that the contract is one for sale (ie one where property in the goods is to pass for a money consideration)?
- Have you considered if this is one of the rare cases where the contract does require certain formalities?
- Are you certain that, as a seller, you can comply with the obligations as to title which are imposed on you; or have you considered the possibility of providing only a limited title?
- Are you satisfied that you will have no problems in meeting the statutory implied duties as to description, quality and fitness for purpose?
- Have you considered if the buyer might lose his rights in relation to fitness and quality by, for example, prior examination of the goods, or absence of reliance on the seller?
- Have you considered the possible use and effectiveness of any exclusion or limitation clauses and, in particular, whether any such clause is reasonable or fair and whether they have been fairly brought to the attention of the other party?
- Have you considered whether you should make special provision as to the passing of property and risk, or are you content to rely on the statutory provisions?
- When considering a special term as to passing of risk, have you first asked if the buyer is not buying in the course of a business?
- Are you aware of the exceptions to the basic rule that a person who has no valid title cannot himself pass a valid title?
- What provision has been made in the contract as to prompt payment? Are you aware that statutory interest may become payable?
- Are you aware of the duties relating to delivery of the goods and the position arising on delivery of too much or too little?
- Is provision made in the contract for a specific right to examine the goods?
- Are you aware of what constitutes acceptance of goods and of the consequences, in terms of remedies, of acceptance?
- Are you aware of the rights and duties of the parties in the event of rejection?
- Have you considered including a clause preventing a buyer from exercising a right to reject only some of the goods?
- Are you fully aware of the rights and remedies available to either party in the event of breach?
- Have you taken care to secure your rights to special damages by acquainting the other side, before the contract was made, of all the relevant circumstances and of any special factors which might give rise to loss?
- Ensure that all terms and conditions have been incorporated in the agreement and that any unusual or onerous terms have been brought to the attention of the buyer.

For further information or to buy the book:  
[www.bloomsburyprofessional.com/comm-contracts](http://www.bloomsburyprofessional.com/comm-contracts)