



Tuvalu

SALE OF GOODS ACT

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Tuvalu

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Tuvalu

SALE OF GOODS ACT

AN ACT FOR CODIFYING THE LAW RELATING TO THE SALE OF GOODS AND CONSOLIDATING WITH ITS PROVISIONS RELATING TO MERCANTILE AGENTS¹

Commencement [1st February 1992²]

PART I - PRELIMINARY

1 Short title

This Act may be cited as the Sale of Goods Act.

2 Interpretation of Parts (I) to (VII)

(1) For the purposes of Parts I to VII, unless the context otherwise requires, the expression —

“**action**” includes counter-claim and set-off;

“**buyer**” means a person who buys or agrees to buy goods;

“**contract of sale**” includes an agreement to sell as well as a sale;

“**delivery**” means voluntary transfer of possession from one person to another;

“**document of title to goods**” includes any bill of lading, dock warrant, warehousekeeper'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 authorising or purporting to authorise, either by endorsement or delivery, the possessor of the document to transfer or receive goods thereby represented;

“**fault**” means wrongful act or default;

“**future goods**” means goods to be manufactured or acquired by the seller after the making of the contract of sale;

“**goods**” includes —

- (a) all chattels personal other than things in action and money;
- (b) emblements, industrial growing crops and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale;

“**mercantile agent**” means a mercantile agent having in the customary course of his business as such agent authority 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;

“**plaintiff**” includes a defendant counterclaiming;

“**property**” means the general property in goods and not merely a special property;

“**quality of goods**” includes their state or condition;

“**sale**” includes a bargain and sale as well as a sale and delivery;

“**seller**” means a person who sells or agrees to sell goods;

“**specific goods**” means goods identified and agreed upon at the time a contract of sale is made;

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

- (2) For the purposes of Parts I to VII —
 - (a) a thing is deemed to be done in good faith when it is in fact done honestly, whether it be done negligently or not;
 - (b) a person is deemed to be insolvent who either has ceased to pay his debts in the ordinary course of business or cannot pay his debts as they become due;
 - (c) goods are in a deliverable state when they are in such a state that the buyer would under the contract be bound to take delivery of them.

PART II - FORMATION OF THE CONTRACT

CONTRACT OF SALE

3 Sale and agreement to sell

- (1) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price.

- (2) There may be a contract of sale between one part owner and another.
- (3) A contract of sale may be absolute or conditional.
- (4) Where under a contract of sale the property in the goods is transferred from the seller to the buyer, the contract is called a sale.
- (5) Where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled the contract is called an agreement to sell.
- (6) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred.

4 Capacity to buy and sell

- (1) Capacity to buy and sell is regulated by the general law concerning capacity to contract and to transfer and acquire property.
- (2) Where necessaries are sold and delivered to an infant or to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price therefor.
- (3) The expression “necessaries” in this section means goods suitable to the condition in life of the infant or other person mentioned in subsection (2) and to his actual requirements at the time of the sale and delivery.

FORMALITIES OF THE CONTRACT

5 Contract of sale, how made

- (1) Subject to this Act and to any other enactment, a contract of sale may be —
 - (a) made in writing (either with or without seal), or by word of mouth, or partly in writing and partly by word of mouth; or
 - (b) implied from the conduct of the parties.
- (2) Nothing in this section affects the law relating to corporations.

SUBJECT MATTER OF CONTRACT

6 Existing or future goods

- (1) The goods which form the subject of a contract of sale may be either existing goods, owned or possessed by the seller, or goods to be manufactured or acquired by the seller after the making of the contract of sale, in this Act called “future goods”.
- (2) There may be a contract for the sale of goods, the acquisition of which by the seller depends upon a contingency which may or not happen.
- (3) Where by a contract of sale the seller purports to effect a present sale of future goods, the contract operates as an agreement to sell the goods.

7 Goods which have perished

Where there is a contract for the sale of specific goods and the goods, without the knowledge of the seller have perished at the time when the contract is made, the contract is void.

8 Goods perishing before sale but after agreement to sell

Where there is an agreement to sell specific goods and subsequently the goods, without any fault on the part of the seller or buyer, perish before the risk passes to the buyer, the agreement is thereby avoided.

THE PRICE

9 Ascertainment of price

- (1) The price in a contract of sale may —
 - (a) be fixed by the contract;
 - (b) be left to be fixed in a manner agreed by the contract; or
 - (c) be determined by the course of dealing between the parties.
- (2) Where the price is not determined in accordance with subsection (1) the buyer must pay a reasonable price.
- (3) What is a reasonable price is a question of fact; dependent on the circumstances of each particular case.

10 Agreement to sell at valuation

- (1) Where there is an agreement to sell goods on the terms that the price is to be fixed by the valuation of a third party and that third party cannot or does not make such a valuation, the agreement is avoided; but if the goods or any part thereof have been delivered to and appropriated by the buyer, he must pay a reasonable price therefor.
- (2) Where the third party is prevented from making the valuation by the fault of the seller or buyer, the party not in fault may maintain an action for damages against the party in fault.

CONDITIONS AND WARRANTIES

11 Stipulation as to time of payments

- (1) Unless a different intention appears from the terms of the contract, stipulations as to time of payment are not deemed to be of the essence of the contract of sale.
- (2) Whether any other stipulation as to time is of the essence of the contract or not depends on the terms of the contract.

- (3) In a contract of sale, the expression “month” means *prima facie* calendar month.

12 When conditions to be treated as warranty

- (1) Where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may —
- (a) waive the condition; or
 - (b) elect to treat the breach of such condition as a breach of warranty and not as a ground for treating the contract as repudiated.
- (2) Whether a stipulation in a contract of sale is —
- (a) a condition, the breach of which may give rise to a right to treat the contract as repudiated; or
 - (b) a warranty, the breach of which may give rise to a claim for damages but not a right to reject the goods and treat the contract as repudiated,
- depends in each case on the construction of the contract; but a stipulation may be a condition, though called a warranty in the contract.
- (3) Where —
- (a) a contract of sale is not severable and the buyer has accepted the goods, or part thereof; or
 - (b) the contract is for specific goods, the property in which has passed to the buyer,
- the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty, and not as a ground for rejecting the goods and treating the contract as repudiated, unless there be a term of the contract, express or implied, to that effect.
- (4) Nothing in this section affects the case of any condition or warranty, fulfilment of which is excused by law by reason of impossibility or otherwise.

13 Implied undertaking as to title etc.

In a contract of sale, unless the circumstances of the contract are such as to show a different intention, there is —

- (a) an implied condition on the part of the seller that —
 - (i) in the case of a sale, he has a right to sell the goods; and
 - (ii) in the case of an agreement to sell, he will have a right to sell the goods at the time when the property is to pass;
- (b) an implied warranty that the buyer will have and enjoy quiet possession of the goods;

- (c) an implied warranty that the goods will be free from any charge or incumbrance in favour of any third party, not declared or known to the buyer before or at the time when the contract is made.

14 Sale by description

- (1) Where there is a contract for the sale of goods by description, there is an implied condition that the goods will correspond with the description.
- (2) If the sale is by sample, as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.

15 Implied conditions as to quality or fitness

Subject to this Act and to any other enactment, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows —

- (a) where —
 - (i) the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment; and
 - (ii) the goods are of a description which it is in the course of the seller's business to supply (whether he is the manufacturer or not),

there is an implied condition that the goods shall be reasonably fit for such purpose; but in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose;

- (b) where goods are bought by description from a seller who deals in goods of that description (whether he is the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality; but if the buyer has examined the goods, there is no implied condition as regards defects which such examination ought to have revealed;
- (c) an implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade;
- (d) an express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith.

SALE BY SAMPLE

16 Sales by sample

- (1) A contract of sale is a contract for sale by sample where there is a term in the contract, express or implied, to that effect.

- (2) In the case of a contract for sale by sample —
- (a) there is an implied condition that the bulk shall correspond with the sample in quality;
 - (b) there is an implied condition that the buyer will have a reasonable opportunity of comparing the bulk with the sample;
 - (c) there is an implied condition that the goods will be free from any defect rendering them unmerchantable, which would not be apparent on reasonable examination of the sample.

PART III - EFFECTS OF THE CONTRACT

TRANSFER OF PROPERTY AS BETWEEN SELLER AND BUYER

17 Goods must be ascertained

Where there is a contract for the sale of unascertained goods, no property in the goods is transferred to the buyer unless and until the goods are ascertained.

18 Property passes when intended to pass

- (1) Where there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.
- (2) For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case.

19 Rules for ascertaining intention

Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer.

Rule 1. - Where there is an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed.

Rule 2. - Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state, the property does not pass until that thing is done, and the buyer has notice thereof.

Rule 3. - Where there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test or, do some other act or thing

with reference to the goods for the purpose of ascertaining the price, the property does not pass until that act or thing is done, and the buyer has notice thereof.

Rule 4. - When goods are delivered to the buyer on approval or “on sale or return” or other similar terms, the property therein passes to the buyer —

- (a) when he signifies his approval or acceptance to the seller or does any other act adopting the transaction;
- (b) if he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time, and if no time has been fixed, on the expiration of a reasonable time. What is a reasonable time is a question of fact.

Rule 5. –

- (1) Where there is a contract for the sale of unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer; and such assent may be express or implied and may be given either before or after the appropriation is made.
- (2) Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to the buyer and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract.

20 Reservation of right of disposal

- (1) Where there is a contract for the sale of specific goods or where goods are subsequently appropriated to the contract, the seller shall, by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled, and in such case, notwithstanding the delivery of the goods to the buyer or to a carrier or other bailee for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled.
- (2) Where goods are shipped and by the bill of lading the goods are deliverable to the order of the seller or his agent, the seller is *prima facie* deemed to reserve the right of disposal.
- (3) Where the seller of goods draws on the buyer for the price and transmits the bill of exchange and bill of lading to the buyer together to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honour the bill of exchange and if he wrongfully retains the bill of lading, the property in the goods does not pass to him.

21 Risk *prima facie* passes with the property

- (1) Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer, the goods are at the buyer's risk whether delivery has been made or not.
- (2) Where delivery has been delayed through the fault of either buyer or seller, the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault.
- (3) Nothing in this section affects the duties or liabilities of either seller or buyer as a bailee of the goods of the other party.

TRANSFER OF TITLE**22 Sale by person not the owner**

- (1) Subject to this Act, where goods are sold by a person who is not the owner thereof and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell.
- (2) Nothing in this Act affects —
 - (a) the provisions of any enactment enabling the apparent owner of goods to dispose of them as if he were the true owner thereof; and
 - (b) the validity of any contract of sale under any special common law or statutory power of sale or under the order of a court without notice of the seller's defect of title.

23 Open Market

Where goods are sold in open market, according to the usage of the market, the buyer acquires a good title to the goods provided he buys them in good faith and without notice of any defect or want of title on the part of the seller.

24 Sale under voidable title

When the seller of goods has a voidable title thereto but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of the seller's defect of title.

25 Seller in possession after sale etc.

Where a person, having sold goods, continues or is in possession of the goods, or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge or other disposition thereof, or under any agreement for sale, pledge or other

disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, has the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same.

26 Buyer in possession after sale

Where a person, having bought or agreed to buy goods, obtains with the consent of the seller possession of the goods or the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge or other disposition thereof, or under any agreement for sale, pledge or other 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, has 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.

27 Effects of writs of execution

- (1) A writ of *fiери facias* or other writ of execution against goods shall bind the property in the goods of the execution debtor as from the time when the writ is delivered to the Sheriff to be executed; and, for the better manifestation of such time, it shall be the duty of the Sheriff, without fee, upon the receipt of any such writ, to endorse upon the back thereof the hour, day, month and year when he received it.
- (2) No writ of execution shall prejudice the title to the goods of the execution debtor acquired by any person in good faith and for valuable consideration, unless that person had at the time when he acquired his title notice that the writ, or any other writ by virtue of which the goods of the execution debtor might be seized or attached, had been delivered to and remained unexecuted in the hands of the Sheriff.
- (3) For the purposes of this section, the expression “Sheriff” includes any officer charged with the enforcement of a writ of execution.

PART IV - PERFORMANCE OF THE CONTRACT

28 Duties of seller and buyer

- (1) 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.
- (2) 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.

29 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; but 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.
- (2) Where a 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.
- (3) 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.
- (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 such third person acknowledges to the buyer that he holds the goods on his behalf.
- (5) Nothing in this section affects the operation of the issue or transfer of any document of title to goods.
- (6) 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.
- (7) Unless otherwise agreed, the expenses of and incidental to putting the goods into a deliverable state must be borne by the seller.

30 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; but 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.

31 Instalment deliveries

- (1) Unless otherwise agreed, the buyer of goods is not bound to accept delivery thereof by instalments.

- (2) Where —
- (a) there is a contract for the sale of goods to be delivered by stated instalments, which are to be separately paid for; and
 - (b) 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 severable breach giving rise to a claim for compensation but not to a right to treat the whole contract as repudiated.

32 Delivery to carrier

- (1) Where, in pursuance of a contract of sale, 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, 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 authorised 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; but if the seller omits so to do 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, under 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 sea transit.

33 Risk where delivery at distant place

Where the seller of goods agrees to deliver them at his own risk at a place other than 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.

34 Buyer's right of examining the goods

- (1) Where goods are delivered to the buyer which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.
- (2) 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.

35 Acceptance

The buyer is deemed to have accepted the goods when —

- (a) he intimates to the seller that he has accepted them; or
- (b) 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; or
- (c) after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them.

36 Buyer not bound to return rejected goods

Unless otherwise agreed, where goods are delivered to the buyer, and he refuses to accept them, having the right so to do, he is not bound to return them to the seller, but it is sufficient if he intimates to the seller that he refuses to accept them.

37 Liability of buyer for neglecting or refusing delivery of goods

- (1) 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.
- (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.

PART V - RIGHTS OF UNPAID SELLER AGAINST THE GOODS

38 Unpaid seller defined

- (1) The seller of goods is deemed to be an “unpaid seller” within the meaning of this Act —
 - (a) when the whole of the price has not been paid or tendered;
 - (b) when a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition on which it was received has not been fulfilled by reason of the dishonour of the instrument or otherwise.
- (2) In this Part, the expression “seller” includes any person who is in the position of a seller, as for instance an agent of the seller to whom the bill of lading has

been endorsed, or a consignor or agent who has himself paid, or is directly responsible for, the price.

39 Unpaid seller's rights

- (1) Subject to this Act and to any other enactment, notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods, as such, has by implication of law —
 - (a) a lien on the goods or right to retain them for the price while he is in possession of them;
 - (b) in case of the insolvency of the buyer, a right of stopping the goods in transit after he has parted with the possession of them;
 - (c) a right of re-sale as limited by this Act.
- (2) Where the property in goods has not passed to the buyer, the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to and co-extensive with his rights of lien and stoppage in transit where the property has passed to the buyer.

UNPAID SELLER'S LIEN

40 Seller's lien

- (1) Subject to this Act, the unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price, in the following cases, —
 - (a) where the goods have been sold without any stipulation as to credit;
 - (b) where the goods have been sold on credit but the term of credit has expired;
 - (c) where the buyer becomes insolvent.
- (2) The seller may exercise his right of lien notwithstanding that he is in possession of the goods as agent or bailee for the buyer.

41 Part delivery

Where an unpaid seller has made part delivery of the goods, he may exercise his right of lien or retention on the remainder, unless such part delivery has been made under such circumstances as to show an agreement to waive the lien or right of retention.

42 Termination of lien

- (1) The unpaid seller of goods loses his lien or right of retention thereon —

- (a) when he delivers the goods to a carrier or other bailee for the purpose of transmission to the buyer without reserving the right of disposal of the goods;
 - (b) when the buyer or his agent lawfully obtains possession of the goods;
 - (c) by waiver thereof.
- (2) The unpaid seller of goods having a lien or right of retention thereon does not lose his lien or right of retention by reason only that he has obtained judgment for the price of the goods.

STOPPAGE IN TRANSIT

43 Right of stoppage in transit

Subject to this Act, when the buyer of goods becomes insolvent, the unpaid seller who has parted with the possession of the goods has the right of stopping them in transit, that is to say, he may resume possession of the goods as long as they are in course of transit and may retain them until payment or tender of the price.

44 Duration of transit

- (1) Goods are deemed to be in course of transit from the time when they are delivered to a carrier, by land or water, or other bailee for the purpose of transmission to the buyer until the buyer, or his agent in that behalf, takes delivery of them from such carrier or other bailee.
- (2) If the buyer, or his agent in that behalf, obtains delivery of the goods before their arrival at the appointed destination, the transit is at an end.
- (3) If, after the arrival of the goods at the appointed destination, the carrier or other bailee acknowledges to the buyer, or his agent, that he holds the goods on his behalf and continues in possession of them as bailee for the buyer, or his agent, the transit is at an end, and it is immaterial that a further destination for the goods may have been indicated by the buyer.
- (4) If the goods are rejected by the buyer and the carrier or other bailee continues in possession of them, the transit is not deemed to be at an end, even if the seller has refused to receive them back.
- (5) When goods are delivered to a ship chartered by the buyer, it is a question depending on the circumstances of the particular case, whether they are in the possession of the master as a carrier or as agent to the buyer.
- (6) Where the carrier or other bailee wrongfully refuses to deliver the goods to the buyer or his agent in that behalf, the transit is deemed to be at an end.
- (7) Where part delivery of the goods has been made to the buyer, or his agent in that behalf, the remainder of the goods may be stopped in transit, unless the part delivery has been made under such circumstances as to show an agreement to give up possession of the whole of the goods.

45 How stoppage in transit is effected

- (1) The unpaid seller may exercise his right of stoppage in transit either by taking actual possession of the goods or by giving notice of his claim to the carrier or other bailee in whose possession the goods are.
- (2) Notice may be given either to the person in actual possession of the goods or to his principal.
- (3) For notice to the principal to be effectual, it must be given at such time and under such circumstances that the principal, by the exercise of reasonable diligence, may communicate it to his servant or agent in time to prevent a delivery to the buyer.
- (4) When notice of stoppage in transit is given by the seller to the carrier, or other bailee in possession of the goods, he must re-deliver the goods to, or according to the directions of, the seller and the expenses of that re-delivery must be borne by the seller.

RE-SALE BY BUYER OR SELLER**46 Effect of sub-sale or pledge by buyer**

- (1) Subject to this Act, the unpaid seller's right of lien or retention or stoppage in transit is not affected by any sale or other disposition of the goods which the buyer may have made, unless the seller has assented thereto.
- (2) Where a document of title to goods has been lawfully transferred to any person as buyer or owner of the goods and that person transfers the document to a person who takes the document in good faith and for valuable consideration, then —
 - (a) if the last-mentioned transfer was by way of sale, the unpaid seller's right of lien or retention or stoppage in transit is defeated; and
 - (b) if the last-mentioned transfer was by way of pledge or other disposition for value, the unpaid seller's right of lien or retention or stoppage in transit can only be exercised subject to the rights of the transferee.

47 Sale not generally rescinded by lien or stoppage in transit

- (1) Subject to this section, a contract of sale is not rescinded by the mere exercise by an unpaid seller of his right of lien or retention or stoppage in transit.
- (2) Where an unpaid seller who has exercised his right of lien or retention or stoppage in transit re-sells the goods, the buyer acquires a good title thereto as against the original buyer.
- (3) Where the goods are of a perishable nature or where the unpaid seller gives notice to the buyer of his intention to re-sell, and the buyer does not within a reasonable time pay or tender the price, the unpaid seller may re-sell the

goods and recover from the original buyer damages for any loss occasioned by his breach of contract.

- (4) Where the seller expressly reserves a right of re-sale in case the buyer should make default and, on the buyer making default, re-sells the goods, the original contract of sale is thereby rescinded, but without prejudice to any claim the seller may have for damages.

PART VI - ACTIONS FOR BREACH OF THE CONTRACT

REMEDIES OF THE SELLER

48 Action for price

- (1) Where, under a contract for sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may maintain an action against him for the price of the goods.
- (2) Where, under a contract of sale, the price is payable on a certain day irrespective of delivery and the buyer wrongfully neglects or refuses to pay such a price, the seller may maintain an action for the price, although the property in the goods has not passed and the goods have not been appropriated to the contract.

49 Damages for non-acceptance

- (1) Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance.
- (2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract.
- (3) Where there is an available market for the goods in question the measure of damages is prima facie to be ascertained by the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted or, if no time was fixed for acceptance, then at the time of the refusal to accept.

REMEDIES OF THE BUYER

50 Damages for non-delivery

- (1) Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may maintain an action against the seller for damages for non-delivery.

- (2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract.
- (3) Where there is an available market for the goods in question the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered or, if no time was fixed, then at the time of the refusal to deliver.

51 Specific performance

- (1) In any action for breach of contract to deliver specific or ascertained goods the court may, if it thinks fit, on the application of the plaintiff, by its judgment direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages.
- (2) An application by the plaintiff for the purposes of subsection (1) may be made at any time before judgment.
- (3) The judgment may be unconditional, or upon such terms and conditions as to damages, payment of the price, and otherwise, as to the court may seem just.

52 Remedy for breach of warranty

- (1) Where there is a breach of warranty by the seller or where the buyer elects, or is compelled, to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject the goods, but he may —
 - (a) set up against the seller the breach of warranty in diminution or extinction of the price; or
 - (b) maintain an action against the seller for damages for the breach of warranty.
- (2) The measure of damages for breach of warranty is the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty.
- (3) In the case of breach of warranty of quality such loss is *prima facie* the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty.
- (4) The fact that the buyer has set up the breach of warranty in diminution or extinction of the price does not prevent him from maintaining an action for the same breach of warranty if he has suffered further damage.

53 Interest and special damages

Nothing in this Act affects the right of the buyer or the seller to recover interest or special damages in any case where by law interest or special damages may be recoverable, or to recover money paid where the consideration for the payment of it has failed.

PART VII - SUPPLEMENTARY**54 Exclusion of implied terms and conditions**

Where any right, duty or liability would arise under a contract of sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by usage, if the usage is such as to bind both parties to the contract.

55 Reasonable time a question of fact

Where, by this Act, any reference is made to a reasonable time, the question of what is a reasonable time is a question of fact.

56 Rights, etc., enforceable by action

Where any right, duty or liability is declared by this Act, it may, unless otherwise by this Act provided, be enforced by action.

57 Auction sales

In the case of a sale by auction —

- (a) where goods are put up for sale by auction in lots, each lot is *prima facie* deemed to be the subject of a separate contract of sale;
- (b) a sale by auction is complete when the auctioneer announces its completion by the fall of the hammer or in other customary manner; but until such announcement is made any bidder may retract his bid;
- (c) where a sale by auction is not notified to be subject to a right to bid on behalf of the seller, it shall not be lawful for the seller to bid himself or to employ any person to bid at such sale, or for the auctioneer knowingly to take any bid from the seller or any such person;
- (d) any sale contravening paragraph (c) may be treated as fraudulent by the buyer;
- (e) a sale by auction may be notified to be subject to a reserved or upset price, and a right to bid may also be reserved expressly by or on behalf of the seller;

- (f) where a right to bid is expressly reserved, but not otherwise, the seller or any one person on his behalf may bid at the auction.

58 Savings

- (1) The rules of the common law, including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, and in particular the rules relating to the law of principal and agent and the effect of fraud, misrepresentation, duress or coercion, mistake or other invalidating cause, shall continue to apply to contracts for the sale of goods.
- (2) Nothing in this Act affects the enactments relating to bills of sale or any other enactment relating to the sale of goods.
- (3) The provisions of this Act relating to contracts of sale do not apply to any transaction in form of a contract of sale which is intended to operate by way of mortgage, pledge, charge or other security.

PART VIII - MERCANTILE AGENTS

PRELIMINARY

59 Interpretation of Part VIII

- (1) For the purposes of this Part, the expression —
 - “**document of title to goods**” has the meaning given by section 2(1);
 - “**goods**” includes wares and merchandise;
 - “**mercantile agent**” has the meaning given by section 2(1);
 - “**pledge**” includes any contract pledging, or giving a lien or security on, goods, whether in consideration of the original advance or of any further or continuing advance or of any pecuniary liability.
- (2) A person is deemed to be in possession of goods or of the documents of title to goods, where the goods or documents are in his actual custody or are held by any other person subject to his control or for him or on his behalf.

DISPOSITIONS BY MERCANTILE AGENTS

60 Powers of mercantile agent with respect to disposition of goods

- (1) Where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge or other disposition of the goods made by him when acting in the ordinary course of business of a mercantile agent shall, subject to this Part, be as valid as if he were expressly authorised by the owner of the goods to make the same, provided that the person taking under the disposition —

- (a) acts in good faith; and
 - (b) has not at the time of the disposition notice that the person making the disposition has no authority to make it.
- (2) Where a mercantile agent has, with the consent of the owner, been in possession of goods or of the documents of title to goods, any sale, pledge or other disposition, which would have been valid if the consent had continued, shall be valid notwithstanding the determination of the consent, provided that the person taking under the disposition has not at the time thereof notice that the consent has been determined.
- (3) Where a mercantile agent has obtained possession of any documents of title to goods by reason of his being, or having been, with the consent of the owner, in possession of the goods represented thereby, or of any other documents of title to the goods, his possession of the first-mentioned documents shall, for the purposes of this Part, be deemed to be with the consent of the owner.
- (4) For the purposes of this Part, the consent of the owner shall be presumed in the absence of evidence to the contrary.

61 Effects of pledges of documents of title

- (1) A pledge of the documents of title to goods effected by a mercantile agent shall be deemed to be a pledge of the goods by him.
- (2) Where a mercantile agent pledges goods as a security for a debt or liability due from the pledgor to the pledgee before the time of the pledge, the pledgee shall acquire no further right to the goods than could have been enforced by the pledgor at the time of the pledge.

62 Rights acquired by exchange of goods or documents

- (1) The consideration necessary for the validity of a sale, pledge, or other disposition, of goods, in pursuance of this Part, may be —
- (a) a payment in cash; or
 - (b) the delivery or transfer —
 - (i) of other goods; or
 - (ii) of a document to title to goods; or
 - (iii) of a negotiable security; or
 - (c) any other valuable consideration.
- (2) Where goods are pledged by a mercantile agent for any consideration mentioned in subsection (1)(b), the pledgee shall acquire no right or interest in the goods so pledged in excess of the value of the goods, documents or security when so delivered or transferred in exchange.

63 Agreements through clerks

For the purposes of this Part, an agreement made with a mercantile agent through a clerk or other person authorised in the ordinary course of business to make contracts of sale or pledge on his behalf is deemed to be an agreement with the agent.

64 Provisions as to consignors and consignees

- (1) Where the owner of goods —
 - (a) has given possession of the goods to another person for the purpose of consignment or sale; or
 - (b) has shipped the goods in the name of another person,and the consignee of the goods has not had notice that other person is not the owner of the goods, the consignee shall in respect of advances made to or for the use of such person, have the same lien on the goods as if such person were the owner of the goods, and may transfer any such lien to another person.
- (2) Nothing in this section limits or affects the validity of any sale, pledge or disposition by a mercantile agent.

SUPPLEMENTAL**65 Mode of transferring documents**

For the purposes of this Part, the transfer of a document may be by endorsement or, where the document is, by custom or by its express terms, transferable by delivery, or makes the goods deliverable to the bearer, then by delivery.

66 Savings for rights of true owner

- (1) Nothing in this Part authorises an agent to exceed or depart from his authority as between himself and his principal, or exempts him from any liability, civil or criminal, for so doing.
- (2) Nothing in this Part prevents —
 - (a) the owner of goods from recovering the goods from an agent at any time before their sale or pledge; or
 - (b) the owner of goods pledged by an agent from —
 - (i) having the right to redeem the goods at any time before their sale, on satisfying the claim for which the goods were pledged, and paying to the agent, if by him required, any money in respect of which the agent would by law be entitled to retain the goods or the documents of title thereto, or any of them, by way of lien against the owner; or

- (ii) recovering from any person with whom the goods have been pledged any balance of money remaining in his hands as produce of the sale of the goods after deducting the amount of his lien.
- (3) Nothing in this Part prevents the owner of goods sold by an agent from recovering from the buyer the price agreed to be paid for the same, or any part of that price, subject to any right of setoff on the part in the buyer against the agent.

67 Saving

The provisions of this Part shall be construed in amplification, and not in derogation, of the powers exercisable by an agent independently of this Part.

ENDNOTES

¹ Act 10 of 1991

² GN 8/1992