

COURSE: CERTIFICATE IN CREDIT MANAGEMENT

SUBJECT: LAW - MODULE 3

UNIT

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Introduction

In the last module, we introduced the area of law commonly defined as Business Law, with most of the emphasis on Company Law. However, the Sale of Goods is also an important area of business law and is a continuation of the points introduced in the first two modules, and in particular, Hire Purchase and Consumer Credit in the last module. There is also some overlap in this section with Contract Law, as the sale of goods also involves agreements between two or more parties, and many of the principles of contract law also apply here. The key difference is that in Contract Law we covered the area of private contracts between consenting parties, whereas a contract for the sale of goods where a consumer is one of the parties has its own specific legislation and the terms are automatically implied.

You will also see, going back to the sources of law in module 1, that the most important legislation in this area is the Sale of Goods Act (1893) and that this legislation is still in force by virtue of Article 50 of the Irish Constitution. All of the provisions set out in this Act still apply today and are as relevant today as they were more than a century ago. The reason for the introduction of a further Act since then was to introduce new legislation to cover the area of Services, as this was not provided for in the original Act. Consequently the Sale of Goods and Supply of Services Act was introduced in 1980. Both of these Acts represent very important legislation for the consumer in particular. If you are involved in consumer credit in your work you will find this of particular interest, however, everyone is a consumer and therefore this area will be of interest to everyone. You will also benefit from the annual Consumer Credit Conference run by the Irish Institute of Credit Management. This Conference provides up to date information on all aspects of consumer credit and also includes a lively debate on this very contentious topic.

The next area that we cover is Exports and Imports. Again this will be of more interest to those who are involved in exporting or importing, but there is also some information which is relevant to the carriage of goods by road, and this will probably be of interest to more of you. Again, this is only introductory, and of necessity very brief, so if you are involved in this area and would like to know more, then it might be a good idea to purchase a book on this area alone.

Finally, the third part of this module introduces you to European Community Law, now more commonly known as European Union or EU law. This has now become one of the biggest areas of law in Ireland today, due to the multitude of new legislation introduced as a result of joining the Community in 1973. We have now built up almost 40 years of legislation in this area. The fundamental changes in policy come from the various Treaties, ranging from the Treaty of Paris in 1951 to the Nice Treaty in 2002 – the most recent covered in your notes for this course. The impact of the most recent treaty, i.e. the Lisbon Treaty, will take some time to be properly assessed and for corresponding legislation and case law to ensue. The notes also refer to a Union of twenty-seven members, although this is not likely to be the final total.

In addition to the Treaties, there have been hundreds of regulations, directives and decisions which are binding on Member States, and also recommendations and opinions, which are merely persuasive and need not be introduced into our law. Because of the restrictions of this course in that we cannot possibly cover every aspect of this area of law, we will not be examining the legislation itself. Instead we will study the roles of the key Institutions of the Community and in particular, the part they each play in the legislative process, and their position in relation to the legislative process in individual Member States.

We will also cover, albeit very briefly, the area of Competition Law and will look at a few relevant cases in this area. This is of particular importance to credit professionals as we sometimes exchange information in relation to our debtors and we might base a decision to grant credit, or not, on this information. We have to be careful to ensure that whatever decisions we make are not in any way discriminating or anti-competitive. The Competition Authority, which operates to enforce any legislation in this area, is primarily concerned with protection of the consumer, and therefore most of the legislation and activities of this division directly concern consumer protection. This is in addition to the protection in law offered by other areas such as the sale of goods. This area of law was introduced and has grown as a result of our membership of the European Community and is therefore regarded as EU law rather than Consumer Law. The reason is that competition policy extends across all members of the European Community. It does not extend beyond this, and so does not apply to commercial trading between Ireland and non-EU countries.

European Law is much more important in business today, not only because of existing legislation, but more importantly, because the European Union is possessed of law-making institutions, and it is now the largest law-making organisation in the world. In addition to that is also the fact of the supremacy of EU law over any national law of member States. For this reason, it is really important to fully understand the functions and roles of the various institutions of the EU and to understand how EU Law fits in with other sources of law in Ireland today. From a legal perspective, does membership offer more benefits than disadvantages? Quite apart from any monetary benefits, the course of Irish law has been radically changed as a result of our membership. Are we better off legally as a result? Are the rights enjoyed by every Irish citizen by virtue of the Irish Constitution enough, or can we enjoy more beneficial rights by virtue of European legislation? The point is, if any Member State enjoys better rights, then we are also entitled to the same, as the whole purpose of EU legislation is the harmonisation of laws within the European Union. Hence, any particular rights that Irish citizens enjoy as a direct benefit of the Irish Constitution, will eventually be enjoyed by all citizens of the European Union, and the same applies to rights enjoyed by other European citizens – ultimately it is the aim of the Union to ensure that all EU citizens enjoy equal rights.

Unfortunately, our course does not allow us the time to go into many of these interesting debates, however, if you have a particular interest, I would recommend a good book on Community Law. There are many available, ranging from mere summaries of the subject to the more comprehensive embodiment of European Law to be found in Butterworths most recent edition.

For the purpose of this course, it is only necessary for you to have a broad understanding of most of the areas covered, but with a little more emphasis on the areas specified. The first question in your second assignment relates to the main body of these notes and therefore these notes alone are sufficient for this purpose. As with the first, full instructions will be provided together with a suggested answer structure. Try to incorporate as many points as you can in your answers, and, as with all assignments or exam questions, use any opportunity you can to cite relevant authority. If you make a statement that there is a rule of law about x, then you should always cite the official source of that rule. This clarifies that you know where the rule originated in law, and that it is not your rule or the rule in your opinion. Above all, try to show that you really do understand the importance of this source of law in Ireland today.

SALE OF GOODS ACT 1893/SALE OF GOODS AND SUPPLY OF SERVICES ACT 1980

The common law principles of contract (looked at under contract law) apply to a contract for the sale of goods. However, the sale of goods transaction has been significantly modified by statute, principally by the Sale of Goods Act, 1893 and the Sale of Goods and Supply of Services Act 1980. While many sale of goods transactions occur in the retail context, it should be remembered that a high percentage of sales occur in the commercial rather than in the consumer setting, as goods pass along the chain of distribution from manufacturer to wholesaler, to retailer, and finally to the consumer.

Section 1(1) of the Sale of Goods Act 1893 defines a contract for the sale of goods as one in which a seller transfers or agrees to transfer ownership of goods to a buyer “for a money consideration called the price”. Three elements are contained in the definition:

1. The agreement must have as its objective the transfer of property in **goods**. Thus, a contract for the transfer of land, shares or a contract for services (now covered by The Sale of Goods and Supply of Services Act 1980) is not governed by the definition. Goods may be **existing** goods which are in their final state and are owned by the seller. They may be **future** goods i.e. goods which have yet to be grown in the case of crops, or manufactured in the case of manufactured goods. They may be **specific** goods i.e. the exact goods are identified. Finally, they may be **unascertained** goods i.e. the goods are not known at the time of the contract.
2. The contract must be for a **sale**. This means that a transfer of goods by way of mortgage or loan is not a sale within the definition of the Act.
3. The goods to be sold must be given a **price tag** or **price**. Most trade-ins involve a price tag on the new item and an allowance for the second-hand item traded-in and so would be a sale within the meaning of the Act.

If a contract does not fall within the terms of this definition, then the Sale of Goods Act 1893 does not apply to it. The operation of such a contract is governed by the ordinary principles of common law.

Sale and Agreement to Sell:

A contract of sale may be either a sale or an agreement to sell. A sale comprises of both the contract and a conveyance, so that the property in the goods sold passes to the buyer when the contract is made. An agreement to sell is a contract only, and does not result in the immediate passing of the property in the goods sold to the buyer

e.g. if I choose kitchen units in a shop, pay the agreed price and receive the article, then a sale has taken place. On the other hand, if I choose the units from a catalogue and pay a deposit to the retailer who then orders the goods from the manufacturer, what has taken place is merely an agreement to sell. The agreement to sell is an enforceable contract whereby the parties agree that property shall pass at a future time.

The importance of the distinction between a sale and agreement to sell lies in its effect on the timing of the passing of the property in goods sold between seller and buyer. The time when the property passes is, in turn important in the context of the loss or destruction of the goods. The general rule is that the party who has the property in goods also bears the risk in respect of their loss or destruction.

Terms of a Contract for the Sale of Goods:

Express Terms:

In a contract for the sale of goods, as in any contract, terms may be express or implied. The parties to the contract will normally expressly agree on the most important terms of the agreement between them. Express terms would normally include, for example, the amount and quality of the goods, the price to be paid and the time and method of delivery.

Implied Terms:

The Sale of Goods Act 1893, as amended by the 1980 Act, implies terms into a contract for the sale of goods for two reasons – firstly, to deal with situations “where the parties are silent” on certain issues and secondly, to protect the rights of consumers because of the discrepancy in bargaining power often found in these types of contracts.

Sections 12-15 of the 1893 Act implies terms in the contract for the protection of the buyer:

1. Title:

Under Section 12 of the 1893 Act as amended, there is an implied condition that the seller has the right to sell the goods. Where a seller has only a limited title to sell the goods, there is an implied warranty that all charges limiting such title have been disclosed to the buyer and that the buyer will have “quiet possession” of the goods.

2. Description:

Under Section 13 of the 1893 Act as amended, where goods are sold by description there is an implied condition that the goods shall correspond with that description.

3. Quality and Fitness for purpose:

In the common law, the courts have a reluctance to imply any term into a contract for the sale of goods that the goods were of a specific quality or that they were fit for use. The rule is “**caveat emptor**” i.e. let the buyer beware. The Act still states this rule to be the general principle but allows for certain exceptions.

Merchantable Quality:

Under Section 14(2) of the 1893 Act (as amended by Section 10 of the 1980 Act), where the seller sells goods in the course of a business there is an implied condition that the goods supplied under the contract are of **merchantable quality**. There is no such condition (a) as regards defects specifically drawn to the buyer’s attention before the contract is made, or (b) if such defects ought to have been noticed by the buyer if he had examined the goods before the contract was made.

“**Merchantable quality**” is defined in the Act as follows:

“Goods of any kind are of merchantable quality for the purposes of Section 14, subsection (2) of the Act if they are fit for the purposes for which goods of that kind are commonly bought as it is reasonable to expect having regard to any description applied to them, the price (if relevant) and all other relevant circumstances”.

Fitness for Purpose:

Section 14(4) – this provides that, where a buyer indicates to the vendor (seller) the purpose for which he requires the goods, there is an implied condition that the goods are reasonably fit for that purpose, whether or not that is the purpose for which the goods are normally supplied, except where the circumstances show that the buyer does not rely, or that it is unreasonable for him to rely, on the seller’s skill and judgement.

In most contracts of sale for everyday goods the purpose for which the goods are purchased will be obvious e.g. food is for human consumption, there is no need for the purchaser to make known expressly to the vendor the purpose for which he requires the food. Clothes are for wearing and having regard to their nature, they should be durable, hold their colour, shape and style for an appropriate time, and as such there is no need for the purchaser to make expressly known to the vendor the purpose for which he requires the clothes.

If goods have several purposes, the buyer must indicate the one for which he requires them e.g. some seeds may be either eaten or sown. If purchased in a garden nursery and intended to be eaten that purpose would have to be made known to the seller if the protection as to fitness is to be gained.

Egan v McSweeney (1955)

The defendant was a coal merchant with whom the plaintiff had a course of dealings lasting some 20 years. The plaintiff ordered two bags of coal and, when this was put on the fire, an explosion occurred and he was seriously injured.

Held – although he had not been negligent, the defendant was liable under Section 14(2) of the 1893 Act (merchantable quality). The coal had been supplied by a person who dealt in coal and the condition that the coal was of merchantable quality was therefore implied.

The defendant was also liable under Section 14(4) of the 1893 Act (fitness for purpose) because the buyer relied on the seller's skill and judgement, the seller knew the purpose for which the coal was required (domestic use) and the contract was for goods with which the seller usually dealt.

The statutory protection referred to above may not be available if the buyer did not rely on the seller's skill and judgement, or it was not reasonable for him to do so. The protection may also be lost where the buyer is possessed of an equal, or greater, amount of skill to the seller. In such a case, it would be unreasonable to allow the buyer to rely on the seller's skill and judgement.

Thus, the Act provides considerable protection for someone dealing with the seller who is acting in "the course of business". It displaces the principle of *caveat emptor* in such contracts. However, if the seller is not acting in the course of business but is selling the goods privately the maxim of *caveat emptor* very definitely applies. Thus, the buyer is forced to look after himself e.g. if a person sells an old electric cooker through the classified ads in the newspaper, the buyer must protect himself because the law affords no protection. On the other hand, if the person placing the small ads buys, repairs and resells the second-hand electric cookers as a hobby, or part-time business, the law would hold him to be acting in the "course of business" and in such circumstances the buyer is protected by the Sale of Goods Act.

There is a considerable overlap between "merchantable quality" and "fitness for purpose" conditions and the buyer can often claim that both have been broken. But if the goods are multi-purpose and the buyer has disclosed that he requires them for one purpose only, it is no defence for the seller that his goods are suitable for other purposes. They may in such circumstances be of merchantable quality but they are not fit for the disclosed specific purpose. "Merchantable quality" is a test of general suitability, while "fitness for purpose" is of specific suitability. It is not a defence that the seller took reasonable care to prevent a breach of either condition.

4. Sale by Sample:

Sales by sample are dealt with under Section 15 of the 1893 Act as amended by Section 10 of the 1980 Act. This section provides that there is an implied condition:

- That the bulk shall correspond with the sample in quality, and;
- That the buyer shall have a reasonable opportunity of comparing the bulk with the sample and;
- The goods are free from any defects rendering them unmerchantable which would not be apparent from a reasonable examination of the sample.

This section applies whether the sale is a private one or one in the course of business.

Exclusion Clauses Relating to Implied Terms:

Under Section 55 of the 1893 Act, as amended by the 1980 Act, it is no longer possible for a seller of goods to totally exclude the statutory implied terms from the sale of goods contract. Any term of a contract which exempts a party from the provisions of Section 12 of the Act concerning the seller's title is **void**.

Any term exempting a party from the provisions of Section 13, 14, or 15 of the Act as amended concerning implied terms as to the quality and fitness of the goods, would be void where the buyer deals as a **CONSUMER**, and in other cases, will not be enforceable unless it can be shown that the terms were fair and reasonable.

A party to a contract is said to deal as a "consumer" in relation to another party if he:

- (1) Neither makes the contract in the course of business nor holds himself out as doing so and;
- (2) The other party does make the contract in the course of business and;
- (3) The goods or services supplied under the contract are of a type ordinarily supplied for private use or consumption.

O' Callaghan v Hamilton Leasing (Ireland) Limited (1984)

The plaintiff operated a take-away restaurant and purchased a machine known as "a slush puppy iced drink dispensing machine" for use in the shop. He claimed that he was a "consumer" within the meaning of the Act.

Held – the contract for the purchase of the machine was made in the course of the plaintiff's business, that he used it in the course of business and that therefore he could not be a consumer as defined by the Act.

Special Contracts for Sale:

(a) Contracts for the Sale of Motor Vehicles:

Under Section 13 of the Sale of Goods and Supply of Services Act 1980, there is an implied *condition* with the regard to the sale of all motor vehicles that at the time of delivery, the vehicle is free from any defect which would render it a danger to the public, including persons travelling in the vehicle.

In the case of a dealer selling motor vehicles there is an obligation imposed on the dealer, by virtue of Section 13 1980 Act, to provide a **certificate in writing** to the buyer to the effect that the vehicle is, at the time of delivery, free from any defect which would render it a danger to the public, including the persons travelling in that vehicle.

The term in relation to the sale of motor vehicles will not be implied where it has been agreed between the seller and buyer that the vehicle is not intended to be used in its present condition and a document consisting of a statement to that effect is signed by or on behalf of the seller and the buyer and given to the buyer at the time of delivery.

It should be noted that the section makes no distinction between new and second-hand Vehicles. It should also be noted that the condition that the vehicle is free from defects applies to all sales of motor vehicles except where the **buyer** is a dealer in motor vehicles i.e. it applies even when the seller is not selling in the course of business, and when the sale is a private one other than to a motor dealer e.g. trade-in.

(b) Contract for the Supply of Services:

The Sale of Goods and Supply of Services Act 1980 sets out certain terms which would be implied into a contract for the supply of **SERVICES**. This is entirely new and no such provision was made in the earlier 1893 Act.

Section 39 of the 1980 Act provides that in a contract for the supply of services where the supplier is acting in the course of the business certain terms are implied:

That the supplier has the necessary skill to render the service.

That he will supply the service with due care, skill and diligence.

That whatever materials are used, they will be sound and reasonably fit for the purpose for which they are required e.g. paint used to re-spray a vehicle is suitable for the purpose.

Where the goods are supplied under the contract they will be of merchantable quality within the definition in Section 14.

Under Section 40 of the Act, the parties are free by contract to vary or entirely exclude the terms implied by Section 39.

In the case of a consumer contract, the exclusion is enforceable if it is fair and reasonable **and** it has been specifically brought to his attention. It is for this purpose that many dry cleaners now require a recipient of a dry cleaning service to sign a document setting out the terms under which the dry cleaning will be done and that the dry cleaning firm will not be responsible for any damage to delicate items etc.

Remedies for Breach of a Sale of Goods Contract:

The parties to the contract may avail themselves of the usual remedies for breach of contract. However, specific remedies are also available under the 1980 Act.

(a) Buyer's Remedies Against the Seller:

- (1) The buyer may rescind the contract if the seller has breached a condition. He may also sue for damages.
- (2) If the buyer has paid the price but the seller's consideration has failed, the buyer may sue for the return of the price.
- (3) If the buyer has breached a warranty, the buyer may sue for loss or reduce the amount payable to the seller.
- (4) The buyer may sue for specific performance.
- (5) The buyer may sue for damages for non-delivery.

(b) Seller's Remedies Against the Buyer:

- (1) The seller may sue the buyer for the contract price if the buyer refuses to pay same.
- (2) The seller may sue the buyer for damages for non-acceptance, if the buyer refuses to accept and pay for the goods.

(c) Seller's Remedies Against the Goods:

It may be more advantageous to the seller to seek his remedy against the goods in question.

- (1) The seller may exercise a lien on the goods i.e. the right to retain possession of goods until the contract price has been paid.
- (2) The seller may stop the goods in transit when a buyer becomes insolvent and repossess the goods until he has been paid the purchase price.
- (3) The seller may resell the goods (a) if the goods are of a perishable nature, (b) if the seller has retained the right of resale under the contract, (c) if the buyer does not pay for the goods within a reasonable time period, having been given notice of the seller's intention to resell. If an unpaid seller resells the goods, the second buyer acquires good title even if the seller is not entitled to resell.