



Session 36

Contract Law 2

Sale-of-goods and agency

Sale-of-goods



Sales contract

A contract of sale is a contract whereby the seller agrees to deliver the property sold to the buyer and to transfer the ownership therein to him and whereby the buyer agrees to pay to the seller the purchase price (CO art 184; [SGActO](#), s 1).

Unless otherwise provided by agreement or custom, the buyer and seller are bound to fulfill their obligations concurrently (CO art 184; SGActOm s 26).

Parties can conclude a sales contract, which need not be in writing (SGActO, s 4)

Transfer of title

Title (i.e. ownership of goods) passes to the buyer as soon as the contract has been concluded, with the exception of particular circumstances and agreements (CO, art 185; SGActO, s 25). In an absolute sale property is immediately handed over.

Most sales contracts specify the time when title passes to the buyer and the conditions of delivery (i.e. the transfer of ownership from seller to buyer). The case of a failure to deliver the goods is considered to be non performance.

The passage of risk is usually expressly regulated in the contract in the general conditions of sale (CO art 185; SGActO, s 21).

Caveat emptor

When a good is purchased the principle of *caveat emptor* applies (i.e. that the buyer is responsible for checking the property sold – the seller not being legally obliged to disclose negative facts that might stop one from buying) (CO art 201 ; SGActO, s 32 ff).

Warranty of quality and fitness

The seller is bound to guarantee the qualities promised and is liable for defaults even if he was not aware of them on the time of conclusion of the contract (CO art 197; SGActO, s 15). This is the *warranty of quality and fitness* in that the object must be of sufficient quality to be sold on the.

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Warranties

Types (SGActO, s 13):

- Express warranties (i.e. guarantees) which are specific promises, of limited duration that producers and retailers make to consumers about the performance, quality, and condition of goods (i.e. express conditions that are essential to the contract).
- Implied warranties which are promises in law that sellers make to buyers through implication or suggestion (i.e. when it is implied that the seller has title to the goods, that the goods are of merchantable quality, and that the goods supplied correspond to the samples provided or match the description made)

Misrepresentation

Common malpractice in selling is misrepresentation (i.e. a false statement made by one person concerning a material fact) including:

- Innocent misrepresentation: making a false statement about a material fact that it is believed to be true.
- Fraudulent misrepresentation: making a false statement about a material fact that it is known not to be true.

Thus the sales contract can be voided as it makes genuine consent impossible; with the latter one can press for damages, whereas with the former, one may review the contract.

Breach of contract

In case of a sales contract breach, there are the following remedies:

- Seller (when the buyer has not paid for the goods): right of lien (i.e. the non-delivery of goods), stoppage in transit (i.e. order the carrier not to make the delivery), resale, claim damages – contractual liability.
- Buyer (when the seller fails to supply or the product is faulty or does not correspond to that described or its sample): use express warranties, demand replacement, claim damages – contractual liability.

Agency



Principal and agent

When we speak of a contract of agency, two parties are involved, namely:

- The principal/mandator who is represented and who gives another person authorization to represent.
- The agent/mandatary who represents and is given the authority to represent.

A mandate is a contract of representation whereby the mandatary/agent (mandataire) takes the responsibility to perform business in the name of the mandator/principal (mandant) (CO art 394; CCQ, s 2130). A mandate is deemed concluded when the mandatee accepts representation.

Rights and obligations

Mandatory (CO art 398 ff; CCQ, s 2138 ff)

- To carry out the contract with diligence – in the same manner as a contract of employment
- To provide information on the activities pertaining to agency
- To render sums of money

Mandator (CO art 402 ff; CCQ, s 2149)

- To pay fees as per the contract

Commercial agency

A commercial agent (e.g. travel agent) is a person who assumes on a continuous basis the obligation to negotiate business transactions for one or more principals (CO, art 418a).

Obligations:

- The agent looks after the interests of the principal with the care needed from a good salesperson
- The agent has therefore a right to remuneration, which cannot be annulled by convention (CO, art 418c).
- The agent is entitled to a commission (CO, art 418g).

Commercial agency (cont)

- The agent has the obligation to secrecy (CO, art 418d).
- The agent has the authority to take all legal action necessary to safeguard the interests of the principal especially in cases of default or non-performance by a customer (CO, art 418e).
- The agent that has been attributed a particular clientele or a region, has the exclusivity (CO, art 418f).

The principal must do all he can to enable the agent to exercise the business activity successfully. In particular, must provide the necessary documents, inform of any changes in the business dealings (CO, art 418f).

Commercial agency (cont.)

Termination:

- In the case of an agreement within a fixed time limit (i.e. determined), termination takes place at the end of this period.
- Should the time limit not be express (i.e. undetermined), termination can be motivated by either party with a month's notice provided the agreement has lasted less than a year. For a contract period of more than a year, two-month notice is required.
- Otherwise, both the principal and the agent can, without previous warning, cancel the contract for justifiable reasons (CO, art 418r).

Procuration (Power of attorney)

An agent with power of procuration is a person who has received from the owner(s) of a firm (i.e. principal) the express or implied authorization to manage a number of business dealings and to sign per procuration using the signature of the business (CO, art 458; CCQ, s 2130).

The members who have the power of procuration may perform any legal act within the purposes of the company and are thus entered, in Switzerland, in the Register of Commerce, in Quebec, Registre de commerces, in Ontario, under the Sevices portal. Only registered signatures and names are valid!