
REMEDIES FOR INTERNATIONAL SELLERS OF GOODS

TAIWAN

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Introduction

Sources of Law

The Civil Law system of the Republic of China on Taiwan follows that of the Roman law in continental European systems.¹

Although the Civil Code of Taiwan was enacted in the late 1920s, there is no unified codification of Taiwanese commercial statutes. In addition to the Civil Code, there are separate enactments governing special commercial matters in Taiwan, such as the Company Law, Negotiable Instruments Law, Maritime Law, Insurance Law, and Business Registration Regulation (collectively, 'Commercial Laws'); within these, however, there is no statute on the sale of goods. In contract matters, the courts traditionally look to the Civil Code, Book I: General Principles, and Book II: Obligations, unless the Commercial Law applies.

Taiwan enacted the Consumer Protection Law on 13 January 1994, the Trade Law on 5 February 1993, and the Fair Trading Law on 4 February 1991, effective on 4 February 1992. The Fair Trading Law regulates antitrust and consumer protection matters for purposes of maintaining trade order, protecting consumers, ensuring fair competition, and enhancing Taiwan's economy.

The Consumer Protection Law charges the designer, manufacturer, producer, importer, or any link in the chain of distribution with duties similar to those under the United States law of product liability. For example, the manufacturer may be held strictly liable for injury of the customer, even though the manufacturer is not negligent in producing or designing the product; warning must be labeled or displayed in a conspicuous place for products or services that might endanger life, health, or property of consumers.²

For the unwary foreign seller of goods, the Consumer Protection Law can be a potential hazard in providing goods, directly or indirectly, to consumers in Taiwan. As distinguished from non-consumer transactions, disputes arising from consumer transactions,

¹ Ma, Trade and Investment in Taiwan: *The Legal and Economic Environment in the Republic of China* (2nd ed, 1985), ch 1, pp 1–53. Since there is no official authoritative English version of Taiwan law, the English translations provided herein are mainly adapted or revised from Liu, Shih *et al*, *Major Laws of the Republic of China on Taiwan* (1991).

² Consumer Protection Law of 13 January 1994, art 7.

foreign sales of goods included, will be governed by the Consumer Protection Law. The application of the Commercial Laws and the Consumer Protection Law, whenever pertinent, will supersede that of the Civil Code. In the event that the special laws are silent in respect of certain civil matters, the Civil Code will come into play. Should any terms, covenants, conditions, or agreements contained in the sales contract conflict or be inconsistent with the law of Taiwan, such terms, covenants, conditions, or agreements will generally prevail unless they conflict with an imperative or prohibitive provision of law,³ public order, or good morals.⁴

Application of Law

Under the Civil Code, '[i]n civil matters, if there is no provision of law applicable to a case, the case must be decided according to custom . . .'.⁵ The Civil Code, together with the Commercial Laws, has priority in the application of law to commercial disputes.

In the event the law is not specified, the business custom will prevail over mere civil custom. The custom applicable nevertheless may not contradict public order or good morals.⁶ If there is no such custom, civil matters then must be determined pursuant to general principles of law.⁷ There is no separate law for the sale of goods as exists with regard to particular kinds of obligations, ie, sale, exchange, gift, lease, and deposit, provided in the Civil Code.⁸

If a sales contract dispute arises involving foreign sellers of goods, the judge will apply the Civil Code and the Commercial Laws as the substantive laws. In essence, except as otherwise specified in the Civil Code, a sales contract under litigation pursuant to the law of Taiwan is treated no differently than other forms of contracts. The Common Law concept of contract may be applicable to some extent.

Taiwan law recognizes and authorizes the enforcement of foreign judgments, including default judgments, so long as the foreign judgment is in compliance with article 402 of the Code of Civil Procedure of 1 February 1935, as amended on 20 August 1990. If a foreign seller of goods should bring suit in Taiwan, the judgment made by the courts may not contravene the Law Governing the Application of Laws to Civil Matters Involving Foreign Elements ('Private International Law') of 6 June 1953, which is basically a conflict of laws rule. In civil matters involving foreign elements, if there is no provision applicable in the Private International Law, other law will apply. If there is no applicable provision in other law, the courts will follow the general principles of law.⁹

3 Civil Code, art 71.

4 Civil Code, art 72.

5 Civil Code, art 1.

6 Civil Code, art 2.

7 Civil Code, art 1.

8 Civil Code, arts 345–378.

9 Law Governing the Application of Laws to Civil Matters Involving Foreign Elements of 6 June 1953, art 30.

As with continental European legal systems, the stipulated provisions of law will have a greater weight than that of court decisions. Although precedents in Taiwan were not considered as a major source of law, the lower levels of the court, ie, the district court, will follow the decisions or judgments rendered by the higher court, ie, Supreme Court or High Court.

Formation of Sales Contract

Declaration of Intent

In general, the concept of Common Law contract in most respects has been codified in the Civil Code. The concept of declaration of intent¹⁰ is one of the general principles regarding the intent and capacity of the parties, mistake, fraud, or duress.

When declarations of intent by the parties constitute a meeting of their minds, expressly or tacitly, there is a binding agreement between the parties. The Civil Code provides basic rules to resolve the inconsistency between the internal mind and external expression by the declarant and to grant relief when the declaration of intent is made due to mistake, fraud, misrepresentation, coercion, or duress. It is required that no defenses to the contract's formation exist before a valid contract can be found.

At the formation stage, the absence of a writing or unconscionability may serve as a defense to the contract's enforcement. Lack of capacity, mistake, or illegality also may be good defenses against formation so as to deter enforcement.

The mere fact that the declarant did not intend to be bound by his declaration of intention will not void such declaration or invalidate the agreement formed by the coinciding declared intent of the other party. Article 86 of the Civil Code states that '[a] declaration of intention is not void by reason of the fact that the declarant did not intend to be bound by it, unless such fact was known to the other party'.

In the event the other party has knowledge or notice that the declarant does not wish to create such obligation but nonetheless declares his intent, ie, acceptance, the courts will not uphold such a contract. In particular, when the declaration of intent is fictitious and is in conflict with that of the other party, no agreement is achieved. The voiding of the agreement, however, cannot be used against a *bona fide* third party. The courts also will apply other provisions of the law when appropriate if the fictitious declaration of intent was intended for another juristic act.¹¹

Capacity to Contract

In General

Legal capacity is crucial in forming a valid and executable contract. The juristic act of an institution or business enterprise will be conducted through the act of a natural person.

¹⁰ Civil Code, arts 86–98.

¹¹ Civil Code, art 87.

Generally, the capacity of such authorized natural person to create a contract is not as important as that of a mere act by a natural person. A natural person with limited capacity can enter into a valid contract if so authorized by such institution or business enterprise. Under the Civil Code, the capacity of a person will fall into the following categories:

- Full capacity, such as an adult, ie, a person over 20 years of age¹² or a minor who is married;¹³
- Limited capacity, such as a minor over seven years but under 20 years of age;¹⁴ and
- No capacity, such as a minor under seven years of age,¹⁵ incapacitated persons,¹⁶ or persons acting in a condition of absence of discretion or of mental disorder.¹⁷

Effect of Incapacity

According to article 75 of the Civil Code, '[t]he declaration of intention of a person incapable of disposing is void . . .'. A person is not bound by a contract when he has no capacity to enter into the contract. As to the contractual duties incurred by the person of the second category, such contract will take effect on an approval, prior consent, or ratification, by the statutory agent, ie, guardian.¹⁸

The legal effect of contracting with persons in the third category is voidable. For example, only voidable contractual duties will be incurred in entering into transaction with an infant or a person with a mental defect. With a few exceptions, lack of full capacity is a good defense against contract enforcement. No approval of the statutory agent is needed for a person with limited capacity for ' . . . the mere acquisition of a legal advantage or the necessities of life according to [his] age and social standing . . .'.¹⁹

Offer, Acceptance, and Consideration

In General

The rules of offer and acceptance in the Civil Code are similar to the Common Law rules. However, the element of consideration or some substitute therefor is not essential to the effect of finding a contract unformed or void. The courts put little emphasis on the issue of consideration.

There is no consideration as such under the Civil Law system. In Taiwan, a contract is formed 'when the parties have reciprocally declared expressly or tacitly their concurring intention'.²⁰ In cases where the parties have mutually agreed on all the essential elements of the contract but have expressed no intention as to non-essential or immaterial points,

12 Civil Code, art 12.

13 Civil Code, art 13(3).

14 Civil Code, art 13(2).

15 Civil Code, art 13(1).

16 Civil Code, arts 14 and 15.

17 Civil Code, art 75.

18 Civil Code, arts 77–85.

19 Civil Code, art 77.

20 Civil Code, art 153.

such contract will be deemed concluded or formed. In the absence of an agreement to the contrary, the courts will determine the non-essential points according to the nature of the affair.²¹ If a contract can be found either explicitly or implicitly, the courts will be more likely to uphold the existence of a contract.

Tender of Offer

The Civil Code does not regulate the methods of tendering an offer, a declaration of intent, which can be made expressly or impliedly, *inter presentes* or *inter absentes*. However, sending lists with price quotations will not be considered to constitute an offer, while displaying goods for sale with price is deemed an offer.²² Mere advertisements will not be treated as an offer.

The offeror will be bound by his offer unless, at the time of tendering, the offeror excludes such obligation or unless it may be presumed from the circumstances or from the nature of the affair that the offeror did not intend to be so constrained.²³ In articles 155–158, the Civil Code provides that an offer will cease to be binding due to rejection by the offeree or acceptance not notified at once during a face-to-face dialogue; the offer may lapse because acceptance is not notified within the period prescribed by the offer or within the reasonable time expected under ordinary circumstances when the offer is made *inter absentes*.

Acceptance

An acceptance, as a form of declaration of intent, will mirror the offer. Acceptance with ‘amplifications, limitations, or other alterations is deemed to be a refusal of the original offer coupled with the making of a new offer’.²⁴ During contract negotiations, various agreements, revisions, or modifications will make it even more difficult to interpret the stages of each negotiation. In the event a notification of acceptance is not required according to custom, due to the nature of the negotiation, or because of waiver of the notice, the courts will consider a contract formed when certain facts sufficiently establish the contract or some performance is made within a reasonable period subsequent to the offer.²⁵

Acceptance not received by the offeror in due time will be considered a new offer. If sent in an ordinary manner and expected to arrive in due time, but delayed, and the offeror did not notify such delay to the acceptor, such late acceptance will be regarded as timely arrival and a contract will be created.²⁶

21 Civil Code, art 153(2).

22 Civil Code, art 154(2).

23 Civil Code, arts 86 and 154.

24 Civil Code, art 160.

25 Civil Code, art 161.

26 Civil Code, arts 159 and 160.

Cross Offers

Cross offers incorporating the terms of the initial offer also form a contract once each offer has reached the respective party.

Unlike the Common Law, in Taiwan, no acceptance is needed to create a contract by cross offer.

Conclusion of Contract

The agreement is concluded because the parties have a meeting of their minds after their intent is declared.²⁷ The courts regard cross offers as two declarations of intent, each mirrored and received by the respective party to form a contract.

If one party to the agreement receives earnest money from the other party, the contract will be deemed concluded²⁸ At auction sales,²⁹ the sale will be complete when the auctioneer announces its conclusion by the fall of the hammer or in any other customary manner.³⁰

Definition and Kinds of Sale

The term 'sale' is defined as '... a contract whereby the parties agree that one of them will transfer to the other his rights over a property and the latter will pay a price for it'.³¹ Other kinds of sales include a sales contract on approval, by installments, by sample, and by auction.³²

Sale by mail order or door-to-door soliciting and sale by installments are regulated in the Consumer Protection Law. A sale by conditioning the reservation of title is governed by the Secured Transaction Law.³³

There are no general rules governing price or the formality of sale. As specified in the Civil Code, the completion of a sales contract depends on the parties' consensus as to the goods sold and price thereof. An agreement in writing is not requisite in finding a valid contract. A sales contract is formed when the contracting 'parties have mutually agreed on the object to be sold and on the price to be paid'.³⁴ The provisions regarding sale³⁵ will not apply if the transaction does not include the goods sold or the price to be paid or if there is no contract at all.

27 Civil Code, art 153(1).

28 Civil Code, art 248.

29 Civil Code, arts 391–397.

30 Civil Code, art 391.

31 Civil Code, art 345.

32 Civil Code, arts 384–397.

33 Secured Transaction Law of 5 September 1963, as amended on 28 January 1976.

34 Civil Code, art 345(2).

35 Civil Code, arts 345–378.

Interpretation of Sales Contract

Express Terms and Writing

The validity of an oral sales contract is no less than that of a written one, or a combination of both oral and writing, unless the law provides otherwise in specific circumstances, such as in the transfer or creation of rights over real property³⁶ and a sale by condition.³⁷

A sale by condition requires a written contract which cannot be set up against a *bona fide* third party, unless otherwise registered with the designated authority.³⁸

Although a land sale contract requires a writing, the Supreme Court has held that a contract for sale of an obligation needs no formalities.³⁹

Preliminary Negotiation

In an oral contract, it is difficult to draw the line between a preliminary negotiation and an agreed term of the contract. There is no law in Taiwan similar to the Anglo-American statute of frauds, but there may be similar results.

For example, although a lease of an immovable over one year also will be executed in writing, such lease is deemed valid for an indefinite period if not so executed.⁴⁰ A sublease or the sale of a lease right, however, if not expressly prohibited otherwise in an agreement, may be made orally.

Priority of Written Terms

In a contract dispute, the four corners of the contract will govern. Should the context of the contract not provide a resolution to the dispute or be ambiguous so as to require inquiry into the intention of the parties, the courts will attempt to conform with the express terms of the written contract.

However, express terms in an agreement pertaining to the extension or reduction of the period of limitation or to the waiver of the benefit of limitation will not be given effect as violating the public interest.⁴¹

Invalid Terms

In a sales contract, an agreement releasing or limiting the seller's liability for defects in the right to the goods sold or defects in the goods themselves will be void if it can be demonstrated that the seller intentionally concealed such defect.⁴²

36 Civil Code, art 760.

37 Secured Transaction Law of 5 September 1963, as amended on 28 January 1976, arts 26–31.

38 Secured Transaction Law of 5 September 1963, as amended on 28 January 1976, art 5.

39 1993 Supreme Court, Case 1207.

40 Civil Code, art 422.

41 Civil Code, art 147.

42 Civil Code, art 366.

The Civil Code establishes the basic rules with respect to the time sequence of delivering the goods and payment and how the costs of sale are to be borne by and between parties; these rules, however, will yield to other laws, contract terms, or custom.⁴³ In other words, any terms, covenants, conditions, or agreements expressly provided in the contract will prevail if there is no conflict with prohibitive or mandatory provisions of law, public order, or good morals.

For example, a contract created by fraud or duress will be voided, and a standard form contract which is adhesive and unjust to the other party will not be enforced. In consumer transactions, the standard form contract is construed on the basis of good faith and reciprocity. If enforcing the provisions of a standard form agreement is extremely unfair to the consumer, the contract will be invalidated.⁴⁴ Interpretation of any questionable terms indicated in a standard form contract will be construed in favor of the consumer.⁴⁵

Course of Dealing, Trade Usage, Course of Performance

The Civil Code does not specify the terms of course of dealing, trade usage, and course of performance, or the situations where each will be applicable and under what circumstances. In a broad sense, course of dealing, trade usage, and course of performance may be considered as forms of custom in construing a sales contract if no pertinent law exists or such custom is not expressly contracted out in the agreement.

In the sale of goods, trade custom will have priority over other civil custom. The Supreme Court has held that custom must be based on habitual or customary practice with certainty deemed by the ordinary people.⁴⁶

As to the course of performance accepted or acquiesced in without objection, the courts may imply such course of performance into the agreement as long as it is not in contravention of the express terms of the contract. '[A]ccording to the custom or owing to the nature of the affair', it is not necessary to have notice of acceptance to form a contract if, '... within a reasonable time, something has been done which may be considered as an acceptance of the offer'.⁴⁷ Such custom may refer to previous facts or other evidence that establish 'something has been done' during the course of performance. A contractual obligation will be created, even without notice from the accepting party.

In a letter of credit transaction, the delivery of the letter of credit must be prior to that of goods by the exporter according to custom.⁴⁸ In terms of custom implied under the sale provisions in the Civil Code, for instance, the seller of a right will cause the buyer to acquire the title to the right sold or, when appropriate, deliver the possession of things

43 Civil Code, arts 369 and 378.

44 Consumer Protection Law of 13 January 1994, art 12.

45 Consumer Protection Law of 13 January 1994, art 11(2).

46 1928 Supreme Court, Case 613.

47 Civil Code, art 161.

48 1974 Supreme Court, Case 206.

related to such right.⁴⁹ In a sale according to sample, the seller will warrant the quality of goods delivered in conformity with that of the sample.⁵⁰

Assignment and Delegation

Assignment

If the explicit provisions of a contract do not prohibit the transfer or assignment of rights, such transfer or assignment can be generally made subject to the nature of the claim, or to the law expressly prohibiting judicial attachment of a certain claim, eg, the retirement fund of a public servant. An agreement by the parties that the claim will not be transferred or assigned must be honored, except as to third parties acting in good faith.⁵¹

All rights, including securities and other ancillaries, separable from the person of the assignor, must be transferred to the assignee concurrently during the assignment. Any interest due and in arrears is presumed to be included in the assignment by the principal to the assignee.⁵²

The transfer of a claim is not effective if the debtor is not notified, unless there is applicable law to the contrary.⁵³ Tendering the documents of transfer to the debtor will have the effect of notice.⁵⁴ Consequently, oral or written notice to the debtor will satisfy the notification requirement.

The debtor can assert all defenses available to the assignor against the assignee if the assignor has notified the debtor of such assignment.⁵⁵ The question then is whether the assignment of rights is revocable. As the notification of the assignment also concerns the interest of the assignee, the assignor's notice cannot be revoked without the consent of the assignee.⁵⁶

Delegation

As with assignment, there is no formality required, oral or written, to make a delegation. In Taiwan, delegation of duties is usually permitted unless there are special contractual restrictions against delegation or other limitations imposed by law. Duties delegated to the delegee, if performed in the name of the delegor and within the scope authorized by the delegor toward a third party, will be effective as to the delegor directly.⁵⁷

49 Civil Code, art 348(2).

50 Civil Code, art 388.

51 Civil Code, art 294.

52 Civil Code, art 295.

53 Civil Code, art 297.

54 Civil Code, art 297(2).

55 Civil Code, arts 298 and 299.

56 Civil Code, art 298(2).

57 Civil Code, art 103.

The manifestation of intent to the delegor, if required, can be made to the delegee instead.⁵⁸ The Supreme Court has distinguished the effect of delegation performed in the name of the delegor from that in the name of the delegee. In the former delegation, the legal effect rests directly on the delegor. According to the definition of delegation, the latter is not a delegation but is a contract of mandate.⁵⁹ Any rights obtained through such mandate belong to the delegee unless a further assignment is made from the delegee to the delegor.⁶⁰ The Supreme Court concluded that, in a mandate, the third party may assert defenses set up against the delegee towards the delegor, but the effect of delegation performed does not take effect directly in favor of or against the delegor.⁶¹

With the exception of fulfilling an obligation or obtaining the consent of the principal-delegor, the delegee is prohibited from entering into any juristic act or contract in the name of the delegor; nor is the delegee, as agent of a third party, permitted to enter into a juristic act in the name of the delegor with such third party.⁶² Two principals may authorize, orally or in writing, a single delegee to execute a sales contract on behalf of both of them. If a third person as delegee agrees with the obligee-creditor to assume the obligation of a delegor-obligor-debtor, such debt will be transferred to the delegee on the conclusion of the contract.⁶³

However, a delegation to assume the obligation of a delegor-obligor by a delegee must be with the permission of the obligee-creditor.⁶⁴ As a result, it is not required that an obligee accept the delegation or performance.

It is generally considered that the effect of the delegation is to exonerate the delegor-obligor from the obligation.⁶⁵ In the event of an assignment regarding the entire properties or business of others, including all assets and liabilities, the delegation of duties to repay debts will rest on the delegee or assignee on publication or notification to the creditor.⁶⁶

Unconscionability

The unenforceability of a sales contract due to unconscionability is not specifically codified in Taiwan. However, the general principle of contractual freedom is limited in this regard in order to avoid violation of public order or good morals and to promote fairness and justice.

The Supreme Court has compared the voidance of a juristic act as against the public policy or morals, pursuant to article 72 of the Civil Code, with the avoidance of a declaration

58 Civil Code, art 103(2).

59 Civil Code, art 528, defining a mandate as ‘... a contract whereby the parties agree that one of them commissions the other party to take charge of his affairs, and the latter agrees to do so’.

60 Civil Code, art 541(2), states: ‘He [the delegee] must transfer to the principal [delegor] the rights which he acquires in his own name but on behalf of the principal [delegor]’.

61 1983 Supreme Court, Case 4720.

62 Civil Code, art 106.

63 Civil Code, art 300.

64 Civil Code, art 301.

65 Civil Code, arts 300 and 301.

66 Civil Code, art 305(1).

of intent obtained by fraud or duress, in accordance with article 92 of the Civil Code.⁶⁷ A sales contract will be void if contrary to public order or good morals, but it will only be avoidable in situations involving duress or fraud. In the event a declaration of intent is attained by fraud or duress, the declarant can elect to avoid it.

If the fraud was by a third party, the declaration may be avoided by the declarant only if the other contracting party knew or should have known of such misrepresentation by the third party. In other words, a contract will be created and not voidable when the other contracting party accepts, in good faith and without knowledge of the existence of fraud, the offer made by the declarant, even if induced by a third party's misrepresentation. As a result, '[t]he avoidance of a declaration of intention on the ground of fraud cannot be set up against a bona fide third party'.⁶⁸

If a person with limited disposing capacity employs fraudulent means to induce the other party to believe that his capacity is full and complete or that his act has the approval of his statutory agent, the juristic act by such person will be valid.⁶⁹ A sales contract involving a person with limited capacity will be binding and unavoidable when the other party was induced by misrepresentation of such person. In the case of delegation of duties, questions regarding the validity of the delegee's declaration of intent owing to defective intention, fraud, duress, notice, or culpable knowledge of certain circumstances must be decided according to the delegee-agent's knowledge of such facts, unless the delegor-principal clearly stipulated otherwise while delegating his authority or duties.⁷⁰

Mistake

Mistake may be a good defense to the contract formation, but the mistake may not result from the negligence of the declaring party. In commercial transactions, a mistake regarding the qualifications of the other party or the nature of an essential thing will be deemed a mistake.⁷¹

If a unilateral mistake or erroneous communication was known to the other party, the resulting contract can be void.⁷² In a mistake by communication, if the party is negligent in the selection or employment of the intermediary, the contract cannot be avoided.⁷³

The Supreme Court has concluded that the term 'mistake' in article 88 of the Civil Code refers to the content or conduct of the declaration of intent, not mere mistake in motive.⁷⁴ Therefore, mistake in motive is not considered as a mistake under Taiwan law. So far as a latent or patent ambiguity is concerned, the true intent of the parties must be sought, and

67 1971 Supreme Court, Case 584.

68 Civil Code, art 92(2).

69 Civil Code, art 83.

70 Civil Code, art 105.

71 Civil Code, art 88.

72 Civil Code, arts 86, 88, and 89.

73 Civil Code, arts 88 and 89.

74 1962 Supreme Court, Case 3311.

the rule of honesty and good faith must be complied with.⁷⁵ The right of avoidance relating to mistake as to content of declaration or incorrect communication will lapse one year after the date of declaration.⁷⁶

Illegality and Impossibility

Illegality

As a general rule, the principle of honesty and good faith must be observed in the performance of obligations or the exercise of rights.⁷⁷ An illegal contract is unenforceable as contrary to public order, good morals, or prohibitive law, and duties to perform under such a contract may be discharged

For example, an obligation to pay gambling debts violates the law, public policy, and good morals. However, in a recent case regarding gambling debts by a Taiwan national in the United States, the Taiwan court applied the law of the State of Nevada, pursuant to the conflict of laws rule, and held such obligation enforceable in Taiwan.⁷⁸

In determining the validity of an agreement to refrain from trade or competition, except as otherwise provided by law, the court will look to each circumstance of the transaction. The courts are reluctant to enforce provisions which unreasonably restrict duration, geographic area, scope, and the nature of business.

Impossibility

Impossibility must have arisen after the formation of contract. A contract may be void for an impossible prestation or inability to perform owing to impossibility.⁷⁹

However, when the removal of such impossibility is possible or practicable, and the parties expect prestation after such removal, the contract will remain valid.⁸⁰

Rescission and Statute of Limitation

Rescission

The Supreme Court has held that rescission may be brought by the mutual agreement of the parties.⁸¹ The Civil Code provides in certain circumstances that one party can rescind the contract to remedy the situation.⁸² For instance, a non-defaulting party may rescind a contract if one party is in default of the contract and has not cured such default within a fixed reasonable time after notice from the non-defaulting party. No notification, however, will

75 Civil Code, arts 98 and 219.

76 Civil Code, art 99.

77 Civil Code, art 219.

78 *Journal of the Taipei Bar*, November 1993, at pp 6–7.

79 Civil Code, arts 246 and 247.

80 Civil Code, art 246.

81 1968 Supreme Court, Case 3211.

82 Civil Code, arts 254–256.

be required by the non-defaulting party opting for rescission if a contract can only be performed at a fixed period, due to the nature of such contract or the intent of the parties.

A creditor also may rescind a contract when a performance becomes totally or partially impossible and such impossibility may be imputed to the debtor.⁸³ There is no formality required for rescission under the Civil Code. Rescinding a contract takes effect on the conveyance of declaration of intent to the other party. No prejudice to claim for damages will operate against the party asserting rescission, even if the contract rescinded is terminated *ab inito*.⁸⁴

In a sales contract, rescission on account of the defectiveness of the principal goods extends to their accessories. Should the accessories alone be defective, rescission by the buyer can be made only towards such accessories.⁸⁵ Except in case of an obvious injury from the separation of partially defective goods, the buyer may rescind the contract regarding the defective part.

Statute of Limitation

Unless the seller has intentionally concealed the defect, the buyer's right to rescind the sales contract will lapse by limitation if not exercised after six months from the delivery of the goods.⁸⁶ Right of claim is usually extinguished by limitation or prescription if not exercised within 15 years. For claims of merchants and manufacturers for the price of goods or products supplied, such rights will be barred if not exercised within two years.⁸⁷

The period of statute of limitation cannot be extended or reduced by juristic acts. The statute of limitation runs from the time a claim can be exercised⁸⁸ Interruptions of such limitation may be made by a demand for satisfying the claim, an acknowledgment of the claim, an action or petition for a payment order, an application for conciliation or arbitration, or notice of pending action.⁸⁹

The Civil Code provides each duration of limitation after being interruption for cause.⁹⁰ For a contract claim for the price of goods supplied by a merchant, action will be barred if not exercised within two years. If there is an interruption for cause which has subsequently abated, the limitation will run from the cessation of the interruption.⁹¹

The right of avoidance in situations of fraud or duress must be exercised within one year from the time of discovery of fraud or the cessation of duress.⁹² The right of avoidance

83 Civil Code, arts 226 and 256.

84 Civil Code, arts 258 and 260.

85 Civil Code, art 362.

86 Civil Code, art 365.

87 Civil Code, arts 125 and 127(8).

88 Civil Code, art 128.

89 Civil Code, arts 128 and 129.

90 Civil Code, arts 130–136.

91 Civil Code, arts 137 and 138.

92 Civil Code, art 92.

will lapse 10 years after the declaration of intent.⁹³ The right of avoidance arising from mistake or erroneous communication must be exercised within one year from the date of the declaration of intent.⁹⁴

The consumer has the right to cancel contracts by returning the merchandise or by writing, with no explanations and expenses or fees required, seven days after his receipt of the merchandise by mail order or door-to-door sale. A sale by mail or by a face-to-face salesperson expressly made irrevocable or rejection of the consumer's right of return or cancellation will be void.⁹⁵

Modification and Waiver

Modification

Modification of the terms of a contract, even without new consideration, may be valid since consideration is not required to form a contract. No termination or modification of or to an express term of a written contract can be made unless in writing and signed by all of the parties to be charged therewith or their respective authorized representatives.

In general, however, oral modifications of a contract will be enforceable. If a contract is required by law to be in writing, such as in a land contract, the question is whether modification also requires a writing. The courts tend to require that modification have the same formality as the contract's formation. By statute, a special agreement in a sales contract discharging the seller of any liability on defects of right or goods or restricting such liability, will be void when the seller has intentionally concealed such defect.⁹⁶

Should such special provision be void, the other provisions of the sales contract will remain binding and enforceable because such contract is modified by the operation of law.

Waiver

In a contract, advance waiver of the benefit of the limitation as prescribed by law will be unenforceable.⁹⁷ The parties may stipulate that a waiver of any of the provisions of the contract or of any of the rights or remedies of the parties must be in writing and signed by the party to be charged in order to be valid.

As a general rule, unless the provisions of a sales contract explicitly stipulate a waiver of rights or remedies to which the contracting parties are entitled, no waiver will be presumed. The question remains whether a waiver will be deemed a continuing waiver of any other provisions if not clearly specified. The courts may consider the business practice or

93 Civil Code, art 93.

94 Civil Code, art 90.

95 Consumer Protection Law of 13 January 1994, art 19.

96 Civil Code, art 366.

97 Civil Code, art 147.

custom of the parties in a sales contract. It is suggested that the parties expressly indicate their intention as to the effect of waiver or subsequent waiver in the written contract.

If a creditor declares to the debtor his intent to waive or release the debtor from indebtedness, the obligation between the creditor and the debtor will thereby extinguish. On conveying such declaration to the debtor, the waiver by unilateral act of the creditor will be effective and binding.⁹⁸

Release or waiver of obligation by delegation is permissible; the release to a debtor by the donee without due authority, however, requires the ratification of the delegator-creditor.⁹⁹

Since the factor of consideration is not concerned, the effect of modification and waiver may serve as an accord and satisfaction agreement.

Missing Terms

The Civil Code, article 98, states that the parties' true intent must be sought, rather than the literal meaning of the words or expression, in interpreting the declaration of intention. The application of article 98 was considered by the Supreme Court, which held that, in the event that the language of the contract could provide the true intention of the parties, any implication of a different meaning would be unnecessary.¹⁰⁰

As a general rule, a contract is concluded when the parties have declared their meeting of the minds reciprocally. While certain non-essential points may be lacking or not expressed by the parties, a contract will be presumed formed once the parties have agreed on the essential or material elements of the contract. Depending on the nature of the transaction, the courts will determine the non-essential missing points as required by the Civil Code.¹⁰¹

A sales contract is concluded when the parties have reached mutual agreement on the goods sold and the price. If the object and the price have not been agreed, there is no conclusion of a sales contract.¹⁰² In a sales contract where the price is left unfixated or not settled but may be inferred, the price element is deemed satisfied. If price is to be fixed according to an agreed market price, the price is deemed fixed at the time and place of performance in terms of such market, unless the express terms of the contract provide otherwise.¹⁰³

The Supreme Court has stated that the agreed price and object are two essential elements to a sales contract.¹⁰⁴ A sales contract with an open price will be valid under certain circumstances. The Supreme Court has held in a sale of public property without expression of price that the element of price is deemed satisfied because public property has a set price.¹⁰⁵

In respect of essential terms, ie, object and price, in a sales contract, the courts cannot interpret the agreement from the intention of the parties; simply put, no sales contract is

98 Civil Code, art 343.

99 1933 Supreme Court, Case 3973.

100 1928 Supreme Court, Case 1118.

101 Civil Code, art 153.

102 1933 Supreme Court, Case 459.

103 Civil Code, arts 345 and 346.

104 1933 Supreme Court, Case 579.

105 1966 Supreme Court, Case 1645.

formed When the sales contract provides only that price will be determined according to reasonable circumstances or market value of the object at the place or time for delivery, the courts will consider the element of price complied with. As to the omission of non-essential terms, the courts may infer so long as such inference is not in conflict with express terms. The courts also may imply terms, eg, quality or fitness for purpose. Business custom or usage also may be employed in supplementing the missing terms of a sales contract.

Risk of Loss

Shift of Risk and Profit

Unless the express terms in a contract specify to the contrary, at the time of delivery, risk of loss and profits in the goods sold will shift to the buyer.¹⁰⁶

The Supreme Court has held that, as to the physical possession of the ship taken by the buyer, risk of loss and profits passed to the buyer although the title of the ship remained with the seller.¹⁰⁷ As a result, the transfer of title or ownership of the goods will not determine the shift of risk of loss, the taking of possession being the decisive factor.

In general, a debtor's non-performance of an obligation will be excused if such reasons or causes cannot be imputed to the debtor. If, as a result of causes for which neither party is responsible, one party cannot perform his obligation totally, the other party will be released from his counter-performance.¹⁰⁸ If there is non-performance for causes for which neither party is culpable, risk of price will be assumed by the party for whom performance becomes impossible to perform.

In cases of partial non-performance, the creditor can claim damages for the non-performance of the entire obligation. In the event of a sale of an object under a valid lease, the lease will continue against the buyer.¹⁰⁹

FOB, CIF, and C&F Contracts

Neither the Civil Code nor other laws define 'merchant' and 'non-merchant' and the 'time of delivery' during a sale of 'goods'. Nor are 'free on board' (FOB), 'cost, insurance, and freight' (CIF) and 'cost and freight' (C&F) defined in the law.¹¹⁰

106 Civil Code, art 373.

107 1942 Supreme Court, Case 1040; 1958 Supreme Court, Case 1655.

108 Civil Code, arts 225 and 266.

109 Civil Code, art 425.

110 The Civil Code provides general rules concerning allocation of costs or expenses of sale in Article 378, which are that, '[u]nless otherwise provided by law, by contract, or by custom, the costs of sale are to be borne according to the following rules: 1. The costs of the contract of sale are to be borne by the parties equally. 2. The costs of transferring the right sold, the costs of transporting the object of the sale to the place of performance, and the costs of delivery are to be borne by the seller. 3. The costs of taking delivery of the thing sold, the costs of registration, and the costs of forwarding the thing sold to a place other than the place of performance are to be borne by the buyer'.

If the parties have agreed FOB, CIF, or C&F terms, their meaning would be construed according to international trade custom. In interpreting the terms, the courts will look to the international rules promulgated, depending on the facts and circumstances of the business transaction at issue. The courts will apply the international customary law, custom, or usage, as appropriate, to determine at what critical point the risk of loss must be allocated.

In general, the seller will deliver the object to the buyer and cause the buyer to obtain title or ownership to it under a sales contract. In a sale of right, the seller will cause the buyer to acquire a legal right sold in addition to the possession of a certain thing.¹¹¹ A risk or burden will be allocated from the seller to the buyer if the buyer requests that the goods sold be delivered to a place other than that where delivery ordinarily would be made. Risk of loss passes to the buyer when the seller delivers the object to the carrier or forwarder entrusted with transporting such goods.¹¹²

As a result, on the seller's tender of delivery, risk of loss would shift to the buyer if the place of performance were changed due to the request of the buyer.¹¹³ The seller is entitled to compensation for the necessary expenses disbursed if risk of loss passed to the buyer before the delivery of the goods sold, and such expenses were incurred on the object before delivery and after such risks have passed.¹¹⁴

The allocation of risk of loss in sale on approval, by installments, by sample, and by auction are not expressly indicated in the Civil Code.

Risk on Bailed Goods

A bailment will be concluded at the time of delivering possession of the bailed goods, title to such goods not being transferred. No formalities are required in forming a bailment. Under the Civil Code, the bailment is a contract of deposit.¹¹⁵

The bailee has a right of possession to the bailed goods but has no right to use or cause a third party to use such goods. Risk will usually pass to the bailee if he used the thing deposited or permitted the use by a third party without the consent of the bailor. If the bailed goods are not damaged, the bailee still must pay reasonable compensation to the bailor for their use. If the bailed chattel is damaged, the bailee must pay unless it can be proved that such damages would have occurred even if the chattel were unused.¹¹⁶

111 Civil Code, art 348.

112 Civil Code, art 374.

113 As to place of performance, the Civil Code, art 314, states that '[i]f the place of performance is not fixed by law or by contract or by custom or cannot be inferred from the nature of the obligation or from other circumstances, the following rules will apply: 1. If the object of the obligation is to deliver a specific thing, performance must be made at the place where such thing was at the time when the contract was concluded 2. The other obligations must be performed at the place of the creditor's domicile'.

114 Civil Code, art 375.

115 Civil Code, arts 589–612.

116 Civil Code, art 591.

The uncompensated bailee only needs to exercise the same diligence of care for the goods as he applies to his own goods. Risk of loss passes to the uncompensated bailee if gross negligence by the bailee can be proven. In the event that the bailee is compensated, his duty of care must meet a higher standard, that of a good administrator, requiring greater diligence.¹¹⁷ To avoid liability, the bailee must prove that he has fulfilled his duty of care or that the damages to the bailed goods would have occurred in any event.

The bailee is entitled to reimbursement of expenses necessarily incurred for maintaining the goods; however, such right of reimbursement may be contracted out. For a claim for damages resulting from the nature or defect of the bailed chattel, the bailor will be liable to the bailee unless the bailor has no knowledge of the defective or dangerous character of the bailed chattel and is not negligent in ignoring it.¹¹⁸

In addition, risk on merchandise not ordered, but received, by the consumer through mail or hand delivery remains with the seller, and the consumer will have no duty to take care of such goods.¹¹⁹

Warranties

Warranty Against Defect in Goods and Right

As previously mentioned, the seller will transfer the title as well as possession of the goods to the buyer, and warrant that the goods transfer free from any defect.¹²⁰ The Civil Code does not explicitly address issues in respect of express warranty, warranty of title, implied warranty of quality or merchantability, or implied warranty of fitness for a particular purpose.

In a sale of right, the seller is bound to cause the buyer to acquire the right sold.¹²¹ The seller must warrant the right sold free from any other claims, liens, or encumbrances.¹²² Warranty also is distinguished from surety.¹²³ The Civil Code distinguishes between warranty and surety because the Chinese characters for warranty are the same as those for surety.

Express Warranty

If the written terms of a sales contract expressly state a certain warranty made by the seller to the buyer for the goods sold, such express terms will be enforced. The Civil Code does not regulate how an express warranty can be created.

117 Civil Code, art 590.

118 Civil Code, arts 595 and 596.

119 Consumer Protection Law of 13 January 1994, art 20.

120 Civil Code, arts 348, 354, and 355.

121 Civil Code, art 348(2).

122 Civil Code, arts 349–353.

123 Civil Code, arts 739–756. Article 739 states that '[a] suretyship is a contract whereby the parties agree that one of them must be bound to satisfy an obligation, when the debtor of the other party fails to perform same'.

Statements made by the seller in describing the goods sold or the exhibition of a model or sample may constitute an express warranty. Such statements or related promises of assurance or affirmations of certain facts by the seller to the buyer, if made orally or in the description or by sample or model, but not provided in the written contract, must be proven by the buyer, unless otherwise provided in the Civil Code.

Warranty of Title

In a warranty against defect of right, the seller must warrant the buyer free from any claim, infringement, or encumbrance of the right sold associated with the sale of goods.¹²⁴ It does not matter whether the contract of sale provides a warranty of title by the seller.

By statute, the seller must warrant that the good title is transferred and, at the time the sales contract is formed, that there are no other rights of any third parties enforceable against the buyer as the rightful owner of the goods sold. However, the seller will not be bound to warrant the right against defect if the buyer knew the condition of defect in right at the time of contracting, unless the express terms of the contract specified otherwise.¹²⁵

The courts may consider the buyer's knowledge satisfied if the buyer should have known of the defect. In any event, the burden of proof rests on the seller who asserts that the buyer had knowledge of such defective condition.¹²⁶

Implied Warranty of Quality, Fitness, and Merchantability

Warranties of quality, merchantability, or fitness for purpose, if not express in the sales contract, will be implied into the contract of sale. In a sale by sample, the seller must warrant that the quality of goods delivered conforms with that of the sample.¹²⁷

In addition, when the risk for profits in goods transfers to the buyer,¹²⁸ the seller must warrant the quality of the goods free from any defect as might destroy, impair, or reduce:

... its value, its fitness for ordinary purposes [merchantability], or its fitness for the purpose of the contract of sale. However, if the extent of the impairment is of no importance, such impairment cannot be deemed to be a defect.¹²⁹

The seller also must warrant that, at the time of transfer of risk, the goods have the promised qualities.¹³⁰ At the time of contracting, if the buyer knew or had reason to know of the defects in the goods, the seller will not be liable for the defects of quality or fitness for its ordinary purposes for which the goods are used or fitness for the purpose stated in the sales contract.¹³¹

124 Civil Code, art 349.

125 Civil Code, art 351.

126 1976 Supreme Court, Case 119.

127 Civil Code, art 388.

128 Civil Code, art 373.

129 Civil Code, art 354(1).

130 Civil Code, art 354(2).

131 Civil Code, arts 354 and 355.

According to the Civil Code, the responsibility of a seller who should reveal the defect, but intentionally conceals it, will not be exempted. If the defect is one of those enumerated in article 354(1) of the Civil Code and it was unknown to the buyer due to the buyer's gross negligence 'the seller is not responsible if he has not guaranteed that the thing is free from the defect, except in the case that he has intentionally concealed it'.¹³² Thus, if the seller called the buyer's attention to the defects and the buyer was grossly negligent in not discovering the defects, no implication of warranty would be drawn against the seller in a sale of goods transaction.

The Supreme Court has stated that the rules in the Civil Code regarding warranty of goods against defects supplement the intention declared by the contracting parties; except where there is agreement to exclude or disclaim such warranty, the seller ought to warrant the goods sold against any defects, even if there exists no such agreement, oral or written, by and between the parties for the seller to warrant.¹³³

The Supreme Court also has held that it would constitute a defect in merchandise if the identified goods sold were short in quantity, which is sufficient to impair or reduce the value, ordinary use, or quality of the goods.¹³⁴

Right to Exclude, Disclaim, or Modify Warranties

Issues relating to the formalities or effects of a disclaimer or exclusion or modification of warranties are not specifically dealt with by statute, except in article 366 of the Civil Code, which states:

An agreement discharging the seller from liability on account of defects in a right or a thing or limiting such liability is void if the seller has intentionally concealed such defect.

The general principles of law under the Civil Code will be applicable in deterring enforcement of an unconscionable or illegal contract. A seller in bad faith concealing the defects of right or goods sold will not be released from liability, and an agreement obtained through such misconduct by the seller will be void and of no effect as to the remaining part of the contract.

In general, it will be difficult for the seller to exclude, disclaim, or modify an express warranty without written consent from the buyer. In a standard form contract, disclaimer of warranty may be void because it is obviously unfair to the consumer buyer.¹³⁵

If any provisions of the standard form contract are invalid, illegal, or unenforceable, the validity, legality, and enforceability of the remaining provisions of the contract will not be affected or impaired, so long as the other provisions are not obviously unfair to either

132 Civil Code, art 355(2).

133 1940 Supreme Court, Case 826.

134 1984 Supreme Court, Case 1173.

135 Consumer Protection Law of 13 January 1994, arts 11 and 12.

r contracting party; in such case, the contract will be void. The seller's right to exclude, disclaim, or modify warranties, therefore, is limited

Remedies of Buyer

In General

In a sale of goods, remedies available to the parties are generally contract-based or tort-based.¹³⁶

Apart from the buyer's remedies regarding defective goods in actions for negligence or product liability claims,¹³⁷ contract-based actions in a sale are dealt with under the Civil Code.

The buyer has the right to inspect goods delivered, and he must do so without delay and within a reasonable period of time according to the nature and ordinary proceedings related to such inspection. If the buyer contracted out his right of inspection due to the seller's deception and assurance that no problem existed, the buyer may rescind the sale or revoke his acceptance, ask for price reduction, or seek compensation for the seller's non-performance.¹³⁸

The buyer has the right to reject non-conforming goods discovered after inspection and timely notice to the seller. If the buyer fails to notify the seller and such defects can be discovered through ordinary inspection, an acceptance of goods received will be deemed and no remedy of rescission will be provided. For defects not initially discovered but revealed in due course, the buyer must send notice to the seller. If the notice is not timely, the buyer has no further right to reject the goods.¹³⁹ In other words, if the defects could not be discovered prior to accepting the goods or if the seller intentionally concealed such defects, the buyer may reject the goods, rescind the sales contract, and/or sue for damages resulting from the seller's breach.

As to tendered goods lacking the quality warranted by the seller, the dissatisfied buyer can sue for the contract damages, rescind the contract, or demand reduction of price.¹⁴⁰ The buyer's right to opt for contract rescission or price reduction will be barred if not exercised within six months after the delivery of the defective goods; the limitation will be inapplicable if the seller deceived the buyer regarding such defects.¹⁴¹

If the goods rejected for defects were delivered from another place and the seller has no representative or agent at the place of acceptance, the buyer has a duty to temporarily preserve the goods under his custody. It is presumed that the goods delivered have no defects

136 There is no distinct law of torts in Taiwan. For actions based on torts, known as 'wrongful acts', the relevant Civil Code provisions are found in arts 184–198.

137 Since Taiwan implemented the Consumer Protection Law of 13 January 1994, strict liability may be alleged by the dissatisfied consumer for defective products or services provided

138 Civil Code, arts 356, 357, 359, and 360.

139 Civil Code, art 356.

140 Civil Code, art 360.

141 Civil Code, art 365.

unless the buyer proves such defects after taking appropriate measures within reasonable time.¹⁴² If the goods are perishable, the buyer may sell the goods and may deduct reasonable expenses associated with the handling and sale of the goods. Notice to the seller for the sale of perishable goods must be made without delay; the seller may sue the buyer for damages arising from delay.¹⁴³

Pursuant to the Civil Code, the buyer may opt for contract rescission or price reduction because of the warranty of the seller and defects in goods sold;¹⁴⁴ however, if ‘. . . a rescission will constitute an obvious unfairness of the transaction, the buyer is only entitled to a reduction of the price’.¹⁴⁵ If the dissatisfied buyer should opt for rescission, his right to claim for damages will not be prejudiced.¹⁴⁶

The buyer may refuse payment in whole or in part, if it appears that a third party may have a conflicting right or interest, unless the seller provides proper security.¹⁴⁷ As indicated by the Supreme Court, after goods have been tendered by the seller and receipt of thereof by the buyer, the Civil Code, art 368, remains applicable. In other words, receiving the delivered goods will not preclude the buyer’s right to refuse payment, in full or in part.¹⁴⁸ If the seller does not observe the specific instructions furnished by the buyer in delivering the goods sold, the buyer may sue the seller for damages resulting from the seller’s deviation from instructions.¹⁴⁹

Moreover, instead of rescinding a contract or asking for a price reduction, the buyer may seek performance in the delivery of non-defective or conforming goods if the goods sold are designated only as to their kind.¹⁵⁰ There are no rules for specific performance by statute. If the contract also is silent in that respect, the courts will deal with the issues regarding the buyer’s right of specific performance on a case-by-case basis.

Limiting Buyer’s Rights and Remedies by Contract

The rights and remedies of the buyer may be expressly limited in the contract. However, such contract will be void if the seller’s intentional concealment of defects is proven.¹⁵¹ In a standard form contract, such limitation will be unenforceable if it is obviously unfair or unconscionable to the buyer and contrary to the principle of good faith and reciprocity.¹⁵²

If the buyer is a non-consumer and has dealt with a foreign seller, the Fair Trading Law might have effect in certain situations. As a consequence, limitation of the buyer’s remedies by contract would be narrowly construed by the courts.

142 Civil Code, art 358(1) and (2).

143 Civil Code, art 358(3) and (4).

144 Civil Code, arts 354–358.

145 Civil Code, art 359.

146 Civil Code, art 260.

147 Civil Code, art 368.

148 1970 Supreme Court, Case 4368.

149 Civil Code, art 376.

150 Civil Code, arts 200 and 364.

151 Civil Code, art 366.

152 Consumer Protection Law of 13 January 1994, arts 11 and 12.

Remedies of Seller

In General

The Civil Code provides little guidance in respect of the seller's remedies, personal or real; there are no specific rules for dealing with the issues relating to the seller's rights to identify goods to the contract, to stop delivery of goods in transit, to resell the goods, or to cure defects on the buyer's rejection or revocation.

Except as provided by statute, the general provisions of the Civil Code regarding performance will be applicable, but these do not furnish a clear and satisfactory answer for each of the above issues. The obligations of the buyer in a sales contract are to pay the agreed price and to accept the goods sold.¹⁵³

If there is non-performance by the buyer, the seller may rescind the contract and claim damages.¹⁵⁴ If the buyer is responsible and performance becomes impossible for the seller, the seller may seek performance by the buyer after deducting his costs saved.¹⁵⁵

For causes for which neither party is responsible and where either party is unable to perform, the other party will be discharged from his counter-performance; in other words, both parties will be excused, and the contract can be rescinded.¹⁵⁶ If the counter-performance has been performed, in full or in part, the performing party may sue for unjust enrichment¹⁵⁷ and claim restoration.¹⁵⁸

Right to Withhold, Recover, and Salvage Goods

In general, the seller may withhold delivery of goods on the buyer's unjustifiable rejection or non-payment. When the seller learns of the insolvency of the buyer, the seller is not relieved of making delivery if the contract is silent in that regard and the buyer does not breach any terms.

The seller may take precautionary measures by not delivering further or by stopping delivery in transit. The seller may take appropriate measures to salvage the value of unfinished goods, although there is no general rule requiring mitigation of damages.

Repossessing and Reselling Goods under Sale by Condition

A security interest can be reserved under the Secured Transaction Law. In a sale by condition made expressly in writing to reserve title, title will transfer from the seller to the

153 Civil Code, art 367, provides that '[t]he buyer is bound to pay to the seller the agreed price and to accept delivery of the object sold'.

154 Civil Code, arts 226, 256, and 260.

155 Civil Code, art 267.

156 Civil Code, arts 225 and 266.

157 Civil Code, arts 181 and 182.

158 Civil Code, art 266(2).

buyer only when certain conditions are met.¹⁵⁹ In such case, the seller will have the right to repossess the goods delivered if:

- The price is not paid according to the agreement;
- Any of the particular conditions is not complete; or
- The goods are sold, pledged, or otherwise disposed of.¹⁶⁰

The seller may claim damages if the value of the repossessed goods has been obviously reduced¹⁶¹ The buyer may request in writing that the seller resell the repossessed goods within 10 days after repossession. Despite the buyer's request, the seller may resell the repossessed goods within 30 days after repossession. If no resale is made because the buyer did not so request or the seller has not resold the goods within the 30-day period, the seller is exempted from returning the price paid by the buyer, and the conditioned sale will be of no effect.¹⁶²

It must be noted that the seller's right of repossession exists only before the time the title passes to the buyer. If title has already passed to the buyer in a conditioned sale, the seller cannot repossess the goods without the consent of the buyer. Moreover, a sale by condition will be void if the object of the conditioned sale has been pledged pursuant to the Secured Transaction Law.¹⁶³

A reservation of title or a security interest in a sale other than a sale by condition may be made by an express clause of conditions in the written contract; such provision, however, will not be effective against a third party in good faith if no registration has been made with the designated authority.¹⁶⁴

Right to Cure on Buyer's Rejection or Revocation

The Civil Code states that:

... [w]hen a party to a contract is in default, the other party may fix a reasonable time and notify him to perform within that time. If he does not perform within that time, the other party may rescind the contract.¹⁶⁵

No right to cure is provided by statute on rejection or revocation by the buyer. The buyer has the option of giving notice to the seller to cure the defects within a reasonable period. If the performance's time by the seller is of essence according to the nature of the contract or by the parties' intent, which time nevertheless lapses without performance, the buyer can simply rescind the contract without notification to the seller, and the seller has no right to cure.¹⁶⁶

159 Secured Transaction Law of 5 September 1963, as amended on 28 January 1976, art 26.

160 Secured Transaction Law of 5 September 1963, as amended on 28 January 1976, art 28(1).

161 Secured Transaction Law of 5 September 1963, as amended on 28 January 1976, art 28(2).

162 Secured Transaction Law of 5 September 1963, as amended on 28 January 1976, art 29.

163 Secured Transaction Law of 5 September 1963, as amended on 28 January 1976, art 31.

164 Secured Transaction Law of 5 September 1963, as amended on 28 January 1976, art 5.

165 Civil Code, art 254.

166 Civil Code, art 255.

Remedy for Non-Acceptance or Repudiation

If the seller has made conforming delivery but the buyer has not performed his obligation in accepting the goods, the buyer is deemed late in acceptance as well as late in payment, and the seller may have the right to rescind the contract pursuant to article 254 of the Civil Code.¹⁶⁷

On the buyer's default in non-acceptance or repudiation, the seller may fix a reasonable period of time and so notify the buyer to accept the delivery within such period. If the buyer does not fulfill his obligation to accept the goods and pay the price within such period of time, the seller may rescind the contract of sale. The seller's exercise of his right of rescission will not prejudice his right to sue for damages.¹⁶⁸

The Civil Code provides for restoration to the prior condition or monetary damages to compensate the injury sustained. Damages are allowed only for actual injury and profits lost.¹⁶⁹ The law does not specify how the damages or lost profits will be calculated. For damages caused to and interest saved by the creditor arising out of the same occurrence, the debtor is only responsible for the difference.¹⁷⁰

If damages result from the buyer's non-acceptance or repudiation, assuming the goods are in the possession of the seller's agent, the courts may measure the damages after deducting interest or expenses saved by the seller, if any, as the difference between unpaid contract price plus necessary expenses for resale and market price of resale at the place of delivery.¹⁷¹

Damages for Lost Profits

Lost profits are recoverable. Article 216(1) of the Civil Code stipulates that, unless the law or the contract specifies to the contrary, the damages will be confined to actual damages and lost profits.

The Civil Code provides that:

... [p]rofit is deemed to have been lost which could have been normally expected, either according to the ordinary course of things, or according to the projects or preparations made or according to other special circumstances.¹⁷²

Under certain situations, all anticipatory profits will be deemed lost profits.

The calculation of lost profits is conducted very strictly by the courts. Even with specific evidence, judges tend to be reluctant to grant damages for lost profits.

167 1975 Supreme Court, Case 2367.

168 Civil Code, arts 254, 255, and 260.

169 Civil Code, arts 213–216.

170 1938 Supreme Court, Case 73.

171 Civil Code, art 358.

172 Civil Code, art 216(2).

Punitive Damages

Punitive damages for breaching a contract of sale are allowed under the Civil Code. The parties may expressly provide that the obligor must pay a penalty on his failure to perform.¹⁷³

Such penalty is generally monetary, but it may be in a form other than money.¹⁷⁴ Such penalty is similar to the concept of liquidated damages under the Anglo-American law.¹⁷⁵

The Civil Code provides that:

... if it is agreed that the penalty is only for non-performance of the obligation at the agreed time or in the agreed way, the creditor may, if the obligation is not performed, claim performance or damages for non-performance, in addition to penalty.¹⁷⁶

If punitive damages are expressly provided for in a contract of sale, the seller may sue for performance or monetary damages plus punitive damages. The Civil Code also provides authority for the courts to reduce an unreasonably high penalty¹⁷⁷ or to offset the amount of penalty in proportion to the benefit received by the creditor due to the partial performance by the debtor.¹⁷⁸

It is unlikely for a court to grant punitive damage where there is no such provision in the contract, unless the law otherwise provides such remedy. For example, in consumer litigation for harm caused by the intentional conduct of a business enterprise, the consumer can plead treble exemplary damages. If the consumer is harmed due to the negligence of a business enterprise, punitive damages may be sought.¹⁷⁹

Action by Seller for Price or Specific Performance

In a contract of sale, it is the buyer's obligation to pay the agreed price to the seller. The seller's action for price is not formulated under the law. It is possible that the buyer may withhold payment for fear that a third party might interfere with the buyer's right to goods delivered by the seller.¹⁸⁰

In a sale of machinery, the Supreme Court found it justifiable for the buyer to refuse partial payment when the machinery possessed by a third party was under judicial attachment by the creditor of the third party.¹⁸¹ The delivery of goods sold and the payment of price

173 Civil Code, art 250(1) states that '[t]he parties may agree on a penalty to be paid by the debtor in case the debtor does not perform the obligation'.

174 Civil Code, art 253.

175 Civil Code, art 250(2) states that, '[u]nless otherwise agreed on by the parties, the penalty must be deemed to be the total amount of damages due for non-performance . . . '.

176 Civil Code, art 250(2).

177 Civil Code, art 252.

178 Civil Code, art 251.

179 Consumer Protection Law of 13 January 1994, art 51.

180 Civil Code, art 368.

181 1970 Supreme Court, Case 4368.

must be made simultaneously unless the law, contract, or custom indicates to the contrary. If there is a fixed time for delivery of goods, the price is deemed to be paid at such time of delivery. The price must be paid at the place of delivery when the delivery of goods and price are to take place at the same time.¹⁸²

The concept of specific performance is not defined under the Civil Code. Action for specific performance under sale is not provided, although the execution relating to claims for feissance and non-feissance for a debtor is possible.¹⁸³ It is questionable whether the term ‘performance’ in the Civil Code has the same meaning as ‘specific performance’.¹⁸⁴

Remedy under Pledge or Lien if Buyer is Insolvent

If the buyer is declared insolvent and unable to pay his indebtedness, the creditor-seller may exercise his rights in compliance with bankruptcy procedures unless there is a pledge¹⁸⁵ or lien¹⁸⁶ on the goods sold.

The Bankruptcy Law states that:

... [a] person who has a pledge, a mortgage, or a lien on the properties of the debtor prior to the adjudication of bankruptcy will have the right of exclusion in respect of such property. Creditors who have the right of exclusion exercise their right without complying with the bankruptcy procedure.¹⁸⁷

No statute provides the seller with a lien or purchase money mortgage over the identified goods. Pledge of chattels takes effect on the possession of delivered goods pledged as security for an obligation. The pledgee cannot have the pledgor possess the pledged goods on his behalf of the pledgee.¹⁸⁸ As regards a lien, the creditor who possesses a chattel owned by the debtor may have the right to retain such chattel if all of the following conditions are met:

- The debt has matured;
- There exists a causal connection between the debt and such chattel; and
- The chattel is not possessed through any tortious conduct.¹⁸⁹

182 Civil Code, arts 370 and 371.

183 Civil Code, arts 226 and 227.

184 1942 Supreme Court, Case 391.

185 Civil Code, arts 884–910; Secured Transaction Law of 5 September 1963, as amended on 28 January 1976, arts 2, 4, and 15–25.

186 Civil Code, arts 928–939.

187 Bankruptcy Law of 17 July 1935, as amended on 5 December 1980, art 108.

188 Civil Code, arts 884 and 885; Secured Transaction Law of 5 September 1963, as amended on 28 January 1976, arts 15–25.

189 Civil Code, art 928.

The creditor will have no such right of retention once his claim is fully satisfied. In a contract involving an international seller of goods, it is unlikely that a pledge or a lien will be involved.

Letters of Credit

Documentary credits or letters of credit are the most frequent method of payment in sale of goods transactions over a long distance. The concept of the letter of credit has been widely accepted in transnational trade.

The Banking Law defines letters of credit and provides certain rules governing the relationship between the bank and its customer.¹⁹⁰ A 'letter of credit' is an instrument which:

. . . a bank has issued on the request of a customer to notify and authorize a beneficiary named by the customer to issue a draft or other certificate in accordance with a prescribed form and in an amount not to exceed a certain limit to be accepted or paid by the bank or its designated correspondent after the beneficiary having performed the terms and conditions as agreed on.¹⁹¹

The Banking Law states that rights and obligations by and between the bank and its customer must be stipulated in a contract on opening a letter of credit.¹⁹²

The Uniform Customs and Practice for Documentary Credits is widely accepted in Taiwan. At minimum, the Uniform Customs and Practice for Documentary Credits will have the force of a trade custom. As a consequence, the courts frequently refer to the provisions of the Uniform Customs and Practice for Documentary Credits, unless other law is contravened, even when the parties did not express it in the sales contract.¹⁹³

The Supreme Court has held that, in a letter of credit transaction, the delivery of the letter of credit must be prior to delivery of the goods by the seller since the seller usually awaits the receipt of the letter of credit before initiating the process for delivering the goods.¹⁹⁴

The principles of the autonomy of letter of credit and the doctrine of strict performance are generally observed; yet, the decisions of the courts exhibit inconsistencies and, in some cases, the courts apply the opinions of local authorities in reaching conclusions favoring the exporter and in contradiction to the Uniform Customs and Practice for Documentary Credits.¹⁹⁵

190 Banking Law of 28 March 1931, as amended on 30 October 1992.

191 Banking Law of 28 March 1931, as amended on 30 October 1992, art 16.

192 Banking Law of 28 March 1931, as amended on 30 October 1992, art 31.

193 1987 Supreme Court, Case 1664; 1985 Supreme Court, Case 1193; 1983 Supreme Court, Case 273; 1970 Supreme Court, Case 367.

194 1974 Supreme Court, Case 206; Civil Code, art 348.

195 1974 Supreme Court, Case 2671; 1980 Supreme Court, Case 1367.

International Aspects

Vienna Convention

Taiwan is not among the Contracting States to the United Nations Convention on Contracts for the International Sale of Goods of 1980 (Vienna Convention).

A foreign seller of goods dealing with a Taiwanese buyer should be cautious since the formation, interpretation, warranties, and remedies of a sale of goods transaction might differ from those of the Vienna Convention. The court will apply the Vienna Convention rules if the application of the Convention is expressly indicated in the sales contract. The parties also can contract out the applicability of any provisions of the Vienna Convention, although the result might be identical after the courts apply the Civil Code or other related laws.

Choice of Law

Choice of law will be governed by the Private International Law. In general:

... [t]he form of a juristic act must be decided by law applicable to such act; provided that if the juristic act is done in a form prescribed by the *lex loci actus* (place of act), it also will be valid.¹⁹⁶

However, where a juristic act establishes an obligatory relationship, ie, contracts, the intention of the parties will determine the applicable law. In the event that the intention of the parties cannot be presumed or ascertained, the law of the parties' country when both parties have the same nationality, or the *lex loci actus* where there exist different nationalities of the parties must be applicable.¹⁹⁷

The law of the place of making or the place of performance will govern the validity of the contract. The Law Governing the Application of Laws to Civil Matters Involving Foreign Elements of 6 June 1953 provides:

'If the act was done at different places, that place where the notice of offer was issued must be deemed as the place of the act. If the opposite party did not know the place where the notice of offer was issued at the time when the offer was accepted, the place of domicile of the offeror must be deemed as the place of the act.'¹⁹⁸

196 Law Governing the Application of Laws to Civil Matters Involving Foreign Elements of 6 June 1953, art 5(1).

197 Law Governing the Application of Laws to Civil Matters Involving Foreign Elements of 6 June 1953, art 6.

198 Law Governing the Application of Laws to Civil Matters Involving Foreign Elements of 6 June 1953, art 6(2).

The law of the place of performance (*lex loci solutionis*) will apply when the place of the act spans two or more countries or it does not belong to any country.¹⁹⁹ As a result, in a contract involving a foreign seller of goods, the parties' intent will govern the construction of the agreement.²⁰⁰

Following certain situations as expressly stated in the Private International Law, the law of the place of act or the place of performance also may be applicable to a sales contract involving foreign sellers. However, it must be noted that custom is not one of the sources of law applicable in commercial matters with foreign elements.²⁰¹

Discovery and Judicial Assistance

The law does not provide for any forms of discovery to be conducted by the parties, such as depositions, interrogatories, and document production. The courts have authority to conduct discovery as they deem proper.

Consequently, the scope of the pre-trial discovery in Taiwan's courts is limited, and little assistance is available for a foreign court action.

With respect to foreign laws or custom, of which the courts are not bound to take judicial notice, the burden of proof is borne by the party alleging them, but the courts may *ex officio* make an investigation. Considering the heavy court load, it is almost impossible for the judge to conduct his own independent investigation. The court nevertheless will assist the foreign court in civil or criminal matters which are not in contradiction with the law.

Requests by the foreign court for assisting service of process must be forwarded through the diplomatic channels of Taiwan and must be based on reciprocity.²⁰²

Recognition and Enforcement of Foreign Judgments

The authority for the courts to recognize and enforce a foreign judgment is provided in the Code of Civil Procedure, article 402, which states:

In any of the following cases an irrevocable judgment of a foreign court will not be deemed valid:

1. If, according to the laws of Taiwan, the foreign court concerned has no jurisdiction over the case;
2. If the party defeated is a citizen of the Republic of China, who has not responded to the action, except where the summons or order necessary for the

199 Law Governing the Application of Laws to Civil Matters Involving Foreign Elements of 6 June 1953, art 6(3).

200 Law Governing the Application of Laws to Civil Matters Involving Foreign Elements of 6 June 1953, art 9.

201 The Law Governing the Application of Laws to Civil Matters Involving Foreign Elements of 6 June 1953, art 30, provides that '[i]n civil matters involving foreign elements, if there is no provision in this law applicable, the provisions of other law will apply. If there is no such provision in other law, the general principles of law must be followed'.

202 Assistance Rules of Matters Entrusted by Foreign Courts of 25 April 1963, arts 4 and 5.

commencement of the action has been served on the party himself in that foreign jurisdiction, or has been served on him through the judicial assistance of the Republic of China;

3. If the judgment of the foreign court is considered to be incompatible with public order or good morals; or
4. If the judgments rendered by the Taiwan courts are not reciprocally recognized by the foreign court concerned.

Conclusion

In a sale of goods transaction involving a foreign seller, the courts will apply all pertinent laws, mainly the Civil Code. Due to the nature of the legal system, codification enacted by the legislation will take a considerable waiting period. In addition to the Trade Law and the Fair Trading Law, the new Consumer Protection Law will have a profound effect on the development of business transactions in Taiwan.

After the full implementation of the Consumer Protection Law, the consumer will be in a better position against the seller, domestic or international.