

Sale of Merchantable Quality Goods in Today's Online Contract: Issues and Challenges

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DOI: <http://dx.doi.org/10.18196/iclr.v4i2.15858>

Abstract

Nowadays, many consumers choose to buy their needs using online platforms rather than the traditional method. The transactions became more active during the Covid-19 pandemic when the citizen movement was restricted with the enforcement of the Movement Control Order. Thus, the online platform needs to provide good information on the product to gain consumers' confidence in entering into any online transactions. This paper highlights the principles of sale of merchantable quality goods in the Malaysia Sale of Goods Act 1957(SOGA) and the consequences of the breach based on a systematic literature review. This paper also investigates the application of the sale of merchantable quality goods in online platforms using the method of content analysis. This research revealed that Lazada and Shopee, as Malaysia's most clicked e-commerce platforms, successfully protect their ranking by providing a perfect practice in ensuring the goods sold comply with the merchantable quality as in SOGA. However, as consumers must be aware of the underlying principle of *caveat emptor* thus, this paper concludes with some tips for buying online and the suggestion for the online platform to ensure the practice is in line with the current law in Malaysia.

Keywords: consumer protection; merchantable quality; online contract; sale of goods

1. Introduction

Malaysian Sale of Goods Act 1957 (SOGA) governs transactions involving all types of goods defined in Section 2 of SOGA which covers every kind of movable property other than actionable claims and money for the purpose of commercial or consumer sales. SOGA is not only applicable to face-to-face transactions but may also cover online transactions since there is no prohibition for the sale of goods over the net in the Act (Amin & Nor, 2013). However, the Act secures minimal protection for consumers, mainly covering the transactions themselves rather than the protection. The online buyer is exposed to many risks of not being able to exercise care in making purchases, no opportunity to examine goods, and no chance of knowing the trader is more vulnerable than traditional buyers (Azam et al, 2020; Al-Daboubi & Alqhaiwi, 2022).

Moreover, the Act preserves the common law rule of *caveat emptor*, which gives liability to the buyer to examine the goods before entering into any transactions. Failure to discover

the product's defect before the contract is concluded may deny the buyer's rights to recover for the defect (Masum et al., 2018).

Generally, Section 16 (1) SOGA highlights that there is no implied warranty as to quality or fitness for any particular purpose of goods in Section 16 (1) of SOGA. Merchantable quality of goods is an exception to the general rule where there is an implied condition as to the merchantable quality of the goods in a sale contract.

In Malaysia, Shopee, with 53,983.3 million traffic monthly visits as of the 2nd quarter of 2021, becomes the first e-marketplace in the country while Lazada in the second rank with 13,753.3 million traffic monthly visits (Statista, 2022). Thus, this paper will analyse the concept of merchantable quality practiced in these two online platforms and discusses four relevant issues of merchantable quality of goods, namely (a) the concept of merchantable quality of goods in the sale of goods contract, and (b) the consequence of a breach of merchantable goods quality in a sale of goods contract, and; (c) the application of merchantable quality goods in Shopee and Lazada, and (d) the consequences of breach of merchantable quality goods in Shopee and Lazada.

2. Method

This article employs a doctrinal analysis consisting of the principles in law books and legislation deduced from judicial decisions. The article will primarily involve the analysis of materials from both primary and secondary sources in law. Library research was conducted to gain information on the sale of merchantable quality goods in the face-to-face contract and electronic contract based on textbooks, journal articles, and other relevant online sources. The article used Shopee and Lazada as samples to display the application of sale of merchantable quality as highlighted in SOGA. Terms and policy in Shopee and Lazada were also referred on the application of sale of merchantable quality.

3. Discussion and Analysis

A stipulation in a contract of sale for the merchantable quality of goods may be a condition or a warranty. A condition is a stipulation vital to the contract's primary purpose, and the innocent party has the right to treat the contract as being repudiated in the case of a breach (Alsagoff, 2015). Conversely, a warranty refers to stipulation collateral to the contract's primary purpose and the innocent party the right to claim damages in case of a breach but not to reject the goods and treat the contract as repudiated (Stone, 2013). A term may be a condition, though stipulated as a warranty in the contract, depending on the construction of the contract and not the words used by the parties in the contract (Yusoff, 1998). A term may also be classified as an express term or implied term. Express term refers to a term stipulated in the contract by the contracting parties, whereas the implied term is a term not being specified by the parties in the contract but may be implied because of its importance (Cohan, 2000).

3.1. Section 16 SOGA

Section 16 of the Malaysian Sale of Goods Act 1957 highlighted no implied condition or warranty as to the quality of the product except (1) (b) that the goods shall be of merchantable quality. This section, however, fails to provide the meaning of merchantable quality. According to Pheng & Detta (2018), merchantable goods can be defined as goods fit

for the particular use to which they were sold. Thus, the goods may be regarded as unmerchantable if it is defective for their particular purpose. In *David Jones v Willis* (1934) 52 CLR 110, the court held that there was a breach of conditions when the shoes purchased by the plaintiff were unmerchantable and not fit to purchase according to Section 16 (1) (b). In this case, the shoe's heel was broken off when she wore it for the third time, making her fall and break her leg. It was revealed that the shoes were not made carefully, and the heels had not been of merchantable quality as it was not attached to the shoes. Similarly, in *Syarikat Abdul Ghaffar Trading Sdn Bhd v Societe Agro-Expert Sahel-Sages* [2022] MLJU 298, the court decided that there was a breach of implied condition as to the merchantable quality of goods when the dried dates supplied by the defendant damaged before the promised shelf-life period. Therefore, the plaintiff can treat the contract as being terminated and claim for special damages and losses incurred by the plaintiff, including the customs duties and tax, storage costs and expenses incurred in disposing of the unmerchantable quality dates.

If the general description in the contract stated that the goods sold could usually be used for several purposes, then fit for any of the purposes will make the goods merchantable under the description. This principle had been upheld in *Henry Kendell & Sons v William Lillico & Sons Ltd* [1969] 2 AC 31, where in this case, the Brazilian groundnut extract sold was suitable for cattle and older poultry but caused the death of young poultry. There was no breach of an implied condition of merchantable quality.

Conversely, if the description mentioned that the goods sold could be used for one purpose only, then the goods would become unmerchantable if they could not be used for that particular purpose. In *Wren v Holt* (1703) 1 KB 610, the beer would be of unmerchantable quality when it was unfit to drink since it contained arsenic from the unclean keg. As the beer has only one purpose in the description, thus not able to be consumed, making it unmerchantable quality goods.

However, the exception is ineffective if the parties who claimed the unmerchantable quality of products never argued or complained about the delivered goods, which were terrible and did not follow the specifications. The complaint should be made immediately after the goods were received. This principle has been highlighted by Shamsulbahri Ibrahim JC in the case of *Industrial Concrete Products Sdn Bhd v CTL Piling & Construction Works Sdn Bhd & Ors* [2022] MLJU 704. In addition to that, Rohatul Akmar Abdullah SJ highlighted in *Hubei Wanhe Food Co. Ltd v Guan Hiang Marketing Sdn Bhd* [2021] MLJU 2351 that with the presence of the plaintiff and a buyer from Pulau Pinang to view the complained dried mushrooms at the defendant's premise where the goods were kept, proved that there was knowledge on the part of the plaintiff about the complaint mushrooms. Moreover, the plaintiff asked the defendant to sell the mushrooms by auction as the goods do not meet the expected quality.

Besides, a few factors need to be considered to determine the merchantability of goods, including price, goods' description and the purpose of buying must come to the seller's knowledge and any other relevant circumstances (Pheng & Detta, 2018). However, the exception of merchantable quality is not applicable if the buyer checks the goods during the contract is made. In *Thornet & Fehr v Beer & Sons* [1919] 1 KB 486, the court held that the superficial look made outside the barrels in which the glue was stored regarded as examination within the meaning of Section 16 (1) (b) of SOGA. The court further stated that a proper examination would have revealed the defect, such as opening the barrel.

If the buyer knows of the product's defect before a contract is concluded, then the buyer cannot, later on, claim the exception of merchantable quality (Saraswati, 2015). In *Barlett v*

Sidney Marcus Ltd [1965] 1 WLR 1013, the salesman informed the plaintiff that the secondhand car clutch and the oil pressure were defective and needed a minor repair costing around £2-3. However, the plaintiff discovered that the defect was more severe than the contracting parties had imagined and cost the plaintiff £84 to repair. However, the court held that there was no breach of implied condition regarding the merchantable quality because the plaintiff should expect that the secondhand car could be used for driving even if the condition was not as good as a new car.

The implied condition of merchantable quality also applies to the goods sold under their patent or trade name. In *Wilson v Ricket, Cockerall & Co Ltd* (1954) 1 All ER 868, when a fuel by its trade name Coalite exploded in the fireplace, the court held that the whole consignment, including a piece of coal in which a detonator was embedded, was unmerchantable and thus, the exception of merchantable quality was applied. The merchantable good should be reasonable for the purpose described, and the purpose was not met in this particular case.

3.2 Consequences of Breach

In the case of a breach, the merchantable quality condition in Section 16 (1) (b) rendered the innocent party rights to treat the contract as being repudiated as it is a stipulation essential to the primary purpose of the contract (Section 12 (2) of SOGA). However, the buyer may elect to treat a breach of condition as a breach of warranty as prescribed in Section 13 (1) SOGA. If he elects to treat the breach of condition as a breach of warranty, he may not treat the contract as repudiated. Several cases also recognized this principle, including *Associated Metal Smelters Ltd v Tham Cheow Toh* [1971] 1 MLJ 271. There is also a situation where the buyer has no option but to treat the breach of condition by the seller as a breach of warranty, especially when the contract for the sale of specific goods is not severable and the buyer has accepted any part of the good. Section 13 (2) of SOGA recognized this principle, and in such a situation, the buyer is entitled to be awarded damages and not to treat the contract as repudiated.

Under Section 62 SOGA, the statutory implied terms prescribed in SOGA can be excluded by express agreement or by previous dealings or usage of the contracting parties. This section gives contractual freedom for the contracting parties, especially the sellers, to dominate the sale of goods transaction (Yusoff et al., 2015). Consequently, the seller cannot include the merchantable quality condition in their contract and use the standard form of contracts, including an exclusion clause hidden in the fine print (Asuhaimi et al., 2021; Abdullah & Yusoff, 2015; Masum et al., 2018). The court also tried to construct the exclusion clauses strictly, especially when the contract involved parties with no equal bargaining strength (Aun & Vohrah, 1991). According to Rachagan (1997), SOGA needs to be repealed. Moreover, the English Sale of Goods Act 1979 does not contain a similar provision.

3.3 Concept of Merchantable Quality in Malaysian Online Trading

Buying online has become prominent among Malaysian nowadays. The comforts of buying online without worrying about the lack of parking space, the running out of fuel, and the cash shortage contributed to the mushrooming platform for online trading. Online buyers can shop globally from their homes with more options than traditional contracts (Anggriawan et al, 2022). They can buy international products directly from the manufacturer without traveling out from their country with one click (Nursyirwan & Ardaninggar, 2020). Unluckily, as no inspection can be made thoroughly as in the physical shop, the buyers will only rely on the product description, hoping that the product is of merchantable quality. Thus, it is crucial

to have a good quality website representing the product's detail with its original image (Asuhaimi et al., 2017). Although the online buyer cannot see and touch the product, the product in the contract must reach the merchantable quality as in the face-to-face contract as section 16 (1) (b) SOGA is also applicable to the online transactions. In Malaysia, Shopee and Lazada are the two most active platforms chosen by Malaysian since the Movement Control Order announced by the Government of Malaysia in March 2020 (Asuhaimi et al., 2021).

3.3.1 Application of Implied Condition as to Merchantable Quality in Shopee

Shopee, in its terms and conditions, highlights the seller's responsibility to provide accurate and correct information such as the price and the details of items, inventory amount and conditions for sales on the seller's listing in their platform. Sellers included the ordinary seller, Shopee Mall seller and the official shop. Shopee introduced Shopee Mall and Official Shop to give rights and privileges to the Shopee-registered buyers to buy confidently with the sellers that Shopee has carefully selected. All products listed by Shopee Mall and Official Shop sellers must be 100% authentic, and any counterfeit products are prevented from being listed in Shopee Mall and Official Shop. The counterfeit product here includes the product which imitates the existing brand to mislead or trick the buyer. It may include an illegal product, a fake or replica product, a discontinued product, an under-price product, a registered trademark product with unauthorized packaging and a replica product with an unauthorized trademark. However, original Equipment Manufacturer (OEM) brands are not categorized as counterfeit products since no official brand logo is displayed. However, in the event of non-compliance, Mall Seller and Official Shop are said to have violated the terms, and Shopee may remove the counterfeit item from the seller's listing or prohibit the publication of the same or similar goods or restrict, suspend, or terminate the Mall Sellers or Official Shop Shopee account. Each Mall Seller and Official Shop Seller must ensure that the product offered in Shopee observes the requirements stated in the law and all the required specifications such as product warranties, specifications, quality, safety and hygiene requirements are listed on the site (Shopee, 2018).

It is evident that even though Shopee had divided the sellers into three categories; Ordinary Sellers, Mall Seller and Official Shop, Shopee still failed to highlight the importance of product quality to the sellers before they can be called Mall Seller or Official Shop. A shop is an offer to be a Mall Seller or Official Shop because of its authentic product but not because of its quality. The terms regarding the merchantable quality of goods are almost absent, which may implicate that the platform does not appreciate the quality of the goods sold. Although Shopee introduced the Shopee Guarantee Policy to increase the trust among the buyers in their platform, however, they still failed to highlight the non-compliance to the merchantable quality requirement as Section 16 (1) (b) may give the rights to the buyer to return and refund the product received. As such, the effectiveness of the policy in the case of unmerchantable quality is still in question (Shopee, 2000).

3.3.2 Application of Implied Condition as to Merchantable Quality in Lazada

Lazada allows the buyers to apply for a return of product if the goods received are substantially different from the advertised description, and in the case of poor quality of the product or lousy condition of goods, the buyer has the right to ask for the replacement of the returned goods or a refund since Lazada in its Return Policy practices 7 Days Easy Returns or 14 Days Easy Returns, depending on the nature of goods. Besides, the buyer also has the right to ask for a repair of dented or defective products, and Lazada and Seller have the discretion

to accept or reject such request. In such a case, the buyer then has no right to ask for a refund (Hashim, 2019).

Besides that, Lazada also introduced LazMall, which has the same criteria as Shopee Mall. Lazada warrants that the LazMall goods are not counterfeit and 100% authentic. Lazada is confident that all the products offered in LazMall are authentic by offering Money-Back Guarantee to the buyer in the case of counterfeit products. The platform also introduced the LazMall Authenticity Guarantee, where the buyer may raise a dispute as to the authenticity of the product received. The platform defines the word authentic as an original product, not a copy. It also means that the product is not an imitation intending to deceive or defraud the buyer. Buyers in the LazMall Authenticity Guarantee policy need to raise a return request on the platform and wait for the customer service agent to call to verify the claim. Once the bogus claim is approved, the buyer will be refunded and entitled to get up to an RM400 Lazada voucher in value. However, if the product does not function properly, the different items received will not amount to a non-authentic product (Lazada, 2019). The issue of quality is not highlighted in giving privilege to those selected as a LazMall Seller. Thus, the authentic product cannot be said as a merchantable quality product, as stated in Section 16 (1) (b) of SOGA.

3.3.2 Consequences of Breach of Merchantable Quality in Shopee and Lazada

There are no clear terms in Shopee and Lazada regarding the consequences of breach of merchantable quality. In SOGA, Section 12 (2) prescribed that the innocent party may treat the contract as being repudiated when there is a breach of condition. As such, by law, the online buyer may ask for a refund from the seller after the product has been returned to the seller. In Shopee and Lazada, if the product received is counterfeit products and, of course, does not meet specific quality as compared to the original product, the buyer has the right to ask for a refund and/ or return. The refund process in the two platforms is more user-friendly than the previous practice. Many online Customer Service Agents will attend to the case as soon as possible. Few FAQs are displayed in the chatbox while waiting for the agent to be available (Lazada Seller Centre, 2020; Shopee Mobile Malaysia Sdn Bhd, 2021).

However, this practice is against Section 12 (2) SOGA, which gives a right to the innocent party to repudiate the contract; instead, on these two online platforms, the party can only rescind the contract and claim remedies. Besides, the sole power to decide to accept the refund request and/or return the product is on the platform, not the buyer. Although the practice against Section 12 (2) SOGA, it is justified by the existence of Section 62 SOGA, which reads as follows:

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

Consequently, the sellers are free to exclude all the implied terms in SOGA to restore the contractual freedom in drafting a contract which may expose the contracting parties to unequal bargaining power (Razak et al., 2020). Sellers may also include the exemption clause in their contract, limiting the liability, duty, or remedy arising from a contract. The contracting out provision may expose the buyer to a dangerous position since they are fragile in a contract (Masum & Hanan, 2018; Amin, 2013; Amin, 2013).

Thus, the buyer needs to practice the maxim of *caveat emptor* as a precaution in entering into any transactions, especially online transactions where the buyer unable to see who is the actual seller whom he contracted with (Rahman, 2018). Shopee and Lazada have introduced

campaigns to build buyers' trust in their platforms, such as the Shopee Guarantee and Lazada Delivery Guarantee. In these two campaigns, buyers are given a clear guideline on how the transactions occur. In the case of a dispute, the platform will take over and settle it accordingly.

4. Conclusion

It is evident from the above discussions that there is not enough protection for consumers in Malaysian law governing the sale of goods. It is suggested that the online platform give the buyer's right to terminate the contract if the product is of unmerchantable quality and not as prescribed in the advertisement. The buyer should be given the right to return the product to the seller and refund the buyer's money. Besides, the seller should also bear shipping costs as compensation for the breach of condition. Although Section 62 SOGA gives rights to exclude the condition of merchantable quality in the sale of goods, it is advised that the seller make a clear announcement on the platform's front page to highlight any changes on their terms from time to time. It is crucial to bring the difference in the terms to the buyer's mind before they engage in any transactions. Besides that, buyers also must protect themselves from being cheated in online transactions. Buyers are advised to read the description carefully, chat with the seller to clarify any doubtful information and ask for an accurate picture of the product from the seller in the case of ambiguity. Buyers are also encouraged to take pictures when they receive the product and make a complaint directly if there is any dissatisfaction.

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