

## Sale and Storage of Goods in Pakistan: Overview

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### CONTRACTS FOR THE SALE OF GOODS

#### Legislative Framework

1. **What domestic legislation and international rules apply to a sale of goods contract in your jurisdiction? Are standard international contractual terms commonly used?**

#### Domestic Legislation

The main legislation applicable to sale of goods contracts is the Sale of Goods Act 1930 (SGA). In addition, the provisions of Contract Act 1872 (Contract Act) that are not inconsistent with the SGA also apply to contracts for the sale of goods.

The SGA and the Contract Act do not expressly contain any provision that protect small businesses against unfair contract terms, or to resolve disputes between small businesses and their larger trading partners.

#### International Rules

Pakistan is a party to the following international conventions:

- Customs Convention on the International Transport of Goods under Cover of TIR Carnets 1975 (TIR Convention). Pakistan implemented the TIR Convention into domestic law through an amendment to the Customs Rules 2001 framed under the Customs Act 1969.
- Convention for the Unification of Certain Rules for International Carriage by Air 1999 (Montreal Convention). The Montreal Convention has been given effect into domestic law through the Carriage of Air Act 2012.

#### Standard Contractual Terms

The courts in Pakistan recognise and enforce the following standard terms:

- International Chamber of Commerce (ICC) International Commercial Terms (Incoterms®) 2010.
- Uniform Customs and Practice for Documentary Credits (UCP).
- Uniform Rules for Demand Guarantees (URDG).

These terms are not very commonly used in Pakistan (except in international sale of goods contracts), but parties can incorporate them into a contract. If that is the case, the contract must include a comprehensive definition of these terms through a definition clause or by reference, to enable interpretation and to ascertain the parties' intention.

#### Formation

2. **What are the essential requirements to create a legally enforceable contract for the sale of goods?**

#### Substantive Requirements

The essential requirements to create a valid and enforceable sale of goods contract are as follows:

- An offer to buy or sell goods for a price.
- Acceptance of the offer.
- Free consent of the parties.
- Capacity of the parties to enter into a contract.
- Lawful consideration.

#### Formal Requirements

A contract for the sale of goods can be:

- Written.
- Verbal.
- A combination of written and verbal.
- Implied from the conduct of the parties.

The Registration Act 1908, read with the Stamp Act 1899, requires contracts to be registered and payment of the prescribed stamp duty. A registered contract on which stamp duty is paid is enforceable and is admissible as evidence. A contract must be attested by two male, or one male and two female, witnesses (*Law of Evidence 1984*). Non-compliance with these requirements does not affect the validity or enforceability of a contract but its admissibility as evidence in judicial proceedings.

The Electronic Transactions Ordinance 2002 recognises the validity of electronic contracts. Witnessing and stamp duty requirements are not applicable to electronic contracts.

There is no language requirement for a sale of goods contract to be valid. Written contracts are usually in English. To be admissible in legal proceedings, a contract that is not in English must be duly legalised and an English translation must be provided with the original contract.

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## Price and Payment

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### 3. If price provisions are not agreed by the parties, does local law impose requirements in relation to price (for example, the time, method and place of payment)?

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If the price is not agreed by the parties, the buyer must pay the seller a reasonable price. Reasonableness is a question of fact dependent on the circumstances of each particular case.

There are no default rules on the time and place of payment.

Parties can agree on the method of payment. However, the Income Tax Ordinance 2001 and the Sales Tax Act 1990 require the buyer to pay through a crossed banking instrument to claim admissible expenses and any related input sales tax, if otherwise admissible. To remit payment outside Pakistan, the parties must comply with the foreign exchange control requirements of the State Bank of Pakistan.

The SGA does not imply responsibility for related costs. The parties should agree on these matters among themselves.

It is common for the parties to international sale of goods contracts to rely on Incoterms® to allocate certain expenses.

## Delivery

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### 4. If delivery provisions are not agreed by the parties, does local law impose requirements in relation to delivery (for example, the time, method and place of delivery)?

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Delivery is the voluntary transfer of possession from one person to another. The parties are generally free to agree on delivery provisions.

#### Time

Where the seller must deliver the goods to the buyer but the contract is silent on the time of delivery, the seller must deliver the goods within a reasonable time. Reasonableness is a question of fact and is determined on a case-by-case basis (*section 36(2), SGA*).

#### Place

Unless otherwise agreed, goods must be delivered at the place where they were located at the time of sale. Goods agreed to be sold must be delivered at the place where they are at the time of the agreement to sell or, if not then in existence, at the place at which they are manufactured or produced (*section 36(1), SGA*).

#### Method

Unless otherwise agreed, the buyer must request delivery from the seller. Delivery is deemed to have taken place by any method that has the effect to transfer possession of the goods to the buyer or to any person authorised by the buyer. The parties are free to agree on packing and removal of packaging material.

## Passing of Title and Risk

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### 5. If not agreed by the parties, when does title to the goods pass to the buyer?

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Title passes to the buyer when the parties intend it to pass. Unless a different intention appears, the following rules apply for ascertaining the intention of the parties as to the time at which title passes to the buyer:

- If there is an unconditional contract for the sale of specific goods in a deliverable state, title passes to the buyer when the contract is made regardless of the time of payment or delivery.
- If the contract is for the sale of specific goods, and the seller is bound to do something to put them into a deliverable state, title will not pass until this is done and the buyer is given notice.
- If the contract is for the sale of specific goods in a deliverable state, but the seller must weigh, measure, test, or do some other act to determine the price, title will not pass until this is done and the buyer is given notice.
- If the contract is for unascertained goods or future goods by description, title passes when the goods are appropriated to the contract by either party with the assent of the other. The seller is deemed to have appropriated goods if the seller has delivered the goods to the buyer or a carrier or other bailee for the purpose of transmission to the buyer without reserving a right of disposal.
- When goods are delivered to the buyer on approval or "on sales or return" or other similar terms, title passes when the buyer signifies their approval or acceptance to the seller or does any other act adopting the transaction. If the buyer does not signify their approval or acceptance to the seller but retains the goods without giving notice of rejection, title passes after a reasonable time or on expiration of the time stated in the contract.

(Sections 20 to 23, SGA.)

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### 6. Are retention of title clauses enforceable in your jurisdiction? If so, what are the requirements to create a legally enforceable retention of title clause?

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Retention of title clauses are enforceable in Pakistan if both:

- The contract is for specific goods or the goods have been subsequently appropriated to the contract.
- The seller has, in the contract or at the time of appropriation of the goods, reserved the right of disposal until certain conditions are fulfilled.

In the above circumstances, title does not pass to the buyer until the conditions imposed by the seller are fulfilled, regardless of delivery of the goods to the buyer, carrier, or other bailee.

The parties are free to agree on the conditions for the passing of title. The SGA does not impose restrictions on retention of title clauses.

An action for the price can be maintained if title has not passed, if the contract expressly fixes the time and date of payment, and the buyer wrongfully neglects or refuses to pay (*section 55(2), SGA*).

The enforceability of a retention of title clause when the buyer enters an insolvency procedure depends on the specific circumstances of each case.

Possible alternatives to retention of title clauses include:

- Bank guarantees.
  - Letters of credit.
  - Advance payment.
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### 7. If not agreed by the parties, when does risk in relation to the goods pass to the buyer?

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Unless otherwise agreed, risk passes at the same time as title (see Question 5).

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The parties can rely on Incoterms® for the passing of risk, which are enforceable in Pakistan.

### **Enforcement and Remedies**

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## **8. What are the seller's obligations in relation to the description and quality of the goods?**

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### **Description**

When there is a contract for the sale of goods by description, there is an implied condition that the goods must correspond with the description (*section 15, SGA*).

This implied condition can be varied expressly, by course of dealings, or by usage (if that usage binds both parties to the contract) (*section 62, SGA*).

### **Fitness**

There is generally no implied warranty or condition as to the fitness for any particular purpose of goods supplied under a contract of sale. However, there is an implied condition that the goods are fit for purpose if the following conditions are met:

- The buyer expressly or by implication makes known to seller the particular purpose for which the goods are required.
- The buyer has relied on the seller's skills or judgement.
- The goods are of a description that the seller supplies in the course of its business.

There is no implied condition as to fitness for any particular purpose in a contract for the sale of a specified article under its patent or other trade name.

### **Merchantable Quality**

If the goods are sold by description by a seller who deals in goods of that description, there is an implied condition that the goods are of merchantable quality (or sellable). If the buyer has examined the goods, there is no implied condition as regards defects that the examination should have revealed.

This implied condition can be varied expressly, by course of dealings, or by usage (if that usage binds both parties to the contract) (*section 62, SGA*).

An implied warranty or condition as to the quality or fitness for a particular purpose may be also be inferred from the parties' usage of trade.

Unless otherwise agreed, the seller must inform the buyer of any defect in the goods sold at the time of the contract, except when the defect is obviously known to the buyer.

The seller is liable to the buyer for delivering defective goods if the defect is either a:

- Breach of condition. If the defect constitutes a breach of an essential condition to the contract, the breach gives the buyer the right to reject the goods and terminate the contract.
- Breach of warranty. If the defect is a breach of warranty collateral to the main purpose of the contract, the breach gives the buyer the right to claim damages, but not the right to reject the goods and terminate the contract.

There is no specific law on product liability.

The above rules equally apply to sales of second-hand goods.

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## **9. What are the main remedies and rules for losses and damages for breach of a sale of goods contract?**

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### **Remedies**

The main remedies for breach of a sale of goods contract include:

- Termination of the contract for breach of condition.
- Damages for breach of warranty.
- Specific performance of the contract if the goods are specific or ascertained goods. Whether goods qualify as specific or ascertained goods is a question of fact and is determined on a case-by-case basis. An order for specific performance can include terms and conditions relating to damages and payment of the contract price.
- Damages for non-delivery by the seller or non-acceptance of the goods by the buyer.

### **Damages**

Damages are recoverable for breach of contract under the general rules in section 73 of the Contract Act, as the SGA is silent on the types of losses that can be recovered for breach of a sale of goods contract.

To claim compensation for loss or damage, the aggrieved party must establish that:

- It has suffered actual loss or damage as a result of the breach.
- The loss or damage naturally arises from the breach.
- The parties knew at the time of conclusion of the contract that the loss or damage was likely to result from a breach of the contract.

The aggrieved party cannot recover compensation for remote or indirect loss. Third parties who are not privy to a contract cannot sue under the contract. However, in certain circumstances, a third party that proves locus standi may be able to recover damages (for example, an insurance company).

In estimating the losses of the aggrieved party, the court will assess all means available for that party to mitigate or remedy its losses. Proceedings must be commenced in the civil court of the jurisdiction where the cause of action arises or where the defendant has its place of business/domicile.

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## **10. What are the buyer's remedies for breach of a sale of goods contract?**

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The buyer's remedies for breach of contract include:

- Repudiation or termination of the contract for breach of condition.
- Damages for breach of warranty, for all losses or damages suffered by the buyer as a result of a breach.
- Reduction or extinction of the contract price for breach of warranty by the seller.
- Specific performance of the contract by the seller.
- Damages for non-delivery by the seller.

If the time of delivery is an essential and express term of the contract, the contract can be terminated in the event of late delivery.

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## 11. What are the seller's remedies for non-payment or late payment?

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The seller's remedies for non-payment or late payment include:

- Suit for the price (or the balance payment, if the buyer has made part payment).
- Seller's lien over the goods, if title to the goods has passed to the buyer.
- Damages, if the buyer wrongfully refuses to accept delivery of the goods and pay the contract price.
- Seller's right to stop the goods in transit if the buyer is insolvent.
- Seller's right of resale (to a third party).
- Interest by way of damages and special damages. The court can award interest on the price in a suit for the price from the date of tender of the goods to the buyer or from the date on which the price was payable by the buyer.

### Exclusion of Liability

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## 12. Are exclusion clauses enforceable in your jurisdiction? If so, what are the requirements to create a legally enforceable exclusion clause?

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Exclusion clause are enforceable in Pakistan if they are not contrary to the SGA and Contract Act.

Any right, duty or liability arising by implication of the law can be excluded or varied by express agreement, course of dealing between the parties, or usage if that usage is binding on both parties to the contract (*section 62, SGA*).

The seller's liability for breach of statutory implied terms relating to quality or fitness for purpose (*see Question 8*) can be excluded by:

- The express terms of the contract.
- Parties' course of dealing.
- Usage that is binding on the parties.

### Choice of Law

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## 13. Will local courts recognise a choice of foreign law in a sale of goods contract? Are there any mandatory local rules that apply, despite a choice of foreign law?

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The courts in Pakistan recognise a choice of foreign law in a sale of goods contract if that choice is:

- Proved as a fact to the satisfaction of the Pakistan court, where "satisfaction" is at the court's discretion.
- Not contrary to the public policy of Pakistan.

Generally, a choice of foreign law is combined with a choice of foreign jurisdiction or an arbitration clause. While the courts recognise a choice of foreign law, if the sale of goods contract also designates Pakistan courts, this can result in delays to the proceedings as legal experts from the choice of law country will be required to give expert evidence on the applicable foreign provisions.

There are no mandatory local statutory rules. However, certain contracts that must be enforced in Pakistan may need to be governed by Pakistan law to be effective, such as contracts for the

creation of security over assets located in Pakistan (including as collateral to a main sale of goods contract).

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## 14. If the parties do not make a choice of law, what rules determine the law applicable to a sale of goods contract?

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If the parties do not make a choice of law, the Supreme Court of Pakistan has held that the law of the place of performance (*lex loci solutionis*) is the proper law of the contract. The Supreme Court has also held that the proper law of the contract is the law that has the closest connection with the contract, having regard to its terms and all its surrounding circumstances (*Central Bank of India Ltd v Muhammad Islam Khan PLD 1962 SC 251*).

However, Pakistan courts tend to assume jurisdiction and apply Pakistan law if the choice of law is not expressly specified. Parties can also challenge the jurisdiction of the courts.

### Choice of Jurisdiction

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## 15. Will local courts recognise a choice of foreign jurisdiction in a sale of goods contract? Are there any mandatory local rules that apply, despite a choice of foreign jurisdiction?

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Any agreement under which a party is restricted absolutely from enforcing its rights under or in respect of any contract through the usual legal proceedings in the ordinary tribunals, or which limits the time within which it can enforce its rights, is void (*section 28, Contract Act*). However, a contractual agreement that exclusively refers a dispute to foreign or local arbitration is enforceable. While this exception does not expressly extend to agreements to refer disputes to the exclusive jurisdiction of a foreign court, the courts treat an exclusive foreign jurisdiction clause as a foreign arbitration clause that does not violate section 28 of the Contract Act (*M. A. Chowdhury v Mitsui O. S. K. Lines Ltd PLD 1970 SC 373*).

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## 16. If the parties do not make a choice of jurisdiction, what rules determine the jurisdiction applicable to a sale of goods contract?

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If the parties do not make a choice of jurisdiction, jurisdiction over a sale of goods contract is determined in accordance with the Code of Civil Procedure 1908. Subject to certain limitations (which mostly deal with disputes relating to immovable property), a suit must be instituted against a defendant in a court that has territorial jurisdiction over the area in which either:

- The defendant resides (for a natural person) or carries on business or works for gain.
- The cause of action arose.

A corporation is deemed to carry on business at its sole or principal office in Pakistan, or at a subordinate office if the cause of action also arose there.

### Arbitration

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## 17. Are arbitration clauses commonly included in sale of goods contracts in your jurisdiction?

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An arbitration clause in a sale of goods contract is enforceable in the same way as any other arbitration agreement. An agreement to refer a dispute to domestic arbitration (under the Arbitration Act 1940) or foreign arbitration is enforceable in Pakistan as an

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exception to the limitations under section 28 of the Contract Act (see *Question 15*).

In disputes relating to contracts containing a foreign arbitration clause, a Pakistan court usually require the parties to stay the court proceedings and refer their dispute to the arbitral forum agreed in the contract. However, the court can grant a stay or issue temporary orders affecting the parties pending a final award in the arbitration proceedings. The courts can also refuse to enforce arbitration agreements on public policy grounds. In the case of *HUB Co v WAPDA PLD 2000 SC 841*, which involved a power company and the government-owned utility company, the Supreme Court held that the matter was not able to be referred to arbitration in a foreign jurisdiction as the contentions were all criminal in nature and this was therefore against public policy.

Pakistan is a signatory to the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention), and incorporated the New York Convention into domestic law through the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act 2011. A foreign award issued in a country that is a party to the New York Convention is recognised and directly enforceable in Pakistan, subject to qualifications set out in Article V of the New York Convention.

## STORAGE OF GOODS

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### 18. How is title to goods in storage protected and evidenced? Are warehouse receipts recognised as documents of title in your jurisdiction?

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There is no legal framework governing the use of warehouse receipts as documents of title to goods in Pakistan. However, there have been recent regulatory developments for the promotion of a warehouse receipt system for agricultural commodities (see *Question 21*).

Under the SGA, "documents of title to goods" include:

- Bills of lading.
- Dock warrants.
- Warrants or orders for delivery of goods.
- Warehouse-keeper's certificates.
- Wharfinger's certificates.
- Any other document used in the ordinary course of business as proof of possession or control of goods, or authorising or purporting to authorise, either by endorsement or by delivery, the possessor of the document to transfer or receive the goods represented.

The SGA does not distinguish between negotiable and non-negotiable documents of title. Warehouse receipts are not expressly recognised to be negotiable documents of title to goods in storage under the law. Negotiable instruments are governed by the Negotiable Instrument Act 1881. A negotiable instrument is defined very narrowly to cover only three types of instruments:

- Promissory notes.
- Bills of exchange.
- Cheques payable to order or bearer.

Under case law, the definition of negotiable instrument in the Negotiable Instrument Act 1881 is not conclusive as to whether a certain document is a negotiable instrument or not, and a document can be negotiable by usage (or custom) if it:

- Gives the holder the right to sue in due course in its own name, such as a bearer cheque.
- Is transferable by delivery, such as cash.

However, no binding judgment in Pakistan has held warehouse receipts to be negotiable instruments.

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### 19. What conditions and formalities must warehouse receipts comply with?

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The SGA does not provide for any conditions or formalities for warehouse receipts to be considered as documents of title to goods in storage (see *Question 18*).

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### 20. Are other interests over goods in storage recognised?

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A charge or pledge can be created over any movable property, including future property acquired after the creation or execution of the charge or pledge instrument, if:

- The description of the goods clearly states the particulars of the goods.
- The description of the goods clearly states the storage facility in which they are located (including its address).
- The scope of the charged or pledged goods is drafted to cover all current and future goods in the facility.

A charge or pledge is created on the execution of a written instrument by the title holder in favour of the chargee/pledgee. A pledge or charge can also be created orally, but written particulars of the charge must be filed to register the security interest (where applicable). The charge is registered with the Registrar of Assurances of the jurisdiction in which the goods are located.

If the title holder is a company, the charge or pledge must be registered with the Registrar of Assurances within 30 days of its creation to be enforceable against the company's liquidator or creditor (*Companies Act 2017*).

There is currently no law that governs pledges or charges over movable property of an unincorporated business (such as a partnership, sole proprietor, or an association of persons).

## REFORM

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### 21. Are there impending developments or proposals for reform of national legislation affecting sale of goods contracts and/or storage of goods in your jurisdiction?

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The Securities and Exchange Commission of Pakistan has issued the Collateral Management Companies Regulations 2019 S.R.O. 890(I)/2019 dated 31 July 2019. These Regulations aim to promote electronic trading and warehouse receipt financing of agricultural commodities. They establish procedures to register collateral management companies (CMCs). CMCs can engage in the following activities:

- Provide storage services for a range of agricultural commodities.
- Issue electronic warehouse receipts (EWRs) for agricultural commodity financing. EWRs are transferable and tradable at futures exchanges.
- Carry out stock audits, verifications, and accreditations of warehouses.

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