APPENDIX F

[see page 50]

UNIFORM SALE OF GOODS ACT

A EXECUTIVE SUMMARY

[1] We have been asked to express our views on whether a Revised Uniform Sale of Goods Act (RUSGA) should be included in the ULCC's Commercial Law Strategy and, if our answer is yes, to indicate whether the Uniform Sale of Goods Act (USGA) approved in principle by the ULCC in 1982 should play that role.

[2] We have concluded that:

(a) sales transactions continue to play a central role in the Canadian economy and therefore of Canadian law, and that a commercial law strategy that does not envisage a place for sales law would be seriously deficient;

(b) we do not support the piecemeal approach to sales law reform adopted in the U.K. and, to a lesser extent, Australia;

[3] We recommend that:

(a) the *Uniform Sale of Goods Act* approved by the ULCC in 1982 should form the basis of a Revised Uniform Sale of Goods Act to be sponsored by the ULCC, but should not be adopted without further review because

(i) there have been many legal, economic and technological changes during the intervening 20 years;

(ii) the Canadian commercial bar was not represented on the Committee of Experts established by the ULCC in 1979 to review the draft Revised Sale of Goods Act prepared by the Ontario Law Reform Commission (OLRC);

(iii) between 1981-1990 a substantial number of drafting changes were made by the Legislative Drafting Section of the ULCC to the 1981 draft Uniform Act that were either not seen or approved by the Committee of Experts;

(iv) we believe a new and adequately funded Committee should be struck to review the 1982 Act and make recommendations in light of the factors mentioned in paragraphs (i) -(iii); and that

(v) after the Committee has reported with its proposals for a Revised Uniform Sale of Goods Act and assuming the Committee's recommendations are approved by the ULCC, the common law provinces and territories should be urged to commit themselves to adopt the new Act on a template basis.

(b) so far as Quebec's position is concerned, we are of the view that given the history, structure and treatment of sales law in the Quebec Civil Code, it would not be realistic to expect Quebec to adopt the Revised Uniform Sale of Goods Act. However, the basic sales issues are the same across Canada, and Quebec and the common law provinces can learn from each other in fashioning solutions appropriate to the 21st century; but that

(c) if the need arises, a domestic version of CISG could be considered to regulate sales transactions between contracting parties in Quebec and the common law provinces. However, we are not satisfied that the need has been shown for such highly particularised legislation.

B THE REPORT

I ROLE OF SALE TRANSACTIONS IN THE CANADIAN ECONOMY

[4] One does not have to adduce an array of statistics to be persuaded of the importance of sales transactions in the Canadian economy. The evidence is all around us – from one end of Canada to the other, from the humblest corner store to the large supermarkets and department stores, from the small clothing retailers in Montreal, Toronto, Winnipeg and Vancouver to the manufacturers of truck, automobiles, airplanes, oil refineries and chemical plants in Canada's manufacturing and processing centres.

[5] A few statistics also attest to the magnitude of the trade in goods within Canada and as part of Canada's export trade. In 1996, aggregate domestic trade amounted to $1,037 billion, of which $455 billion was in goods.[1] Exports to the U.S. amounted to $309.6 billion in 1999; the auto industry alone accounted for $99.5 billion of the export trade to all countries.[2] Earlier statistics also show the intensity of the trade between the provinces, frequently amounting to 50 per cent or more of the provincial product.[3] The economic importance of trade in goods is not however matched by a comparable volume of litigation. For example, for the period 1995 to April 1999, QuickLaw only cites 149 cases in which a provincial Sale of Goods Act is referred to. Later in this report[4] we discuss the significance of this apparent discrepancy.

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[1] Transport Canada www.tc.gc.ca

[2] Statscan www.statcan.ca/english/Pgdb/Economy/intern.htm Figures have been rounded off to the nearest decimal point.

[3] See John Whalley in Trebilcock et al., *Federalism and the Canadian Economic Union,* University of Toronto Press, 1981, pp. 173-78, tables 2-5.

[4] *Infra,* Section V.1 .

II EVOLUTION OF SALES LAW IN COMMON LAW JURISDICTIONS OUTSIDE CANADA

United Kingdom[5]

[6] All organized societies that have developed beyond the barter stage need a system of sales rules, however rudimentary. Roman law during its classical period developed a very sophisticated system of sales rules which later greatly influenced many modern civil codes and systems with mixed systems of law, including the sales provisions in the old and new Civil Codes of Quebec.

[7] English sales law was quite rudimentary until the late 18th century but developed rapidly thereafter in response to the industrial revolution.[6] By 1889, the common law rules had reached such a state of complexity that the then Lord Chancellor felt the need to codify them. The task was entrusted to Mackenzie Chalmers, a skilled draftsman and fine commercial law scholar, and led to the enactment of the Sale of Goods Act, 1893.[7] The Act was widely copied in other Commonwealth jurisdictions, including Australia, New Zealand and Canada, and also greatly influenced the Uniform Sales Act of 1906 prepared by Samuel Williston for the NCCUSL. Nevertheless, great though its merits were, the SGA had the misfortune of being enacted just as the United Kingdom was about to enter the automobile age and the new era of mass production and prepackaged and standardized goods sold to generally unsophisticated consumers.

Post-World War II Developments

[8] No significant amendments were made to the SGA in the interwar period but many changes to English sales law have been made over the past half-century. The important developments are the following:[8]

(1) *Law Reform (Enforcement of Contracts) Act, 1954*. The Act abolished the writing requirements in s.4 of the SGA for contracts of sale above ten Pounds.

(2) *Misrepresentation Act 1967*. The Act changed some of the rules governing contracts induced by a party's misrepresentation and in particular allowed the recovery of damages for negligent misrepresentations by a contracting party.

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5 Since 1893, Scotland has basically shared the same sales law regime with England and Wales.

6 Ontario Law Reform Commission, *Report on Sale of Goods, 3 vols. (1979), pp.7-8.* ("OLRC Report").

7 With minor exceptions, the Act also applies to Scotland.

8 For more detailed descriptions of the post-war U.K. legislation, see Appendix 1.

(3) *Supply of Goods (Implied Terms) Act 1973* ("SOGIT 1973"). SOGIT 1973 made three main changes: it amended the implied terms in the SGA; limited the seller's right to exclude or restrict liability for breach of the implied terms; and enacted implied terms for hire-purchase agreements.

(4) *Consumer Credit Act 1974* ("CCA 1974"). CCA 1974 substituted new hire-purchase implied terms provisions in SOGIT 1973. The changes were all minor or inconsequential.

(5) *Unfair Contract Terms Act 1977* ("UCTA 1977"). UCTA 1977 is a general contract measure for the control of exclusion clauses. It includes provisions relating specifically to exclusion clauses in sales, hire-purchase agreements and other contracts for the supply of goods. The sale and hire-purchase agreement provisions are derived from SOGIT 1973.

(6) *Supply of Goods and Services Act 1982* ("SGSA 1982"). The Act introduces implied terms in contracts for the transfer of goods not involving sales, in contracts of hire and in contracts for the supply of services.

(7) *Consumer Protection Act 1987* ("CPA 1987") CPA 1987, Part I deals with product liability. It is based on the European Community Product Liability Directive. Part II deals with product safety. Part III deals with misleading price indications.

(8) *Sale of Goods (Amendment) Act 1994* ("1994 Amendment Act"). The 1994 Amendment Act repealed the market overt rule.

(9) *Sale and Supply of Goods Act 1994* ("SSGA 1994"). SSGA 1994 implements the recommendations of the English and Scottish Law Commissions in their report on the Sale and Supply of Goods (Cmnd. 137, May 1987). It amends three of the earlier Acts and makes important amendments to the parent SGA.

(10) *Sale of Goods (Amendment) Act 1995* ("1995 Amendment Act"). The Act deals with the sale of an undivided share in goods; the sale of unascerained goods forming part of a larger bulk; and ascertainment by exhaustion.

[9] In view of the large number of changes made to the British *Sale of Goods Act* over the past 30 years, there is growing pressure for the British government to introduce a revised Sale of Goods Act.

Australia [9]

[10] Australian legislatures have been active in sale of goods law reform over the past few decades, but their efforts have been directed mainly to consumer transactions. There has been no attempt at comprehensive reform of sales law at large. The New South Wales Law Reform Commission released a report on the sale of goods in 1987 which recommended a modest package of reforms in relation to: (1) innocent misrepresentation; (2) intermediate stipulations; (3) the statute of frauds requirements; (4) the passing of property as a bar to the buyer's right of rejection; and (5) the relationship between the rules governing acceptance and the buyer' statutory right of examination. New South Wales amended its sale of goods legislation in 1988 to give effect to these recommendations. Some of these reforms have also been made in other States. The Law Reform Commission of Western Australia began work on a sale of goods reference in 1995. It produced two Discussion Papers, one dealing with implied terms and the other with equitable rules applicable to sales contracts. However, work on the reference was suspended after that and so far it has not been resumed.

[11] Reforms in the consumer sales area cover the following ground: (1) implied terms and the buyer's right of rejection; (2) manufacturers' liability; (3) misrepresentation and misleading conduct; (4) unconscionable transactions; and (5) car sales. A notable feature of the Australian scene distinguishing it from the Canadian position is the very active role played by Commonwealth legislation through the Commonwealth Trade Practices Act with respect to statutory implied terms in consumer contracts, civil liability of business enterprises for misrepresentation and misleading conduct, and manufacturers liability to buyers for defective goods.[10]

United States

Uniform Sales Act

[12] Before the adoption of the Uniform Sales Act in 1906, the sales laws of the individual states differed greatly in detail and most of it was case law based. Unhappily, the USA was not entirely successful in its goal of national uniformity since only 36 states adopted the Act before it was replaced in the early 1950s by Article 2 of the Uniform Commercial Code (UCC). Williston greatly admired Chalmers' work on the British Act. Nevertheless, there were important differences between the USA and the British Act, which included the following:[11] the USA did not distinguish between warranties and conditions; it adopted a reliance definition of express warranty, and it retained a different remedial regime for buyers' remedies.

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[9] For a more detailed description of the Australian legislation, see Appendix 2.

[10] The Commonwealth derives its jurisdiction in these areas mainly through its corporations and interstate trade and commerce power in the Commonwealth Constitution.

[11] See OLRC Report, vol. 1, pp.12-13.

Uniform Commercial Code, Article 2

[13] The Uniform Commercial Code project was initiated in the 1940s. The initial impulse for the project was merchant pressure to revise the Uniform Sales Act. In the end, however, it was Article 9 on Secured Transactions that provided the driving force for the successful adoption of the Code by all the states and the District of Washington.

[14] Karl Llewellyn, the chief reporter for the Code and the principal drafter of Article 2, was very critical of many features of the USA and felt strongly that modern sales law should be functional and flexible in character and avoid "lump concept" thinking. He also seized the opportunity to modernize important aspects of the formational rules governing sales contracts, including the binding character of firm offers (UCC 2-205), the battle of forms (UCC 2-207), the interpretation of output and requirement contracts (UCC 2-306), and the enforceability of contract modifications whether or not supported by consideration (UCC 2-209). Llewellyn was also responsible for the famous section 2-302 explicitly authorizing American courts to police unfair contract terms and the good faith behavioral standards applied to merchant parties in the exercise of their contractual powers. Other important features of Article 2 include the following:

- Demotion of title as the touchstone for the transfer of risk and the assignment of other rights and obligations flowing from the contract (UCC 2-509);
- Entitlement to adequate assurance of performance where a party has reasonable doubts about the other party's ability to perform its contractual obligations (UCC 2-609);
- Greater flexibility in dealing with effects of anticipatory repudiation (UCC 2-610);
- A buyer's right to revoke acceptance of goods because of hidden defects (UCC 2-608);
- Recognition of radical and uncontemplated economic changes as basis for frustration of contract (UCC 2-613);
- General exception to nemo dat rule arising from entrustment of goods to a merchant seller (UCC 2-403); and
- Seller's right to specific performance where no alternative market exists for the goods (UCC 2-709).

Revised Article 2

[15] Starting in the early 1980s, the sponsors of the Uniform Commercial Code initiated projects for the revision of the Articles of the Code. It was natural for Article 2 to be included in the agenda. An Article 2 Review Committee (later known as Article 2 Drafting Committee) was established and proceeded with its work in two phases.[12] In the first phase (1987-91), the Study Group satisfied itself that there was sufficient consensus in support of a revision. The second phase (1991-99) consisted of the actual revisionary and draft work. The Committee completed its work in 1999 and, after a vigorous debate, Revised Article 2 was approved at the annual meeting of members of the ALI in May 1999. Important changes in the revised Article included the following:[13]

- New provisions were added dealing with electronic contracts (UCC 2-210, 2-213);
- The test of unconscionability was broadened (UCC 2-302);
- The "battle of the forms" provision (UCC 2-207) was rewritten to provide greater flexibility;
- "Remedial Warranties" were given a separate status (UCC 2-313)[14];
- The benefit of the seller's warranties were extended to remote buyers (UCC 2-409);
- Disclaimer of consumer warranties must be written in consumer friendly language; and
- Prepaying Buyers were given stronger protection (UCC 2-824).

[12] ALI, Uniform Commercial Code, Revised Article 2. Sales. *Proposed Final Draft* (May 1, 1999), p.xxiii.

[13] For a complete list of substantial changes, see *Proposed final Draft, xxiv-xxxi.*

[14] A separate status was deemed necessary to overcome statute of limitations problems

[16] Some of these changes were strongly opposed by counsel for industry groups and they expected to receive a more sympathetic hearing from NCCUSL than they had received at the ALI annual meeting. Revised Article 2 was on NCCUSL's annual meeting agenda for August 1999. Fearing that rejection of the report would damage the Code's image, NCCUSL's Executive decided to entertain a motion to table the report, and tabled it was. This meant that the report was returned to the ALI for further review to eliminate the controversial features. The ALI established a new Drafting Committee and appointed a new reporter[15] in the fall of 1999. The new committee presented a Discussion Report to the May 2000 annual meeting of the ALI[16], and is expected to present a final report for the year 2001 meeting.

III CANADIAN SALES LAW DEVELOPMENTS

Pre-1980 History

[17] All of the common law provinces have adopted the British Sale of Goods Act 1893 more or less verbatim.[17] Such changes as have been adopted are mainly of post-World War II origin[18] and have been inspired more by domestic Canadian developments than by the many changes made to the parent Act in the UK. Some of the changes adopted in the provincial SG Acts involve the repeal of the Statute of Frauds writing requirements (British Columbia and Ontario), modification of the s.25 provisions in the light of the Personal Property Security Acts (most of the provinces), and deletion or modification of the auction sale provisions (Alberta); restriction or prohibition of exclusion of implied warranties and conditions (many provinces); extension of sales warranties to chattel leases (British Columbia); and creation of a non-possessory lien for prepaying buyers (again British Columbia)[19]

[18] In addition, all the provinces, including Quebec, have adopted a great deal of consumer protection legislation that greatly impacts on the earlier provisions in the Sale of Goods Acts.[20]

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[15] He is Prof. Henry D. Gabriel of Loyola University School of Law in New Orleans.

[16] ALI, Uniform Commercial Code, [New] Revised Article 2. Sales. *Discussion Draft (April 14, 2000).* For a summary of the changes being considered in the new Revised Article 2, see Appendix 3 to this report.

[17] For the details see, GHL. Fridman, *Sale of Goods in Canada,* Comparative Table of provincial Acts, 4th ed. (1995), p.3.

[18] Two important exceptions involve conditional sales legislation which actually predates the British SGA and Farm Implements legislation adopted in the Prairie provinces from about 1914 onwards and more recently adopted in some of the Maritime provinces as well.

[19] See Arthur Close, "The B.C. Buyer's Lien – A New Consumer Remedy" (1995) 25 CBLJ 127.

[20] For the details see OLRC Report, vol. 1, pp.9-10.

OLRC Sale of Goods Report

[19] In 1970, the Ontario Law Reform Commission received a reference from the Ontario Attorney General to review the Ontario Sale of Goods Act with a view to recommending changes. The attorney general was acting on a request from the Ontario Branch of the Canadian Bar Association whose commercial law subsection had recommended adoption of Article 2 by Ontario.[21] Before the OLRC was able to start work on the sales reference it was asked to give priority to another reference on warranties and guarantees in consumer sales.[22] As a result, the OLRC did not begin work on the Sale of Goods project until 1972.

[20] The Commission presented its report to the Ontario government in 1979[23] The Report comprised three volumes. Volumes 1 and 2 contained a detailed analysis of the shortcomings of the current Ontario Act and recommendations for change. It also contained many references to extensive empirical work on current sales practices in Ontario conducted by the OLRC research team. Volume 3 contained the draft bill for a revised Sale of Goods Act. The Report indicated that the Commission had considered the following options in determining the type of new sales legislation it should recommend for adoption in Ontario: (i) maintaining the existing structure and concepts of the SGA and adding to it many changes; (ii) adoption of Article 2 in place of the SGA; and (iii) adoption of a modified form of Article 2.[24] The Commission favoured the third alternative. Some of the many changes to Article 2 incorporated in the Commission's draft bill included the following:

- Abolition of writing requirements for contracts of sale regardless of the contract price
- Greatly simplified "battle of the forms" provision
- Abolition of the parol evidence rule
- No formulaic prescription of language sufficient to exclude implied warranties
- Adoption of a substantial breach test instead of Article 2's perfect tender rule as basis of party's right to cancel contract for breach by the other party
- No provision, optional or otherwise (unlike UCC 2-318), holding seller liable for personal injuries to members of the buyer's family or other remote parties as a result of breach of the seller's warranties.

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[21] The Committee's reasoning was that Article 2 reflected North American trading conditions much more faithfully than did the SGA, and that since the US was Ontario's most important trading partner it made sense to adopt a sales law that was common to both jurisdictions.

[22] Ontario Law Reform Commission, *Report on Consumer Warranties and Guarantees in the Sale of Goods* (1972).

[23] Supra n. 6 .

[24] Report, vol. 1, pp. 26-29.

[21] In 1979, the Ontario commissioners informed the ULCC of the OLRC's Sale of Goods Report and invited the Conference to consider whether the draft bill could be used as the basis for a Uniform Sale of Goods Act. The Conference accepted the invitation and, with the support of the Law Reform Agencies of Canada, appointed a seven member committee of experts ("Experts Committee") to review the draft bill and report its findings to the Conference.[25] The Committee reported in 1981 and recommended adoption of an amended version of the OLRC draft bill as the Uniform Sale of Goods Act.[26] The Committee recommended 10 substantive changes to the draft bill. Easily the most important was the Committee's preference for a perfect tender rule, coupled with a generous right to cure, in place of the substantial breach test and right to cure adopted in the draft bill.[27] The Conference accepted the Committee's recommendation and referred the draft USGA to the Legislative Drafting Section for review in conformity with the Conference's general practice. It also resolved that the draft Act, as approved by the LDS, be adopted by the Conference and that it be recommended for adoption by the provinces.[28]

[22] The LDS proceeded with its review and submitted a revised draft Act in accordance with its mandate. Unfortunately, the Experts Committee was not consulted during the stylistic review and only learned of the many changes that had been made after the event. Prof. Ziegel pointed out in a letter to Derek Mendes da Costa in 1984[29] that the LDS had seriously misunderstood the purpose of some of the provisions in the draft Act and had unwittingly made substantive changes in the guise of drafting changes. He also noted that the sequence of sections and the location of definitions had been changed, greatly to the detriment (in his view) of the clarity and logical structure of the draft Act. At Prof. Ziegel's invitation, other members of the Expert Committee reviewed other parts of the draft Act with which they had particular familiarity and encountered the same problems that he had.[30]

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[25] ULCC, *Annual Proceedings 1981,* pp. 185 et seq. The members of the Committee were drawn from across Canada and were made up of 4 well known commercial law professors, a senior research counsel with the Alberta Institute of Research and Law Reform, a member of the Quebec Ministry of Justice, and, as chair, Prof. Derek Mendes da Costa, chair of the Ontario Law Reform Commission. Prof. Ziegel served as non-voting consultant to the Committee.

[26] The Committee's Report is reproduced in Appendix 4 to this report.

[27] *Ibid.,* pp.193-194.

[28] *Ibid.,* p.34.

[29] ULCC, Annual Proceedings 1984, pp.35, 430 et seq.

[30] Ibid., pp.433 et seq. Ironically, the Ontario draft bill had been drafted by Prof. Ziegel in close consultation with L.R. McTavish, Q.C., former chief Ontario legislative counsel and a ULCC commissioner for many years.

[23] These expressions of concern by the Experts Committee made an impact. Between 1984 and 1990 the Conference received a series of recommendations from the LDS for changes to the USGA. The authors of this report have not examined the current version of the Uniform Act and therefore cannot say whether it faithfully reflects the amended draft Act as presented by the Experts Committee. We do not dwell on the significance of this fact because later in this report we recommend that a new committee be struck to review the 1981 Expert Committee's report and draft Act in light of the many technological and legal changes that have occurred in the meantime.

Quebec Sales Law [31]

[24] The current Quebec sales provisions appear in Book V, articles 1708 to 1805, of the Civil Code of Quebec, which came into effect in January 1994. There are many differences between the history, structure and concepts of these provisions and the sale of goods Acts of the common law provinces and Article 2 of the Uniform Commercial Code, of which the following are the more important:

- Historically, the Quebec provisions are derived from the French Code Napoleon, which in turn were much influenced by Roman law concepts. However, the new Quebec provisions have also been influenced by Quebec's Consumer Protection Law and by several articles in the Vienna Convention on Contracts for the International Sale of Goods (CISG or "International Sales Convention").[32] The common law sales provisions are largely indigenous and, in the case of Article 2, have a strong functional orientation. The common law provisions are also much more detailed than the Quebec provisions.

- The Quebec sales provisions apply to sales of immovables as well as movables and, it seems, also to sales of incorporeal property (intangible property)[33]; the common law Acts and Article 2 are restricted to goods.

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[31] Martin Boodman of McCarthy Tétrault in Montreal was kind enough to assist us with some bibliographical references but we alone are responsible for the summary of the Quebec position in the text. We have found particularly helpful G. Goldstein , "La vente dans le nouveau Code civil du Québec: quelques observations critiques sur le projet de loi 125" (1991) 51 Rev. de Barreau 329 and *Le Code civil du Québec, Commentaires du ministre de la Justice*, tome 1 (Publications du Québec 1991).

[32] E.g., Que., arts. 1738-1739. CISG is discussed further, infra Part IV.

[33] Title 2 on Sales also deals with specific types of sale (§7), with sale of an enterprise (bulk sales) (§8), and with sale of incorporeal property (§9).

- The Quebec sales provisions are also governed by the general contract principles in Book V, Title 1 on Obligations, which makes it unnecessary for the sales provisions to repeat them. Because the common law provinces do not have a code of contract law, the provincial Sale of Goods Acts contain several sections dealing with formation of the contract, writing requirements, capacity, risk of loss and frustration of the contract due to supervening circumstances. As previously noted, Article 2 contains a large number of sections dealing with formation of the contract of sale and related issues.

- In the Civil Code, the seller's warranty obligations are differently articulated and have a different scope. In terms of quality of the goods, the seller's primary obligation is to deliver goods free of hidden defects (vices cachés) which the buyer could not have discovered by reasonable examination prior to purchase.[34] This obligation applies to all sellers. In the common law provinces, the implied conditions of merchantability and fitness for purpose only apply to commercial sellers but there is no obligation on a buyer to examine the goods prior to purchase.

- Art. 1730 of the new Civil Code also deems the manufacturer, wholesaler and importer of goods to warrant the goods "in the same manner" as the immediate seller of the goods.[35]

- The Civil Code and the common law provinces approach regulation of the excludability of the implied warranties and conditions in different ways. Prima facie, both jurisdictions permit the seller to contract out of his statutory obligations but the Civil Code does not permit a seller to exclude responsibility for his personal fault (art. 1732) or permit exclusion where the seller knew or could not have been unaware of the defects (art. 1733). The preferred contemporary common law approach to policing of disclaimer clauses is through judicial or statutorily based doctrines of unconscionability or, in the case of consumer goods, through statutory nullification of disclaimer provisions in the contract.

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[34] Art. 1726. Under art. 1728, the seller is liable for damages if he knew or ought to have known of the defect and, under art. 1729, the defect is presumed to exist at the time of sale by a professional seller if the property malfunctions or deteriorates prematurely. Art. 1729 is new and greatly extends the seller's warranty obligations under Quebec law. The buyer's duty of examination under the provisions of the old Civil Code provoked a lively debate in the 1960s between Professors Durnford and Gow, both of the McGill Faculty of Law. See J.W. Durnford, "What is an Apparent Defect in the Contract of Sale?" (1964) 10 McGill L.J. 60, J.J. Gow, "A Comment on the Warranty in Sale Against Latent Defects", ibid., 243, Durnford, ibid., 341, and Gow (1965) 11 McGill L.J. 35. See also Ziegel, "The Seller's Liability for Defective Goods at Common Law" (1966-67) 12 McGill L.J. 183.

[35] Art. 1730 is new and gives codal effect to the celebrated decision of the Supreme Court of Canada in *General Motors of Canada Ltd. v. Kravitz* [1979] 1 S.C.R. 790.

- The buyer's right to claim consequential damages for breaches of the seller's obligations also differ. Apparently, the Civil Code only permits the recovery of consequential damages in the case of claims against professional sellers who are deemed to be familiar with the properties of the goods; the common law jurisdictions generally permit the recovery of foreseeable consequential damages from all sellers under the rule in Hadley v. Baxendale.

- Where the seller lacks title to the goods, the Civil Code arguably provides stronger protection to the good faith buyer than do the Sale of Goods Acts. Under the Code, if the seller lacks title the sale is a nullity but the owner is bound to reimburse the buyer for the price the buyer has paid if the sale occurred in the ordinary course of business of an enterprise.[36] The Sale of Goods Acts only explicitly protect the buyer where the goods were in possession of the seller with the buyer's consent under a previous sale[37] although protection is also afforded good faith buyers under other statutory provisions and common law doctrines of estoppel.[38]

IV INTERNATIONAL DEVELOPMENTS

Hague Uniform Laws 1964

[25] International jurists have long been interested in promoting the adoption of a common sales law regime in international transactions. The cause was taken up in the late 1920s by the Rome Institute for the Unification of Private Law (UNIDROIT) and a working group was established to prepare a draft convention. The work was resumed after World War II. In 1948, two conventions were approved at a diplomatic conference held at The Hague: one on a Uniform Law on Contracts for the International Sale of Goods (ULIS) and a second on a Uniform Law on the Formation of Contracts for the International Sale of Goods (ULFC).[39] The Conventions found few adherents and only 9 states had adopted one or both of the Laws before the Uniform Laws were withdrawn by its sponsors in 1981. Canada was not among them. The lack of popularity of the Uniform Laws was ascribed to their complexity and the fact that they were essentially a Western European creation.

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[36] Art. 1714, para. 2. This provision replaces arts. 1488-1490 in the old Code.

[37] See e.g., Ont. SGA, s.25.

[38] The complex common law position is discussed in the OLRC Sales Report, ch.12.OLR.C Report, pp.19-21.

[39] OLR.C Report, pp. 19-21.

The UNCITRAL International Sales Convention

[26] Nevertheless, the need for a more representative and widely adopted International Sales Convention continued to be felt and was the first of the projects to be taken up by the United Nations Commission on International Trade Law (UNCITRAL) on the Commission's establishment in 1966. A new Working Group was established and CISG was approved at the Vienna Diplomatic Conference in April 1980. The Convention came into force on January 1, 1988 and, as of 1999, had been ratified or adopted by 56 states. The adopting states include most of Europe, many common law jurisdictions (including Australia, New Zealand, Singapore and, most importantly, the USA, but not the United Kingdom), the Russian Federation, and many Latin American countries. Canada acceded to the Convention on April 23, 1991, with effect from May 1, 1992.[40]

[27] More than 500 decisions have been rendered so far on some aspect of the Convention by domesticcourts and domestic and international arbitral tribunals. However, very few of them have emerged from common law jurisdictions. There are only about a dozen US reported decisions or references to CISG and only two so far in Canada.[41] Despite the initial support, even enthusiasm, for the Convention it seems that in practice common law lawyers prefer to deal with the domestic legal systems with which they are most familiar even where a contract is clearly governed by the Convention. There may also be other reasons. Important aspects of modern sales law are expressly excluded from the scope of the Convention[42] and some of the Convention provisions have been overtaken by technological and legal developments.[43] Also, there is not always a comfortable fit between the marriage of common law and civil law concepts in CISG and important practical questions remain unresolved.[44]

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[40] See Ziegel, "Canada Prepares to Adopt the International Sales Convention" (1991) 18 CBLJ 1.

[41] Ziegel, "Canada's First Decision on the International Sales Convention" (1999) 32 CBLJ 313. (The second Canadian decision is discussed by the author in a postscript to the Comment.) We are only aware of one Australian decision and know of no New Zealand decisions. New Zealand and Australia both adopted the Convention before Canada did.

[42] E.g., the validity of the contract, the passing of property and its effect on third parties, the seller's liability for death or personal injury caused by defective goods. CISG, arts. 4-5.

[43] This is particularly true of the formational provisions in the Convention although some of these defects may now be cured by UNCITRAL's Model Law on Electronic Commerce and Unidroit"s *Principles of International Commercial Contracts* (1996).

[44] E.g., the law governing the calculation of interest on judgments or payments to which a party is entitled under the Convention. See CISG, article 78.

V WHERE SHOULD THE ULCC GO FROM HERE?

[28] All we have said so far provides necessary background information for the primary purpose of this Report: to give the Conference the benefit of our opinion on what the ULCC should be doing with respect to the role of sales law as part of the Commercial Law Strategy. In our view, there are three components to this enquiry:

1 Should a Sale of Goods Act be included as part of the CLS?

2 If the answer is yes, what type of Act should be included?

3 What should be done about Quebec?

1 Should a Sales Act be Included?

[29] In our view, a Commercial Strategy that does not provide a place for a sale of goods Act would be seriously incomplete. As we have explained earlier, sales transactions constitute a predominant aspect of modern commerce and may be expected to do so as long as individuals, corporations and governments have material needs.[45]

[30] In putting forward this position we are not insensitive to some possible counterarguments. One concern might be that there is only a modest amount of sales litigation and that this shows that the present laws are working well. The answer is that litigation activity does not necessarily provide a reliable indication of how well laws work. The absence of cases does not prove that parties know what the current law means or that that they are satisfied with what it says. Litigation costs are high, many complaints only involve modest sums, and many parties cannot afford to litigate while those that can often find it not worth while. Governments themselves have actively been promoting alternatives to litigation. The relatively small number of cases in the sales area can also be explained at least partly on the basis that for the most part sales law comprises default rules which apply when the contracting parties have not indicated their preferences for other rules. The freedom to contract around rules which parties find uncongenial reduces the need for litigation after the event.

[31] This last consideration raises another potential argument against the case for reform. If the parties are free to contract around the law, why does it matter what the law says? The answer is obvious. It costs time and money to negotiate agreements around default rules. Lawmakers should strive to minimize these costs to business. They can do so by making sure as far as possible that the law matches modern commercial expectations. To be sure, parties may still want to contract around a modernized sales law, but they are likely to have less need for doing so than if the law is out of date or otherwise deficient.

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[45] Cf. the frequently quoted aphorism that consumption is the goal of all economic activity.

[32] In any event, providing a set of default rules describes only one (albeit very important) function of modern sales law. It serves at least three other purposes. First, the law must protect weaker parties against oppressive contract clauses and unfair bargains that offend our sense of how much even a free market in goods and services can tolerate. Coupled with this there must be behavioral baselines of good faith and fair dealing in the formation of the contract and performance of the parties' obligations. These normative rules, while obviously of importance to consumers, also address the needs of small businesspersons, especially those facing standard form contracts by powerful business enterprises.

[33] Second, the Act must address the recurring problems that arise where the seller lacks title to the goods that the seller purports to sell and to resolve the competing claims of the true owner and the good faith buyer. In the third place, a modern sales law must address emerging problems (such as those posed by electronic forms of contracting or a manufacturer's warranty obligations to the ultimate consumer of the manufacturer's goods where there is no privity of contact between the parties in the classical sense) where existing law provides no clear or satisfactory answers and where, for whatever reason, the market is not in a position to do so either.

2 What Type of Act?

[34] In our view, most of the factors point in favour of using the draft Uniform Sale of Goods Act approved by the Committee of Experts in 1981. It represented the best thinking of informed scholars in Canada at the time even though some of the Committee's conclusions were not unanimous. We see no virtue in adopting the piecemeal postwar U.K. legislative approach, although some of the amendments could usefully be considered for inclusion in the ULCC Act. We also believe, however, that the draft Act needs to be reviewed before it is included in the Commercial Law Strategy. Almost 20 years have elapsed since the Committee did its work and much has happened since then. We also recommend that the Committee's composition be expanded to include some experienced members of the commercial bar and in-house counsel of manufacturers and retail organizations. This will hopefully ensure that the new Committee's recommendations enjoy broad support and that differences in policy can be resolved before the ULCC is asked to add its imprimatur to the Act. It is realistic to expect that lawyers representing commercial interests may take a different view of some of the features of the 1981 draft Act from that held by members of the Experts Committee.

Issues to Be Considered

[35] We hope that the new Committee's deliberations will also include a study of the following issues:

- The interface between electronic commerce and the Sale of Goods Act, and the adequacy of the provisions in the existing or prospective provincial and federal electronic commerce provisions to deal with the formational problems. The drafters of Revised Article 2 felt that the Article needed its own provisions. We are not in a position to say whether the considerations that influenced the American drafters are also relevant for Canada.

- The interface between the SGA and consumer protection. This question raises issues of policy and drafting preferences. Some would prefer all consumer issues to be hived off into consumer protection legislation; others take a less dogmatic view and believe there is legitimate scope for addressing some consumer issues in the SGA, for example, the warranty liability of sellers to remote buyers. Article 2 has always adopted an undogmatic approach, which we also share. In Canada, the provincial legislation shows no consistent pattern on this issue.[46]

- The treatment of formational issues. The 1981 draft Act, following Article 2's lead, contains a substantial number of formational sections. In ideal conditions, they might be better located in a Law of Contract Amendment Act (LCAA).[47] This would make it clear that the changes are not meant to be limited to sales contracts. However, there is little evidence that the provinces are ready to contemplate even a mini-contract Code and it may be better therefore to settle for half a loaf than to have no formational provisions at all.

How to Ensure that the Provinces Will Adopt the USGA?

[36] This is a key issue. There is no point in investing intellectual capital to review the 1981 draft Act unless there are substantial prospects of the provinces actually enacting a new Sale of Goods Act. The problem is a familiar one and many federal jurisdictions face the challenge of persuading the constituent members of the Union to adopt uniform legislation. We strongly urge the ULCC to seriously consider adopting Australia's template solution. This is a two-step procedure and involves (a) a member state agreeing to be the first to enact the agreed on legislation and (b) the other member states agreeing to enact identical legislation within an agreed time frame after the first enactment.[48] No doubt the template model lends itself to variations but the principle itself is of overriding importance if the ULCC's Commercial Law Strategy is to achieve meaningful success.

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[46] For example, British Columbia's Sale of Goods Act contains a substantial number of consumer protection provisions.

[47] As previously mentioned, the OLRC published an LCAA in 1987 which unfortunately was never acted on by the Ontario government.

[48] The Commonwealth states have been cautious in committing themselves to the template solution but where they have done so (as with respect to the Corporations Law and Uniform Consumer Credit Code) it appears to have worked extremely well.

The Quebec Position

[37] It does not seem to us realistic to expect Quebec to abandon the sales provisions in the new Civil Code in favour of a uniform Act adopted by the ULCC, and in any event the Uniform Act would not fit into the civilian framework without numerous changes and adaptations. It seems to us equally unrealistic to ask the common law provinces to abandon the 1981 draft Act and the immense efforts that have gone into its preparation in favour of an entirely new statutory creation.

[38] A possible compromise would be for Quebec and the common law jurisdictions agreeing to enact a domestic version of CISG to govern sales contracts between Quebec contracting parties and contracting parties in another province.[49] If there was evidence of serious problems arising because of the different sales regimes in Quebec and the common law provinces this approach might be worth considering, although it presents significant difficulties of its own. However, the available evidence does not show that there are serious problems, although admittedly the data is rather dated.[50] We believe it better therefore for market forces and informal consultation between Quebec officials and their counterparts in the other provinces to bring about greater harmonization in the sales rules (as to some degrees they already have[51]) than for the ULCC to try to persuade Québec and the common law provinces to adopt a contrived solution that may do more harm than good.

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[49] Prof. Gow (as he then was) recommended in 1965 (see supra n. 34, at 11) that the provinces enact the Hague Uniform Laws to govern domestic sales contacts in Canada but he did not elaborate on his ideas and it is not clear how far he would have gone. In correspondence with the research director of the OLRC project, Prof. Paul Crépeau, then chair of the Quebec Civil Code Revision Office, said he saw no reason why Quebec and the common law provinces should not be able to agree to common sales provisions. However, he did not explain how he would have brought about the harmonization and, in our view, he considerably underestimated the technical challenges.

[50] See OLRC Report, vol. 1, pp.30-31.

[51] As evidenced by some of the changes made in the sales provisions of the new Civil Code.

APPENDIX 1

POSTWAR UNITED KINGDOM SALES AND RELATED LEGISLATION

Introduction

[39] The following is a short summary of the main sale of goods law reform measures in the United Kingdom over the past three decades.

Supply of Goods (Implied Terms) Act 1973 ("SOGIT 1973")

[40] SOGIT 1973 made three main changes.

- It amended the implied terms provisions of the Sale of Goods Act 1893 among other things by:
  - adding implied terms governing the right to sell, and so on for cases involving the transfer of limited title;
  - introducing a statutory definition of merchantable quality; and
  - amending the implied condition of fitness for purpose to take account of case law developments.
  - It limited the seller's right to exclude or restrict liability for breach of the implied terms.
  - It enacted implied terms for hire-purchase agreements governing the right to sell and so on, correspondence with description, merchantable quality, fitness for purpose and sample.

Consumer Credit Act 1974 ("CCA 1974")

[41] CCA 1974 substituted new hire-purchase implied terms provisions in SOGIT 1973. The changes were all minor or consequential.

Unfair Contract Terms Act 1977 ("UCTA 1977")

[42] UCTA 1977 is a general contract measure for the control of exclusion clauses. It includes provisions relating specifically to exclusion clauses in sales, hire-purchase agreements and other contracts for the supply of goods. The sale and hire-purchase agreement provisions derive from SOGIT 1973. UCTA 1977 provides in relevant part as follows.

- In the case of sale and hire-purchase agreements, the implied terms governing right to sell and so on cannot be excluded or modified. The other implied terms cannot be excluded or modified as against a person dealing as a consumer. As against a person dealing otherwise than as a consumer, these implied terms can be excluded or modified by contractual provision, but only if the provision passes a reasonableness test according to criteria set out in UCTA 1977 Schedule 2.
- In the case of contracts for the supply of goods other than sales and hire-purchase agreements, liability in connection with the right to transfer ownership or give possession, quiet possession, and so on can be excluded or modified by contractual provision subject to the statutory reasonableness test. The other implied terms cannot be excluded or modified as against a person dealing as a consumer. As against a person dealing otherwise than as a consumer, the implied terms can be excluded or modified, subject again to the reasonableness test.
- For the purposes of the Act, a person deals as a consumer if:
  - she does not make the contract in the course of a business;
  - the other party does make the contract in the course of a business; and
  - in the case of a sale or hire-purchase agreement, the goods are of a type ordinarily supplied for private use or consumption.

Supply of Goods and Services Act 1982 ("SGSA 1982")

[43] SGSA 1982 incorporates three initiatives.

- It enacts implied terms for contracts for the transfer of goods. A transfer of goods is a contract for the transfer of property in goods otherwise than by sale or hire-purchase.
- It enacts implied terms for contracts of hire. A contract of hire is a contract for the bailment of goods, not including a hire-purchase agreement.
- It enacts implied terms for contracts for the supply of services.

Consumer Protection Act 1987 ("CPA 1987")

[44] CPA 1987, Part I deals with product liability. It is based on the European Community Product Liability Directive. Part II deals with product safety. Part III deals with misleading price indications.

Sale of Goods (Amendment) Act 1994 ("1994 Amendment Act")

[45] The 1994 Amendment Act repealed the market overt rule.

Sale and Supply of Goods Act 1994 ("SSGA 1994")

[46] SSGA 1994 implements the recommendations of the English and Scottish Law Commissions in their report on the Sale and Supply of Goods (Cm 137, May 1987). It amends:

- GA 1979;
- SGSA 1982; and
- the SOGIT 1973 hire-purchase-agreement provisions (as substituted by CCA 1974).

[47] The Act changes the law in relation to:

- implied terms (merchantable quality);
- buyer's remedies (minor breaches);
- buyer's remedies (acceptance);
- buyer's remedies (delivery of wrong quantity); and
- buyer's remedies (partial rejection).

Sale of Goods (Amendment) Act 1995 ("1995 Amendment Act")

[48] The 1995 Amendment Act deals with:

- the sale of an undivided share in goods;
- the sale of unascertained goods forming part of a larger bulk; and
- ascertainment by exhaustion.

[49] It is based on the recommendations of the English and Scottish Law Commissions in their report Sale of Goods Forming Part of a Bulk (Law Com. No. 215 and Scottish Law Com. No. 145, 1993).

[50] Sections (b) and (c), below discuss in more detail the changes made to SGA 1979 by SSGA 1994 and the 1995 Amendment Act.

(a) The SSGA 1994 reforms

(i) *Implied terms (merchantable quality)*. Before SSGA 1994, SGA 1979 incorporated an implied condition of merchantable quality as follows:

> "Where the seller sells goods in the course of a business, there is an implied condition that the goods supplied under the contract are of merchantable quality, except that there is no such condition –

(a) as regards defects specifically drawn to the buyer's attention before the contract is made; or

(b) if the buyer examines the goods before the contract is made, as regards defects which that examination ought to reveal".

[51] In relation to merchantable quality, the Act said:

"Goods of any kind are of merchantable quality ... if they are fit for the purpose or purposes for which goods of that kind are commonly bought as it is reasonable to expect having regard to any description applied to them, the price (if relevant) and all the other relevant circumstances".

This definition derived from SOGIT 1973. It was a modified version of the judicially developed "purpose test": Henry Kendall & Sons Ltd v Wm Lillico & Sons Ltd [1979] 2 A.C. 31.

[52] The Law Commissions were critical of the SGA 1979 provisions on a number of grounds. Among other things:

- the expression "merchantable quality" was thought to be archaic and inappropriate to consumer transactions;
- there were doubts about whether the statutory definition of "merchantable quality" adequately covered minor or cosmetic defects; and
- the provisions made no reference to the issues of product safety or durability.

[53] SGA 1979 section 14(2A) now provides as follows:

"For the purposes of this Act, goods are of satisfactory quality if they meet the standard that a reasonable person would regard as satisfactory, taking account of any description of the goods, the price (if relevant) and all the other relevant circumstances".

[54] Section 14(2B) says:

"For the purposes of this Act, the quality of goods includes their state and condition and the following (among others) are in appropriate cases aspects of the quality of goods –

(a) fitness for all the purposes for which goods of the kind in question are commonly supplied,

(b) appearance and finish,

(c) freedom from minor defects,

(d) safety, and

(e) durability."

(ii) *Buyer's remedies (minor breaches)*. SGA 1979 implied in a sale of goods "conditions" of correspondence with description, merchantable quality, fitness for purpose, and so on. A **"condition"** means a term of a contract breach of which entitles the buyer to treat the contract as repudiated. The Act drew no distinction between major and minor breaches. The consequence was to facilitate opportunism on the buyer's part. The seller's breach of an implied condition could get the buyer out of an unprofitable contract regardless of whether the breach actually mattered to the buyer. The courts could avoid this result only by saying that minor defects did not breach the implied condition, but the consequence of doing this would have been to deny buyers any remedy at all, including damages. The dilemma was the function of a too rigid condition/warranty distinction. The courts had come up with the "innominate term" concept to break down the distinction at common law: Hong Kong Fir Shipping Co. v. Kawasaki Kisen Kaisha [1962] 2 Q.B. 26; Reardon Smith Line Ltd v. Hansen-Tangen [1976] 1 WLR 989. However, in the sale of goods context, the express statutory references to "conditions" and "warranties" precluded a parallel development: Cehave NV v. Bremer Handelsgesellschaft mbH [1976] Q.B. 44. SSGA 1994 addressed the problem in the context of non-consumer sales. New SGA 1979 section 15A reads in relevant part as follows:

"(1) Where in the case of a contract of sale –

(a) the buyer would, apart from this subsection, have the right to reject goods by reason of a breach on the part of the seller of a term implied by section 13, 14 or 15 above, but

(b) the breach is so slight that it would be unreasonable for him to reject them, then, if the buyer does not deal as a consumer, the breach is not to be treated as a breach of condition but may be treated as a breach of warranty.

(2) This section applies unless a contrary intention appears in, or is to be implied from, the contract.

(3) It is for the seller to show that a breach fell within subsection (1)(b) above".

SGA 1979 section 61(4A) says that references in the Act to "dealing as a consumer" are to be construed in accordance with UCTA 1977.

(iii) *Buyer's remedies (acceptance)*. New SGA 1979 section 35 provides in relevant part:

"(1) The buyer is deemed to have accepted the goods subject to subsection (2) below –

(a) when he intimates to the seller that he has accepted them, or

(b) when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller.

(2) Where goods are delivered to the buyer and he has not previously examined them, he is not deemed to have accepted them under subsection (1) above until he has had a reasonable opportunity of examining them for the purpose -

(a) of ascertaining whether they are in conformity with the contract, and

(b) in the case of a contract for sale by sample, of comparing the bulk with the sample.

(3) Where the buyer deals as a consumer ... the buyer cannot lose his right to rely on subsection (2) above by agreement, waiver or otherwise.

(4) The buyer is also deemed to have accepted the goods when after the lapse of a reasonable time he retains the goods without intimating to the seller that he has rejected them..

(5) The questions that are material in determining for the purposes of subsection (4) above whether a reasonable time has elapsed include whether the buyer has had a reasonable opportunity of examining the goods for the purpose mentioned in subsection (2) above.

(6) The buyer is not by virtue of this section deemed to have accepted the goods merely because –

(a) he asks for, or agrees to, their repair by or under an arrangement with the seller, or

(b) the goods are delivered to another under a sub-sale or other disposition.

(7) Where the contract is for the sale of goods making one or more commercial units, a buyer accepting any goods included in a unit is deemed to have accepted all the goods making the unit; and in this subsection "commercial unit" means a unit division of which would materially impair the value of the goods or the character of the unit".

[55] This provision reforms the law in the following main ways.

- It address the case where the buyer intimates acceptance of the goods before she has had a reasonable opportunity of examining them. The rule now is that an intimation in these circumstances does not constitute acceptance. The main concern was the potential prejudice to a buyer who signed a receipt for the goods containing an "acceptance note" or similar provision.

- The courts had made it clear that resale to a sub-buyer is not itself an act inconsistent with the seller's ownership: Hardy & Co. v. Hillerns & Fowler [1923] 2 K.B. 490. The new provision codifies this rule.

- The courts had also held that if the buyer does an inconsistent act in relation to the goods before she has had a reasonable opportunity of examining them, there is no acceptance: Hardy & Co. v. Hillerns & Fowler. The new provision codifies this rule too.

- The new provision makes it clear that acceptance by lapse of a reasonable time is in part a function of the buyer's reasonable opportunity to examine the goods.

- It is made clear that in the case of a consumer sale, the buyer cannot waive the reasonable opportunity of examination.

- The provision removes any suggestion that if the buyer attempts to have the goods repaired, she is deemed on that ground alone to have accepted the goods.

(iv) *Buyer's remedies (delivery of wrong quantity).* In a case where the seller delivered less than the agreed quantity of goods SGA 1979 originally gave the buyer the option of rejecting the delivery or accepting it and paying for the goods at the contract rate. Correspondingly, if the seller delivered more than the agreed quantity, the Act allowed the buyer to either accept the goods included in the contract and reject the rest or reject the whole. The buyer could reject the whole delivery in either case even if the seller's breach had not caused the buyer any harm. SGA 1979 section 30(2A) now provides:

"A buyer who does not deal as a consumer may not –

(a) where the seller delivers a quantity of goods less than he contracted to sell, reject the goods under subsection (1) above, or

(b) where the seller delivers a quantity of goods larger than he contracted to sell, reject the whole under subsection (2) above,

if the shortfall or, as the case may be, excess is so slight that it would be unreasonable for him to do so".

The amendment parallels the changes made by section 15A in relation to minor breaches.

(v) *Buyer's remedies (partial rejection).* Under SGA 1979, as a general rule, where a contract of sale was not severable and the buyer had accepted part of the goods, she could not reject the rest but was limited to a claim for damages. SSGA 1994 introduced a rule allowing for partial rejection. New section 35A reads as follows:

> "(1) If the buyer –
>
> (a) has the right to reject the goods by reason of a breach on the part of the seller that affects some or all of them, but
>
> (b) accepts some of the goods, including, where there are any goods unaffected by the breach, all such goods, he does not by accepting them lose his right to reject the rest.
>
> (2) In the case of a buyer having the right to reject an installment of goods, subsection (1) above applies as if references to the goods were references to the goods comprised in the installment.
>
> (3) For the purposes of subsection (1) above, goods are affected by a breach if by reason of the breach they are not in conformity with the contract.
>
> (4) This section applies unless a contrary intention appears, or is to be implied, from the contract."

[56] The 1995 Amendment Act reforms

(i) *Sale of an undivided share in goods.* The 1995 Amendment Act inserted a new definition of "goods" in SGA 1979 section 61. The new definition reads as follows:

> "'**Goods**' includes all personal chattels other than things in action and money... and in particular 'goods' includes emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale *and includes an undivided share in goods*" (emphasis added).

The italicized words are new. The purpose is to make it clear that a part owner's sale of an undivided share in goods is a contract for the sale of goods to which the Act applies.

(ii) *Sale of goods out of bulk.* SGA 1979 section 16 originally said that where there is a contract for the sale of unascertained goods, no property in the goods is transferred to the buyer unless and until the goods are ascertained. This meant that a buyer who bought goods forming part of a larger bulk could have no interest in the goods unless and until they were separated out of the bulk. The rule was open to criticism on a number of grounds. For example:

- it produced anomalies such as the following: (1) if the seller sold and delivered to other customers the entire bulk net of the buyer's entitlement, then property in what was left would pass to the buyer under the doctrine of ascertainment by exhaustion, but if the residual bulk comprised goods even slightly in excess of the buyer's entitlement, property would not pass (*Re Wait* [1927] 1 Ch. 606); (2) if the contract identified the buyer's entitlement in terms of quantity, weight or some other measure, property would not pass until the goods were separated out but if the contract gave the buyer a fixed share of the bulk, the buyer became an owner in common of the bulk;

- the rule meant that if the buyer pre-paid the contract price and the seller became insolvent before the goods could be delivered, the buyer had no claim to the goods themselves against the seller's trustee in bankruptcy, but was limited to proving in the bankruptcy for the amount of the payment: see, for example, *Re Goldcorp Exchange Ltd* [1994] 3 WLR 199. The Law Commissions thought that it was unjust that a prepaying buyer should stand to lose both the price and the goods on the seller's insolvency;

- the rule was an impediment to freedom of contract. Parties may have wanted property to pass when the price was paid in exchange for documents, such as a bill of lading, but the rule prevented this outcome.

[57] Section 20A was enacted to meet these concerns. It provides as follows:

"(1) This section applies to a contract for the sale of a specified quantity of unascertained goods if the following conditions are met –

(a) the goods or some of them form part of a bulk which is identified either in the contract or by subsequent agreement between the parties; and

(b) the buyer has paid the price for some or all of the goods which are the subject of the contract and form part of the bulk.

(2) Where this section applies, then (unless the parties agree otherwise), as soon as the conditions specified in paragraphs (a) and (b) of subsection (1) above are met or at such later time as the parties may agree –

(a) property in an undivided share in the bulk is transferred to the buyer, and

(b) the buyer becomes an owner in common of the bulk.

(3) Subject to subsection (4) below, for the purposes of this section, the undivided share of a buyer in a bulk at any time shall be such share as the quantity of goods paid for and due to the buyer out of the bulk bears to the quantity of goods in the bulk at that time.

(4) Where the aggregate of undivided shares of buyers in a bulk determined under subsection (3) above would at any time exceed the whole of the bulk at that time, the undivided share in the bulk of each buyer shall be reduced proportionately so that the aggregate of the undivided shares is equal to the whole bulk.

(5) Where a buyer has paid the price for only some of the goods due to him out of a bulk, any delivery to the buyer out of the bulk shall, for the purposes of this section, be ascribed in the first place to the goods in respect of which payment has been made.

(6) For the purposes of this section, payment of part of the price for any goods shall be treated as payment for a corresponding part of the goods".

[58] Section 20B says that co-owner A is deemed to have consented to any dealing with goods in the bulk by co-owner B in so far as the goods fall within B's undivided share. The purpose is to facilitate dealings in the individual shares.

[59] Compare UCC section 2.105(4):

"An undivided share in an identified bulk of fungible goods is sufficiently identified to be sold, although the quantity of the bulk is not determined. Any agreed proportion of such a bulk or any quantity thereof agreed upon by number, weight or other measure may to the extent of the seller's interest in the bulk be sold to the buyer who then becomes an owner in common".

(iii) *Ascertainment by exhaustion.* The 1995 Amendment Act added the following provisions to SGA 1979 section 18 Rule 5:

"(3) Where there is a contract for the sale of a specified quantity of unascertained goods in a deliverable state forming part of a bulk which is identified either in the contract or by subsequent agreement between the parties and the bulk is reduced to (or to less than) that quantity, then, if the buyer under that contract is the only buyer to whom goods are then due out of the bulk –

(a) the remaining goods are to be taken as appropriated to that contract at the time when the bulk is so reduced; and

(b) the property in those goods passes to that buyer

(4) Paragraph (3) above applies also (with the necessary modifications) where a bulk is reduced to (or to less than) the aggregate of the quantities due to a single buyer under separate contracts relating to that bulk and he is the only buyer to whom goods are then due out of that bulk".

[60] The purpose is to codify the doctrine of ascertainment by exhaustion: Wait & James v. Midland Bank (1926) 31 Co. Cas. 172.

APPENDIX 2

POSTWAR AUSTRALIAN SALES AND RELATED LEGISLATION

Introduction

[61] Australian legislatures have been active in sale of goods law reform over the past few decades, but their efforts have been directed mainly to consumer transactions. There has been no attempt at comprehensive reform of sales law at large. The New South Wales Law Reform Commission released a report on the sale of goods in 1987 which recommended a modest package of reforms in relation to: (1) innocent misrepresentation; (2) intermediate stipulations; (3) the statute of frauds requirements; (4) the passing of property as a bar to the buyer's right of rejection; and (5) the relationship between the rules governing acceptance and the buyer' statutory right of examination. New South Wales amended its sale of goods legislation in 1988 to give effect to these recommendations. Some of these reforms have also been made in other States. The Law Reform Commission of Western Australia began work on a sale of goods reference in 1995. It produced two Discussion Papers, one dealing with implied terms and the other with equitable rules applicable to sales contracts. However, work on the reference was suspended after that and so far it has not been resumed.

[62] Reforms in the consumer sales area cover the following ground: (1) implied terms and the buyer's right of rejection; (2) manufacturers' liability; (3) misrepresentation and misleading conduct; (4) unconscionable transactions; and (5) car sales.

[63] The following is a short summary of the reforms in each of these areas.

Implied terms

(i) *Commonwealth legislation.* Trade Practices Act 1974 (Cth), Part V, Div.2 contains a set of statutory implied terms limited to consumer transactions. The provisions are based on the United Kingdom Supply of Goods (Implied Terms) Act 1973. The main features are as follows.

(1) The provisions are not limited to sales. They apply to contracts for the "supply" of goods or services. "Supply" is defined in relation to goods as including supply by way of sale, exchange, lease, hire or hire-purchase.

(2) A person acquires goods a s a consumer if:

- the contract price is $40,000 or less and the goods are not acquired for resupply or other trade-related purposes; or

- the contract price is more than $40,000 and the goods are not acquired for resupply or other trade-related purposes and the goods are of a kind ordinarily acquired for personal, domestic or household use or consumption or the goods are a commercial road vehicle.

- A person acquires services as a consumer if the contract price is $40,000 or less or the contract price is more than $40,000 and the services are of a kind ordinarily acquired for personal, domestic or household use or consumption.

(3) There is a definition of merchantable quality that follows the statutory purpose test in the 1973 United Kingdom statute. It has been held in Australia that the reference in the definition to purposes is not limited to functional considerations, but may also include the appearance of the goods: Rasell v. Cavalier Marketing (Aust) Pty Ltd [1991] 2 Qd R 323. This means that aesthetic considerations can be taken into account in judging whether or not goods are of merchantable quality.

(4) In a contract for the supply of services to a consumer there is an implied warranty that the services will be rendered with due care and skill, and that any materials supplied in connection with the services will be reasonably fit for the purpose for which they are supplied. If the consumer makes known any particular purpose for which the services are required, or the desired result, there is an implied warranty that the services and any materials supplied will be reasonably fit for that purpose, or are of such a nature and quality that they might reasonably be expected to achieve that result.

(5) The consumer's right to reject goods for breach of implied condition is lost if:

(a) the goods are disposed of by the consumer, or are lost or destroyed other than by reason of the defect;

(b) the consumer caused the goods to become unmerchantable;

(c) the goods were damaged by abnormal use; or

(d) the consumer failed to exercise the right of rejection ("rescission") within a reasonable time after the consumer has had a reasonable opportunity to inspect the goods.

(6) As a general rule, the implied terms are mandatory. However, in certain cases, the supplier can exclude liability for consequential losses. Subject to this qualification, exclusion and limitation clauses are void, and if the supplier has an exclusion or limitation clause in its contract it commits an offence for which there is a substantial monetary penalty.

[64] For constitutional reasons, the Trade Practices Act is mostly limited to cases where the supplier is a corporation. This means that as a general rule, the implied terms provisions do not apply if the supplier is a sole trader, a partnership or an unincorporated association. State legislatures have moved in to fill the gap, but their efforts have been mostly uncoordinated and the results are not uniform. The main features of the Victorian and New South Wales laws are summarized below in so far as they are different from the Trade Practices Act implied term provisions. Other states have enacted consumer sales legislation that is not materially different from the Trade Practices Act implied term provisions. These do not warrant separate comment.

(ii) *Victoria*. The Victorian sale of goods legislation was amended in 1981 to include a new Part IV. Part IV governs consumer transactions. It is in substance similar to the Trade Practices Act implied term provisions but there are significant differences in drafting style and also a few substantive differences. The main substantive differences are as follows.

(1) Where in a sale of goods the seller is in breach of the implied condition as to title, the Victorian Act says that the buyer may not discharge the sale without giving notice to the seller and providing the seller with a reasonable opportunity to cure the defect in title. The purpose is to overcome the effect of the decision in Butterworth v. Kingsway Motors Ltd [1954] 2 All ER 694.

(2) Where a buyer discharges the contract of sale for breach of condition, the Victorian Act says the court may require the buyer to pay the seller compensation for the buyer's use of the goods in the period before discharge. One consequence is to overcome the windfall effect of the decision in Rowland v. Divall [1923] 2 KB 500 in cases involving breach of the implied condition as to title. However, the provision is not limited to title cases.

(3) The Victorian Act takes an expansive approach to what constitutes a sale by sample. For the purpose of the relevant implied terms, a sale by sample is not limited to the case where there is a term in the contract, express or implied, to the effect that the sale is a sale by sample. It also applies where the buyer is induced by the showing of a sample to make the purchase.

(4) The Victorian Act designates as "conditions" the terms implied in a sale of services. The implication is that the buyer may discharge the contract if the seller is in breach. However, the Act is silent on the limits of this right. It is presumably subject to the common law doctrine of affirmation and possibly also to the doctrine of substantial performance.

(5) The Act implies terms in a contract for services where the buyer is induced by a demonstration of the services or a result achieved by the services to make the purchase. The requirements are that the services must correspond in nature and quality with the services shown in the demonstration or must correspond in quality with the services that achieved the demonstrated result, and that the services will be free from any defect rendering them unfit for their normal purposes.

(6) In the case of a sale, the buyer's right to reject goods for breach of condition is limited by reference to acceptance. Passing of property is not a bar to rejection. "Acceptance" has the same meaning as in the earlier part of the Act, subject to the qualification that the following conduct of the buyer is deemed not itself to constitute acceptance:(1) retention or use of the goods within a reasonable period after it becomes apparent that they are defective; (2) failure to inform the seller of the rejection within that period; and (3) delivery of the goods to the seller for repair or replacement. As mentioned above, the Act is silent on loss of the right of discharge in the case of a sale of services and a goods lease. This means the common law rules apply.

[65] To repeat, these measures are all limited to consumer transactions. In the case of measures (1), (2) and (6), in particular, it is hard to see the reason for the limitation.

(iii) *New South Wales.* The implied conditions and warranties set out in the New South Wales Sale of Goods Act 1923 apply to both commercial and consumer transactions. However, Part VIII of the Act incorporates special provisions relating to consumer sales. The distinctive features are as follows:

(1) The implied terms are made mandatory for consumer sales, except that the implied condition of merchantable quality can be excluded if the goods are second-hand.

(2) An express warranty in a consumer sale does not negative the statutory implied condition of merchantable quality.

(3) Where in any proceedings arising out of a consumer sale (except if the goods are second-hand), the court concludes the goods are not of merchantable quality, the manufacturer may be joined in the proceedings and ordered to remedy the defect.

Manufacturer's liability

(i) *State laws.* South Australia was the first Australian jurisdiction to enact comprehensive manufacturers' liability legislation: Manufacturers Warranties Act 1974. The Australian Capital Territory followed suit soon afterwards with the Manufacturers Warranties Act 1975. The South Australian Act applies when goods are sold by retail in that State. It creates a notional contract between the manufacturer of the goods and the consumer and it implies in this contract warranties of merchantable quality and, where the goods are of a kind likely to require repair or maintenance, that spare parts will be available for a reasonable period following the date of manufacture. The manufacturer is also liable for breach of express warranty made in relation to the goods. The ACT legislation is similar except that it also includes implied warranties governing correspondence with description, fitness for purpose and correspondence with sample.

[66] Part III, Div 5 of the Queensland Fair Trading Act 1989 contains provisions that deal specifically with consumer warranties. The requirements are as follows: (1) the warranty must be evidenced by a document that is given to the consumer; (2) it must be so worded as to express, as tersely as possible, clearly and accurately, every act required to be performed to honour the warranty, and every act required to be performed by the consumer in order to be entitled to claim on the warranty; (3) it must clearly and accurately specify the name and place of business of the person by whom it is issued; (4) the duration of the warranty must be clearly specified; (5) the procedure for making a claim on the warranty must be clearly specified, including the designation of an address in Australia to which claims may be sent; (6) it must clearly specify how expenses incurred in honouring the warranty are to be borne; and (7) it must clearly state that the benefits conferred on the consumer are additional to all other applicable rights and remedies. Failure to comply is an offence. The word "warranty" or "guarantee" may not be used in a document unless the document incorporates a warranty that applies to every major component of the goods. It is an offence to communicate a warranty without a reasonable belief that the warranty will be honoured.

(ii) *Trade Practices Act 1974 (Cth), Part V, Div.2A.* The Trade Practices Act was amended in 1977 to incorporate manufacturers' liability provisions based on the text of the ACT statute. The provisions make a manufacturer statutorily liable to consumers for loss caused by product defects. Liability does not extend to third parties such as bystanders or non-owners who happen to be using the goods, and the legislation is limited to consumer goods (goods of a kind that are ordinarily acquired for personal, domestic or household use or consumption). As in the case of the ACT law, the basic scheme is to make the manufacturer liable to the consumer on the same footing that the immediate supplier is liable. Accordingly, a manufacturer may be required to pay damages if, for example, the product is not of merchantable quality or fit for its purpose, or if it does not correspond with a description the manufacturer has applied to it. There are also requirements governing reasonable availability of spare parts and repair facilities and manufacturers' express warranties. There has been only a handful of reported cases decided under the provisions in the more than 20 years since their enactment.

(iii) *Trade Practices Act 1974 (Cth), Part VA.* The Trade Practices Act was amended again in 1992 to incorporate a new Part VA, dealing with manufacturers' liability. The new provisions were meant to give effect to recommendations made by the Australian Law Reform Commission and the Victorian Law Reform Commission in their joint report on product liability. The text of Part VA is based on the European Community Product Liability Directive. Part V, Div.2A is still in place. The two sets of manufacturers' liability provisions overlap and to some extent are inconsistent. The main differences are as follows: (1) the 1977 provisions are an extension of contract law, whereas the 1992 provisions are an extension of tort law; (2) the 1977 provisions apply to goods that are defective in the sale of goods sense, namely goods that are not of merchantable quality, fit for their purpose, and so on, whereas the 1992 provisions define defect by reference to a standard of safety that "persons generally are entitled to expect"; (3) the 1977 provisions cover all kinds of loss recoverable in contract, including any amount by which the defect makes the goods themselves less valuable, whereas the 1992 provisions are limited to personal injury, loss relating to other goods and loss relating to buildings; (4) the 1992 provisions are not limited to consumer goods, though they do not apply to losses that are recoverable under workers' compensation laws; (5) the 1992 provisions include a contributory negligence defence and a state of the art defence; and (6) the 1977 provisions benefit the immediate consumer and any person who derives title to the goods through or under the consumer, while the 1992 provisions extend to other third parties as well.

Misrepresentation

(i) *State misrepresentation laws.* The Australian Capital Territory and South Australia have enacted misrepresentation statutes based substantially on the Misrepresentation Act 1967 (U.K.). The main reforms the legislation makes are to: (1) abolish the doctrine of merger and the rule in Seddon v. North East Salt Co [1905] 1 Ch.326; (2) introduce a statutory damages remedy for non-fraudulent misrepresentation; (3) invest courts with a discretion to disallow rescission and award damages instead; and (4) prevent reliance on exclusion clauses except to the extent that the court considers fair and reasonable. The significance of the legislation has been diminished by the enactment of the misleading conduct provisions of the Trade Practices Act 1974 (Cth) and the state fair trading laws (see below). Nevertheless it continues to have a role to play in non-business transactions because the misleading conduct provisions are limited to conduct that is engaged in "in trade or commerce".

(ii) *Sale of goods legislation.* Amendments to the Sale of Goods Act 1923 (NSW) in 1988 reformed the law by: (1) avoiding the decision in Watt v. Westhoven [1933] VLR 458 (a Victorian Supreme Court case which held that a contract for the sale of goods could not be rescinded in equity for innocent misrepresentation); and (2) abolishing the doctrine of merger and the rule in Seddon v. North East Salt Co. in relation to contracts for the sale of goods. Amendments to the Victorian Goods Act 1958, made in 1981, introduced a statutory right of rescission for non-fraudulent misrepresentation in the case of consumer sales and leases.

(iii) *Trade practices and fair trading legislation.* Trade Practices Act 1974 (Cth), s.52 (1) provides as follows:

> "A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive".

[67] There are corresponding provisions in the various state and territory fair trading laws. Section 52 is relevant to contracts for the sale of goods, but it is by no means exclusively a sales measure. Nor, despite the fact that it appears in the Consumer Protection part of the statute, is it an exclusively consumer protection measure. It is a commercial law reform measure of general application. Section 52 is probably the single most heavily litigated statutory provision in Australia and it is certainly one of the most significant reforms to have been made to Australian commercial law. Case law on s.52 has radically transformed the law of misrepresentation, and it has affected many other areas of law as well including the law of passing off, unfair competition and defamation. Section 52 is routinely pleaded in these areas, with the common law causes of action either pleaded in the alternative or not pleaded at all. See further Duggan, "Misrepresentation" in Patrick Parkinson (ed), The Principles of Equity (LBC Information Services Ltd Sydney Aust., 1996), 158 at 181-200.

Unconscionable transactions

[68] Unconscionability legislation has been high on the Australian legislator's agenda for the past decade or so. The main initiatives are as follows:

- Contracts Review Act 1980 (N.S.W.)
- Consumer Credit Code, sections 70-72
- Trade Practices Act 1974 (Cth), Part IVA
- Fair Trading Act 1985 (Vic), section 11A and corresponding provisions in other States and Territories.

[69] These measures were all substantially influenced by UCC section 2-302. They are not limited to sales contracts. The Contracts Review Act 1980 (N.S.W.) provides for the reopening of a contract if it is found by a court to be unjust. "Unjust" is defined to include "harsh, unconscionable or oppressive". The Act includes a list of factors the court must take into account in judging a contract. The court can refuse to enforce a contract or any part of it, avoid the contract or any provision or vary the contract. The Consumer Credit Code reopening provisions are similar to the Contracts Review Act 1980 (NSW), but they are limited to credit contracts, mortgages and guarantees. Trade Practices Act 1974 (Cth), Part IVA prohibits unconscionable conduct in trade or commerce in connection with the supply of goods or services to consumers. It also contains a section aimed at protecting small business purchasers and suppliers in their dealings with large corporations. The section prohibits unconscionable conduct in trade or commerce in connection with the supply to a small business purchaser ("business consumer") or the acquisition from a small business supplier of goods or services. It does not apply if the business consumer or small business supplier is a public listed company, and it is limited to transactions where the price is $1 million or less. Remedies for contravention include statutory damages awards, injunctions and rescission and related orders.

Car sales

[70] All states and territories have enacted legislation governing motor vehicle dealers. The laws are not uniform but they deal with most, and in some cases all, of the following matters: (1) licensing of dealers; (2) disclosures before sale; (3) form and content of sale contracts; (4) dealer's obligation to repair; (5) misleading and deceptive practices; (6) dispute resolution; and (7) the establishment of statutory compensation funds. The dealer's obligation to repair is additional to the dealer's obligations deriving from the sale of goods and trade practices legislation implied terms. In some states, the obligation is limited to used vehicles,

but in others it extends to new cars as well. The dealer's obligation is to repair any defect that appears in the vehicle within the statutory period. The relevant period is defined in terms of both time and the distance the vehicle has traveled since purchase. The length of the period varies depending, in most states, on the price the buyer paid for the vehicle. If the price falls below a certain figure, there is no repair obligation at all. The dealer can exclude the obligation, but only in relation to specified defects and only if, in the case of a used vehicle, a statutory notice disclosing the defect and other information is displayed on the vehicle at the time of sale. The obligation to repair does not apply to specified parts and accessories nor does it apply in specified cases, for example where the defect is attributable to misuse by the buyer.

APPENDIX 3

SUMMARY OF PROPOSED CHANGES FOR [NEW] REVISED UCC ARTICLE 2

Introduction

[71] Article 2 of the Uniform Commercial Code (Sales) is currently under revision by the American Law Institute and the National Conference of Commissioners on Uniform State Laws. The process has not been an easy one. A draft revised Article 2, which had already been approved by the American Law Institute, was due to be considered at the July 1999 NCCUSL annual meeting. However, there had been widespread criticism of the draft and it was removed from the agenda. A freshly appointed drafting committee prepared a new draft revision for presentation at the May 2000 ALI annual meeting. The draft was debated at the ALI meeting, but ALI will not give its final approval until next year. In the meantime, the draft is due for consideration at the July-August 2000 NCCUSL annual meeting. The main changes the draft proposes to Article 2 are in the following areas:

- scope
- electronic contracting
- "battle of the forms"
- unconscionability
- warranties
- remedies.

[72] The following discussion looks at each of these areas in turn. It draws on the Prefatory Note to the current draft revision and the draft section comments.

Scope

[73] UCC section 2.102 is the current scope provision. It says that, unless the context otherwise requires, Article 2 applies to "transactions in goods". The draft revision substitutes a new provision, numbered section 2.103. The main purpose is to clarify the application of Article 2 to mixed transactions involving the sale of goods and computer information. Proposed section 2.103 mirrors the *Uniform Computer Information Transactions Act*. It reads in relevant part as follows:

> "(b) If a transaction includes computer information and goods, this article applies to the goods but not to the computer information or informational rights in it. However, if a copy of a computer program is contained in and sold, or pursuant to section 2.313A or 2.313B, leased as part of goods, this article applies to the copy and computer program unless:
>
> (1) the goods are a computer or computer peripheral; or
>
> (2) giving the buyer or lessee of the goods access to or use of the program is ordinarily a substantial purpose of transactions in goods of the type sold or leased.
>
> (c) In a transaction that includes computer information and goods, then with regard to the goods, including any copy of a computer program constituting goods under section 2.102(a)(23), the parties may not by agreement alter a result that would otherwise be required by this article".

[74] The expressions "computer information", "computer program", "information", "informational content" and "information rights" are all defined in proposed section 2.102(a).

[75] The draft comment to section 2.103 says:

> "This section states, with a limited exception, that the rules in Article 2 do not explicitly apply to the computer information aspect involving both the sale of goods and the transfer of an interest in computer information. In that case, if the State has not enacted a statute (such as the Uniform Computer Information Transactions Act) specifically dealing with computer information transactions, a court must select an appropriate rule to govern that aspect of the transaction."

[76] The limited exception is that Article 2 does apply to the computer information component of the transaction if a computer program is contained in the goods and supplied with them, subject to the qualification that section 2.103(b) mentions. So, for example, the computer program that controls a car's antilock braking system is governed by Article 2, as is the copy in which the program is contained. However, an upstream contract to develop or supply the program to the car manufacturer is beyond the scope of Article 2. So is a separately licensed program for a digital camera that enables the camera to link to a computer: draft Comment on section 2.103.

Electronic contracting

[77] The draft revision contains provisions to facilitate electronic sales contracts. The Article 2 formal requirements have been redrafted in medium neutral language. For example:

- the statute of frauds provision in current section 2.201 requires a contract in some cases to be evidenced "in writing" "signed" by or on behalf of the party against whom enforcement is sought. The proposed new provision refers instead to a "record" "authenticated" by or on behalf of the party against whom enforcement is sought. "Record" means "information that is transcribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form": section 2.102(a)(34). "Authenticate" means "(i) to sign, or (ii) to execute or otherwise adopt a symbol, or encrypt or similarly process a record in whole or in part, with the present intent of the authenticating person to identify the person or to adopt or accept a record or term": section 2.102(a)(1). There are corresponding changes to the modification, rescission and waiver provision in section 2.209;

- the parol evidence rule in section 2.202 has been modified, substituting "record" for "writing"; and

- the rules governing contract formation in section 2.204 now make express reference to the "interaction of electronic agents". Draft new section 2.204(d) reads as follows:

> "(d) Except as otherwise provided in sections 2.211 through2.213, the following rules apply:
>
> (1) A contract may be formed by the interaction of electronic agents of the parties, even if no individual was aware of or reviewed the electronic agents' actions or the resulting terms and agreements.
>
> (2) A contract may be formed by the interaction of an electronic agent and an individual acting on the individual's own behalf or for another person. A contract is formed if the individual takes actions that the individual is free to refuse to take or makes a statement that the individual has reason to know will:

(A) cause the electronic agent to complete the transaction or performance; or

(B) indicate acceptance of an offer, regardless of other expressions or actions by the individual to which the electronic agent cannot react.

(3) If an offer evokes an electronic record in response, a contract is formed, if at all:

(A) if the electronic record operates as an acceptance under section 2.206, when the record is received; or

(B) if the offer is accepted under section 2.206 by an electronic performance, when the electronic performance is received".

[78] Subsections (d)(1) and (2) are derived from *Uniform Electronic Transactions Act*, section 14(a) and (b).

[79] According to the draft Comments, subsection (d)(1) confirms that contracts may be formed by machines functioning as electronic agents for parties to a transaction. The purpose is to negate any claim that lack of human intent at the time of contracting prevents a contract from coming into existence. When machines are involved, the requisite intent to contract flows from the programming and use of the machine. Subsection (d)(2) validates contracts formed by an individual and an electronic agent. It substantiates an anonymous click-through transaction. Subsection (d)(3) places the risk of transmission in an electronic transaction on the sender. Contrast the rule for paper transactions, which is that acceptance occurs at the point of dispatch.

[80] Draft sections 2.211,2.212 and 2.213 are new. Section 2.211 deals with the legal recognition of electronic contracts, records and authentication. It provides as follows:

"(a) A record or authentication may not be denied legal effect or enforceability solely because it is in electronic form.

(b) A contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation.

(c) Subsection (a) and section 2.104(b) and (c) only apply to transactions between parties each of which agrees to conduct transactions by electronic means. Whether the parties agree to conduct transactions by electronic means is determined from the context and surrounding circumstances, including the parties' conduct.

(d) This article does not require a record or authentication to be created, generated, sent, communicated, received, stored, or otherwise processed by electronic means or in electronic form.

(e) A contract formed by the interaction of an individual and an electronic agent under section 2.204(d)(2) does not include terms provided by the individual if the individual had reason to know that the agent could not react to the terms as provided".

[81] Subsections (a) and (b) derive from Uniform Electronic Transactions Act, section 7(a) and (b). Subsections (c) and (d) derive from UETA section 5(a) and (b). Subsection (e) derives from Uniform Computer Information Transactions Act, section 206(c).

[82] Draft section 2.212 deals with attribution. It provides as follows:

"An electronic record or an electronic authentication is attributed to a person if the record was created by or the authentication was the act of the person or the person's electronic agent or the person is otherwise bound by the act under the law".

[83] This provision is based on UETA section 9. The draft Comments explain the provision as follows:

"As long as the electronic record was created by a person or the electronic authentication resulted from a person's action it will be attributed to that person. The legal effect of the attribution is to be derived from other provisions of this Act or from other law. This section simply assures that these rules will be applied in the electronic environment. A person's actions include actions taken by a human agent of the person as well as actions taken by an electronic agent, i.e., the tool, of the person. Although this section may appear to state the obvious, it assures that the record or authentication is not ascribed to a machine, as opposed to the person operating or programming the machine".

[84] Section 2.213 says:

"(a) An electronic record is effective when received even if no individual is aware of its receipt.

(b) Receipt of an electronic acknowledgment of an electronic record establishes that the record was received but, in itself, does not establish that the content corresponds to the content received".

[85] The provision is adapted from UETA, section 15 (e) and (f). The draft Comments explain the provision as follows:

"1 Subsection (a) makes clear that receipt is not dependent on a person having notice that the record is in the person's electronic system. Receipt occurs when the record reaches the designated system whether or not the recipient ever retrieves the record. The paper analog is the recipient who never reads a mail notice.

2 Subsection (b) provides legal certainty regarding the effect of an electronic acknowledgment. It only addresses the fact of receipt, not the quality of the content, nor whether the electronic record was read or 'opened'".

Battle of the forms

[86] The draft revises and simplifies the "battle of the forms" provision in section 2.207. The new draft section 2.207 reads as follows:

"If (i) conduct by both parties recognizes the existence of a contract although their records do not otherwise establish a contract, (ii) a contract is formed by an offer and acceptance, or (iii) a contract formed in any manner is confirmed by a record that contains terms additional to or different from those in the contract being confirmed, the terms of the contract, subject to section 2.202, are:

(1) terms that appear in the records of both parties;

(2) terms, whether in a record or not, to which both parties agree; and

(3) terms supplied or incorporated under any provision of the [Uniform Commercial Code]".

[87] The new provision states the terms of all contracts, and it is not limited to cases where there has been a battle of the forms. The draft Comments explain the provision as follows:

"1 This section applies only when a contract has been formed under other provisions of Article 2. Its function is to define the terms of that contract. Where forms are exchanged before or during performance, the subsection differs from original section 2.207 and the common law in that it gives no preference to the first or the last form; it applies the same test to the terms in each. Terms in a record that insist on all of that record's terms and no others as a condition of contract formation have no effect on the operation of this section. (Of course where one party's record insists on its own terms as a condition to contract formation, where that party does not perform or otherwise acknowledge the existence of a contract, and where the other party does not agree to those terms, the record's insistence on its own terms will keep a contract from being formed under section 2.204 or 2.206, and section 2.207 will not be applicable.) ...

2 By inviting a court to determine whether a party "agrees" to the other party's terms, the text recognizes the enormous variety of circumstances that may be presented to a court under this section, and the section gives the court greater discretion to include or exclude certain terms than original section 2.207 did. In many cases mere performance should not be construed to be agreement to terms in another's record by one that has sent or will send its own record with additional or different terms. Thus a party that sends a record (however labeled or characterized, including an offer, counteroffer, acceptance, acknowledgment, purchase order, confirmation or invoice) with additional or different terms should not be regarded as having agreed to any of the additional or different terms by performance; in that case the terms are found under paragraph (1) (terms in both records) and paragraph (3) (supplied by this Act). By the same reasoning performance after an original agreement between the parties (orally, electronically or otherwise) should not normally be construed to be agreement to terms in the other's record unless that record is part of the original agreement.

The rule would be different where no agreement precedes the performance and only one party sends a record. If, for example, a buyer sends a purchase order, there is no oral or other agreement and the seller delivers in response to the purchase order but does not send its own acknowledgment or acceptance, the seller should normally be treated as having agreed to the terms of the purchase order".

Unconscionability

[88] There are no substantive changes to the text of section 2.301, but the Preliminary Comment has been redrafted to encourage courts to be more flexible in their application of the provision to consumer contracts. The Prefatory Note to the draft revision summarizes the changes as follows:

- Specifically, the Preliminary Comment:

  - Recognizes that in certain circumstances a term can be held unenforceable on the basis of procedural or substantive unconscionability alone ...

  - Recognizes that disclaimers that meet the conspicuousness and language requirements of section 2.316 can be held unconscionable under the traditional test ...; and

  - Provides additional support for the requirement imposed by some courts under section 2.719 that sellers using exclusive remedy clauses provide at least a minimum adequate remedy to their buyers".

Warranties

(i) *Remedial promises.* The draft revision introduces a new category of actionable statement called a "remedial promise". A remedial promise is a promise by the seller to repair or replace goods or to refund all or part of the price upon the happening of a specified event: section 2.102(a)(35). Examples include a commitment to repair any parts that prove to be defective, or a commitment to refund the purchase price if the goods fail to perform in a certain manner. The purpose is to resolve a statute of limitations problem. Section 2.725 currently provides that a right of action for breach of express warranty accrues at the time of tender, unless the warranty explicitly extends to future performance of the goods, in which case the cause of action accrues when the breach is or should have been discovered. By contrast, a right of action for breach of an ordinary (non-warranty) promise accrues when the breach occurs. The courts have divided on which of these rules applies where the seller breaches a commitment to take remedial action in relation to the goods in the event of a defect. Some courts have applied the time of tender rule. Others have applied the discovery rule even though the promise in question referred to the seller's future performance, not the performance of the goods themselves: draft Comment on section 2.103(a)(35). Draft section 2.725 introduces a special set of rules for remedial promises. The basic rule is that the right of action accrues when the remedial promise is not performed when due. However, this is subject to a statute of repose-type qualification. If the remedial promise is made in connection with a warranty arising under section 2.313 (express warranties),2.314 (merchantability) or 2.315 (fitness for purpose) or under section 2.313A or 2.313B (obligations to remote purchasers), an action may not be commenced more than two years after the right of action accrues or the period of limitations for the warranty or other obligation expires. If the remedial promise is not made in connection with any of the obligations specified above (for example, where the seller promises to repair or replace any part that proves to be defective but does not warrant that the parts will not fail), then an action may not be commenced more than two years after the right of action accrues or four years after tender of delivery to the immediate buyer or receipt of the goods by the remote purchaser, as the case may be: draft Comment on section 2.725.

(ii) *Warranty of title.* The draft revision amends section 2.312(1) (warranty of title) to cover the case of colourable claims that affect the value of the goods. The amendment says that the title "shall not, because of any colorable claim to the goods, unreasonably expose the buyer to litigation". Examples include a sale of goods where the seller's title is subject to litigation at the suit of a third party, and a sale of goods that are subject to export restrictions in their country of origin: draft Comment on section 2.312. The draft Comment says that "not only is the buyer entitled to a good title, but the buyer is also entitled to a marketable title, and until the colorable claim is resolved the market for the goods is impaired". The amendment codifies case law on the application of section 2.312.

(iii) *Express warranties.* Section2.313(1) currently reads as follows:

"Express warranties by the seller are created as follows:

(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to any affirmation or promise.

(b) Any description of the goods that is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

(c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model".

[89] The draft revision adds a further category of case as follows:

"(d) Any remedial promise made by the seller to the immediate buyer creates an obligation that the promise will be performed upon the happening of the specified event".

[90] Section 2.313 imposes obligations on the seller to the immediate buyer only. The draft revision adds new sections 2.313A and 2.313B imposing warranty-type obligations on the seller to remote purchasers in certain cases. Section 2.313A covers obligations to a remote purchaser created by a record packaged with or accompanying goods. The draft Comment says the provision is meant to deal with so-called "pass-through warranties". The typical case is where a manufacturer sells packaged goods to a retailer and includes in the package a record that sets out the obligations the manufacturer is willing to undertake in favour of the end consumer. The provision is limited to new goods that are sold in the normal chain of distribution. The operative part of the section reads as follows:

"(b) If a seller makes an affirmation of fact or promise that relates to the goods, provides a description that relates to the goods, or makes a remedial promise, in a record packaged with or accompanying the goods, and the seller reasonably expects the record to be, and the record is, furnished to the remote purchaser, the seller has an obligation to the remote purchaser that:

(1) the goods will conform to the affirmation of fact, promise or description unless a reasonable person in the position of the remote purchaser would not believe that the affirmation of fact, promise or description created an obligation; and

(2) the seller will perform the remedial promise".

[91] The measure of damages for breach of these obligations is "the loss resulting in the ordinary course of events as determined in any manner that is reasonable." The seller is liable for incidental or consequential damages under section 2.715, but not for lost profits. The seller may limit or modify liability under the section so long as the modification or limitation is furnished to the remote purchaser no later than the time of purchase or it is contained in the record that contains the affirmation of fact, promise or description: section 2.313A(d).

[92] Section 2.313B is a parallel provision that covers obligations to a remote purchaser created by communication to the public. The typical case is where: a manufacturer makes statements in its advertising which, if made to an immediate buyer, would amount to an express warranty or remedial promise under section 2.313; and the goods are sold to a person other than the recipient of the advertising and are then resold or leased to the recipient. By imposing liability on the seller, the section adopts the approach of cases such as Randy Knitwear Inc. v. American Cynamid Co. 11 N.Y. 2d 5; 226 N.Y.S. 2d 363; 181 N.E. 2d 399 (Ct App. 1962): draft Comment on section 2.313B. Section 2.313B does not apply if the seller's communication is made to an immediate buyer. The immediate buyer's remedy is governed by section 2.313. To recover under section 2.313B, the remote purchaser must, at the time of purchase, have knowledge of the affirmation of fact, promise, description or remedial promise and must also have an expectation that the goods will conform or that the seller will comply.

(iii) *Third party beneficiaries of warranties, express or implied, warranty obligations and remedial promises.* Section 2.318 in certain circumstances extends the seller's liability for breach of express or implied warranty to third parties such as the buyer's family members and guests. The draft revision expands this provision to cover obligations arising under sections 2.313A and 2.313B.

(iv) *Disclaimer of warranty.* Section 2.316 deals with exclusion or modification of warranties. The draft revision changes the current rules by imposing more detailed requirements for exclusion clauses in consumer contracts. The relevant part of the new provision reads as follows:

> "(b) Notwithstanding subsection (c), unless the circumstances indicate otherwise, all implied warranties are excluded by expressions such as "as is" or "with all faults" or similar language or conduct that in common understanding make it clear to the buyer that the seller assumes no responsibility for the quality or fitness of the goods. In a consumer contract evidenced by a record, the requirements of this subsection must be satisfied by conspicuous language in the record.
>
> . .

(c) Subject to subsection (b), to exclude or modify an implied warranty of merchantability or fitness, or any part of either implied warranty, the following rules apply:

(1) In a consumer contract, the language must be in a record and be conspicuous and:

(A) in the case of an implied warranty of merchantability state "The seller undertakes no responsibility for the quality of the goods except as otherwise provided in this contract"; and

(B) in the case of an implied warranty of fitness, state "The seller assumes no responsibility that the goods will be fit for any particular purpose for which you may be buying these goods, except as otherwise provided in the contract."

(2) In a contract other than a consumer contract, the language is sufficient if:

(A) in the case of an implied warranty of merchantability, it mentions merchantability; and

(B) in the case of an implied warranty of fitness, it states, for example, "There are no warranties that extend beyond the description on the face hereof".

(3) Language that satisfies paragraph (1) also satisfies paragraph (2)."

[93] Draft section 102(a)(10) defines "conspicuous" in medium neutral terms as follows:

"**'Conspicuous'**, with reference to a term, means so written, displayed or presented that a reasonable person against which it is to operate ought to have noticed it. A term in an electronic record intended to evoke a response by an electronic agent is conspicuous if it is presented in a form that would enable a reasonably configured electronic agent to take it into account or react to it without review of the record by an individual. Whether a term is 'conspicuous' or not is a decision for the court. Conspicuous terms include the following:

(A) with respect to a person:

(i) a heading in capitals equal to or greater in size than the surrounding text, or in contrasting type, font or color to the surrounding text of the same or lesser size;

(ii) language in the body of a record or display in larger type than the surrounding text, or in contrasting type, font or color to the surrounding text of the same size, or set off from surrounding text of the same size by symbols or other marks that call attention to the language; and

(B) with respect to a person or an electronic agent, a term that is so placed in a record or display that the person or electronic agent cannot proceed without taking action with respect to the particular term."

Remedies

(i) *Prepaying consumer buyer.* Section 2.502 currently allows a prepaying consumer buyer to recover the goods if the seller becomes insolvent within ten days after receipt of the first installment of the purchase price. The draft revision extends this right of recovery to a consumer buyer in the case where the seller repudiates the contract or fails to deliver the goods as agreed.

(ii) *Cure.* Section 2.508 currently gives the seller a right of cure in cases where the buyer rejects the goods. The new draft provision extends also to the case where a non-consumer buyer justifiably revokes acceptance of the goods under section 2.608(a)(2). The seller must have performed in good faith. Also, where the agreed time for performance has passed, the cure must be "appropriate and timely in the circumstances". The seller is required to compensate the buyer for the buyer's reasonable expenses caused by the seller's breach of contract and subsequent cure.

(iii) *Notice of breach.* Section 2.605 covers the case where a buyer rejects goods but fails to notify the seller of a particular defect that is ascertainable by reasonable inspection. The provision says that the buyer may not rely on the unstated defect to justify rejection or establish breach where: (1) the seller could have cured the defect if stated seasonably; or (2) between merchants, the seller has after rejection made a request in writing for a full and final statement of all defects on which the buyer proposes to rely. The draft revision expands this rule to cover revocations of acceptance. It also limits the consequences to the buyer of non-compliance. It prevents the buyer from relying on the defect to justify the rejection or revocation of acceptance. However, in contrast to the current law it does not prevent a buyer in a damages claim from relying on the unstated defect to establish breach. Waiver of a right to damages for a breach because of a failure properly to notify the seller is governed by section 2.607(c)(1). The revised version of this provision says that "where a tender has been accepted, the buyer must within a reasonable time after the buyer discovers or should have discovered any breach notify the seller; however, failure to give timely notice bars the buyer from a remedy only to the extent that the seller is prejudiced by the failure" (emphasis added). The words in italics are new.

(iv) *Reasonable use of goods following rejection or revocation of acceptance.* Section 2.608 governs the buyer's right to revoke acceptance of goods. The draft adds a new subsection (1) which says that if the buyer uses the goods after a rightful rejection or justifiable revocation of acceptance, the following rules apply: (1) any use by the buyer that is unreasonable under the circumstances is wrongful as against the seller and is an acceptance only if ratified by the seller; and (2) any use of the goods that is reasonable under the circumstances is not wrongful as against the seller and is not an acceptance, but in an appropriate case the buyer may be required to compensate the seller for the value of the use. Rule (1) gives the seller a choice between ratifying the use, thereby treating it as an acceptance or pursuing a remedy in tort for conversion. Rule (2) permits reasonable use for the purpose of mitigating the buyer's loss.

(v) *Measuring market-based damages.* Section 2.708 governs the seller's right to damages for non-acceptance or repudiation. Section 2.713 governs the buyer's right to damages for non-delivery or repudiation. Current section 2.708 measures the seller's damages by reference to the market price of the goods at the time and place for tender. Current section 2.713 measures the buyer's damages by reference to the market price of the goods at the time the buyer learned of the breach. Draft new section 2.713 changes the date to the date of tender. Draft new sections 2.708 and 2.713 both incorporate a provision to clarify the proper measure of damages in the case of anticipatory repudiation. The measure is the difference between the contract price and the market price at the expiration of a commercially reasonable time after the aggrieved party learned of the repudiation.

(vi) *Seller's consequential damages.* Section 2.710 currently governs the seller's right to incidental damages. The draft revision adds a new subsection to cover consequential damages: compare current section 2.715 (buyer's incidental and consequential damages). Consequential damages include any loss resulting from general or particular requirements and needs of which the buyer at the time of contracting had reason to know and which could not reasonably be prevented by resale or otherwise. The seller's right to recover consequential damages is limited to non-consumer transactions.

(vii) *Specific performance.* Section 2.716 currently says that specific performance may be decreed where the goods are unique or in other proper circumstances. The draft new provision goes on to say that in a contract other than a consumer contract, specific performance may be decreed if the parties have agreed to it. However, even if the parties have agreed to specific performance, it may not be decreed if the breaching party's sole remaining obligation is the payment of money.

(viii) *Liquidated damages*. The draft revision simplifies the rules in section 2.718 governing the enforceability of liquidated damages provisions.

(ix) *Statute of limitations*. The draft revision amends the statute of limitations provision in section 2.725. The basic four year limitation period has been supplemented by a rule that permits a cause of action to be brought within one year after the breach was or should have been discovered but no later than five years after the time the cause of action would otherwise have accrued. The new provision precludes sellers from reducing the limitation period in consumer contracts. It also clarifies the accrual rules for causes of action based on different obligations.

APPENDIX 4

ULCC, REPORT OF THE COMMITTEE OF EXPERTS ON DRAFT ONTARIO ACT (1981)

CONTENTS

The Chairman of the Uniform Law Section
George B. Macaulay, Q.C.

Dear Mr. Macaulay:

The Committee on Sale of Goods has completed its terms of reference, and submits herewith its Report on Sale of Goods.

Dr. Derek Mendes da Costa,
Chairman
E. Arthur Braid
Michael G. Bridge
Diane Campbell
David Vaver
Ronald C. C. Cuming
Karl J. Dore
Michel Paquette

INTRODUCTION

[94] At the sixty-first Annual Meeting of the Uniform Law Conference of Canada, held in Saskatoon in 1979, the Uniform Law Section considered a report of the Ontario Commissioners on the subject of the 1979 Report on Sale of Goods (hereafter OLRC Report) of the Ontario Law Reform Commission (hereafter OLRC). The Ontario Commissioners proposed that a committee be appointed to consider the need for new, revised, uniform sale of goods legislation, and, if such a need existed, to assess the utility of the OLRC Report as the basis for such uniform law. The Uniform Law Section also considered a letter from Dr. Derek Mendes da Costa, Q.C., dated August 20,1979 written on behalf of the law reform agencies. The letter supported the proposal of the Ontario Commissioners and stressed the willingness of the law reform agencies to participate in the work of the proposed committee. The Uniform Law Section referred the matter to the Executive "for development as speedily as is practicable".

[95] The Executive considered the matter at its meeting on August 24 1979, and requested Dr. Mendes da Costa:

1 to ascertain the Law Reform Agencies that wished to participate in the Sale of Goods Project;

2 to recommend to the Executive for appointment the names of not more than five persons representative of the participating Provinces and of the various regions of Canada to constitute a Committee to study the Draft Act attached to the Report of the Ontario Law Reform Commission on the Sale of Goods and to report thereon to the 1980 Annual Meeting of the Uniform Law Section with a recommendation for its adoption as a Uniform Act in its present form or with such changes as they considered necessary;

3 to submit a budget to the Executive for the operations of the Committee during the year 1979-1980.

[96] A Sale of Goods Committee was subsequently struck but with an increased membership. The members of the Committee are: Dr. Derek Mendes da Costa, Q.C. (chairman) (Ontario); Professor Arthur Braid (Manitoba); Mr. Michael Bridge (who replaced Mr. George Field) (Alberta); Professor R. C. C. Cuming (Saskatchewan); Mr. Karl J. Dore (New Brunswick); M. Michel Paquette (who replaced Professor Claude Samson) (Quebec); Miss Diane Campbell (P.E.L), and Professor David Vaver (British Columbia). Professor Jacob S. Ziegel of Toronto served as consultant to the Committee but had no voting rights. Apart from this fact, it should of course be clearly understood that the Committee alone is responsible for the decisions taken by it.

[97] The Committee held an organizational meeting in Toronto in November, 1979, and has met since then on twelve occasions including most recently on July 28 and 29, 1981. During this period the Committee has considered every recommendation in the OLRC Report and its proposed legislative implementation at least once, and difficult or contentious issues more often. The Committee has also had the benefit of numerous memoranda on particular topics prepared by the members of the Committee and Professor Ziegel.

THE NEED FOR A REVISED ACT

[98] All the common law provinces have adopted, more or less verbatim, the Sale of Goods Act 1893 (U.K.), and the Act is still in force in those Provinces.[1] The United Kingdom Act has been amended in important respects[2] but only one of those amendments has been adopted anywhere in Canada. Nor, for the most part, have the Provinces adopted many changes of their own. Most of the Provinces have adopted consumer protection Acts which qualify or supplement the Sale of Goods Act in important respects; but, as their names imply, their effect is restricted to consumer transactions. For the most part, non-consumer transactions have been left untouched.[3] By way of contrast, in the United States, the earlier Uniform Sales Act, which was substantially modeled on the United Kingdom Act, has been superseded by an entirely new legislative effort, Article 2 of the Uniform Commercial Code (hereafter UCC).[4]

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[1] The citations and a comparative table of the sections will be found in GHL Fridman, The Sale of Goods in Canada 2nd ed., pp. 4-5. One of the earliest initiatives of the Conference of Commissioners on Uniformity of Legislation in Canada was to encourage the Provinces that had not yet done so to adopt the UK Act of 1893, but the Act was never formally adopted as a Uniform Act. See Proc. 1st Ann. Meeting, 1918, p. 9, and IIProc. 2nd Ann. Meeting, pp, 7, 11 and 60.

[2] See OLRC Report, pp. 8-9. The 1893 Act and the subsequent amendments have now been consolidated in The Sale of Goods Act, 1979, c. 54 (U.K.).

[3] OLRC Report, pp. 9-11.

[4] Ibid., pp. 12 et seq.

[99] Having regard to the many changes that have occurred in Canada since the adoption of the United Kingdom Act, we agree with the OLRC that there is a need for a revised Sale of Goods Act tailored to meet Canadian conditions and perceptions, and that every reasonable effort should be made to maintain uniformity among the Provinces by the adoption of a Uniform Sale of Goods Act.[5] We also agree that an amended version of the Ontario draft bill commends itself for this purpose. We have prepared such an amended draft Act and submit it herewith for adoption by the Uniform Law Conference as the Uniform Sale of Goods Act 1981. Part II of this Report contains an annotated version of our draft Act. The annotations explain what changes, if any, were made to the corresponding provisions of the Ontario draft bill, and why. The Table of Concordance, following the Table of Contents at the beginning of our draft Act, also shows what changes were adopted in the organization of the sections and their numbering.

[100] We devote the balance of this Introduction to a brief review of the most important changes made by us to the Ontario draft bill.

SALIENT FEATURES OF CHANGES TO ONTARIO DRAFT BILL

I *Basic Behavioural Norms*: Good Faith and Unconscionability

[101] Ontario bill, s. 3.1, like the existing provincial Acts, permits the parties to vary or exclude altogether their rights and duties arising by implication of law. In the Ontario bill, however, the power to vary or exclude does not extend to the obligations of good faith, diligence, reasonableness and care prescribed by the Act. The Committee agrees that, in a modern milieu, minimum benchmarks of decent contractual behaviour must be maintained, but the Committee was concerned about the broad reach of the good faith requirement in Ontario bill, s. 3.2.[6] Some members felt that it could affect the exercise of every right and obligation of the parties and expose it to ex post facto review and potential attack. Whether this would have happened in practice is debatable (and even more debatable is whether such attacks would have succeeded). The Committee agreed, however, that the scope of s. 3.2 should be confined to the "performance" of a duty created by the contract or the Act, good faith itself being defined in s.1.1(1)15 (as before) as "honesty in fact and the observance of reasonable standards of fair dealing".

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[5] Ibid., p. 30.

[6] Section 3.2 of the Ontario bill reads: "Every right and duty that is created by a contract of sale or by this Act imposes an obligation of good faith in its enforcement or performance whether or not it is expressly so stated." The "good faith" requirement is discussed in the OLRC Report, pp. 163-69.

[102] The Committee made only minor changes to the powers conferred on the courts in Ontario bill s. 5.2, to police unconscionable bargains or manifestly unfair terms contained in a contract. We agree with the OLRC[7] that such an explicit power is preferable to the covert tools frequently used by Canadian recognize that several of the Provinces have now adopted business practices and trade practices legislation to deal with contractual abuses in the consumer area, and that at least two provinces (Ontario and Manitoba) are considering more comprehensive unfair contract terms legislation. In our view, there is no justification for restricting the courts' reviewing power to consumer contracts and, in the interests of uniformity, the unconscionability provisions should be retained in the Act until such time as a majority of the Provinces have adopted general unconscionability legislation.

II *Formational Issues*

[103] Unlike the present provincial Acts, the Ontario bill contains a substantial number of provisions dealing with the formation, assignment and modification of contracts of sale. We support this attempt to modernize some basic contractual rules but feel that some amendments are desirable to the following provisions appearing in the Ontario bill.

1 *Conflicting Writings and* ***"Battle of the Forms"***: UCC 2-207 deals with this difficult topic which has been much litigated in the United States. The OLRC felt that the section raises too many problems of construction to make it entirely suitable for adoption, and that only subs. (3) should be adopted in Ontario. Ontario bill, s. 4.2(3), accordingly provides:

> (3) Conduct by both parties which assumes the existence of a contract is sufficient to establish a contract of sale although the writings or other communications of the parties do not otherwise establish a contract, and in such a case the terms of the contract consist of those terms on which the parties have agreed together with any supplementary terms incorporated under any provision of this Act.

[104] It was the Committee's view that this solution was too rigid and might lead to undesirable results. We have therefore replaced s. 4.2(3) with two new provisions. First, s. 4.2(3) of the draft Act provides that a reply purporting to be an acceptance of an offer shall be treated as an acceptance, even though the reply contains additional or different terms, if the changes "do not materially alter the terms of the offer". Secondly, and more importantly, new s. 4.3 deals with the situation, corresponding to UCC 2-207(3), where one or other party has proceeded with performance of the contract even though the parties' communications do not show mutual assent to a single set of contractual terms. In such circumstances, the court is invested with broad powers to deal with the conflicting terms if it concludes that "having regard to all of the circumstances, the one party, by his conduct in receiving or shipping the goods or otherwise, has not in fact assented to conflicting terms of the other party and that it would be unreasonable to hold such parties to such terms" (s. 4.3(2)).

[7] OLRC Report, ch. 7, pp. 153 et seq.

2 *Parol Evidence Rule.* We agree with the conclusion in the OLRC Report, pp. 110-17, that the parole evidence rule, as traditionally interpreted, should cease to apply in contracts of sale and that a court should be free to hear all relevant evidence to determine the terms of the bargain struck between the parties. A similar conclusion, in a wider setting, was reached in a subsequent report by the British Columbia Law Reform Commission.[8]

[105] We feel, however, that Ontario bill, s. 4.6, which gives effect to the OLRC recommendation, is too compressed and that the effect of abolishing the parol evidence rule should be spelt out more fully. Accordingly, s. 4.8 of the draft Act provides:

4.8 No rule of law or equity respecting parol or extrinsic evidence and no provision in a writing shall prevent or limit the admissibility of evidence to prove the true terms of the agreement, including evidence of any collateral agreement or representation, or evidence as to the true identity of the parties.

[106] Section 4.8 does not mean of course that a court must always "or even most of the time" accept the parol evidence when it varies or conflicts with the written terms. It means simply that the court may admit it and may take it into consideration in determining whether the writing was intended by both parties to be the exclusive expression of their agreement.

(3) *Binding Character of Modifications without Consideration.* An important aspect of the Ontario bill's attempt to liberalize some of the existing rules of consideration is the provision, in its s. 4.8(1), that an "agreement in good faith modifying a contract of sale needs no consideration to be binding". Some members of the Committee felt keenly that a promise "not paid for" should be enforceable only to the extent that it has actually been relied upon; until such time a party should be free to withdraw from the executory portion of such an agreement and revert to the terms of the original contract after giving reasonable notice to the other party. We accepted this argument and a provision to this effect now appears in s. 4.10 of the draft Act.

III *Warranty Provisions*

[107] *Definition of* **'Express Warranty':** The existing distinction in sales law between contractual and non-contractual representations, the one amounting to a warranty and the other not, has been a source of recurring difficulty because of the problem of devising a satisfactory test to distinguish between them and because of the inadequate remedies available under existing law for a non-contractual representation. The OLRC Report favoured adopting the reliance test in s.12 of the American Uniform Sales Act as the definition of an express warranty, and this was done in Ontario bill, s. 5.10. The OLRC Report recognized, however,[9]

[8] Law Reform Commission of British Columbia. Report on Parol Evidence Rule (1979) LCR 44.

[9] OLRC Report, pp. 140-41, and 489-91.

that this expanded definition could give rise to undesirable results in the case of representations by private sellers (or buyers), but eventually decided to defer the whole question of damages claims in private sales for consideration by the OLRC in its Law of Contract Amendment Project. The Committee agrees with the soundness of the reliance test (though not where the representation clearly amounts to a term of the agreement), but we also felt that the question of remedies had to be addressed. Our solution will be found in s. 9.19(1)(b) of the draft Act, which confers a broad remedial discretion on the court with respect to a breach of warranty "not amounting to a term of a contract". In such a case, the court may grant one or more of the following remedies: rescission, reduction in the price, and damages. In considering which of these remedies to exercise the court may take into account such factors as:

(a) the fact that both persons are merchants or that one or neither is a merchant;

(b) whether the person giving the warranty or contractual undertaking purported to have knowledge or expertise, or, as the other party knew, was merely transmitting information derived from another source;

(c) whether the person giving the warranty or contractual undertaking was negligent; and

(d) any other relevant circumstance.

[108] The net result, it will be seen, is to retain a substantial measure of difference between contractual and non-contractual warranties, but one which gives the court much greater remedial flexibility than is possible under existing law.

[109] *Manufacturers' Liability for Breach of Express and Implied Warranties.* The Committee also experienced some difficulty with Ontario bill, s. 5.18. It is a commonplace that under the existing law a buyer, not in privity with the manufacturer, experiences great difficulty in holding the manufacturer liable for defective goods even though it is the manufacturer who normally advertises and creates the market for them. Of course, the buyer has his recourse against the person (usually a retailer) from whom he bought the goods, but this may avail him little if the immediate seller is judgment proof or has gone out of business. Moreover, the retailer may have similar difficulties in obtaining satisfaction from the manufacturer if he bought the goods, not from the manufacturer, but from an intermediate distributor.[10]

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[10] This point is illustrated by the recent decision of the English Court of Appeal in Lambert v. Lewis, [1980] 1 All. E.R. 978, rev'd on other grounds [1981] 1 All. E.R. 1185 (H.L.).

[110] Where the manufacturer advertises directly to the public, a member of the public may have redress under the doctrine of collateral warranty. Section 5.10 of both the Ontario bill and the draft Act gives statutory legitimacy to the doctrine. However, this still leaves a large gap. Ontario bill, s. 5.18, provides that the express and implied warranties of "a prior seller", and any remedies for breach thereof, enure in favour of a subsequent buyer who suffers injury because of a breach of the warranty. Section 5.18(4) goes on to provide that the measure of damages recoverable by a subsequent buyer shall be no greater than the damages that the immediate buyer could have recovered from such a prior seller, if a successful claim had been brought against the immediate buyer for breach of the same warranty and the immediate buyer had made a claim over against the prior seller. Section 5.18 was only put forward by the OLRC for purposes of discussion.[11] The OLRC made no recommendations concerning its enactment.

[111] The Committee also debated the wisdom of including such a provision in the draft Act. Some members of the Committee felt the whole problem was best left to be dealt with in the context of consumer product warranties legislation. Other members were concerned that only a minority of the Provinces have so far adopted consumer product warranties legislation and that there was little evidence that the remaining Provinces were in a hurry to follow the lead of Saskatchewan, New Brunswick, and Quebec. It was also pointed out that Lambert v. Lewis[12] showed that privity problems were not confined to consumer sales, and that it would be anomalous if a modern sales Act failed to acknowledge, however modestly, one of the most pressing problems in this branch of the law. It was these latter arguments that ultimately prevailed and, as a result, the Committee decided to retain s. 5.18 in an amended form as a fully fledged section in the draft Act. However, in the draft Act the section is restricted by subs. (1)(d) to cases where the prior seller is a merchant who sells goods that are subsequently resold Ontario bill, s. 5.18(5), which in effect made the section non-excludable, has been omitted, thus subjecting such a disclaimer to the usual test of unconscionability.

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[11] OLRC Report, p. 247.

[12] Supra, n. 10.

IV *Special Property and Insurable Interest*

[112] Following the UCC precedent, the Ontario bill has eliminated title issues as a factor in determining the rights and duties of buyer and seller vis-a-vis one another.[13] In partial substitution, Ontario bill, s. 7.1, adopts the UCC concept of the buyer's special property and insurable interest, both of which arise by identification of existing goods to the contract. The insurable interest speaks for itself. "Special property" is a relevant connecting factor in Article 2 for the purpose of allowing the buyer to claim goods in the hands of an insolvent seller that have been paid for (UCC 2-502) and to bring an action in tort against third parties for injury to the goods (UCC 2-722). The OLRC decided that neither section was suitable for adoption in the Ontario bill.[14] In view of this conclusion, the question to which the Committee addressed itself was whether or not special property still serves a useful purpose. The Committee was especially troubled by the case of the buyer of identified goods who has paid all or part of the price, but has not received delivery of the goods because of the seller's insolvency. It felt that endowing the buyer with a special property may still assist him in obtaining the goods and in bringing tortious claims against third parties even before he has received the full title to the goods. The Committee therefore decided that both aspects of s. 7.1 should be retained. It also felt that the buyer's special property was a relevant factor for the court to consider in an action for special performance, and the draft Act so provides in s. 9.20(2).

V *Excuse for Failure of Presupposed Conditions*

[113] An important group of provisions in Part VIII of the Ontario bill ss. 8.13 to 8.17) deals with the effects of unforeseen circumstances on the parties' obligations. The Committee's changes here were of a twofold character. First, the sequence of the sections was arranged in a more logical pattern.[15] Secondly, the scope of s. 8.12 of the draft Act, which corresponds to Ontario bill, s. 8.13, was narrowed somewhat. Both sections deal with the effect on the contract of an attempt to sell non-existing goods and with cases where casualty is suffered by the goods subsequent to the conclusion of the contract. The point was made that, since s. 7.7 operates to preserve bargains where the goods are non-conforming, it would be consistent with this approach for the dispensing power in s. 8.12 to be as narrow as reasonably possible for goods damaged or destroyed before delivery. Accordingly, s. 8.12(3) of the draft Act provides that Rules 1 and 2 of subs. (1) do not apply where "the seller is able to tender performance that differs in no material respect from that agreed on".

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[13] See s. 6.2 and OLRC Report, ch. 5.

[14] OLRC Report, pp. 265, and 276-78.[16] See OLRC Report, ch. 6(B) and ch. 17, pp. 459-61; and Ontario bill, ss. 8.1, 8.10, 8.2, 9.3(2) and 9.12(2).

[15] See now ss. 8.11 to 8.15.

VI *Remedies for Breach*

[114] *Doctrine of Substantial Breach.* No single issue provoked livelier discussion within the Committee than the question of what type of breach should be sufficient to entitle a buyer to reject non-conforming goods and either party to cancel the contract for breach by the other. The OLRC Report, deviating from the perfect tender rule in UCC Article 2, adopted the position that only a "substantial breach", defined in Ontario bill, s.1.1(1)24, should justify such strong remedies.[16] Ontario bill, s. 7.7, further qualified the right to cancel by conferring on the seller a broad right to cure even a substantial breach where this could be done without unreasonable prejudice to the buyer. The Committee felt that these provisions were too complex and perhaps too generous to the seller. It favoured a **"perfect tender"** rule with respect to the seller's obligations and the buyer's right to reject, coupled with substantially the same right to cure as under the Ontario bill. A similar regime has also been adopted with respect to breaches by the buyer although, in the nature of things, the buyer's right to cure in such cases is much more simply described.[17] In the Committee's view, the effect of these changes is to reach a result not dissimilar from that of the Ontario bill but by a more direct route. There are two important exceptions to the strict performance rule. In the case of installment contracts (s. 8.10) and in cases of anticipatory repudiation (s. 8.8), only a substantial or total breach will confer a right to cancel the contract. The Committee is of the view that these revised provisions will have two salutary effects. First, they will encourage a performing party to take his duties seriously since he will not be able to shelter behind the confident belief that a minor breach can lead only to a damages claim. A reduction in the price may indeed be an appropriate remedy under the new provisions (e.g., for the delivery of non-conforming goods) but the burden will be on the seller to show this, and he will have a strong inducement to make his offer promptly. The second salutary effect will be that, where a breach has occurred, the parties will be obliged to negotiate a settlement in faith since neither party will enjoy absolute rights.

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[16] See OLRC Report, ch. 6(b) and ch. 17, pp 459-61; and Ontario bill, ss. 8.1, 8.10, 8.2, 9.3(2) and 9.12(2).

[17] See draft Act, ss. 9.4(f) and 9.5 (seller's rights), and ss. 8.1, 9.12 and 7.7 (buyer's rights).

[115] *Rejection and Revocation of Acceptance.* **"Revocation of acceptance"** is the term used in the UCC and in Ontario bill, s. 8.8, to describe the right of a buyer to reject non-conforming goods even after he is deemed to have accepted them. The OLRC Report[18] considered the possibility of collapsing the distinction between rejection and revocation of acceptance, but concluded it was not feasible in view of the important role reserved for acceptance (narrowly defined) in the Ontario bill in determining when the seller is entitled to sue for the price. For reasons that are explained below, the Committee reached the conclusion that the link between acceptance and entitlement to price should be severed so that this obstacle to eliminating the distinction has been removed. However, the Committee still thought acceptance a useful and familiar concept for other purposes and decided to retain it (see s. 8.2 of the draft Act). What the Committee has done instead is to expand the concept of acceptance so as to merge rejection and revocation of acceptance. This was possible because, under s. 8.2(2) of the draft Act, mere lapse of time no longer amounts to acceptance (as it is under the existing law and under the Ontario bill), except where (i) the buyer knew or ought to have known of the non-conformity, (ii) the goods are no longer in substantially the condition in which the buyer received them, or (iii) the non-conformity is of a minor character. Apart from this change, the sequence of the sections in Ontario bill, ss. 8.2 to 8.8, has been rearranged and their number reduced by two by consolidating several of the provisions.

[116] *Seller's Right to Price.* As already mentioned, under Ontario bill, s. 9.11, following UCC 2-709, the seller is entitled to recover the price only where the goods have been accepted by the buyer or where one of the other enumerated exceptions applies. The Committee was of the view that the acceptance test was a little too severe and might result in a seller having to take back goods that had already been shipped to the buyer. It preferred instead a "delivery" test as the touchstone of the seller's entitlement to the price. This is the test adopted in s. 9.11(1)(a) of the draft Act. "Delivery" for this purpose is defined in subs. (4). The seller also retains the right to sue for the price in the same circumstances as under the Ontario bill, viz., where at the material time the goods were at the buyer's risk or where the seller can show that there is no alternative market for the goods.

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[18] Op. cit., pp. 474-75.

[117] *Remedies Common to the Parties*. The Ontario bill, following the existing provincial Acts and the structure of part VII of UCC Article 2, treats separately the seller's and buyer's claim for damages. In a search for greater economy of language and a desire to avoid the unnecessary repetition of provisions, the Committee decided to combine several of the damages provisions in what is now s. 9.18 of the draft Act. The Committee also thought it desirable to include in s. 9.18(3) a specific reference to the aggrieved party's duty to mitigate his damages.

[118] *Damages in Private Sales.* As previously mentioned, the OLRC Report considered this a generally neglected branch of sales law but ultimately decided that the question should be referred, in a broader setting, to its Law of Contracts Amendment Project. The Committee was of the view that something should be done now, and that the right solution was to give the court the same discretion to vary the remedy or substitute other remedies as it has in the case of a breach of warranty not amounting to a term of the contract of sale (see s. 9.19(1)(a)). Reference was made earlier to s. 9.19(2), which lists some of the factors to be taken into consideration by the court in determining whether or not to exercise its discretion.

[119] *Specific Performance.* In addition to the change involving the relevance of the buyer's special property in the goods, only one significant alteration has been made to the provisions in Ontario bill, s. 9.18. Section 9.20 of the draft Act covers suits by a seller as well as a buyer. The change was made because the Committee felt there may be circumstances-as, for example, in requirement and output contracts and in situations involving third party contracts[19] -where damages may not be an adequate remedy to an aggrieved seller. Of course, the remedy itself remains discretionary, as is true under the existing law and under the Ontario bill.

DOCUMENTS OF TITLE

[120] **"Documents of title"** is a term that appears frequently in the draft Act,[20] and necessarily so, to describe the rights and obligations of the parties under a contract of sale and in the context of the exceptions to the nemo dat rule. The draft Act also distinguishes between negotiable and non-negotiable documents of title.[21]

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[19] Cf. Beswick v. Beswick, (1968) A.C. 58 (H.L.).

[20] See e.g., ss. 6.1(3)2, 6.2, 7.2(4), 7.4, 7.5, 7.8, and 7.9. "Document of title" is defined in s.1.1(1)11.

[21] See sections cited in previous note.

[121] The OLRC was of the view that the Ontario law of documents of title was badly fragmented, not always consistent, and incomplete in important respects, and it recommended that the Ontario law be comprehensively examined with a view to its systematic codification.[22] The Commission also recommended that Article 7 of the Uniform Commercial Code should be considered with a view to determining its suitability for adoption in Ontario.

[122] The Committee fully endorses the sentiments of the OLRC and believes them to be as relevant to the position in the other common law Provinces as they are in Ontario. The Committee is particularly concerned that there is no proper common law or comprehensive statutory basis for distinguishing between negotiable and nonnegotiable documents of title, although the distinction is a vital one for the purposes of the draft Act. We therefore recommend, as a matter of some urgency, that the Uniform Law Conference establish a committee to review the existing federal and provincial law and to make recommendations with respect to the adoption of a Uniform Documents of Title Act.

CONCLUSION

[123] It is always hazardous to generalize about a draft Act as complex as the present one. It would be fair to conclude, however, that certain themes are pervasive throughout much of the draft Act, which generally favours flexibility, reasonable conduct, and an enlarged scope for the exercise of judicial discretion in difficult situations. In adopting this approach or, more accurately, in pursuing and adapting an approach already very evident in the Ontario bill, the Committee has not lost sight of the importance of certainty and predictability in commercial transactions. It believes, however, that the certainty is often illusory and that in daily practice sellers and buyers themselves adopt the same attitude of flexibility and reasonableness that the draft Act seeks to promote.

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[22] OLRC Report, p. 329, recom. I-2.