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Sale of Goods Law Reform: an Irish perspective.

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The cornerstone of sale of goods law in the common law world is the English Sale of Goods Act 1893.[1] The 1893 Act was not a reforming statute[2]; instead, it sought to make sales law more accessible via a statutory codification of the existing common law.[3] Although expressed to be: *An Act for codifying the law relating to sale of goods*, it was by no means a complete code of the law of sale of goods.[4] Nevertheless, the 1893 Act was an impressive feat of draftsmanship and was adopted as a model throughout the common law world, not only in the Commonwealth but also in the United States.[5]

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[1] 56 & 57 Vict., cap. 71.

[2] Sir Mackenzie Chalmers, who drafted the legislation leading to the Bills of Exchange Act 1882, drafted the Sale of Goods Bill which was presented to Parliament in 1889. The Bill lapsed and was re-introduced in 1891. Following extensive amendments, the Bill emerged as the Sale of Goods Act 1893. Although the Bill was intended not to alter the common law position at the time, it proved unsuccessful in this regard, in certain instances, due to details of drafting and parliamentary amendment. The 1893 Act came into operation on January 1, 1894: 1893 Act, s.63. See further M. Bridge, 'The evolution of modern sales law', [1991] *LMCLQ* 52; R. Goode, *Commercial Law,* 4th edn (LexisNexis: London, 2009) Ch 6; and the Introduction to the First Edition of Chalmer's *Sale of Goods Act 1893* 18th edn (Butterworths: London, 1981).

[3] Other areas of commercial law underwent similar treatment: see e.g. the Bills of Sale Acts 1878-91; the Bills of Exchange Act 1882; the Factors Act 1889; the Partnership Act 1890; and the Marine Insurance Act 1906. All this legislation continues in force in England (and indeed in Ireland) today. See further A. Rodgers, 'The codification of commercial law in Victoria Britain', (1992) 109 *LQR* 570.

[4] See 1893 Act, s. 61(2) which states: 'The rules of the common law, including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, and in particular the rules relating to the law of principal and agent and the effect of fraud, duress or coercion, mistake or other invalidating cause, shall continue to apply to contracts for the sale of goods'. See also English Law Commission and the Scottish Law Commission, *Sale and Supply of Goods,* (Law Com. No. 160, Scot. Law Com. No. 104, 1987), para. 1.5

[5] The Sale of Goods Act 1893 was adopted in what has been described as 'an intermittent and haphazard manner' in the various Canadian provinces: in 1896 in Manitoba, in 1897 in British Columbia, in 1898 in the Northwest Territories of Canada (formed into the Provinces of Alberta and Saskatchewan in 1905) and in 1910 in Nova Scotia. Although the 1893 Act was never formally adopted as a Uniform Act in Canada, one of the earliest initiatives of the Conference of Commissioners on Uniformity of Legislation in Canada was to recommend to Provinces that had not already done so to adopt the Sale of Goods Act 1893. Thereafter, the 1893 Act was adopted in New Brunswick and Prince Edward Island in 1919 and in Ontario in 1920. Regarding Australia, see Sale of Goods Act 1895 (S.A.); Sale of Goods Act 1895 (W.A.); Sale of Goods Act 1896 (Qld.); Sale of Goods Act 1896, now 1958 (Vic.); Sale of Goods Act 1896 (Tas.); Sale of Goods Act 1923 (N.S.W.); Sale of Goods Act 1954

On enactment in Westminster in 1893, the Sale of Goods Act applied automatically in Ireland.[6] With Irish Independence in 1922, came the formal separation of the English and Irish legal systems. Notwithstanding, the Irish Constitution (1922, and later 1937) provides that pre-1922 statutes applicable to Ireland, such as the Sale of Goods Act 1893, continue in force; further, pre-1922 case law continues to bind Irish courts.[7]

All remained quiet with sale of goods law in Ireland until the 1970s and 1980s.[8] Throughout the common law world at this time various legislative initiatives were undertaken to modernise the law of sale and in particular, to address the position of the consumer buyer. So, for example, in the UK, the 1893 Act was amended by the Supply of Goods (Implied Terms) Act 1973 which restricted the extent to which sellers could exclude liability for breach of the statutory implied terms and a new definition of 'merchantable quality' was introduced.[9] Other jurisdictions introduced separate consumer legislation, amending the law of sale of goods and more. In South Australia, the Consumer Transactions Act 1972 also provided a definition of merchantable quality and regulated the use of exclusion clauses in consumer contracts. While in Saskatchewan, the Consumer Products Warranties Act 1978 was notable because it provided for further protections (as regards express warranties, implied warranties; written warranties and additional remedies) in relation to consumer contracts for the sale of goods and its scope extended beyond the immediate seller and buyer of goods.[10]

In Ireland, inspired by developments in the UK and Canada[11], the Sale of Goods and Supply of Services Act 1980 was enacted to modernise the law and protect consumers.[12] As well as recasting the implied

(A.C.T.); Sale of Goods Act 1972 (N.T.). Regarding New Zealand, see the Sale of Goods Act 1895, replaced by the Sale of Goods Act 1908. Regarding the United States, see the Uniform Sales Act 1906; see now Uniform Commercial Code, Art. 2.

[6] See the Union of Ireland Act 1800 and the Act of Union (Ireland) 1800. This legislation provided for the union of Great Britain and Ireland into one kingdom, from 1 January 1801. The legislation included provision for one Parliament, based in Westminster.

[7] See Art. 72 of the 1922 Constitution. See now Art. 50 of the Constitution, Bunreacht na hÉireann, 1937 which provides that 'Subject to this Constitution and to the extent to which they are not inconsistent therewith, the laws in force in Saorstát Éireann immediately prior to the coming into force of this Constitution shall continue to be of full force and effect until the same or any of them shall have been repealed or amended by the Oireachtas.' See further R. Byrne & P. McCutcheon, *The Irish Legal System,* 5t^{h} edn (Bloomsbury: Haywards Heath , 2009) paras 2.64–2.65, and para 2.91.

[8] The implied terms from the 1893 Act were adapted to hire-purchase transactions in the Hire-Purchase Act 1946.

[9] See also Unfair Contract Terms Act 1977 and Sale of Goods Act 1979.

[10] See now the Consumer Protection Act, SS 1996.

[11] National Prices Commission, Occasional Paper No. 9. *Consumer Protection Law in America, Canada and Europe* (Stationery Office: Dublin, 1973) (known as the Whincup Report); National Consumer Advisory Council, Submission to the Minister for Industry and Commerce on Proposals for Legislation to Assure the Consumers' Interests (Stationery Office: Dublin, 1974).

[12] Other consumer legislation enacted in Ireland around this time included the Consumer Information Act 1978; the Trading Stamps Act 1980 and the Pyramid Selling Act 1980.

terms and regulating their exclusion, Part II of the 1980 included new implied terms in relation to spare parts and servicing, and motor vehicles; it introduced a right to request cure for consumer buyers; and it regulated manufacturers' guarantees. However, the 1893 Act remains the principal Act in Ireland today, with Part II of the 1980 Act amending certain provisions of the 1893 Act by substitution and introducing some new provisions: together this legislation is referred to as the Sale of Goods Acts 1893 and 1980.[13] Since 2003, a third layer of regulation of certain aspects of consumer sales law has been added by the European Communities (Certain Aspects of the Sale of Consumer Goods and Associated Guarantees) Regulations, 2003.[14] These Regulations were made to transpose a European Directive of the same name[15] and are additional to the rules contained in the Sale of Goods Acts.

Deficiencies in this legislative framework are numerous and widely recognised.[16] For instance, although it has been amended (in 1980) and supplemented (in 2003), the 1893 Act still dominates. Accordingly, many of the provisions are out-moded, even archaic, and thus, are not suited to our modern economy and consumer society. A clear example of this type of deficiency is the core requirement under the legislation that where goods are sold in the course of a business they must be of 'merchantable quality'.[17] Despite the introduction of a statutory definition in 1980, this phrase, 'merchantable quality', is rooted in the nineteenth century, and is not a phrase in common usage today. Hence, there is a lack of common comprehension of this phrase, both in a commercial and a consumer context.

Another major criticism relates to the over-complicated nature of the legislative framework from a consumer perspective. The Sale of Goods Acts 1893 and 1980 apply to both commercial and consumer sales (although certain provisions only apply where the seller is acting in the course of a business – e.g. section 14(2) of the 1893 Act on merchantable quality; while others only apply where the buyer is dealing as a consumer—e.g. section 14 of the 1980 on the joint liability of finance houses). Further, the European Communities (Certain Aspects of the Sale of Consumer Goods and Associated Guarantees) Regulations 2003 add another layer of regulation of consumer sales regarding certain matters, namely: quality of goods; buyer's remedies; and guarantees. On the one hand, this legislation offers consumers harmonised minimum rights and remedies throughout the European Union, where goods do not conform to the contract but, on the other hand, it brings with it an unwanted level of

[13] 1980 Act, s.9.
[14] S.I. No. 11 of 2003.
[15] Directive 1999/44/EC, [1999] O.J. L171/12.
[16] See further e.g. F. White, *Commercial Law*, 2nd edn (Round Hall: ublin, 2011), Ch 8; Sales Law Review Group, *Report on the Legislation Governing the Sale of Goods and Supply of Services* (Prn. A11/1576, 2011) Ch 1.
[17] See further below.

complexity and uncertainty to Irish consumer sales law.[18] In transposing Directive 1999/44 into Irish law, it was decided not to integrate the new European rules into the pre-existing sale of goods framework,[19] but instead to enact free-standing Regulations which operate in addition to the Sale of Goods Acts.[20] Time seems to have been a factor in this decision—the Directive should have been transposed by January 1, 2002[21]—though integration would not have been an easy task given the differences between Irish sales law and the Directive on a number of key issues. However, the decision to transpose the Directive as a free-standing piece of legislation has brought its own difficulties. In particular, pursuant to the 2003 Regulations, a consumer buyer of defective goods must elect whether to pursue his rights and remedies under the provisions of the Sale of Goods Acts, *or* the 2003 Regulations.[22] Given the differences between these two regimes—in terms of application of the rules, the quality standard, and more significantly, the remedies regime—a lawyer, let alone a consumer, would be hard pressed to decide which would be the better course of action to pursue: the provisions of the Sale of Goods Acts *or* the 2003 Regulations.

These and other deficiencies were recognised by Government when, in late 2008, it established an expert group, the Sales Law Review Group, to advise on reform of the law of sale of goods and related transactions. The Group's remit included:

- To review the general sales law provisions of the Sale of Goods Acts 1893 and 1980 and to make recommendations for a scheme of legislation capable of providing a statutory sales law framework appropriate to modern-day conditions and needs.

In late 2011, the Sales Law Review Group, issued its final report, *Report on the Legislation Governing the Sale of Goods and Supply of Services,* comprising over 120 recommendations for reform of the law

[18] See T. Bird, 'Directive 99/44/EC on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees: its impact on existing Irish sale of goods law', (2000) *European Review of Private Law* 279; A. Walley, 'The Directive on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees – Implications for Irish Consumer Sales Law', (2000) *Irish Law Times* 32; F. White, 'The EC Directive on Certain Aspects of Consumer Sale and Associated Guarantees: One Step Forward, Two Steps Back?' (2000) 7 *Commercial Law Practitioner* 3.
[19] As was done in the UK: see the UK Sale and Supply of Goods to Consumers Regulations 2002 (SI 2002, No. 3045); see further C. Willett et al, 'The Sale and Supply of Goods to Consumers Regulations', [2004] *Journal of Business Law* 94.
[20] Reg. 3(1).
[21] Art. 11.
[22] Reg. 3.

of sale of goods and related transactions.[23] The Report has been accepted in principle by Government,[24] but draft legislation is still awaited.[25]

This article seeks to examine these recommendations for reform, many of which have been inspired by legislative developments or proposals for reform from abroad. The article will critically review the key proposals under a number of contrasting headings. Hence, in the first section, a number of recommendations which are long overdue are set beside aspects of the law of sale where it was decided to maintain the *status quo*. In the next section, a number of key recommendations for reform that can be described as 'predictable' are contrasted with a variety of recommendations that can be described as 'unpredictable' or 'novel'. And, in the final section, recommendations that arguably 'go too far' are compared with other recommendations which 'don't go far enough'. This proposed methodology has its limitations. For one, the contrasting headings are not always mutually exclusive – some reforms may be long overdue *and* predictable, or, long overdue *and* novel; nor are they designed to be all encompassing. Another potential weakness in this methodology is that the different headings are by no means evenly balanced, with some headings being scarcely populated while others are over-run with examples and illustrations. Despite these and other limitations, the contrasting headings do highlight the complex nature of law reform and provide a useful template within which to view the key recommendations, in light of experience from other common law jurisdictions.

Reforms that are long overdue v. Maintaining the status quo

Arguably, any area of law where the principal statute dates from 1893 is over-due comprehensive review and reform by the twenty-first century. That said, a couple of aspects of the 1893 Act pre-date its enactment by centuries and hence are *long* overdue reform.

One of these relics is the market overt exception to the nemo dat rule, found in section 22 of the 1893 Act. The nemo dat rule is short-hand for a basic principle of property law that no one can transfer a better title than he himself has: *nemo dat quod non habet*.[26] In relation to goods, the basic rule is restated in section 21 of the 1893 Act:

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[23] Prn. A11/1576: available at www.djei.ie/commerce/consumer/slrg.htm.

[24] See Press Release: Bruton Announces Major Overhaul of Consumer Law, 18 October 2011, available at http://www.djei.ie/press/2011/20111018.htm.

[25] Around the same time, the European Commission proposed an optional Common European Sales Law in the form of a Regulation: COM (2011) 636 final. If adopted, the Regulation will not replace national contract law but will offer consumers and businesses an optional (28th system) of European sales law. At the time of writing this Regulation was still under negotiation before the Justice and Home Affairs Council. See further Twigg-Flesner, *The Europeanisation of Contract Law,* 2nd edn (Routledge- Cavandish: London, 2013).

[26] *E.g. Cundy v Lindsay* (1878) 3 App. Cas. 459. This, or a similar basic rule, applies to sales of goods, land, and to other forms of property, to gifts, and to bailments.

> Subject to the provisions of this Act, where goods are sold by a person who is not the owner thereof, … the buyer acquires no better title to the goods than the seller had …

Hence, in a conflict of title between the original owner of goods and an innocent third party purchaser, the nemo dat rule favours the original owner. Over time, a number of common law exceptions to the basic rule were developed in order to protect bona fide purchasers and thus encourage commercial activity by reinforcing the security of sale transactions. These and other exceptions are now set out in the Sale of Goods Act 1893,[27] including section 22(1) on market overt which provides:

> Where goods are sold in market overt, according to the usage of the market, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of any defect or want of title on the part of the seller.

This exception is said to derive from the ancient *lex mercatoria,*[28] and has been part of the common law since the fifteenth century, a time when the only trading in goods occurred in open markets and neither people nor goods were very mobile. It sought to represent a compromise between the interests of the owners of goods and the traders and buyers at such markets. Where goods were stolen, the onus was placed on the owner to go to the nearest market to seek his goods. If an owner failed in this endeavour and the goods were sold at market, the buyer took a good title, hence encouraging trading at markets. Clearly, today, the same rationale does not hold good.[29]

There are a number of options in terms of reform. For example, in 1966 in the UK, the Law Reform Committee suggested extending the principle to all sales from retail premises thereby further protecting innocent purchasers of goods and facilitating commercial transactions generally.[30] This approach was taken in Hong Kong in 2000 when the market overt exception was extended to goods sold openly in a shop or market.[31] However, most other jurisdictions have taken a very different approach to reform. For example, in England, following strong lobbying by fine art dealers and others[32], the market overt exception was repealed by the Sale of Goods (Amendment) Act 1994.[33] Others have also abolished the market overt exception over the years including, various Canadian

[27] 1893 Act, ss.21-26; see also ss. 2, 8 and 9 of the Factors Act 1889.
[28] Scrutton J. in *Clayton Le Roy* [1911] 2 Q.B. 1031 at 1038–9.
[29] See further L.B.C. Gower, 'Sale of Goods in Market Overt' (1949) 12 *MLR* 371; E.R.H. Ivamy, 'Revision of the Sale of Goods Act', (1956) 9 *CLP* 113; P.M. Smith, 'Valediction to Market Overt', 41 (1997) *American Journal of Legal History* 225.
[30] See the Twelfth Report of the Law Reform Committee, *Transfer of Title to Chattels*, Cmnd. 2958 (1966); see further A.L. Diamond, 'Law Reform Committee: Twelfth Report,' (1966) 29 *MLR* 431; P.S. Atiyah, 'Law Reform Committee: Twelfth Report,' (1966) 29 *MLR* 541.
[31] Sale of Goods Ordinance, Cap.26, s.24, amended 66 of 2000, s.3.
[32] See, *e.g. The Times,* July 25, 1994, p.5 where the equivalent of section 22 was referred to as a 'thief's charter' because of the view that the market overt exception facilitated the 'laundering' of stolen goods.
[33] See also D.T.I. Consultation Document, *Transfer of Title: Sections 21 to 26 of the Sale of Goods Act 1979* (1994).

provinces, Singapore, New Zealand and a number of Australian states.[34] In fact, in Hong Kong, the Law Reform Commission has since recommended repeal of the market overt exception.[35] Likewise, in Ireland, the Sales Law Review Group has also recommended repeal of the market overt exception. The Group agreed that criticisms of the market overt exception as archaic and anomalous are well-founded and its abolition would mean that, where goods are stolen, title to them could not pass to an innocent third party purchaser.[36]

A second relic can be found in section 4(1) of the 1893 Act which provides that a contract for the sale of goods of the value of £10 or more is not enforceable by action unless:

(i) the buyer accepts, and actually receives, part of the goods sold; or
(ii) the buyer gives something in earnest to bind the contract; or
(iii) the buyer has made part payment; or
(iv) there is a note or memorandum in writing of the contract and signed by the party to be charged.

This provision derives from the Statute of Frauds 1677[37] and a time when executory contracts were treated with some suspicion by the law.[38] Fears of perjury and fraud on the courts lead to the requirement of written evidence for certain contracts if they were to be enforceable. Executory contracts no longer suffer from this secondary status when compared with executed contracts, and so the distinction maintained by section 4 is unfounded.[39] Again there are a couple of options for reform. In the US, for example, the monetary amount has been updated to keep pace with inflation: it now stands at $5,000.[40] More commonly, section 4 of the 1893 Act has been repealed in many other jurisdictions, including in the United Kingdom in 1954,[41] and New Zealand in 1956.[42] The rationale for repeal is quite convincing. The minimum figure of £10 is totally out of date due to inflation. As a result, the provision catches a whole range of transactions that was never intended to come within its

[34] Interestingly, the market overt rule never applied in Scotland or, it appears, in Wales.
[35] Law Commission Report on Contracts for the Supply of Goods (2002) Recommendation 26.
[36] Sales Law Review Group, *Report on the Legislation Governing the Sale of Goods and Supply of Services* (Prn. A11/1576, 2011) para 7.40.
[37] Regnal. 29 Cha 2; see also Statute of Frauds (Ireland) 1695, 7 Will 3 ch.12.
[38] See P.S. Atiyah, *The Rise and Fall of Freedom of Contracts* (Oxford University Press: Oxford, 1979) Chs 6 and 7 and at 419–424.
[39] See e.g. Law Revision Committee, *Statute of Frauds and the Doctrine of Consideration: Sixth Interim Report* Cmd. 5449 (Stationery Office: London, 1937) para. 9.
[40] See U.C.C. 2–201(1).
[41] Law Reform (Enforcement of Contracts) Act 1954, s.1.
[42] Contracts Enforcement Act 1956. In Australia, these formal requirements have been repealed in South Australia, Queensland, New South Wales, the Australian Capital Territory, Victoria, and the Northern Territory, though it remains in force in Western Australia and Tasmania. In Canada, the equivalent provision has been repealed in British Columbia, Manitoba, New Brunswick, and Ontario, though it remains in force with a threshold of $40-50 in a number of other provinces, including Alberta, Newfoundland, Saskatchewan and Nova Scotia. The equivalent provisions in sale of goods legislation in Hong Kong and Singapore have also been repealed.

scope.[43] The section has been further criticised for offering an expedient way out of freely entered into contractual obligations where changes in market conditions make this advantageous.[44] More generally, today, when parties enter into contracts (whether executed or executory) they expect to be able to enforce the contract. The law should support this expectation and not hinder it by requiring out-of-date formalities to be complied with. Accordingly, the Sales Law Review Group has recommended the repeal of section 4 of the 1893 Act.[45]

Including the recommendations for reform mentioned above, the Sales Law Review Group has made a total of 124 recommendations in its final report. Of this total, it is notable that some recommendations are for 'no change', or for maintenance of the status quo. This approach is best explained in light of an earlier study commissioned by the Group into the *Evolution of the Sale of Goods Act 1893 in other jurisdictions,* namely the United Kingdom; Canada; Australia, New Zealand; Hong Kong; and Singapore; with a view to learning lessons from abroad in terms of reform of the law.[46] The study identified two main approaches to reform. The first involved a complete review and codification of the law of sale, including a clear move away from the principles and structure of the Sale of Goods Act 1893. This occurred in the United States with the Uniform Commercial Code (1952) which deals with sale of goods in art.2, and, inspired by the US experience, it was attempted, though unsuccessfully, in Canada with its Uniform Sale of Goods Act (1981).[47] The second approach is described in the study as 'piecemeal', involving the amendment of particular provisions of the sale of goods legislation in need of reform but maintaining the framework of the 1893 Act. In practice, this is the approach taken in all of the six jurisdictions surveyed. The Sales Law Review Group in its Report also subscribes to this approach as the best means of reform of the law. Its recommendations are based on the maintenance of the general philosophy and structure of the Sale of Goods Act 1893, with specific proposals for reform being directed at particular deficiencies in the legislation. On closer reading of the Report, the Group has opted for maintenance of the status quo in two different

[43] J.F. Stephen & F. Pollock, 'Section 17 of the Statute of Frauds' (1885) 1 *LQR* 1.
[44] M. Ní Shúilleabháin, 'Formalities of Contracting: A Cost-Benefit Analysis of Requirements that Contracts be Evidenced in Writing', (2005) *Dublin University Law Journal* 113, at 117-119.
[45] Sales Law Review Group, *Report on the Legislation Governing the Sale of Goods and Supply of Services* (Prn. A11/1576, 2011) para. 3.23. Another potential relic is the common law principle *caveat emptor* restated in section 14(1) of the 1893 Act. Bridge has observed that this subsection 'is the husk of a general rule, deprived of almost all content by the various exceptions': M. Bridge, 'The evolution of modern sales law', (1991) *LMCLQ* 52 at 54. This provision has been repealed in Hong Kong and the Sales Law Review Group has also recommended its repeal in Ireland at para. 4.50. See also recommendation to repeal rules on stoppage in transit in ss. 44-46, subject to any evidence to the contrary being brought forward: para. 10.22.
[46] Sales Law Review Group, *Report on the Legislation Governing the Sale of Goods and Supply of Services* (Prn. A11/1576, 2011) Appendix IV.
[47] A Uniform Sale of Goods Act was adopted by the Uniform Law Conference of Canada in 1981, but it has never been implemented in the various Canadian provinces.

circumstances. First, various provisions were identified as having given rise to criticism and/or proposals for reform but, on balance, the Group has decided that maintenance of the status quo is the preferred option. Second, other provisions were found to continue to work well and have not given rise to any difficulties or criticism, and hence they are maintained.

In the first category, for example, is the recommendation to maintain the distinction between conditions and warranties which reflects the origins of the 1893 Act in the common law of the nineteenth century.[48] It is arguable that the classification of all the statutory implied terms as either conditions or warranties leads to a lack of flexibility in the law, in particular when dealing with the consequences of breach and the remedies available. While this approach was conducive to commercial certainty, it made it possible for contracts to be terminated for breaches of little or no material consequence. It can be further argued that this inflexibility may lead to a watering-down of the seller's obligations as a means of avoiding the rigid effects of this classification.[49] A recognition of this general inflexibility and its consequences led to the renaissance of the intermediary or innominate terms in the *Hong Kong Fir*[50] case in the UK (approved in Ireland in *Irish Telephone Rentals v ICS Building Society*[51]). A subsequent case, *Cehave NV v Bremer Handelsgesellschaft* (*The Hansa Nord)*[52] applied the reasoning in *HongKong Fir* to an express term in a contract of sale.

It has been suggested that the inflexibility of the condition/warranty classification could be addressed by amending legislation which would identify some or all of the statutory implied terms as innominate in character, thereby leaving discretion to the judiciary to determine the appropriate consequences of their breach, on a case by case basis. This proposal was considered by the Law Reform Commissions in England and Scotland, in 1983 and again 1987, for instance, in the context of the statutory implied terms as to the quality of the goods supplied.[53] Ultimately, while the implied terms as to quality in Scotland where reclassified as 'terms', in keeping with the general law of Scotland[54], the distinction between conditions and warranties in relation to implied terms as to quality was maintained in

[48] See Sales Law Review Group, *Report on the Legislation Governing the Sale of Goods and Supply of Services* (Prn. A11/1576, 2011) para 4.17.
[49] See e.g. *Cehave NV v Bremer Handelsgesellschaft (The Hansa Nord)* [1976] QB 44; see further P.S. Atiyah, *The Sale of Goods,* 12th edn (Harlow: Pearson, 2010) at 88.
[50] *Hongkong Fir Shipping Co. Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26.
[51] [1991] ILRM 880; see further *Laird Bros v Dublin Steampacket* (1900) 34 ILTR 9; and *Taylor v Smyth* [1990] ILRM 377**.**
[52] [1976] QB 44.
[53] Law Commission Working Paper No.85 and Scottish Law Commission Consultative Memorandum No.58; Law Commissions, *Report on Sale and Supply of Goods*, (Law Commission No. 160; Scottish Law Commission No. 104).
[54] Sale of Goods Act 1979, s.15B. Also, in New Zealand, in its consumer sales legislation, the Consumer Guarantees Act 1983, the concept of 'guarantees' (a form of innominate term) is used when addressing the seller's obligations in relation to the goods.

England.[55] In other common law jurisdictions, the principal sale of goods legislation also maintains the distinction between conditions and warranties.[56] As well as keeping in line with other jurisdictions, the Sales Law Review Group has rationalised the maintenance of the status quo on a number of grounds. The Report states that the abolition of the condition/warranty classification in future legislation, and its replacement by the category of innominate term would be ill-advised for a number of reasons. First, it would create an undesirable rift between sales law and the wider law of contract. Second, it is entirely justified on grounds of both policy and practice that the law should recognise that some contract terms are more important than others and should attract more potent remedies. Third, classifying all terms as innominate, the remedies for which would depend on the nature and effects of a breach, would create commercial uncertainty and, in all likelihood, lead to more litigation. And last, the loss of automatic entitlement to the right to reject in consumer cases would considerably weaken the position of consumers.[57] Therefore, the Group recommended that future legislation should retain the distinction between conditions and warranties.[58] And hence, this recommendation brings with it a certainty in the law, which is valuable for both commercial traders and consumers alike.

Another provision which has given rise to questions and criticism but which the Group has recommended not to change is section 13 on sales by description.[59] Section 13(1), unchanged since 1893, provides that where goods are sold by description, there is an implied condition that the goods correspond with the description.[60] This may seem like stating the obvious. It appears odd to state that

[55] Instead in England, as regards the implied terms as to quality, a new provision was introduced in relation to commercial contracts only, which prohibited rejection and termination where the breach of the implied terms was minor (s.15A(1), Sale of Goods Act 1979). Similar changes were made in relation to section 30 on the delivery obligation. This more modest reform sought to address the potential 'abusive' conduct of parties without altering a core feature of the legislation, though it is not without its critics: see e.g. J. N. Adams & H. MacQueen, ed., *Atiyah's Sale of Goods* 12th edn (Pearson: Harlow, 2010) at 498.

[56] See Sales Law Review Group, *Report on the Legislation Governing the Sale of Goods and Supply of Services* (Prn. A11/1576, 2011) Appendix IV.

[57] *Ibid.* at para. 4.14.

[58] *Ibid.* at para. 4.17. The Group has also recommended that future legislation should clarify that express contractual terms may be innominate in character; and, in line with the current English position, future legislation should include a default provision restricting the right of buyers in non-consumer sales to reject goods for slight breach of the implied terms as to quality and fitness for purpose and correspondence with description and sample: para. 4.17. Similar changes are recommended in relation to section 30 on the delivery obligation: para. 8.35.

[59] *Ibid.* at para. 4.27. Similarly, section 12 on implied undertakings as to title has given rise to various commentary and criticism; but again the Group has decided, on balance, that the provision should remain as is: para 7.11.

[60] The Sale of Goods and Supply of Services Act 1980 inserted two new subsections into section 13: subsection (2) was based on a provision first included in the UK Supply of Goods (Implied Terms) Act 1973 with the aim of clarifying that s.13 applied to cases where the buyer selected the goods in a self-service scenario. Subsection

it is an implied obligation of the contract to delivery goods matching the description, when such an obligation is surely an express obligation of the contract.[61] This provision is best explained in its historical context,[62] and it has been noted that section 13 is '[c]onceptually … one of the most troublesome provisions of the Act'.[63] As the Sales Law Review Report states: '[m]ore fundamentally, there are questions about the utility of section 13 relative to the express terms of the contract - principally, what if anything does it add to these terms?'[64] Hence, apart from identifying that the term is a condition, it is arguable that section 13 is redundant and should be repealed.[65] While the Sales Law Review Group expresses some sympathy for this view, it does not go as far as to recommend repeal of section 13; rather it opts for its retention, for a number of stated reasons. First, compliance with description is a feature of the European Directive on consumer sales and so its place in European law cannot be denied; second, while judges and academics have been critical of the operation of section 13, as interpreted by the court, the Group notes the importance of the law being stated clearly and simply for non-lawyers, including businesses and consumers. And last, although the Uniform Sale of Goods Act prepared in Canada in the early 1980s deleted the implied term as to description and absorbed it into the provision on express warranties, this proposal has never been implemented and so no other jurisdiction under reviewed has repealed section 13.[66] In effect, section 13 has been reinvented and given fresh relevance for the twenty-first century.

Many other provisions of the legislation have been retained because they have not given rise to issues in case law or academic commentary and would appear to be working well. So for example, section 14(4) on fitness for particular purpose; section 14(5) on terms implied by usage; and section 14(6) on sales by agents all fall into this category.[67] Equally, bar section 16 on the passing of property in unascertained goods (see further below), the rules on the passing of property in sections 17-18 are to

(3), which is not derived from the 1973 Act, provides that a reference to goods on a label or other descriptive matter accompanying goods exposed for sale may constitute or form part of a description.

[61] This point was neatly made by Slade LJ in *Harlingdon Leinster v C. Hull Fine Art Ltd.,* [1991] 1 QB 564 at 584 when he stated: '[i]f the court is to hold that a contract is one 'for the sale of goods by description' it must be able to impute to the parties a common intention that it shall be a term of the contract that the goods will correspond with the description.'

[62] See further Adams & McQueen, above note 54, at 150-151.

[63] See M. Bridge, ed., *Benjamin's Sale of Goods,* 8th edn (Sweet & Maxwell: London, 2010) para 11-002. See also R. Goode, *Commercial Law,* 4th edn (LexisNexis: London, 2009) at 308.

[64] Sales Law Review Group, *Report on the Legislation Governing the Sale of Goods and Supply of Services* (Prn. A11/1576, 2011) p.138.

[65] See e.g. Adams & McQueen, above note 54, at 155; Goode, above note 63 at 325; and M. Bridge, 'Do We Need a New Sale of Goods Act?', in J. Lowry and L. Mistrelis ed., *Commercial Law: Perspective and Practice* (Butterworth LexisNexis: London, 2006), para. 2.10.

[66] Sales Law Review Group, *Report on the Legislation Governing the Sale of Goods and Supply of Services* (Prn. A11/1576, 2011) paras 4.23 – 4.27.

[67] *Ibid.* at para. 4.49.

remain, largely, as is[68]; the rules on the seller's lien in sections 41-43 are to remain, as is[69]; and many of the new provisions introduced in the Sale of Goods and Supply of Services Act 1980 (such as section 12 on spare parts and servicing[70], section 13 on motor vehicles[71] and section 14 on liability of finance houses) are to remain, as is.[72]

As a result, aspects of the legislation which are well past their sell-by-date are to be removed from any future legislation. Few would argue with the repeal of section 4 on formalities, or, the market overt exception, for example. These provisions have no place in a modern sale of goods statute. Indeed, it was unfortunate that these aspects of the legislation survived the Sale of Goods and Supply of Services Act 1980. At the same time, the Sales Law Review Group has identified other features of the legislation which appear to be working well and hence are not in need of reform; or even if some provisions are not perfect, they are also not suitable for statutory reform and any issues that exist are either 'academic' or more suitable to be resolved on a case by case basis. The approach of the Group to follow the experience of other jurisdictions whereby the broad framework of the 1893 Act is maintained while particular provisions in need of reform are addressed, brings with it the minimal level of change and seeks to ensure certainty in the law: a quality prized in commercial[73] and consumer law.

Reforms that are predictable v. Reforms that are novel

As noted above, the Sales Law Review Group grounded their final report in an earlier comparative study of the evolution of the 1893 Act in six common law jurisdictions and hence, many of the recommendations are inspired by reforms or reform proposals from elsewhere. Moreover, of the six jurisdictions surveyed[74], Ireland has a unique relationship with the UK, and in particular English law. In light of Ireland's unique connections with the UK—geographical, economic, legal and political (including our minority position in the European Union as common law jurisdictions) —maintaining connections through a similar sale of goods framework is to be expected and encouraged, not least

[68] *Ibid.* at para. 6.33.
[69] *Ibid.* at para. 10.22.
[70] *Ibid.* at para. 4.68. However, the Group has recommended that the operation of this section, including the reasons for its under-utilisation, should be the subject of consultation with interested parties.
[71] *Ibid.* at para. 4.73, subject to some refinements.
[72] *Ibid.* at para. 4.77 and this provision is to extended to cover transactions involving the supply of services.
[73] 'Predictability' or certainty is the second of eight principles of commercial law identified by Professor Goode: see R. Goode 'The Codification of Commercial Law', (1988) 14 *Monash Law Review* 135 at 148–153.
[74] The United Kingdom; Canada; Australia, New Zealand; Hong Kong; and Singapore.

because it provides us with access to a significant pool of case law interpreting the legislation. This is vital in an Irish context where relevant modern case law is a scarce commodity.

Therefore, in the past, when the UK modernised its law of sale of goods with the Supply of Goods (Implied Terms) Act 1973, the Unfair Contract Terms Act 1977 and the Sale of Goods Act 1979, Ireland followed with the Sale of Goods and Supply of Services Act 1980. The 1980 Act was clearly influenced by developments in the UK (and elsewhere), though not limited by them.[75] And so again, when in the 1990s the UK Sale of Goods Act 1979 was amended three times, in close succession, it is hardly surprising that Irish commercial lawyers would sit-up and take note. And thus, a number of recommendations of the Sales Law Review Group can be described as 'predictable' in that they follow a number of more recent UK reforms.

Three major recommendations for reform from the Sales Law Review Group fit this 'predictable' category.[76] The repeal of the market overt rule, effected in the UK pursuant to the Sale of Goods (Amendment) Act 1994 is one of the three, already considered above. A second example, mentioned in passing above, is reform of section 16 of the 1893 Act on the passing of property in unascertained goods effected in the UK by the Sale of Goods (Amendment) Act 1995. Bearing in mind that the ultimate purpose of the contract for the sale of goods is the transfer of property in the goods from the seller to the buyer[77], sections 16–19 of the 1893 Act contain a series of detailed and technical rules to determine when property passes. The operation of these rules depend on whether the goods sold are specific goods, future goods, or unascertained goods. So, for example, where there is an unconditional contract for the sale of *specific goods* (that is goods that are identified and agreed upon at the time the contract is made[78]) in a deliverable state, there is a presumed intention that property passes when the contract is made.[79] Again, for example, where unascertained goods (goods that are not specific) or future goods (goods yet to be manufactured or acquired by the seller[80]) are sold, there is a presumed intention that property will pass when the goods are *unconditionally appropriated* or

[75] The provisions in the 1980 Act on spare parts and after sales service; motor vehicles and guarantees went far beyond the UK position at that time; even the Irish definition of merchantable quality with its reference to 'durability' marked a distinction in form between Irish and English law.

[76] A fourth 'predictable' recommendation for reform is grounded in the concept of a 'contract for the transfer of goods' from the UK Supply of Goods and Services Act 1982. Accordingly, the Sales Law Review Group has recommended that the implied undertakings as to goods currently contained in separate statutes for different types of transaction (sale, hire-purchase, consumer hire, work and materials) or not covered by statutory provisions (barter/exchange, commercial hire-purchase and hire agreements) should be consolidated in future legislation: Sales Law Review Group, *Report on the Legislation Governing the Sale of Goods and Supply of Services* (Prn. A11/1576, 2011) para. 14.14.

[77] 1893 Act, s.1.

[78] 1893 Act, s.62.

[79] 1893 Act, s.18 r.1.

[80] 1893 Act, s.5.

irrevocability earmarked to the contract.[81] However, under section 16, no property can pass in unascertained goods until they are *ascertained* or identified with the contract.[82] So, for example, where a buyer purchases 500 tons of wheat out of a bulk cargo abroad a ship which contains 1,000 tons of wheat, no property in the 500 tons will pass to the buyer until the 500 tons are separated from the bulk and hence identifiable as the goods being bought. This rule applies even where the goods have been paid for in advance and the source of the goods, i.e. the ship, is identified. This rule applies equally to pre-paying consumer buyers of unascertained goods, as where goods are sold by a purely generic description, such as, 500 litres of heating oil. In this case, no property will pass until the 500 litres are separated from the bulk tank, usually on delivery at the consumer's home.

That the operation of section 16 can lead to injustice is well recognised.[83] First, it is mandatory; it cannot be contracted out of. Second, it applies equally to wholly unascertained goods and unascertained goods from an identified source (known as *quasi-specific goods*). In particular, where the seller becomes insolvent, a pre-paying buyer of unascertained goods is left as an unsecured creditor with limited opportunity to recoup any price paid. It has been noted elsewhere that section 16 operates contrary to most people's expectations, including buyers and sellers, commercial and consumer.[84] It also leads to anomalous results. For example, where one buyer purchases the whole bulk under several contracts, the goods will be ascertained but where two or more buyers purchase the whole bulk there is no ascertainment.[85]

In its Report, the Sales Law Review Group identified section 16 as in need of reform and recommended that provisions along the lines of those contained in the UK Sale of Goods (Amendment) Act 1995, should be introduced in Ireland.[86] Accordingly, subject to contrary agreement, where there is:

(i) a pre-paying buyer;

(ii) of a specified quantity of goods of the same kind;

(ii) forming part of an identified bulk;

[81] 1893 Act, s.18 r.5; see further e.g. *Aldridge v Johnson* (1857) 7 E & B 885; *Healy v Howlett & Sons* [1917] 1 KB 337.
[82] *Re Wait* [1927] 1 Ch 606.
[83] See e.g. English Law Commission, *Sale of Goods Forming Part of Bulk* (Law Com. No. 215, 1993).
[84] R. Goode, 'Ownership and Obligations in Commercial Transactions' (1987) 103 *LQR* 433 at 447–451.
[85] *The Elafi* [1982] 1 All ER 208.
[86] Sales Law Review Group, *Report on the Legislation Governing the Sale of Goods and Supply of Services* (Dublin, Prn. A11/1576, 2011) para. 6.26.

the buyer would be recognised as having a proprietary interest in the goods in the form of an undivided share in the bulk and he would become a tenant in common with the other owners. Complicated rules on dealing with the bulk and the consequences of a shortfall in the bulk would be part of the proposed new legal framework. Moreover, if the buyer's portion is ever removed from the bulk, it would be ascertained for the purposes of section 16, allowing property to pass to the buyer. In making this recommendation, the Group has proposed a change which has been effected in a number of other jurisdictions, including Singapore and various Australian states such as New South Wales, Southern Australia and Victoria. The Group can be bolstered in its recommendation in that this new legal framework would appear to be operating well given the lack of case law to date on the new provisions.

The third major reform which falls within this 'predictable' category relates to reform of the statutory implied terms, in particular section 14(2) of the 1893 Act, and buyer's remedies, as inspired by the UK Sale and Supply of Goods Act 1994. Accordingly, the Sales Law Review Group has recommended that the term 'satisfactory quality' should replace 'merchantable quality' as the statutory standard for the purpose of the implied terms as to the quality of goods.[87] Moreover, goods should be defined as being 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'.[88] An indicative list of the following specific aspects of quality should apply alongside the general definition in appropriate cases: fitness for all the purposes for which goods of the kind in question are commonly supplied; appearance and finish; freedom from minor defects; safety; and durability.[89]

The report of the Law Commissions which was the basis for the reforms in the United Kingdom had stated that the proposed reforms were 'intended to be useful but not revolutionary'.[90] Indeed, case law in the UK since 1994 suggests that there is little difference, in substance, between 'merchantable quality' and 'satisfactory quality'.[91] Hence, while it is arguable that these reform proposals have more to do with optics than substance, they are to be welcomed for bringing 'the very heart of the law of sale'[92] into the twenty-first century.

[87] *Ibid.* at para.4.43.
[88] *Ibid.* at para.4.48.
[89] *Ibid.*
[90] Law Commissions, *Sale and Supply of Goods* (Law Com. No. 160; Scot Law Com. No. 104, 1987) para.1.11.
[91] See further W.C.H. Ervine, 'Satisfactory quality: what does it mean?' [2004] *Journal of Business Law* 684.
[92] Adams & McQueen, above note 54, at 157.

Pursuant to the 1893 Act, a buyer's remedies for breach of contract by the seller depend on whether the term breached is a condition or a warranty. Where a condition is breached (the vast majority of statutory implied terms being conditions) the buyer can reject the goods (seeking a refund of any price paid), terminate the contract, and sue for damages for any resultant loss.[93] In contrast, where a warranty is breached the only remedy is damages.[94] The buyer's right to reject, in particular, has proved a powerful self-help remedy. However, this right is restricted in two important ways. First, the right to reject is lost where the buyer is deemed to have accepted the goods. And, a buyer is deemed to have accepted the goods in three circumstances: where the buyer (i) intimates acceptance; or (ii) acts inconsistently with the seller's ownership, or (iii) retains the goods for a period of time without rejecting them.[95] Second, and generally, the right to reject is an all-or-nothing remedy: you must reject *all* the goods supplied; or keep *all* the goods supplied. There is no general right to reject part of the goods.[96]

The Sales Law Review Group has made a number of important proposals for reform to the right to reject and acceptance, many of which are in line with the current UK position. First, as a means of avoiding rejection in bad faith in commercial sales, the Group has recommended that future legislation should include a default provision restricting the right of buyers in commercial sales to reject goods for slight breach of the implied terms as to quality.[97] In a similar vein, the Group has recommended that the right of buyers to reject for delivery of a wrong quantity should not apply in commercial contracts of sale where the excess or shortfall is so slight that it would be unreasonable to reject the whole of the goods.[98] As a counter-balance to these modest restrictions to a commercial buyer's right to reject, the Group recommends a wider right to partial rejection (reflecting the reality in commercial sales). Accordingly, the Group has recommended that future legislation should give buyers a right of partial rejection of goods not in conformity with the contract and which do not form part of a commercial unit.[99]

In relation to the loss of the right to reject following acceptance, the Group has made a number of recommendations, some in line with the current position in the UK, others not, which seek to bring

[93] 1893 Act, s.11(2).
[94] 1893 Act, s.62.
[95] 1893 Act, ss.34-35.
[96] A limited right of partial rejection does exist in two specific circumstances: (i) where the contract is severable, as with an instalment contract (1893 Act, s.11(3) and s.31); and (ii) where goods of a *mixed description* are supplied: 1893 Act, s.30(3).
[97] Sales Law Review Group, *Report on the Legislation Governing the Sale of Goods and Supply of Services* (Dublin, Prn. A11/1576, 2011) para.4.17.
[98] *Ibid.* at para.8.35.
[99] *Ibid.* at para.8.39.

clarity to the law. In particular, the Group has recommended that in the case of commercial contracts of sale, the buyer would not be deemed to have accepted goods by means of intimation of acceptance to the seller unless he has had a reasonable opportunity of examining the goods for the purpose of ascertaining their conformity with the contract[100]; while in the case of consumer contracts of sale, intimation by acceptance should be excluded from the rules governing acceptance in consumer contracts of sale in future legislation.[101] Further, the rules governing acceptance by reason of acts inconsistent with the seller's ownership of the goods should be amended in future legislation to provide that a buyer would not be deemed to have accepted the goods merely because:

> a) the goods have been delivered to a third party under a sub-sale, gift or other disposition; or
>
> b) the buyer asks for, or agrees to, the repair of the goods.[102]

In contrast to the recommendations considered above, a number of other recommendations are less predictable, or more novel, in seeking to reform Irish sales law. For example, currently, the Sale of Goods Acts 1893 and 1980 only apply to *contracts* for the sale of goods, as defined.[103] However, today, goods are often supplied 'for free' or on promotions such as 'buy one, get one free' and hence arguably outside a contractual context. The exact legal status of such common transactions remains unclear; as do the rights and remedies of the 'buyers/recipients' of such goods.[104] Therefore, the Sales Law Review Group has recommended that future legislation should clarify that goods supplied 'free', or at a reduced price, when bought in conjunction with other goods under promotional campaigns or under loyalty schemes are subject to the same implied quality and other terms as goods purchased for a price.[105]

A second novel recommendation of the Sales Law Review Group relates to the regulation of exclusion or limitation of liability clauses in sale of goods contracts. Ireland lacks a general set of statutory rules which regulate the use of exemption clauses or other unfair terms. Instead, the Sale of Goods and Supply of Services Act 1980 introduced rules which prohibit the use of clauses in relation to consumers which seek to exclude or limited the seller's liability for breach of the statutory implied terms; any

[100] *Ibid.* at para.9.21.
[101] *Ibid.*
[102] *Ibid.* at para.9.28.
[103] 1893 Act, s.1.
[104] See e.g. *Esso Petroleum Co. Ltd v Customs & Excise Commissioners* [1976] 1 All ER 117; *Kuwait Petroleum v Customs & Excise Commissioners* [2000] All ER (D) 2378.
[105] Sales Law Review Group, *Report on the Legislation Governing the Sale of Goods and Supply of Services* (Dublin, Prn. A11/1576, 2011) para. 14.14. See also New Zealand Consumer Guarantees Act 1993 which applies to gifts: 1993 Act, s.2.

such clauses in relation to commercial buyers must be fair and reasonable.[106] Moreover, the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 and 2000[107] provide further regulation of unfair terms (including exclusion and limitation of liability clauses) in consumer contracts which are not individually negotiated.[108] Accordingly, a term which is *unfair* is not enforceable against a consumer.

The Sales Law Review Group expressed the view that the present situation under which exemption clauses in consumer contracts are regulated in different ways under different enactments is manifestly unsatisfactory and needs to be addressed.[109] The Group has identified the Unfair Terms Regulations are the most appropriate vehicle for the regulation of exclusion clauses in consumer sale and related contracts. Therefore, the Group has recommended that such clauses should be deemed *automatically* unfair under the Regulations. As well as dealing with the confusion caused by the co-existence of overlapping statutory rules, this approach would enable the National Consumer Agency to take action, where appropriate, against contract terms which sought to exclude the implied quality and other terms in sale contracts.[110]

A third novel feature of the Sales Law Review Group's final report takes us back to buyer's remedies and the right to reject. As noted above, currently, a buyer can looses the right to reject the goods if he is deemed to have accepted the goods. Section 35 sets-out three grounds of acceptance: (i) intimation of acceptance by the buyer; (ii) where the buyer does an act inconsistent with the seller's ownership and (iii) where without good and sufficient reason, the buyer retains the goods without intimating to the seller that he has rejected them.[111] This last ground has proved particularly

[106] 1893 Act, s.55, as substituted by 1980 Act, s.22.
[107] S.I. No. 27 of 1995, and S.I. No. 307 of 2000.
[108] This form of regulation does not extend to an assessment of the fairness of the definition of the main subject matter of the contract and the adequacy of the price: Reg.4, 1995.
[109] Similarly in the UK, in 2005, the Law Commission and the Scottish Law Commission recommended a single harmonised regime to deal with unfair terms in consumer contracts (Law Com No. 292 and Scot Law Com No 199, 2005). See more recently Law Commissions, *Unfair Terms in Consumer Contract: Advice to the Department for Business Innovation and Skills,* (March 2013).
[110] Sales Law Review Group, *Report on the Legislation Governing the Sale of Goods and Supply of Services* (Dublin, Prn. A11/1576, 2011) para. 5.16. It is also recommended that clauses exempting the implied statutory terms as to goods in sales and related contracts between businesses should be unenforceable unless shown to be fair and reasonable. Moreover, the 'deals as consumer' test at section 3 of the 1980 Act should be repealed and the definition of 'consumer' for the purposes of the regulation of exemption and other clauses in future legislation should refer to a natural person acting for purposes unrelated to his or her business: Sales Law Review Group, *Report on the Legislation Governing the Sale of Goods and Supply of Services* (Dublin, Prn. A11/1576, 2011) para. 5.22.
[111] The first two grounds in section 35 have remained unchanged in substance since 1893; however, the third ground was altered in 1980 with the insertion of 'without good and sufficient reason ...' instead of 'when after the lapse of a reasonable time...'.

problematic in terms of predicting the amount of time a buyer has, or what circumstances must pertain, before he loses the right to reject. In one English case, based on a corresponding statutory provision, a buyer lost the right to reject a car three weeks after delivery,[112] while in another case, a Canadian case, a buyer was allowed to use a computer system for 17 months and still to exercise his right to reject.[113] Modern Irish case law in this issue is non-existent and so again the legal position is unclear. Having considered a number of options for reform, the Sales Law Review Group recommended the introduction of a fixed time period for the exercise of the right to reject. The Group has proposed a standard thirty day rejection period, with provision for a shorter or longer period in specified circumstances.[114] Such a change, it is argued, brings with it greater certainty and strikes a reasonable balance between the interests of seller and buyers, alike.[115]

Reforms that go too far v. Reforms that don't go far enough

There would appear to be only one recommendation for reform that arguably *goes too far*, in the sense that the case for reform has not been well made out, in the particular circumstances. This relates to the recommendation considered above to introduce a standard fixed period of thirty days for the rejection of defective goods.[116] This proposal is initially made in relation to consumer contracts and in this regard the proposal has merit. However, the Report goes on to provide that a thirty day rejection period should also apply to commercial sales, as a default rule. Commercial buyers are a very different breed from consumer buyers. A commercial buyer may have an equality of bargaining power with the seller and so accept, as a business risk, that some goods may be defective. This risk can be factored into any pre-contractual bargaining. Further, a commercial buyer will be less at risk of post-contractual threats by the seller that the buyer should keep the goods, as the continuance of a good trading relationship may be in the interests of both parties. At worst, a commercial buyer will be better able to pursue litigation, if necessary. None of these factors apply to consumer buyers. The

[112] *Bernstein v Pamsons Motors (Golders Green) Ltd* [1987] 2 All ER 220.
[113] *Public Utilities Commission of City of Waterloo v Burroughs Business Machines* (1974) 52 DLR 481.
[114] Sales Law Review Group, *Report on the Legislation Governing the Sale of Goods and Supply of Services* (Dublin, Prn. A11/1576, 2011) para. 9.44. See further similar proposals by English and Scottish Law Commissions, *Consumer Remedies for Faulty Goods* (Law Com No. 317, Scot Law Com No. 216, 2009); and UK BIS Consultation Paper, *Enhancing Consumer Confidence by Clarifying Consumer Law* (2012).
[115] Other novel recommendations include: simplifying s.23 on sale under voidable title by abolishing the distinction between contracts that are void by reason of mistake of identity and voidable for misrepresentation (para. 7.40); harmonising the burden of proof for all of the exceptions to the *nemo dat* rule (para. 7.40); and adopting of a provision linking a seller's an action for the price to delivery modelled on Section 9.11 of the Canadian Uniform Sale of Goods Act (1982) to replace s.49 of the 1893 Act (para. 11.12).
[116] Sales Law Review Group, *Report on the Legislation Governing the Sale of Goods and Supply of Services* (Dublin, Prn. A11/1576, 2011) para. 9.44.

default nature of the rule for commercial buyers clearly limits its impact on commercial buyers. Moreover, maintaining a common set of rules between commercial and consumer buyer has its advantages but questions remain about the appropriateness of this recommendation in a commercial context. The Group was conscious of such questions and accordingly it noted: 'This recommendation should be reviewed, however, if evidence emerges that the proposed rule is unsuited to certain types of commercial contract'.[117]

In contrast to the above, there are a number of areas, three major areas, at least, where it is arguable that the Sales Law Review Group did not go far enough in their recommendations for reform. These three areas relate to the application of the legislation to digital content; the regulation of contracts for the supply of services; and, the wider issue of direct producer liability. Each of these areas will be considered in turn below.

As already noted, the Sale of Goods Acts 1893 and 1980 only apply to contracts for the sale of *goods*.[118] 'Goods' are defined in section 62 of the 1893 Act as including all chattels personal other than things in action and money. In more modern terminology, this definition would seem to comprise all tangible moveable items.[119] A great many items clearly come within this definition – e.g. commodities, cars and foodstuffs – the picture is less clear in relation to other items though, including electricity and digital content. The Sales Law Review Group has made a number of recommendations concerning the definition of goods to modernise it[120] and bring clarity to it[121], however its recommendations in relation to the legal status of digital content are dissappointing and may be viewed as a missed opportunity.

There is no Irish authority on the legal status of digital content as goods or otherwise, but in *St Albans City and District Council v. International Computers Ltd,*[122] Sir Ian Gildewell stated *obiter* in the English

[117] *Ibid. at* para. 9.43.
[118] 1893 Act, s.1.
[119] Similarly, the 2003 Consumer Sale Regulations apply to 'tangible moveable items': Reg. 2.
[120] The Group recommended that the definition of 'consumer goods' in Directive 1999/44/EC on consumer sales and associated guarantees as 'any tangible moveable item' should be the basis of the general definition of 'goods' in future legislation: para. 2.4.
[121] For example, the Group has recommended that electricity and, unless supplied for sale in a limited volume or set quantity, gas and water, should be included in the definition of 'services' in future legislation: para. 2.35; further the part of the definition of 'goods' at section 62(1) of the Sale of Goods Act 1893 which deals with matters relating to the demarcation between the sale of goods and the sale of land or interests in land should be simplified and updated: para. 2.42.
[122] [1996] 4 All ER 481. In *Saphena Computing Ltd v Allied Collection Agencies Ltd* [1995] FSR 616, the court avoided classifying a supply of software which was adapted to the customer's needs because it was common ground that the law was the same whether it was a supply of services or a sale of goods. A contract to write a new program for a customer is clearly capable of being a contract for the supply of services: see *Salvage Association v CAP Financial Services Ltd* [1995] FSR 654.

Court of Appeal that while a disk was clearly goods, a program or software, 'being instructions or commands telling the computer hardware what to do', of itself was not.[123] In the *St Albans* case, as is common, the defective program was not sold or hired, it was simply copied from a disk onto the plaintiff's computer without delivery of the disk. The property in the software remained with the supplier, while the plaintiff was licensed to use it.[124] In these circumstances, the program was not 'goods' so there were no statutory implied terms as to quality. In the absence of any express terms, his Lordship held that there would be a term implied at common law that the program should be reasonably fit for its intended purpose. This case gives rise to a number of problems including that the buyer's rights and remedies will differ depending on the means of delivery of the digital content.

Arguably, where software, such as computer software, music or games, is sold in tangible form, such as on a disk or pre-installed on a personal computer or other device, there seems little difficulty in treating the software and the tangible item as one – as goods, and hence the protective framework of the sale of goods legislation will automatically apply. After all, many everyday items such as digital televisions, washing machines and cars, operate, at least in part, using software. The greater difficulty arise where software is supplied in intangible form, such as when it is download from the Internet, under licence.[125] Determining a person's rights and remedies based on the mode of delivery of digital content is completely inappropriate and outmoded in our modern information society.[126] Moreover, relying on the implication of terms at common law, as occurred in *St Albans,* is without doubt a poor substitute for the statutory sale of goods framework, particularly in the consumer context.

Therefore, uncertainty surrounding the legal status of computer software persists in Ireland and elsewhere and has given rise to a volume of academic literature.[127] The issue has been addressed, within the context of the sale of goods legislation, in New Zealand in 2003[128], and more recently in

[123] In a New South Wales case, *Toby Construction Products Pty Ltd v Computa Bar (Sales) Pty Ltd*, [1983] 2 NSWLR 48, the Supreme Court held that the transfer of property in hardware and software together was a sale of goods, but this case failed to address the issue of the supply of software alone, and particularly software adapted to specified requirements.

[124] See also *London Borough of Southwark v IBM UK Ltd* [2011] EWHC 549 (TCC).

[125] Further authority from Australia indicates that software downloaded from the Internet under licence is not *goods* for the purpose of relevant Sale of Goods Act: *Gammasonics v Comrad* [2010] NSWSC 267.

[126] See further S.Hedley, 'Quality of Goods, Information, and the Death of Contract' [2001] *Journal of Business Law* 114 at 119–120.

[127] See e.g. V. Niranjan, 'A Software Transfer Agreement and its Implications for Contract, Sale of Goods and Taxation', [2009] *Journal of Business Law* 799; J. Adams, 'Software and Digital Content', [2009] *Journal of Business Law* 396; S. Green and D. Saidov, 'Software as Goods', [2007] *Journal of Business Law* 161; S. Hedley, 'Quality of Goods, Information, and the Death of Contract' [2001] *Journal of Business Law* 114; B.L. Horovitz, 'Computer Software as a Good Under the Uniform Commercial Code: Taking a Byte out of the Intangibility Myth', (1985) *Boston University Law Review* 129.

[128] Sale of Goods Amendment Act 2003, s.3: see further Cox, 'The definition of goods and services in consumer protection Acts: some recent changes', [2003] *New Zealand Law Journal* 281.

Australia in 2010, where the definition of 'goods' was extended to include computer software.[129] While this may be seen by some as an improper extension of the concept of *goods* beyond its traditional meaning of tangible items, it has the advantage of simplicity.[130] In an Irish context, the Sales Law Review Group has noted that the implication of the above case law:

> leads to the clearly unsatisfactory situation that the law applicable to a certain transaction will depend on whether software has been delivered on a physical medium such as a disk or a CD (in which case it could be classified as a sale of goods) or whether it has been downloaded online (in which case it could be categorised as a supply of services, or as a contract *sui generis* to which the statutory rules do not apply).[131]

However, despite recognising the unsatisfactory state of the law, the Sales Law Review Group did not recommend amending the definition of goods to include digital content, nor did it recommend that digital content should be treated, *as goods*. Instead, it recommended that a comprehensive consultative process on the issues of whether strict liability standards are suitable for software contracts and on whether there is a need for a specialised instrument dealing with software transactions should be undertaken in advance of any further consideration of legislative regulation in this area.[132] Clearly, the argument put forward by the software industry that the application of strict liability rules would be likely to stifle innovation and growth in the sector was taken seriously by the Group.[133] This is not surprising given the strategic role the ICT sector plays in the modern Irish economy. However, this could be seen as a missed opportunity to address the current unsatisfactory state of the law but it does have the advantage of tying in with any future European measure which may emanate from the European Union.[134] In the meantime, sellers and suppliers of digital content continue to 'benefit' from this gap in regulation to the detriment of buyers, including consumers.[135]

Turning to contracts for the supply of services, these contracts were first regulated, in general terms, in Ireland in 1980 pursuant to Part IV of the Sale of Goods and Supply of Services Act. This regulation

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[129] See the *Australian Consumer Law*: see further Australian Competition and Consumer Act 2010, Sch. 2, Ch. 1, s.2.
[130] See K. Moon, 'Intangibles as Property and Goods', (2009) *New Zealand Law Journal* 228.
[131] Sales Law Review Group, *Report on the Legislation Governing the Sale of Goods and Supply of Services* (Dublin, Prn. A11/1576, 2011) para 2.7.
[132] *Ibid.* at para 2.29.
[133] See e.g. responses to the European Commission Green Paper on the Review of the Consumer Acquis at http://ec.europa.eu/consumers/rights/detailed_analysis_en.pdf.
[134] See University of Amsterdam, *Study on the Legal Framework for Digital Content Services for Consumers* (2011), a study commissioned by the European Commission: see further: http://ec.europa.eu/justice/newsroom/consumer-marketing/events/digital_conf_en.htm.
[135] See also R. Bradgate, *Consumer Rights in Digital Products*: Research Report for the UK Department for Business, Innovation and Skills (September 2010).

is minimal, comprising four sections which address mainly the implication of various undertakings as to quality,[136] and the regulation of exclusion clauses.[137] There is no statutory definition of a contract for the supply of services; the undertakings implied are innominate in nature[138]; the quality standard required when supplying a service is one of due skill, care and diligence; and exclusion of liability for breach of this standard is permissible, even against a consumer, so long as the exclusion is 'express', 'fair and reasonable' and 'specifically brought' to the attend of the consumer. In referring to the minimal nature of this regulation, the Report of Sales Law Review Group states[139]:

> ... it is revealing nevertheless that the statutory rules governing the sale of goods occupy over sixty sections of the 1893 and 1980 Acts compared with four sections for the supply of services. Part of the explanation for this divergence lies in the fact that, in the formative era of commercial statute law, services were a less important and developed component of economic activity than goods. This is no longer the case. Services now account for close to two-thirds of gross domestic product in Ireland.[140] According to the most recent Household Budget Survey, thirty per cent of household income went on services and other expenditure, while there was also a substantial services element in some other expenditure categories such as transport and housing.[141]

In light of the importance of services to the modern economy, the Group set about fleshing out the regulation of contracts for the supply of services and pitching the level of regulation at a more equivalent status to that of sale of goods regulation. Accordingly, the Group recommended that:

- a broad definition of services be introduced;[142]
- the implied terms as to quality of services should be re-classified as conditions;[143]
- as per the UK Supply of Goods and Services Act 1982, future legislation should include an implied term that, where the time of performance of a service is not fixed by the contract, it should be carried out within a reasonable time; it should also include an implied term that, where the price for a service is not fixed by the contract, the recipient of the service should pay a reasonable price;[144]
- future legislation should include a provision along the lines of section 29 of the New Zealand Consumer Guarantees Act 1993 that a service, and any product resulting from it, will be

[136] 1980 Act, s.39.
[137] 1980 Act, s.40.
[138] *Irish Telephone Rentals v Irish Civil Service Building Society Ltd* [1991] ILRM 880.
[139] Sales Law Review Group, *Report on the Legislation Governing the Sale of Goods and Supply of Services* (Dublin, Prn. A11/1576, 2011) para. 14.18.
[140] http://www.esri.ie/irish_economy
[141] CSO, *Household Budget Survey 2004-05: Final Results*, 2007.
[142] Sales Law Review Group, *Report on the Legislation Governing the Sale of Goods and Supply of Services* (Dublin, Prn. A11/1576, 2011) para. 14.21.
[143] *Ibid.* at para. 14.30.
[144] *Ibid.* at para. 14.38.

reasonably fit for any *particular* purpose made known to the supplier - this provision should apply to both consumer and commercial contracts;[145]

- all of the implied terms applying to contracts of sale should apply to goods supplied under a contract of service in which the property in the goods is transferred from seller to buyer;[146] and
- exclusion clauses in commercial contracts for services should be regulated on the same basis as exclusion clauses in contracts of sale, namely they are unenforceable unless shown to be fair and reasonable; whereas exclusion clauses in consumer contracts for services should be automatically unfair in all circumstances under the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 and 2000.[147]

In the midst of all this detail – which is welcome – there is however, no statutory framework for remedies (as there is in sale of good legislation) and hence a very important aspect of the regulation of contracts for the supply of services remains unregulated. The re-classification of the implied terms as conditions makes clear that breach of an implied term will allow the recipient of the service to terminate the contract and sue for damages, but beyond that many questions remain unanswered. More generally, termination may not be the most appropriate remedy: for instance, you cannot reject a service when completed in the same way that you can reject goods after delivery. More particularly, do recipients (or suppliers) of services have a right of repair; if not, should recipients (or suppliers) of services have a right of repair; and if so, how would such a right interact with any right to terminate and/or sue for damages? Similarly, where poor quality service is provided, should the recipient be entitled to a reduction in the price, as an alternative to repair? It is unfortunate that the Sales Law Review Group did not take this opportunity to, at least, sketch out the bones of a remedial framework.[148]

Third, the clear focus of the Report of the Sales Law Review Group has been on *contracts* of supply – whether contracts for the sale of goods or contracts for the supply of services. Only the provisions on manufacturers' guarantees in sections 15 – 19 of the Sale of Goods and Supply of Services Act 1980 take us outside this contractual nexus.[149] However, there may be much to be gained by looking further afield and, in particular, in the direction of what is sometimes called 'direct producer liability'. There is a strong case to be made for direct producer liability, in particular for consumer buyers. Producers may already be liable to consumers for defective products, on a number of bases (contractually liable

[145] *Ibid.* at para. 14.38.
[146] *Ibid.* at para. 14.40.
[147] *Ibid.* at para. 14.44.
[148] See further UK BIS Consultation Paper, *Enhancing Consumer Confidence by Clarifying Consumer Law* (2012).
[149] See also 1980 Act, s.14 on joint liability of finance houses.

under any guarantee pursuant to the Sale of Goods and Supply of Services Act, 1980; in negligence based on the principle in *Donoghue v Stevenson;* and strictly liable under the Liability for Defective Products Act 1991). The introduction of direct liability for quality defects to consumers can be seen as a natural progression in the development of producer liability and hence it can be argued that it would not impose significant extra costs on producers who are well placed to re-distribute the cost through pricing or insurance. Others have argued that the imposition of such liability might have a longer-term benefit of improving overall quality standards. Probably the strongest argument for imposing direct liability is that in many instances the producer will be the person responsible for the consumer's complaint as where the defect originates in the manufacture or design. Moreover, the consumer's expectations concerning the goods (in relation to their description and purpose, for instance) may derive from advertising and promotional materials from the producer as much as sales-talk from the supplier. In certain circumstances, it may be easier to pursue a claim against the producer than against the seller. In particular, this may be the case where the seller is insolvent or has merely gone out of business or is in some way inaccessible. For example, in the context of distance selling, the producer may be more accessible to the consumer than the seller. Seller's liability is often justified on the basis that the seller is a conduit who can pass liability back to the producer through the distribution chain. However, in reality, this may not be possible because the chain is broken through the use of exclusion clauses or insolvency.

A number of European states already have some form of direct producer liability, including France, Portugal and Spain.[150] In its 2006 Green Paper on the Review of the Consumer Acquis,[151] the Commission asked whether direct producer liability for non-conformity should be introduced or not, at European level. The Irish Government, in its response to the Green Paper, identified a number of areas where is would be unfair to impose direct producer liability, as, for example, where a seller claims that the product has certain characteristics which it does not. On the other hand, it recognized that the supplier's claims may be based on information from the producer in which case imposing liability on the supplier seems equally unfair. Ultimately, the Irish Government failed to opt one way or the other stating that: '[g]iven the uncertainties in this area it is not possible to conclude which option is preferable.' Following consultation, the issue of direct producer liability has been suspended at European level.[152]

[150] See further M. Ebers, A. Jansson & O. Mayer ed., *European Perspectives on Producers' Liability,* (Sellier European Law Publishers: Munich, 2009); H. Schulte-Nolke, et al, ed., *EC Consumer Law Compendium: Comparative Analysis*, (Sellier European Law Publishers: Munich, 2008) at 695-696.
[151] COM(2006) 744 final.
[152] COM (2007) 210 final, at 14.

The Sales Law Review Group also considered briefly the concept of direct producer liability, and, while noting that a case can be made in principle for its introduction, the Group was of the view that change of this kind would not be of significant benefit to consumers in practice and could well operate to their detriment.[153] The Group noted that the current scheme of liability under the Sales of Goods Acts is clear, widely understood and accepted. In contrast, a scheme for direct producer liability would be more complicated and consumers could face uncertainty and difficulty in establishing where liability lay in specific instances. Undoubtedly, drafting the exact terms of such liability would not be without its challenges but such schemes already operate in a number of member states of the European Union, and so could be used as models. Therefore, it is regrettable that this option for a new additional, alterative remedy for consumers was not explored in greater detail by the Group.

Conclusion

The above analysis seeks to capture the main recommendations for reform of the law of sale of goods and related transactions in Ireland out of a total of 124 recommendations in the final report of the Sales Law Review Group. By necessity, many more minor, and some not so minor, recommendations have not been mentioned. For example, there are a number of proposals concerning auction sales[154]; the trigger for the passing of risk is to be delivery and not the passing of property[155]; the seller's real remedies are to be rationalised[156]; and the Group recommends adoption of the Vienna Convention on Contracts for the International Sale of Goods (1980)[157], to name a few. Moreover, the Group envisaged that a separate Consumer Contract Rights Act should be enacted that would incorporate the main statutory provisions applicable to consumer contracts; whereas provisions relating to other non-core aspects of consumer contracts of sale should be dealt with, together with all of the provisions applicable to commercial contracts, in a new Sale of Goods and Related Transactions Act.[158] This more formal separate of commercial and consumer law, as regards sale of goods and related transactions, would mark a significant step in the development of Irish consumer law as a doctrine driven by its own unique policy imperatives, such as the protection of the weaker party and the enhancement of

[153] Sales Law Review Group, *Report on the Legislation Governing the Sale of Goods and Supply of Services* (Dublin, Prn. A11/1576, 2011) para. 9.5.
[154] *Ibid.* at paras 3.47, 3.50, and 3.55.
[155] *Ibid.* at para. 6.56.
[156] Sales Law Review Group, *Report on the Legislation Governing the Sale of Goods and Supply of Services* (Dublin, Prn. A11/1576, 2011) paras 10.6, 10.22, and 10.32.
[157] *Ibid.* at para. 15.9.
[158] *Ibid.* at para. 14.14.

consumer confidence.[159] At the same time, commercial sale of goods law would be freed to pursue its more traditional agenda whereby the legislation provides a framework to facilitate (not regulate) commercial transactions and to promote certainty.[160]

As is evident from the above analysis, this new Sale of Goods Act will continue to have its feet firmly planted in the foundations of the 1893 Act, with reforms and refinements derived from a variety of sources including the extended family of the 1893 Act and the European Union. It is notable that in completing its work, the Sales Law Review Group was greatly assisted by having access to numerous reports, consultation papers, and other such papers, on reform of the law of sale of goods from government departments and law reform bodies through-out the common law world. These reports made the process of law reform in Ireland more efficient and it is hoped more effective. In turn, the final report of the Sale Law Review Group adds to this body of work and provides to others interested in reform of the law of sale of goods another perspective: an Irish perspective, which may be used as a template or model for others.

Importantly, all these recommendations of the Sales Law Review Group have yet to be transformed into legislative action. The Government has committed to introducing legislation to give effect to the Report.[161] In reality, pressures on Attorney General's Office and in Parliament to enact various measures as part of the EU/ IMF Programme for Financial Support for Ireland (the bail-out programme), means that reform of the law of sale of goods remains a low priority, in political terms. Ireland is already required under European law to transpose the recently agreed Consumer Rights Directive by 13 December 2013,[162] and, it is envisaged that this will be achieved within the architecture of a statutory instrument. Any further delay in implementation the Group's recommendations for a new Sale of Goods Act and a consolidated Consumer Contract Rights Act may provide the Government with an opportunity to re-consider some aspects of the Report where, it is argued above, the Report did not go far enough, such as rules around digital content and remedies on contracts for the supply of services.

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[159] Traditionally, consumer law was viewed by many as a specific application of general commercial law principles: see F.M.B. Reynolds 'The Applicability of General Rules of Private Law to Consumer Disputes', in Andermann et al ed., *Law and the Weaker Party* (Professional Books: Abingdon, 1982) Vol. 2, 93–110. Others have recognised a fundamental difference between commercial and consumer law and hence have called for separate legislation: e.g. M. Bridge, 'What is to be Done about Sale of Goods?', (2003) *LQR* 173; L. Sealy & R. Hooley, *Commercial Law: Text, Cases and Materials,* 4th edn (OUP: Oxford, 2009) at 16–17.

[160] See e.g. Lord Irvine, 'The Law: An Engine for Trade,' (2001) 64 *MLR* 333.

[161] See Press Release: 'Bruton Announces Major Overhaul of Consumer Law', 18 October 2011, at http://www.djei.ie/press/2011/20111018.htm.

[162] Directive 2011/83/EU, [2011] OJ L 304/64, Art. 28.