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University College Cork, Ireland
Coláiste na hOllscoile Corcaigh

SALES LAW REVIEW GROUP

REPORT ON THE LEGISLATION GOVERNING THE SALE OF GOODS AND SUPPLY OF SERVICES

JULY 2011

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INTRODUCTION

The Sales Law Review Group was appointed in November 2008 by the then Tánaiste and Minister for Enterprise, Trade and Employment, Mary Coughlan T.D. with the following terms of reference:

- 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.

- To examine the provisions of the proposed EU Directive on consumer contractual rights in the light of existing Irish consumer law and assess its implications for Irish consumer rights and law, to contribute to the development of the Irish response to the proposed Directive, and to consider and make recommendations as to how the Directive and Irish contract and sales law may best be integrated.

- To consider and make recommendations on other matters related to Irish sales law and the common law and statutory framework of that law, including dispute resolution mechanisms in Ireland.

In accordance with these terms of reference, the Review Group published a position paper on the proposed Consumer Rights Directive in June 2009.[1]

This is the Group's final report and deals with the other elements of our terms of reference as well as with matters relating to the implementation of the Consumer Rights Directive, the text of which has recently been agreed and which is expected to come into force in October 2011. We have decided, however, not to deal with the issue of alternative dispute resolution mechanisms in this Report. Since the Review Group's establishment, these mechanisms have been the subject of a report, including a draft Mediation and Conciliation Bill, from the Law Reform Commission in 2010,[2] and of a consultation paper from the European Commission in 2011.[3] We saw no advantage in duplicating the work undertaken by the Law Reform Commission in particular, or in adding further to what is already a lengthy Report.

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[1] **Position Paper on the Proposal for a Directive of the European Parliament and of the Council on Consumer Rights**, http://www.djei.ie/publications/commerce/2009/slrgcrdpositionpaper.pdf

[2] Law Reform Commission. 2010. **Report on Alternative Dispute Resolution: Conciliation and Mediation** (LRC 98-2010).

[3] European Commission. 2010. **Consultation Paper on the Use of Alternative Dispute Resolution as a Means to Resolve Disputes Relating to Commercial Practices and Transactions in the EU**.

It was envisaged on the establishment of the Review Group that our work would be finished by mid-2010. In accordance with this time frame, we had substantially completed our deliberations and finalised our conclusions and recommendations by the third quarter of 2010. In view of the uncertainty then surrounding the provisions of the proposed Consumer Rights Directive, and the major implications of those provisions for Irish sale of goods law, the Chairman of the Review Group wrote in September 2010 to the then Minister for Enterprise, Trade and Innovation, Batt O'Keefe, T.D., indicating the Group's preference to defer submission of its report until the final shape of the proposed Directive had been clarified. The Minister agreed that the proposed deferral was a sensible course given the major direct implications of the Directive for core provisions of Irish consumer sales law and the significant indirect implications for Irish commercial sales law. At the time, it was thought that clarification of the contents of the proposed Directive would be forthcoming by the end of 2010. In the event, though a general approach to the Directive was approved at Council in early 2011, further discussions on the proposal had then to take place with the European Parliament and these did not reach a conclusion until late June. The proposed Directive is expected to be formally adopted by the Competitiveness Council in September and to come into force in October, following which Member States will have two years in which to implement it. Though we regret the delay in submitting our report, knowledge of the final provisions of the Consumer Rights Directive was of considerable benefit to the Group in putting the final touches to our conclusions and recommendations in a number of key areas.

(Signed)[4]

Robert Clark (Chairman)

Tony Burke	Judy Dunne
Caterina Gardiner	Roderick Maguire
Sean Murphy	Kevin O'Higgins
Nathan Reilly	Fidelma White

[4] Richard Nesbitt S.C. participated in the work of the Group to mid-2009 and contributed to the Position Paper on the proposed Consumer Rights Directive, but was unable to participate thereafter.

SUMMARY

CHAPTER ONE SALES LAW SINCE 1893

The Sale of Goods 1893 and the Sale of Goods and Supply of Services Act 1980

1. The Sale of Goods Act 1893 has been the cornerstone of Irish sales law for over a century. Its durability is due to two principal factors. First, many of its provisions take the form of default rules. As originally enacted, the Act also gave contracting parties a free hand to waive or alter the terms that it inserted into contracts of sale. Though, following an amendment made by the 1980 Act, these terms cannot now be altered in the case of consumer sales and can be altered only where shown to be 'fair and reasonable' in commercial sales, the legislation still affords a substantial degree of latitude to the parties to commercial contracts. Secondly, in providing that, unless inconsistent with the statutory provisions, the rules of the common law continue to apply to contracts of sale, the 1893 Act left ample space for the evolution of sales law in line with the general development of the common law relating to obligations.

2. The first amendment of the 1893 Act had to await the passing of the Sale of Goods and Supply of Services Act 1980, an enactment whose main purpose was to strengthen the protections available to consumers. Though the 1980 Act was a progressive piece of legislation in a number of respects, it took the form of additions and amendments to the 1893 Act rather than its repeal and replacement. In order to understand the statutory rules governing contracts of sale, therefore, it is necessary to read the original Act of 1893, the sections substituted in the 1893 Act by the 1980 Act, the textual and non-textual amendments to the 1893 Act made by the 1980 Act and other enactments, as well as the new provisions of the 1980 Act – a state of affairs not in keeping with the principles of better regulation. The focus of the 1980 Act on enhancing the protections available to consumers also left much of the parent Act untouched; in all, fifty three of the 1893 Act's sixty two sections were unaffected by the amendments effected by the 1980 Act.

European Union Consumer Legislation and its Impact

3. From the mid-1980s, the dynamic for change in Irish consumer legislation came from the European Union which adopted a number of Directives in the area of consumer contract law, notably Directive 1999/44/EC on Consumer Sales and

Guarantees. Though the Directive overlapped substantially with the consumer sales provisions of the 1893 and 1980 Acts, it was transposed into Irish law as a stand-alone statutory instrument, resulting in a confusing and, in some respects, contradictory legislative framework. While several examples of the discrepancies between the domestic and EU enactments can be cited, the sharpest difference between the two regimes lies in the remedies available to the consumer for goods not in conformity, with the contract.

Other Developments

4. In recent decades, innovations in information and communications technologies, in particular the emergence of digital services, have presented challenges for the Sale of Goods Acts of a kind that could not have been envisaged in 1893 or even in 1980. These centre on the appropriate basis for the classification and regulation of contracts for the supply of software and digital content, often supplied in immaterial form over the Internet.

The Need for Reform

5. The time for a thorough revision of the 1893 and 1980 Acts and the related secondary legislation is now long overdue. There is a need to distinguish between legislative provisions that no longer serve a necessary or useful purpose in modern conditions and those that that remain relevant but require modification. There is a need also to integrate the provisions of domestic and EU legislation in a more coherent and accessible way than has been done to date, and to achieve a workable balance between the partly common, partly separate requirements of the provisions governing consumer and commercial contracts of sale while maintaining, as far as possible, a unified sales law regime.

CHAPTER TWO SALE OF GOODS ACT 1893 INTERPRETATION AND SCOPE

The Definition of Goods

6. The definitions in the 1893 Act, particularly that of 'goods', govern the scope of the legislation. The wording of the definition of 'goods'- 'all chattels personal other than things in action and money' – is archaic and obscure. Though similar in substance, the core of the definition in the EU Directive on Consumer Sales and Guarantees - the

specification that goods are tangible and moveable – is clearer and less dated than that in the 1893 Act and should be the basis of the definition in future legislation.

The Classification of Contracts for the Supply of Software

7. Considerable uncertainty surrounds the law on the classification of contracts for the supply of software and digital content. Though there is no Irish authority in the matter, UK case law suggests that, if software is to be treated as goods, it must be contained on a tangible medium. Where software or other digital content is downloaded from the Internet or transferred to the end user by e-mail, no such tangible medium is involved. This leads to the 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). The classification of a transaction as 'goods' or 'services' is significant because the duties and liabilities of the seller of goods and the supplier of services are different; the rules governing the exclusion of the implied statutory terms also differ between the two types of contract.

8. It is plainly unsatisfactory that the legal rights and remedies enjoyed by the purchasers of software of similar content vary with the medium on which the software is supplied. The most straightforward way of addressing the divergent legal treatment of software supplied via different media would be to regard all forms of software as goods for the purposes of sale of goods legislation. We gave full consideration to a possible legislative amendment along these lines but concluded, for a number of reasons, that it was not a change we could recommend in present circumstances. Though we are not in a position to propose an overall solution to the legal classification of software and digital content, we have sought where possible in our recommendations to minimise the differences in the legal treatment of contracts of sale and contracts for the supply of services. These changes will serve to reduce the anomalies that currently exist where software is supplied through different media.

The Classification of Electricity, Gas and Water

9. There is no clear-cut answer to the question as to whether electricity, gas and water should be defined as 'goods' for the purposes of sale of goods legislation. The 1893 Act offers no specific guidance on the issue, while Sale of Goods and Supply of Services Act 1980 treats electricity as the supply of a service. The EU Directive on Consumer Sales and Guarantees expressly excludes electricity from the definition of 'consumer goods' and includes gas and water only where sold in a limited volume or set quantity such as bottled water or cylinders of gas. We think that, other than where sold in this way, the arguments for defining these utilities as services is, on balance, more persuasive.

Categories of Goods in the 1893 Act

10. The 1893 Act contains two classifications of goods, namely 'existing' and 'future' goods, and 'specific' and 'unascertained' goods. 'Existing goods' are those 'owned or possessed by the seller' while 'future goods' refer to those 'to be manufactured or acquired by the seller after the making of the contract of sale.' 'Specific goods' are defined by the Act as 'goods identified and agreed upon at the time a contract of sale is made', for example, a particular car with a specified registration number. Though the Act does not define 'unascertained goods', these comprise goods not identified and agreed upon at the time the contract is made. This two-fold categorisation is not a model of clarity, particularly in regard to the overlap between the respective binary categories. While we have some sympathy with the view that it amounts to a case of statutory over-classification, we have decided on balance against recommending substantial change to either of the Act's classifications of goods. A number of minor changes are recommended however in order to bring greater clarity to these categorisations.

CHAPTER THREE SALE OF GOODS ACT 1893 FORMATION OF THE CONTRACT

The Contract of Sale

11. The definition of contract of sale in the recently agreed Directive on Consumer Rights includes 'any contract having as its object both goods and services' and, in thus treating mixed-purpose contracts as contracts of sale, is at odds with the approach of the common law to the distinction between a sale of goods and a supply of

services. While the definition in the Directive will have to be implemented in the case of consumer contracts of sale, there is no requirement to apply it to commercial sales contracts. Though we are in favour as far as possible of having common rules for consumer and commercial transactions, we do not consider, on balance, that the definition of commercial contracts of sale should include mixed-purpose contracts.

Capacity to Buy and Sell: the Necessaries Rule

12. Where necessary goods (as distinct from services) have been sold and delivered to a minor or a person incompetent to contract by virtue of mental incapacity or drunkenness, section 2 of the 1893 Act requires that he pay a reasonable price for them. 'Necessaries' as the Act terms them, are not limited to essentials such as food, clothing or medicine but can include other items as long as they are not purely ornamental. In its 2006 Report on *Vulnerable Adults and the Law*, the Law Reform Commission proposed an amended necessaries rule whereby an adult who lacked capacity to contract would be obliged to pay the supplier a reasonable sum for necessaries supplied at his or her request. It also recommended a new definition of 'necessaries' that would include services as well as goods supplied under non-sale contracts. We are in agreement with the Commission's reformulation of the necessaries rule and recommend that a similar provision should be included in future legislation on the sale and supply of goods and the supply of services.

Formalities of the Contract

13. Section 4 of the 1893 Act, which has its origin in the Statute of Frauds 1695, provides that a contract of sale for the value of €12.70 or more is not enforceable in the absence of a note or memorandum in writing unless the buyer has accepted and received part of the goods or given something in earnest for payment. Reform of this provision is long overdue, and the sole matter for decision is whether it should be repealed as has been done in most jurisdictions or substantially recast and updated as has been done in the United States. While a large increase in the monetary threshold and a widening of the bases for enforceability would address some of the concerns raised by the present rule, we do not consider that there is a convincing case for the retention of even a modified provision of this kind.

Perished Goods

14. Section 6 of the 1893 Act deals with the situation where, at the time the contract is made, specific goods have perished without the knowledge of the seller, while section 7 deals with the situation where such goods perish after the making of the contract but before the property in them has transferred to the buyer. The Act does not define 'perish' and, while the term might suggest that it denotes the actual destruction of goods, case law has held goods to have perished where they have ceased to exist in a commercial sense. Future legislation should include a definition of the term to this effect. As it is unclear whether section 55 of the 1893 Act (which permits the parties to negative or vary any right, duty or liability that arises under a contract of sale by implication of law) applies to section 6, future legislation should clarify that parties to a commercial contract, though not a consumer contract, can vary the application of the section.

The Price

15. Section 8 of the 1893 Act provides that, where the price in a contract of sale is not fixed by the contract or in some other way prescribed by the section, the buyer must pay a reasonable price. Section 9 provides that, where there is an agreement to sell the goods on the terms that the price is to be fixed by the valuation of a third party and this party cannot or does not make the valuation, the agreement is avoided. It would be preferable to stipulate that the buyer should pay a reasonable price for the goods in this event, and future legislation should provide accordingly.

Auction Sales

16. Section 58 of the 1893 Act codifies certain common law rules governing aspects of auction sales. There is merit in our view in also incorporating in statute the case law rulings that a notification that a sale by auction is not subject to a reserve price constitutes a collateral contract on the part of the auctioneer to sell the goods to the highest bidder. Future legislation should accordingly provide, first, that, in a sale by auction without reserve, a lot cannot be withdrawn from the sale by the owner or auctioneer after the auctioneer has called for bids unless no bid is made within a reasonable period of time. Secondly, where goods are stated to be sold at auction 'without reserve', that statement shall be binding upon the auctioneer once bidding commences. An agreement between bidders to form a 'ring' - that is, to refrain from

bidding in competition with each other in order to depress the price - is not illegal at common law. While we considered the introduction of specific criminal law provisions to regulate this practice, we concluded that it appears to be adequately covered by the Criminal Justice (Theft and Fraud Offences) Act 2001. There is merit, however, in introducing statutory provisions dealing with the rights of the seller of goods in such a case to avoid the contract and with the joint and several liability of the parties to a non-bidding agreement to make good to the seller any loss he has sustained.

17. The courts in Ireland and in the United Kingdom have yet to rule on whether auctions conducted by means of online platforms come within the scope of section 58 of the 1893 Act on auction sales. In our view, the central issue is not whether online auctions are auctions within the meaning of the Act, but rather what type of provisions, including those in section 58, would serve a useful purpose in regulating this type of transaction. We consider that some of the existing provisions – in particular those restricting the right of sellers to bid or to employ others to bid – should apply to online auctions. The application of other elements of section 58 to online auctions is less straightforward and should be assessed following consultation with industry and consumer interests.

Contract Formation and Sale of Goods Legislation

18. Though the Sale of Goods Acts contain no general provisions on contract formation, we gave some consideration as to whether future legislation should include rules on key aspects of contract formation such as offer and acceptance, the 'battle of the forms', and parol evidence along the lines of the provisions of the United Nations Convention on the International Sale of Goods or the Draft Common Frame of Reference. As such a reform would involve a fundamental change in the structure of sale of goods legislation of a kind unsuited to the Irish legal system, it is not one that we can recommend.

CHAPTER FOUR CONDITIONS AND WARRANTIES

The Implication of Terms by Statute

19. Though the rights that buyers enjoy by virtue of the implied quality and other terms in the Sale of Goods Acts are rights conferred by statute, breaches of their

provisions do not involve a breach of the Acts *per se*. As the terms are inserted into the contract between seller and buyer, their breach takes the form of a breach of the contract between the parties. It has been suggested that this approach injects an additional layer of complexity into the law and that the imposition of statutory requirements on a seller vis-à-vis goods sold, independent of an underlying agreement between the parties, would provide a simpler and sounder basis for consumer rights. We are not persuaded that placing such duties on a seller other than through the implication of terms into the contract is a change worth pursuing. In our view, similarly, the presumption of conformity with the contract approach employed in the Directive on Consumer Sales and Guarantees affords a less satisfactory basis for consumer rights than the implied terms approach adopted in the Sale of Goods Acts, and the latter should be retained in future legislation.

Conditions and Warranties

20. The 1893 Act divides contract terms into conditions, breach of which may give rise to a right to treat the contract as repudiated, and warranties, breach of which may give rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated. Most of the terms implied into contracts of sale by the Act have the status of conditions. The common law distinction between conditions and warranties that was incorporated in the 1893 Act related to contract terms at the time the contract was made and, as such, did not require regard to be had to the actual effects of any subsequent breach. The decision in 1962 of the English Court of Appeal in *Hong Kong Fir Shipping Co. Ltd.* v *Kawasaki Kisen Kaisha* signalled a major change in twentieth century judicial thinking in holding that the main obligations under a contract could be neither a condition nor a warranty, but belong instead to a separate category of innominate terms, the applicable remedy for breach of which would depend on the nature and effect of the breach. In our view, the abolition of the distinction between conditions and warranties and its replacement by the category of innominate term would be ill-advised on grounds of both policy and practice. The condition/warranty dichotomy recognises that some contract terms are more important than others and should attract more potent remedies. 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. Though the present statutory rules governing termination rights under the

Sale of Goods Act should broadly be maintained, future legislation should include a provision restricting the right of buyers in non-consumer sales to reject goods for slight breach of the implied terms.

Sale by Description

21. Section 13 of the 1893 Act provides that, in the case of a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description. In the view of some commentators, section 13, as it has come to be interpreted by the courts, merely states as an implied term an obligation that is central to the contract as an express term, namely to deliver the agreed goods under the contract. Other than labelling the obligation as a condition, the section, on this view, does nothing that is not also done by section 27 of the 1893 Act in stipulating that it is the duty of the seller to deliver the goods in accordance with the terms of the contract. While we have some sympathy with this view, we cannot go as far as to recommend that future legislation should dispense with a provision on correspondence with description. Section 13 provides the parties with a convenient reminder of a key contractual obligation and should be retained.

Implied Undertakings as to Quality or Fitness

22. The seller's obligations as to the quality of goods are at the heart of the law of sale. Section 14 of the 1893 Act, as amended by the 1980 Act, provides that goods are of 'merchantable quality' if they are as fit for the purpose or purposes for which goods of that kind are commonly bought and as durable as it is reasonable to expect having regard to any description applied to them, the price (if relevant) and all the other circumstances. The term 'merchantable quality' is, in our view, outdated and unsuited to modern day legislation. On balance, we think that 'satisfactory quality', the wording used in the UK Sale of Goods Act since 1994, is preferable to the 'acceptable quality' wording used in Australian and New Zealand legislation or any of the other possible options.

23. When it comes to the substance of the statutory rules on the quality of goods, the principal alternative to the present section 14 is the provision that has applied in UK legislation since 1994, and is broadly similar to that in consumer legislation in Australia and New Zealand. This states that 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. Though there is no great difference of substance between this formulation and that in the 1980 Act, the adoption of the definition used in the UK, Australian and New Zealand statutes would give us the benefit of being able to draw on the greater volume of case law from these jurisdictions. 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.

Sale by Sample

24. The provisions on sale by sample at section 15 of the 1893 should be amended in future legislation to provide expressly for sale by model. It is common in consumer transactions for prospective buyers to be shown a model or specimen of the goods rather than a sample, and a provision along these lines is also required by the Directive on Consumer Sales and Guarantees.

Implied Warranty for Spare Parts and Servicing

25. Section 12 of the Sale of Goods and Supply of Services Act 1980 provides that there is an implied warranty that spare parts and an adequate after-sale service will be made available by the seller in such circumstances and for such period as are stated in an offer, description or advertisement by the seller on behalf of the manufacturer or on his own behalf. We gave some consideration to the adoption of a provision that would afford a stronger entitlement to an after-sale service and the availability of spare parts, but concluded that this would not be a practical proposition. Though Section 12 has had a limited impact in practice, it can still serve a purpose in enhancing the rights of buyers and should be retained in future legislation.

Implied Condition on Sale of Motor Vehicles

26. Section 13 of the Sale of Goods and Supply of Services Act 1980 inserts into contracts for the sale of motor vehicles a condition that the vehicle be free from defects that would render it a danger to the public, including persons travelling in the vehicle. The section further provides that a person using the vehicle with the consent

of the buyer, who suffers loss as a result of breach of the implied condition, may maintain an action for damages against the seller as if that person were the buyer. Though the case for statutory provisions of this kind may not be as strong as in the past due to developments such as compulsory vehicle testing, their retention remains justified in our view.

CHAPTER FIVE EXCLUSION OF IMPLIED TERMS AND CONDITIONS

27. As originally enacted, section 55 of the 1893 Act provided that any right, duty or liability arising under a contract of sale by implication of law could be negatived or varied by agreement between the parties, by the course of dealing between them, or by usage of a kind binding both parties to the contract. The widespread resort by sellers to exemption clauses – that is, contractual provisions which oust or qualify the express or implied terms of the contract – came to be seen as a significant problem, particularly in standard form consumer contracts. In response, the courts sought to curb the use of exemption clauses by means of the doctrine of fundamental breach, and held that such clauses could not protect against liability where there had been a 'fundamental breach' of the contract. While the doctrine was expressed as a corollary of the rules of contract construction in some cases, in others it appeared to have the status of an independent rule of law. Though judicial repudiation of this approach in Ireland must await a Supreme Court decision, a number of High Court cases have cited with approval the contrary UK case law to the effect that application of exclusion clauses to breaches of contract is always dependent on the construction of the contract. As many of the cases in which fundamental breach was applied were sales contracts, argued before the statutory reforms of exemption clauses were in place, we think that the 'fundamental breach as a rule of law' approach has outlived its usefulness. The rule should accordingly be abrogated in the new legislation recommended to replace the 1893 and 1980 Acts.

28. Following its amendment by the Sale of Goods and Supply of Services Act 1980, section 55 provides that any contract term exempting the implied statutory terms applicable to contracts of sale is void where the buyer 'deals as consumer' and, with the exception of the implied terms as to title which cannot be excluded in any circumstances, is enforceable only where shown to be fair and reasonable in commercial contracts of sale. Exemption clauses in consumer contracts are also

subject to regulation under the Unfair Terms in Consumer Contracts Regulations 1995 and the Consumer Sales and Guarantees Regulations 2003. The broad approach to the regulation of exemption clauses in contracts of sale at section 55 of the 1893 Act remains valid in its essentials, namely that such clauses should be prohibited in consumer contracts and subject to a test of fairness in business contracts. The present situation under which exemption clauses in consumer contracts are regulated in different ways under different enactments, however, is manifestly unsatisfactory. In our view, the Unfair Terms in Consumer Contracts Regulations are the most appropriate vehicle for the regulation of exclusion clauses in consumer contracts. Such clauses should be deemed to be automatically unfair under the Regulations rather than being assessable by reference to the criteria governing fairness.

'Deals as Consumer'

29. The 'deals as consumer' formulation used to govern the application of the rules on exemption clauses at section 55 of the 1893 Act and other provisions of the 1893 and 1980 Acts is not fit for purpose and should be repealed. The definition of 'consumer' for the purposes of the application of exemption clauses and other provisions in future legislation should refer to a natural person acting for purposes unrelated to his or her business.

CHAPTER SIX TRANSFER OF PROPERTY AS BETWEEN SELLER AND BUYER

30. The rules regulating the transfer of property in contracts of sale are set out in sections 16-20 of the 1893 Act. The pre-eminence accorded the transfer of property by the Act has been the subject of critical comment, and it has been suggested that the US Uniform Commercial Code which makes the transfer of possession, rather than property, the pivotal event for determining the rights and obligations of the parties would offer a more coherent and practical foundation for a modern sales law regime. In the absence of evidence that the existing provisions are a cause of substantial practical difficulty or of any appreciable demand for change from business or consumer interests, fundamental reform of this element of the Sale of Goods Acts is not a practical proposition at the present time in our opinion. Though the UCC model has undoubted merits, it would be wrong, moreover, to assume that it would resolve all of the problems that have arisen in this area of the law.

The Passing of Property in Unascertained Goods

31. Section 16 of the 1893 Act lays down the fundamental and mandatory rule that property cannot pass until goods are ascertained. Case law on the section has highlighted the vulnerable position of pre-paying buyers of goods in bulk in that, as the goods remain unascertained, the buyers acquire no proprietary rights over them while they remain part of the larger bulk. If the seller becomes insolvent, a buyer in this position can only claim repayment of the price as an unsecured creditor. The issue was addressed in the UK by the Sale of Goods (Amendment) Act 1995 which provides that, where there is a contract for the sale of a specified quantity of unascertained goods forming part of an identified bulk, a buyer who has paid for some or all of the contract goods obtains an undivided share in the bulk and becomes a tenant in common of the whole. The Act has provided a model for legislative change in a number of other common law jurisdictions. Its provisions are balanced and workable, and in our opinion should be adopted in future Irish legislation.

Consumer Buyers and Insolvent Sellers

32. Insolvencies are a not uncommon occurrence in the retail sector and, though most do not lead to losses for consumers, serious detriment can occur where consumers have paid for goods in advance of delivery. In this situation, the goods will normally be unascertained, and the pre-paying buyer will have no proprietary right over them as a result. His payment will be used, together with the insolvent seller's other assets, to pay the creditors, and he will rank as an unsecured creditor behind the preferred and secured creditors when it comes to the distribution of the assets. In British Columbia, by contrast, the Sale of Goods Act 1996 gives pre-paying buyers a mandatory, non-possessory lien over the seller's goods. The lien is for the amount the buyer has paid towards the purchase price of the goods and is against all goods in possession of the seller that correspond with the contract description, and the property in which has not passed to another buyer. Though the mandatory lien approach has merits, it is not one that we can recommend. A similar result could be achieved more simply by giving consumer buyers preferential status, like employees as regards unpaid wages, in insolvencies. The matters at issue are, for a number of reasons, more appropriately considered in the context of the overall rules governing insolvencies than in that of the rules on the passing of property in contracts of sale.

Reservation of Right of Disposal

33. Section 19 of the 1893 Act permits the seller of goods to include a term in the contract of sale that property in the goods will not pass to the buyer until certain conditions are fulfilled. The most common such term is a clause stipulating that the seller retains title to the goods supplied to the buyer until they have been paid for. Retention of title clauses have given rise to challenges in the courts and been the subject of reforms of the law regulating security interests in personal property in some countries and, in others, including Ireland, and the UK, of calls and proposals for reform. Experience in other jurisdictions suggests that it is preferable to address these issues in the broader context of personal property security reform rather than in the narrower context of sale of goods legislation. While we are not unsympathetic to a broader programme of reform along these lines, a recommendation to this effect is outside our terms of reference.

The Passing of Risk

34. Section 20 of the 1893 Act provides that, unless otherwise agreed between the parties, risk passes with property. The recently agreed EU Directive on Consumer Rights will require a change to the effect that risk passes with delivery where the trader dispatches the goods to the consumer, and it would be anomalous and confusing to have a different rule for other consumer sales contracts. Though the matter is less clear-cut in the case of commercial transactions, we think, on balance, that a default provision linking risk with delivery rather than with the passing of property would also be a more appropriate rule for commercial contracts of sale.

CHAPTER SEVEN TRANSFER OF TITLE

The *Nemo Dat* Rule and its Exceptions

35. Section 21 of the 1893 Act restates the fundamental rule of property law that no one can transfer a better title than he himself has - *nemo dat quod non habet* – thereby protecting security of ownership. Over a long period of time, a number of common law and statutory exceptions to the rule have been developed in order to protect *bona fide* purchasers and thereby encourage commercial activity by reinforcing the security of sale transactions. Sections 21-23 & 25 of the 1893 Act contain seven separate exceptions to the *nemo dat* rule. Further exceptions can be found in the Factors Act 1889 and the Consumer Credit Act 1995, amongst others.

36. The main general criticism levelled at these sections of the 1893 Act is that the exceptions to the *nemo da*t rule are over-complicated, lack an underlying and unifying rationale, and overlap in ways that are inconsistent and incoherent. These criticisms have led to suggestions that the rule and its exceptions should be repealed and replaced by a single more coherent principle. While the current Irish rules on conflict of title seek to strike a balance between original owners and innocent third-party purchasers, other jurisdictions such as France and Germany take what appears to be the more straightforward approach of favouring the innocent third-party purchaser over the original owner. In our view, the replacement of the existing statutory provisions in this way would not offer an appropriate or balanced basis for reform. An alternative reform option focuses on the all-or-nothing nature of the current rules on conflict of title, and proposes that the loss which occurs when an innocent owner and an innocent *bona fide* purchaser are left in a conflict of title should be apportioned between them. While we are sympathetic to the aims of this approach, it would be impractical and complicated to implement, particularly where a string of transactions was involved. Though we do not recommend the replacement of the existing statutory provisions by an alternative general framework, a number of specific amendments are recommended to sections 22-23 and 25-26 of the Act, including the repeal of the market overt exception at section 22.

CHAPTER EIGHT DELIVERY OF THE GOODS

Modalities of Delivery

37. The rules regulating the time, place and other aspects of the delivery of goods at sections 29 and 32-33 of the 1893 Act are relatively straightforward and have given rise to little or no significant case law. The recently agreed Directive on Consumer Rights will contain a default rule applicable to all consumer contracts of sale requiring the trader to deliver the goods by transferring physical possession or control of them to the consumer without undue delay, but not later than thirty days, from the conclusion of the contract. This will require the amendment, in the case of consumer contracts of sale, of the rule at section 29(2) of the 1893 Act requiring delivery within a reasonable time where the contract requires the goods to be sent to the buyer. There will also be a need in this event to amend the rule at section 32(1) of the Act which provides that delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer is, *prima facie,* deemed to be a delivery of

goods to the buyer. Though our preference is for common rules to apply to consumer and commercial contracts as far as possible, we do not favour the application of a thirty-day default delivery rule to commercial contracts. A specific provision of this kind, even one of a presumptive character, is unsuited to the diversity of circumstances and requirements found among delivery arrangements in commercial contracts. The issues regarding the retention or replacement of the provision at section 32(1) that delivery of the goods to a carrier for the purpose of transmission to the buyer is *prima facie* deemed to be a delivery of goods to the buyer are also less clear-cut in the case of commercial contracts of sale. We consider, on balance, that the existing rule remains appropriate to commercial sales contracts and should be retained.

Delivery of the Wrong Quantity

38. Section 30(1) of the 1893 Act provides that, where the seller delivers a lesser quantity of goods than that contracted for, the buyer may either reject the delivery or accept and pay for it at the contract rate. Section 30(2) provides that, where the seller delivers a greater quantity than that contracted for, the buyer may either accept the contract quantity and reject the rest, reject the whole delivery, or accept the whole delivery and pay for it at the contract rate. It can reasonably be argued that the buyer's right to reject the goods, regardless of the extent of the shortfall or excess, is disproportionate. In response to concern of this kind, the UK Sale of Goods Act was amended in 1994 to provide that the right to reject for delivery of a wrong quantity would not apply in commercial contracts of sale where the excess or shortfall was so slight that it would be unreasonable to reject the whole of the goods. This amendment is sensible and balanced in our view and should be adopted in future Irish legislation.

Mixed Delivery and Partial Rejection

39. Section 30(3) of the 1893 Act provides that, where the seller delivers the contract goods mixed with goods of a different description, the buyer may either accept the goods which match the contract description and reject the rest, or reject the whole delivery. This provision constitutes the sole exception to the bar on partial rejection of defective goods in non-severable contracts which derives from section 11(3) of the Act. We are not persuaded by the rationale for either the Act's broad prohibition of a right of partial rejection, or the single exception to it for goods of mixed description.

Future legislation should accordingly replace the limited right of partial rejection for goods of mixed description at section 30(3) with a general right of partial rejection for goods not in conformity with the contract. There should be an exception to this right in respect of what are termed commercial units, that is goods whose division would materially impair the value of the goods or the character of the unit, for example a multi-volume set of encyclopaedias.

CHAPTER NINE EXAMINATION, ACCEPTANCE AND REJECTION OF THE GOODS

Acceptance

40. As the buyer's acceptance of the goods annuls his right to reject them, the provisions on acceptance at sections 34 and 35 of the 1893 Act are pivotal to the remedies available to the buyer for goods not in conformity with the contract. Section 35 provides that acceptance is deemed to occur when: (i) the buyer intimates to the seller that he has accepted the goods; (ii) the buyer does any act in relation to the goods that is inconsistent with the ownership of the seller; and (iii), without good and sufficient reason, the buyer retains the goods without intimating to the seller that he has rejected them. A number of changes are recommended to the first two heads of acceptance to clarify and rebalance them. The 1980 Act substituted the 'without good and sufficient reason' test in the third and most important head of acceptance in section 35 for the original provision in the 1893 Act that the buyer was deemed to have accepted the goods 'when after the lapse of a reasonable time' he retained them without intimating rejection. This amendment was prompted by concerns arising from UK case law that the original provision had been interpreted in ways that were not in the interests of consumers. The main problem with the present wording of this head of acceptance, however, is that it is couched in such general terms that it offers little or no guidance to buyers and sellers as to when acceptance occurs and the right of rejection is lost. Insofar as this provision can be interpreted, moreover, as providing a long-term right to reject, we would have serious reservations about it. Though superficially attractive in principle, such a right would give rise to major issues and difficulties in practice.

41. In our deliberations on this question, we have had the benefit of the detailed review of consumer remedies for faulty goods undertaken by the English and Scottish

Law Commissions in 2008-09. After considering a range of options, the Commissions recommended that the normal period for the exercise of the right to reject should be thirty days. A standard period of this duration would be easy to publicise, understand and apply, and would afford sufficient time in most cases for the buyer to examine the goods and test them in use. Though a thirty day period would be appropriate in most cases, it was necessary to make allowance for circumstances in which a longer or shorter rejection period was justified. It should be open accordingly: (i) to the seller to argue that the right to reject should be exercised in less than thirty days where the goods are of a kind that would be expected to perish within a shorter time, and (ii) to the consumer to argue that the right to reject should be exercisable for a period longer than thirty days where it is reasonably foreseeable by both parties that a longer period would be necessary to inspect the goods. 42. In our view, the recommendations of the Law Commissions for a normal thirty day rejection period, with provision for a shorter or longer period in specified circumstances, would bring a substantially greater degree of clarity and certainty to the operation of the remedies regime. Though the Law Commissions' recommendations were put forward in the context of a review of consumer remedies, we consider that, if applied as default rules, they could function no less advantageously in the context of commercial contracts of sale. This would also have the merit of maintaining broadly common rules for consumer and commercial sales. This recommendation should be reviewed, however, if evidence emerges that the proposed rule is unsuited to certain types of commercial contract.

Remedies under Domestic and EU Legislation

43. Under the European Communities (Certain Aspects of the Sale of Consumer Goods and Associated Guarantees) Regulations 2003, repair or replacement are the first-tier remedies for goods not in conformity with the contract. The second-tier remedies of price reduction or rescission of the contract can be invoked only where the consumer is not entitled to the first-tier remedies, or where the seller cannot provide these remedies within a reasonable time or without significance inconvenience to the consumer. By contrast, the remedial scheme under the Sale of Goods Acts gives primacy to the right to reject the goods and repudiate the contract. The co-existence of parallel remedies arising by virtue of differing regimes, of domestic and EU origin, is one of the main issues in need of reform. Their integration

is essential and should take the form of a provision for the following three remedies of first resort to be exercised at the choice of the consumer:

- termination of the contract and full refund of the price within a normal thirty-day period or, in specified circumstances, a longer or shorter period;
- replacement of the goods;
- repair of the goods.

Where the consumer opts in the first instance for repair or replacement, he would be entitled to proceed to the remedies of termination and full refund or price reduction where:

- The seller has not completed the repair or replacement within a reasonable time or without significant inconvenience to the consumer; or
- The lack of conformity of the goods has not been remedied by the first repair or first replacement.

44. A number of other recommendations are made regarding the remedies for consumer contracts of sale, including the removal of any restriction on the right of termination and refund for so-called minor defects. The remedial framework proposed here would apply only to consumer contracts of sale. In the case of commercial contracts of sale, the right to reject and the related rules on examination and acceptance recommended above would operate in tandem with the 'cure' provision for commercial contracts of sale recommended in the context of the amendment of section 53 of the 1893 Act.

CHAPTER TEN RIGHTS OF UNPAID SELLER AGAINST THE GOODS

45. The duty of the buyer under the contract of sale is to accept and pay for the goods in accordance with the contract of sale. Where the buyer defaults on this obligation, sections 38-39 and 41-48 of the 1893 Act afford the unpaid seller a number of real remedies against the buyer's default - a lien on the goods, a right to stop the goods in transit, and a right to re-sell the goods.

46. A lien is a right to retain possession of the goods until the price has been paid or tendered in full. Section 41 of the 1893 Act provides that the unpaid seller who is in possession of the goods is entitled to retain possession of them until payment or tender of the price where: (i) the goods have been sold without any stipulation as to credit; (ii) the goods have been sold on credit but the term of credit has expired; (iii) the buyer has become insolvent. Recourse to the lien has declined greatly since the

inclusion of the remedy in the 1893 Act. As there is no entitlement to the remedy where goods are sold with a stipulation as to credit, the prevalence of credit terms in present-day contracts of sale means that the lien is no longer an option for the unpaid seller in many cases. The seller's need for protection from the risk of non-payment has also been met in other ways, most notably through recourse to retention of title clauses. Though the relevance of the lien has declined, it has not entirely disappeared from commercial practice, and the remedy should accordingly be retained in future legislation.

47. Section 44 sets out the right of the unpaid seller who has parted with the possession of goods to stop them in transit, that is to resume and retain possession of them until payment or tender of the price. Three conditions must be met before the right can be exercised. First, the seller must be unpaid; second, the buyer must be insolvent; and, third, the goods must be in transit. The case for the retention of the right of stoppage is weaker in our view than that for the unpaid seller's lien. Rapid transit has made the right of stoppage both less usable and less useful, while the development of the system of payments against documents and, more particularly, of payment by bankers' commercial credits, have greatly reduced the need for a right to stop goods in transit. While the Group favours the repeal of the right of stoppage in transit, this recommendation should be reviewed if evidence is forthcoming that the right retains some utility.

48. In practice, the right of lien is often exercised as a preliminary to resale. The circumstances in which the seller can resell the goods and the effect of resale on both the passing of title to a second buyer and the contract of sale with the first buyer are the subject of section 48 of the 1893 Act. Sections 48(3) and (4) which deal with the seller's right of resale have been the subject of considerable critical comment. These criticisms centre, first, on the confusion apparent in the provisions between the power of resale and the right of resale and, secondly, on their divergence from modern contract theory, particularly in respect of termination for breach. We share the view that section 48 needs to be redrawn and make a number of recommendation aimed at clarifying the circumstances in which the seller's right of resale applies and the effects of such resale on the property in the goods.

CHAPTER 11 ACTIONS FOR BREACH OF CONTRACT

Remedies of the Seller: Action for the Price

49. Section 49 of the 1893 Act provides the seller with an action for the price of the goods where (i) the property in the goods has passed to the buyer and payment is not made in accordance with the contract, and (ii) the price is payable 'on a day certain' irrespective of delivery although property has not passed and the goods have not been appropriated to the contract. There are a number of areas of doubt and uncertainty around section 49, stemming in large part from the fact that the transfer of property is the critical event for the seller's action for the price. The US Uniform Commercial Code opts in contrast for acceptance by the buyer as the most important factor in triggering the seller's right to an action for the price. The Canadian Uniform Sale of Goods Committee, however, favoured delivery as the controlling event. While the Group considers that acceptance will include delivery in virtually every instance, it may be the case that the complex process of drafting a stand alone section on this point renders section 9.11 of the draft 1982 Canadian Uniform Sale of Goods Act a more practicable solution. Future legislation should accordingly replace section 49 of the 1893 Act with a provision linking an action for the price to delivery that is modelled on section 9.11 of the Canadian Act.

Remedies of the Seller: Damages for Non-Acceptance

50. Section 50 of the 1893 Act provides the seller with a right to damages in cases where the buyer wrongfully refuses to accept and pay for the goods, and includes rules on the applicable measure of damages. Case law reveals a number of difficulties in relation to its provisions, including uncertainty regarding what is meant by an 'available market' for the purposes of assessing damages. While the case for fundamental reform of the section is not compelling, some adjustments to the existing rules are recommended for adoption in future legislation.

Remedies of the Buyer: Specific Performance

51. Though section 52 of the 1893 Act affords the court discretion to award specific performance following upon breach of a contact for specific or ascertained goods, Irish courts have proved very reluctant to exercise this discretion in favour of a disappointed buyer. The increasing awareness by courts of the need to recognise and vindicate the buyer's 'performance interest' should, in our view, lead the judiciary to

recognise that specific performance of a contract affords an alternative to engaging in a difficult or arbitrary process of assessing damages. While the Group favours the retention of specific performance as a discretionary remedy rather than a remedy of first resort, or one based on entitlement, we consider that an adjustment based on the template in section 2-716 of the Uniform Commercial Code should be made to section 52 in order to 'liberalise' its provisions. We also favour the deletion of the words 'specific or ascertained goods' from the first sentence of section 52 in order to broaden the scope of the provision.

Remedies of the Buyer: Cure

52. Section 53(2), as introduced by the 1980 Act, gives a consumer buyer the right to request the seller either to remedy a breach or to replace goods not in conformity with the contract. While some commentators are sceptical of the value of a cure provision in the commercial context, we think that there should be a general statutory right to repair or replacement for buyers. Article 46 of the United Nations Convention on the International Sale of Goods contains an appropriate legislative model for a cure regime for non-conforming goods in commercial contracts, and future legislation should include a provision along similar lines.

Remedies of the Buyer: The Measure of Damages for Breach of Warranty

53. Section 53(4) of the 1980 Act provides that the measure of damages for breach of warranty is the estimated loss directly and naturally resulting, in the ordinary course of events from the breach. Section 53(5) provides that, in the case of breach of warranty, such loss is *prima facie* the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty. Recent English case law, however, has upheld the general position in relation to the award of damages that it is for the plaintiff to prove a loss and, in ignoring the benefits of a provision such as Section 53, has left the law of damages in the UK Sale of Goods Act in an incoherent and unpredictable state. Though the judgment in question does not represent Irish law, we think it desirable to provide greater clarity in the way in which Irish statute law estimates damages in respect of non-conforming goods. Section 53(5) should be amended accordingly in order to meet the market value standard where commercial practice and the expectations of the

parties, viewed as at the date of breach, so require. This can be done by deleting the reference to 'prima facie' in the subsection.

CHAPTER 12 MISREPRESENTATION

54. The provisions at sections 43-46 of the 1980 Act deal with a number of aspects of the law relating to misrepresentation, specifically the remedies of rescission and damages and the exclusion of liability. While the English Misrepresentation Act of 1967 on which the provisions in the 1980 Act are based applies to contracts generally, the scope of the Irish legislative provisions is limited to contracts for the sale of goods, hire-purchase and consumer hire agreements, and contracts for the supply of services. Though the matter is outside our terms of reference, serious consideration should be given to the introduction of statutory provisions of general application on misrepresentation. Future legislation should extend the misrepresentation provisions to commercial hire agreements and clarify their application to consumer hire agreements.

55. Section 44 of the 1980 Act was enacted in order to remove certain bars to rescission for innocent misrepresentation. Its provisions remain necessary in our view and should be retained in their existing form. Future legislation, however, should lay down clearer and more balanced rules on the circumstances in which rescission should be available for misrepresentation. There is merit in our view in the rules at section 7 of the New Zealand Contractual Remedies Act 1979, and we would favour the incorporation of provisions along similar lines into Irish law.

56. Section 45(1) of the 1980 Act reversed the historical pre *Hedley Byrne* common law rule that, as innocent misrepresentation was not actionable in tort, damages were unavailable as a remedy. This was balanced, however, by the discretion afforded the courts by section 45(2) to award damages in lieu of the remedy of rescission previously available at common law for all forms of misrepresentation. The main issues raised by section 45 relate to the measure of damages available for the cause of action under subsection (1). The language of the subsection appears to point to the measure in the tort of deceit, an interpretation which, though upheld by the English courts, has been criticised for being excessively punitive in permitting the plaintiff to recover all losses flowing directly from the misrepresentation. These criticisms are

valid in our view in respect of innocent and negligent misrepresentation, and it would be preferable to apply the contract measure of damages in these cases. In the case of fraudulent misrepresentation, however, the applicable measure should remain damages in the tort of deceit, including for unforeseen loss and damage.

57. Section 46 of the 1980 Act provides that contract terms excluding or restricting liability, or the availability of any remedy, for misrepresentation shall not be enforceable unless shown to be fair and reasonable. Future legislation should incorporate the common law prohibition on the exclusion of liability for fraudulent misrepresentation. Contract terms that exclude or limit liability for other forms of misrepresentation should be permissible where shown to be 'fair and reasonable'.

CHAPTER THIRTEEN PRODUCT GUARANTEES, UNSOLICITED GOODS, DIRECTORY ENTRIES, AND REGULATIONS

Product Guarantees

58. Product guarantees are regulated by sections 15-19 of the Sale of Goods and Supply of Services Act 1980 and by Regulation 9 of the European Communities (Certain Aspect of Consumer Guarantees and Regulations) 2003. Both sets of provisions are broadly similar in their focus on the enforceability of guarantees and the provision of information about them, an approach that we support. A single set of rules governing product guarantees should replace the present dual regimes and, as the rules in the 1980 Act are clearer and more detailed than those in the Directive, these should provide the basis for future statutory provisions.

Unsolicited Goods and Services

59. Section 47 of the 1980 Act provides that, subject to specified conditions, the recipient of unsolicited goods can treat them as an unconditional gift. The supply of unsolicited goods and services is also regulated at EU level by Directive 97/7/EC on Distance Selling and Directive 2005/29/EC on Unfair Commercial Practices. The Distance Selling Directive exempts the consumer from any duty to provide of any consideration in cases of unsolicited supply. It has been suggested that the conditions applying to the retention of unsolicited goods under section 47 may constitute a form of consideration, and these conditions should be repealed in future legislation to remove any doubt on the issue. Issues of compatibility with EU law aside, we see no

good reason why restrictive conditions should attach to the retention of goods sent to persons without their consent.

Business Directory Entries

60. Sections 48 and 49 of the 1980 Act on business directory entries were introduced to regulate demands for payment for entries in business directories where the business had not knowingly consented to such an entry or, in some cases, where the directory did not exist. The sections lay down procedural requirements governing orders, and consent to charges, for entries in such directories. The evidence of continued abuses involving business directories shows the need for the retention of provisions along the lines of those at sections 48 and 49. As these provisions predate modern communication technologies and business practices, there is a need to update them to take appropriate account of these technologies and practices and the requirements of e-commerce legislation.

Ministerial Orders

61. Sections 51-54 of the 1980 Act deal with the powers of the Minister for Enterprise, Trade and Innovation to make orders in respect of a range of matters relating to contracts. In the thirty years in which these sections have been in force, however, no such order has been made. Regulations could usefully be introduced in two areas in our view: the use of small print in consumer contracts, and the issue of receipts in consumer transactions. The substance and detail of such regulations should be decided following consultations with consumer and business interests.

CHAPTER FOURTEEN NON-SALE CONTRACTS FOR THE SUPPLY OF GOODS AND CONTRACTS FOR THE SUPPLY OF SERVICES

Non-Sale Contracts for the Supply of Goods

62. There are a range of transactions that fall outside the definition of a contract of sale either because there is no transfer of property or only an option for such a transfer (contracts of hire, hire-purchase agreements); no consideration (gift) or no money consideration (barter or exchange); or no goods (contracts for services, or work and materials contracts in which the goods element is incidental). A number of gaps and areas of uncertainty exist in the present statutory regulation of these transactions, such as the absence of any implied statutory undertakings as to goods supplied under

commercial hire-purchase and hire agreements. The implied undertakings that apply to goods supplied under different types of transaction, moreover, are spread across a number of separate statutes - the Sale of Goods Acts 1893 and 1980 for contracts of sale, the Sale of Good and Supply of Services Act 1980 for work and materials contracts, the Consumer Credit Act 1995 for consumer hire-purchase and hire agreements, and the Trading Stamps Act 1980 for goods supplied in exchange for trading stamps. As these provisions are similar in their purpose and substance, their consolidation would advance regulatory simplification and make the law clearer and more accessible for both businesses and consumers. The policy approach that should underline such consolidation is straightforward. Other than where adjustments are required by virtue of the nature of the contract, the implied conditions and warranties governing goods supplied under different kinds of transaction should be identical in substance and form. As well as making the law less complex, this would minimise the practical effects of differences in the classification of contracts.

A Separate Consumer Contract Rights Act

63. The consolidation of different legislative provisions raises the question of whether there is merit in having a separate statute for the core provisions applicable to consumer contracts. The New Zealand Consumer Guarantees Act 1993, for example, deals essentially with the implied quality and other terms applicable to contracts for the supply of goods and services and with the remedies available to consumers for breaches of these implied terms. Provisions relating to non-core aspects of consumer sales – transfer of property, transfer of title, the rights of unpaid seller against the goods etc – continue to be dealt with, together with all of the provisions applicable to commercial contracts of sale, in the Sale of Goods Act 1908. Though we favour the retention of a common legal basis for consumer and commercial contracts of sale, this would not preclude, nor be inconsistent with, the introduction of a separate statute governing the main aspects of consumer contract rights. We think that there would be considerable benefit to both consumers and businesses in bringing together in an accessible way the main statutory provisions applicable to consumer contract rights. A separate Consumer Contract Rights Act should accordingly be enacted that would incorporate the core statutory provisions applicable to consumer contracts, including the provisions of the recently agreed Consumer Rights Directive and of the Unfair Contract Terms Directive.

Contracts for the Supply of Services

64. Part IV of the 1980 Act, comprising sections 39-42, constituted the main innovation of the Act in that, almost a century after legislation of general application was first enacted to regulate the quality of goods, it introduced statutory standards governing the quality of services. Though this Part of the Act was intended to be of general application, a number of restriction were placed in relation to certain services provided by State bodies. Part IV of the Act has also been given a somewhat restrictive interpretation in case law. A broadly-based definition of 'services', modelled on the definition at section 2 of the Consumer Protection Act 2007, should be included in future legislation, and the existing restrictions should be repealed.

65. The implied undertakings in section 39 of the 1980 Act are expressly said to be terms of the contract. The corresponding undertakings in contracts of sale, however, are classified by the 1893 and 1980 Acts as either conditions or warranties. Though the status of the implied terms under section 39 does not appear to have created significant practical difficulties to date, the logic of treating the implied undertakings for the two types of contract differently can be questioned. The implied terms which apply to services contracts under the 1980 Act relate to quite fundamental aspects of the performance of the contract and, for this and other reasons, we favour, on balance, giving the implied statutory undertakings as to services the status of conditions in future legislation.

66. The requirement under section 39 that the supplier should supply the service with due skill, care and diligence is a negligence or fault-based standard. Though the service provided may fail to achieve the desired result or even be defective, the supplier will be liable only if he has failed to exercised the due level of skill and care. This contrasts with the strict liability or result-based standards applicable to the implied undertakings as to goods under the 1893 and 1980 Acts. Though we are not in favour of the introduction of an inflexible result-based standard for services contracts, we think that there is scope for a measured reform of the purely fault-based standard under the 1980 Act. Future legislation should accordingly include a provision to apply to both consumer and commercial contracts for services that:

A service, and any product resulting from it, will:

(i) be reasonably fit for any particular purpose, and

(ii) be of such a nature and quality that it can reasonably be expected to achieve any particular result,

that the recipient makes known to the supplier as the particular purpose for which the service is required or the result that he desires to achieve.

67. Section 40 provides that the implied undertakings as to the quality of services can be negatived or varied by express or implied terms of the contract. Where the recipient of the contract deals as consumer, however, it must be shown that the exclusion clause is (i) fair and reasonable by reference to the criteria in the Schedule to the Act and (ii) has been specifically brought to the attention of the consumer. In the case of contracts of sale, by contrast, any contract term exempting any or all of the implied undertakings regarding correspondence with description, quality and fitness for purpose, and correspondence with sample under sections 13-15 of the Act is void where the buyer deals as consumer and, in any other case, is not enforceable unless shown to be fair and reasonable. It is now time in our view to put exemption clauses pertaining to the implied terms in services contracts on the same footing as those for sales contracts, namely that they should be void in consumer contracts and enforceable in commercial contracts where shown to be fair and reasonable. As the Unfair Terms in Consumer Contracts Regulations are the most appropriate vehicle for the regulation of exemption clauses, clauses of this kind in consumer contracts for the supply of services should be deemed automatically unfair under the Regulations.

CHAPTER FIFTEEN THE UNITED NATIONS CONVENTION ON THE INTERNATIONAL SALE OF GOODS

69. The United Nations Convention on the International Sale of Goods [CISG] comprises a set of uniform substantive rules for the regulation of contracts of sale involving parties with a place of business in states that have ratified the Convention (Contracting States). In its 1992 Report on the Convention, the Law Reform Commission examined a wide range of considerations relevant to Ireland's ratification of the CISG and concluded that, on balance, it would be desirable for Ireland to become a party to it. In our view, the case for Ireland's accession to the Convention is, if anything, stronger now than when the Law Reform Commission reported in 1992. At that time, thirty-four states had ratified the Convention compared with seventy-six states now, including most of the world's main trading economies and all

European Union Member States other than Ireland, the United Kingdom, Portugal and Malta. As accession to the Convention will require appropriate legislative provisions, the opportunity presented by the need for new sale of goods legislation to give effect to our other recommendations should be availed of for this purpose. The UN Convention permits Contracting States to make declarations limiting the application of specific provisions of the Convention in respect of that State. The Law Reform Commission were against the exercise of any of these derogations on the general ground that such derogations lessened the impact of the Convention and for reasons specific to the individual opt-outs. We agree with the Commission's view that Ireland should not avail of any of derogations permissible under the Convention and note the generally low level of recourse to these opt-outs on the part of Contracting States.

CHAPTER ONE SALES LAW SINCE 1893

1.1. The Sale of Goods Act 1893 has been the cornerstone of Irish sales law for over a century. Enacted during the reign of Queen Victoria when electricity, the telephone and the motor car were still in their infancy, it has remained in force with most of its provisions unchanged through the successive commercial and technological changes of the twentieth and early twenty-first centuries – the growth of mass production, the development of new consumer goods and markets, the rise of the mass media and modern advertising and marketing, and the emergence of advanced information and communication technologies. As the account of its history in other common law jurisdictions at Annex IV shows, the Act's durability is not unique to Ireland. Of the countries which have based their sales law on the 1893 Act – the United States, Canada, Australia, New Zealand, India, Hong Kong and Singapore – only the United States has subsequently put its law on a different foundation with the adoption of the Uniform Commercial Code in 1952. Despite a succession of legislative reforms in the United Kingdom and the repeal of the 1893 Act, many of the Act's provisions have been retained unchanged in the legislation that has replaced it.

1.2. This Chapter sets out the background to the enactment of the 1893 Act and outlines its key features. It notes the virtual absence of legislative change in Ireland during the first three quarters of the twentieth century, and describes the series of legislative changes in the United Kingdom from the mid-1950s to the late 1970s that greatly influenced subsequent Irish reforms. In Ireland, as in the UK, the impetus for change came increasingly from the pressure to adapt the 1893 Act to reflect the growing importance of consumer sales, an impetus that led eventually to the enactment of the Sale of Goods and Supply of Services Act 1980. Though the 1980 Act was an innovative piece of legislation in a number of respects, it took the form of additions and amendments to the 1893 Act rather than its repeal and replacement. Its primary focus on enhancing the protections available to consumers also left much of the parent Act untouched; in all, fifty three of the 1893 Act's sixty two sections were unaffected by the amendments effected by the 1980 Act. From the mid-1980s, the dynamic for change in Irish consumer legislation came from the European Union which adopted a number of Directives in the area of consumer contract law, most notably Directive 1999/44/EC on Consumer Sales and Guarantees. Though this

Directive overlapped substantially with the consumer sales provisions of the 1893 and 1980 Acts, it was transposed into Irish law as a stand-alone statutory instrument, resulting in a confusing and, in some respects, conflicting legislative framework. In seeking to explain why the 1893 Act has remained largely unchanged for so long, this account will underline that the time for a thorough revision of the 1893 and 1980 Acts and the related secondary legislation is now long overdue.

The Sale of Goods Act 1893

1.3. The Sale of Goods Act 1893 was one of several statutes drafted by Sir MacKenzie Chalmers as part of a movement for the codification of core elements of commercial law that got underway in the last quarter of the nineteenth century.[5] Its long title describes it an 'Act for codifying the law relating to the Sale of Goods', a summary that accurately describes its objectives and explains its limits. As the Law Commission for England and Wales and the Scottish Law Commission observed:[6]

> What Chalmers sought to do was to prepare a statement in statutory form of the principles of law derived from decided cases. For this reason, the Sale of Goods Act does not provide an answer to every question which it could be imagined might arise in a dispute concerning the sale of goods. If a point had been decided, it might well be found stated in the Act. But many points of potential dispute had not then (and still have not) been decided and the Act did not attempt to answer them in advance. This means that the Sale of Goods Act is far from being a complete code, as the Uniform Commercial Code of the U.S.A. sets out to be.

1.4. The case law codified by the Act inevitably reflected the commercial conditions and practices of its era. It made no reference to consumer sales as the notion of the consumer as a distinct category of buyer in need of special protection was still some decades distant. The type of commercial cases that underlay the Act's provisions were also very much of their time. As Bridge has observed,[7] this case law:

> does not deal with massive shipments or supertankers or with the sale of complex manufactured machinery. It is heavily concentrated in the area of relatively small-scale transactions involving raw materials soon to be used in the manufacturing process. There is little evidence of dealings in futures. The cases are therefore replete with references to bags of waste silk, quantities of worsted coatings, pockets of hops, Manila hemp, scarlet cuttings, oil extracted from grain, long-staple Salem cotton and the like. Less often, they deal with relatively unsophisticated

[5] Other notable examples include the Bills of Exchange Act 1882 and the Marine Insurance Act 1906, both of which remain on the statute book in Ireland and the UK.
[6] The Law Commission and the Scottish Law Commission. 1987. **Sale and Supply of Goods** (Law Com. No. 160, Scot. Law Com. No. 104), para. 1.5.
[7] Bridge, M.G. 'The evolution of modern sales law', (1991) *L.M.C.L.G.* 53.

manufactured objects such as hosting ropes, carriage poles, and copper sheathing for a ship.

1.5. The durability of legislation so firmly rooted in the conditions prevailing at its inception is due to two principal factors. First, the Act's provisions are for the most part optional and not mandatory. Many are expressly formulated as default rules. Section 55 of the Act as originally adopted gave contracting parties a free hand to waive or alter its implied statutory terms:

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

Though the Sale of Goods and Supply of Services Act 1980 amended this section to provide that the terms implied by the Act cannot be altered in the case of consumer sales and can be altered only where shown to be 'fair and reasonable' in commercial sales, the latter provision still affords a substantial degree of latitude to the parties to business-to-business contracts. Second, section 61(2) of the 1893 Act left ample space for the evolution of sales law in line with the general development of the common law relating to obligations:

> 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, misrepresentation, duress or coercion, mistake or other invalidating cause, shall continue to apply to contracts for the sale of goods.

As Bridge has noted, this section has proved its value in enabling courts to avoid inflexibility in the Act and, more broadly, in helping to prevent the divergence of sales law from an evolving general law.[8]

1.6. One further factor merits mention in any consideration of the 1893 Act, namely the nature and quality of its drafting. Goode has observed that:[9]

> Compared with modern legislation, the Sale of Goods Act is delightfully easy to read. Perusal of any section conveys at once the basic idea the draftsman is trying to implant. The tortuousness of recent statutes is avoided, and the impression is given of limpid clarity.

[8] Bridge, M. 2009. **The Sale of Goods** (2nd ed.) (Oxford: Oxford University Press), p. 7.
[9] Goode, R. & McKendrick. E. 2010. **Goode on Commercial Law** (4th ed.) (London: Penguin), p. 210.

He adds, however, that the Act's simplicity is deceptive, a verdict that will be borne out at a number of points in this Report. Other assessments of the 1893 Act are less positive. In Atiyah's view,[10] the Act 'has not proved one of the more successful pieces of codification undertaken by Parliament towards the end of the nineteenth century', though he acknowledges that this may largely be due to a change in the type of sale of goods cases coming before the courts as consumer sales assumed increased importance over the course of the twentieth century.

Developments 1893-1980

1.7. The three-quarters of a century that followed the adoption of the 1893 Act saw little legislative change in sales law in Ireland and limited change in the United Kingdom. The pressure for change in Ireland may have been lessened by the fact that, over the first half of the twentieth century, the patterns of trade and manufacture here remained consonant with the conditions underlying the Act's provisions. In Britain and beyond, the Act's inbuilt flexibility permitted parties engaged in, for example, large-scale international commodity trading to devise appropriate contractual arrangements without impediment from its provisions, often using standard contract forms prepared by trade associations. Forms of contract, such as c.i.f (cost, insurance and freight),[11] which are nowhere mentioned in the Act, became an established feature of international trade over this period.

1.8. The first Irish legislative development of relevance to the 1893 Act occurred with the enactment of the Hire Purchase Act 1946. Though commercial contracts providing for a bailment of goods coupled with an option to buy after the payment of all instalments of the price had been common for some time, this type of arrangement became a feature of consumer contracts for motor cars and other consumer goods from the 1920s. The 1946 Act, which drew heavily on the UK Hire-Purchase Act 1938, can claim therefore to be the first piece of post-Independence Irish consumer legislation.[12] While its main focus was on protecting hirers from unfair terms, it also

[10] Atiyah, P.S. et al. 2010. **The Sale of Goods** (12th ed) (Harlow: Pearson), p. 6.
[11] Commercial contracts where the sum contracted for covers the price of the goods, their insurance during transit, and the cost of freight.
[12] Like the UK Act, the Bill in its original form was limited to goods whose hire-purchase price did not exceed £100. The then Minister for Industry for Commerce, Seán Lemass, stated in introducing the Bill to Dáil Éireann that it was 'assumed that persons in a position to acquire goods of a value in excess of £100 should be able to look after their own interests' (**Dáil Debates**. Vol. 100, 1 May 1946 Hire

provided for the application to goods supplied under hire-purchase agreements of implied undertakings as to title and quality and fitness for purpose similar to those at sections 12 and 14 of the 1893 Act. These implied terms were incorporated in updated and augmented form in the Sale of Goods and Supply of Services Act 1980 and were later incorporated, along with the other provisions regulating hire-purchase agreements, in the Consumer Credit Act 1995.

1.9. In the United Kingdom, the Law Reform (Enforcement of Contracts) Act 1954 repealed section 4(1) of the 1893 Act, the main effect of which had been to render unwritten contracts of sale to the value of £10 or more unenforceable unless specified conditions were met. As discussed in Chapter 3, this provision remains in force in Ireland, and its repeal is long overdue. If the amendment effected in the UK in 1954 addressed an archaic provision with its origin in the seventeenth century Statute of Frauds, a development towards the end of the same decade was a harbinger of future trends. The Molony Committee on Consumer Protection established by the British Government in 1959 was the first official inquiry dedicated to issues of consumer policy and welfare. Its establishment was symptomatic of a new-found emphasis on consumer issues in advanced economies. Though the main focus of the Molony inquiry was on matters other than consumer rights under sale and related contracts, its report published in 1962 made a number of recommendations for changes to the 1893 Act.[13] These included the prohibition of clauses excluding or varying the terms as to title, correspondence with description, quality and fitness for purpose implied by sections 12-14 of the 1893 Act.

1.10. Exemption clauses of this kind were emerging as a key issue in the conflict between the old emphasis on freedom of contract and the new insistence on the need to protect consumers by reason of their position as the weaker party in dealings with business.[14] The newly established Law Commission for England and Wales and the

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Purchase Bill Second Stage: cols. 2250-2251). This restriction was deleted at Committee Stage, however, partly in response to concerns expressed about the position of farmers purchasing tractors and farm machinery by hire- purchase.

[13] **Final Report of the Committee on Consumer Protection**. 1962. (London: HMSO). Cmd. 1781: paragraphs 414-478.

[14] The Molony Committee concluded that the most serious limitation of the sale of goods legislation was 'the ease and frequency with which vendors and manufacturers of goods exclude the operation of the statutory conditions and warranties by provisions in guarantee cards or other contractual documents', ibid: para. 426.

Scottish Law Commission reported jointly on the issue in 1969 and recommended that contracting out of the terms implied by sections 12-15 of the Sale of Goods Act 1893 should be prohibited in consumer sales.[15] While the Commissions were agreed that protection against contracting out should not be limited to private purchasers, they were divided as to the extent of the protection that should be provided for business buyers. The report also recommended a number of changes to sections 13-14 of the 1893 Act, including clarification that the sale of goods exposed for self-selection by the buyer, as had become increasingly common in supermarkets and department stores, came within the scope of the Act's provisions on sale by description, and the inclusion of a definition of 'merchantable quality' in the Act.

1.11. The piecemeal reform of the 1893 Act continued meanwhile in England and Wales when the Misrepresentation Act 1967[16] repealed the stipulation at section 11(1)(c) of the 1893 Act that, in the case of a contract for the sale of specific goods, the buyer lost the right of rejection when the property in the goods had passed to him. This had represented a significant curtailment of the right to reject goods not in conformity with the contract, and the effect of the amendment was that this right was henceforth governed in all cases by the rules on the acceptance of goods at sections 34-35 of the 1893 Act. Section 22(2) of the Act which provided that the provisions of section 22 on sales in market overt were not to affect the law relating to the sale of horses was repealed by the UK Criminal Law Act 1967, and section 24 which provided that property in stolen goods disposed of in market overt revested in the owner on conviction of the offender was repealed by the UK Theft Act 1968. Further changes of greater significance followed in the UK with the enactment of the Supply of Goods (Implied Terms) Act 1973. The Act addressed the issue of exemption clauses by providing that any clause in a consumer sales contract which exempted the implied terms of the 1893 Act on title, correspondence with description and sample, and quality and fitness for purpose would be void. In the case of business-to-business contracts, clauses exempting the implied terms as to description, quality, and sample would be unenforceable unless shown to be 'fair and reasonable', while exemption of

[15] Law Commission for England and Wales and Scottish Law Commission. 1969. **Exemption Clauses in Contracts – First Report**. (Law Commission Report No. 24, Scottish Law Commission Report No. 12. HC 403). A second report on the subject was published in 1975. Law Commission for England and Wales and of Scottish Law Commission. 1975. **Exemption Clauses: Second Report.** (Law Commission Report No. 69, Scottish Law Commission Report no. 39 HC 605).
[16] A separate Misrepresentation Act was enacted in Northern Ireland in 1967.

the implied term as to title would be void. The 1973 Act also set out five criteria to be taken into account in determining whether a term was fair and reasonable. In addition, it made a number of amendments to sections 12-14 of the 1893, the most significant of which brought goods sold on a self-service basis within the ambit of section 13 on sale by description. The 1973 Act's provisions on exclusion clauses were broadly retained in the more comprehensive regulation of these clauses effected by the UK's Unfair Contract Terms Act 1977. A more systematic reform of UK sale of goods legislation occurred with the enactment of the Sale of Goods Act 1979. This repealed the 1893 Act and replaced it with a statute which incorporated the amendments made in 1967 and 1973 and introduced some additional changes. These changes centred on the implied conditions and warranties at Sections 11-15, including the addition of a definition of 'merchantable quality', and the provisions on examination and acceptance at sections 34-35. Much of the 1893 Act survived intact however so that, as Bridge has observed, the 1979 Act 'represents the old 1893 Act encrusted with some ten or so statutory alterations ranging from 1954'.[17]

1.12. The first step towards a modern consumer protection regime in Ireland was taken with the establishment of the National Prices Commission in 1971. The new body proceeded to commission of a number of reports on consumer policy and protection, the most important being a comparative report on consumer protection law undertaken by an English legal academic, Michael Whincup, that was published in 1973.[18] The Whincup report contained a large number of recommendations, including proposals for significant changes to the Sale of Goods Act 1893. In November 1973, a National Consumer Advisory Council was established, and the new body assumed the consumer protection function previously exercised by the National Prices Commission.[19] Its terms of reference included the provision of advice to the Minister for Industry and Commerce on 'the introduction of legislation which the Council feels is needed to assure consumers' interests'. In December 1974, the Council made a submission to the Minister on a wide range of proposals for new or amended

[17] Bridge. M. 'Do we need a new Sale of Goods Act?' in Lowrey & Mistelis (eds). 2006. **Commercial Law: Perspectives and Practice** (London: Butterworths), para. 2.2.
[18] National Prices Commission. 1973. Occasional Paper No. 9. **Consumer Protection Law in America, Canada and Europe** (Dublin: Stationery Office).
[19] **Dáil Debates**. Vol. 316, 13 November 1979, col. 399: Written Answers – National Consumer Advisory Council.

legislative provisions, including proposals for the reform of the Sale of Goods Act 1893, broadly in line with those in the Whincup Report.[20]

1.13. The years following the submission of the Council's proposals saw the introduction of a number of pieces of consumer protection legislation, commencing with the Consumer Information Act 1978 which modernised the law relating to false and misleading advertising and consumer information, and established the office of Director of Consumer Affairs.[21] More pertinently for the purposes of the present account, the Sale of Goods and Supply of Services Act was enacted in 1980 following a lengthy parliamentary gestation. The legislation was first introduced in the form of a Consumer Protection Bill circulated by the Fine Gael-Labour Government in May 1977 shortly before it left office. In November 1978, the Bill was reintroduced with some modifications as the Sale of Goods and Supply of Services Bill by the Fianna Fail Government and finally became law in May 1980.

1.14. The Sale of Goods and Supply of Services Bill 1978 was presented as a consumer protection measure and the influence of the National Council Advisory Council and Whincup recommendations on its provisions was fully acknowledged.[22] In large part, the Act followed the reforms previously enacted in the United Kingdom in respect of exclusion clauses and the criteria to be taken into account in assessing whether such clauses were 'fair and reasonable'; the amendments of the implied terms on title, correspondence with description and sample; the inclusion of a definition of merchantable quality; the conditions governing the right to reject specific goods; the amendment of the provisions on the examination of goods; and the inclusion of statutory rules governing misrepresentation. The Act differed from its UK counterpart, however, in a number of significant respects. First, the detailed provisions on manufacturers' and suppliers' guarantees at sections 16-19 of the Act

[20] National Consumer Advisory Council. December 1974. **Submission to the Minister for Industry and Commerce on Proposals for Legislation to Assure the Consumers' Interests** (Dublin: Stationery Office).

[21] In addition to the Consumer Information Act and the Sale of Goods and Supply of Services Act 1980, the period also saw the enactment of the Pyramid Selling Act 1980 and the Trading Stamps Act 1980.

[22] Introducing the Bill's second stage reading, the then Minister for State at the Department of Industry, Commerce and Energy, Máire Geoghegan Quinn, described it as a 'major move to ensure certain basic rights for the consumer in buying goods and services'. She further stated that the National Consumer Advisory Council and Whincup Reports were 'major factors leading … to the measure now before us.' **Dáil Debates**. Vol. 309, 16 November 1978: cols. 1100-1101.

had no counterpart in Westminster legislation and broke new ground in departing from the doctrine of privity of contract. Secondly, the Act's provisions on the supply of services, including implied undertakings as to quality of services, preceded the adoption of broadly similar provisions in the UK in the Supply of Goods and Services Act 1982. Thirdly, the Act's provisions on cure in consumer sales gave consumers the additional remedies of repair or replacement where the right of rejection had been lost, and revived that right where the seller failed either to provide these remedies or to do so within a reasonable time. Fourthly, the Bill as introduced had followed the 1893 Act and UK Act of 1979 in providing at section 35 that the buyer was deemed to have lost the right to reject goods not in conformity with the contract when, 'after the lapse of a reasonable time', he retained the goods without intimating rejection to the seller. A Government amendment to the section at Committee stage recast it, however, to provide that the buyer was deemed to have accepted the goods when he retained them 'without good and sufficient reason' without intimating rejection. This change was made in response to the decision of the English courts in *Lee v. York Coach and Marine Ltd*[23] in which the buyer of a faulty car who had spent six months in an unsuccessful attempt to have it repaired by the seller was held to have accepted the vehicle.[24] Though the wording at section 35 of the 1980 Act has yet to be interpreted by the courts, it is generally taken to be more expansive than the equivalent provision under UK legislation.[25] The fact that the new wording of the section diverges from the equivalent provision in the Sales of Goods Act 1979 means, of course, that UK case law cannot be drawn upon in the case of this provision. Fifthly, the 1980 Act included novel provisions that conferred specific protections in respect of spare parts and after-sales service, unsafe motor vehicles, and purchases made through finance houses.[26] The combined effect of these elements of the 1980

[23] 1977 RTR 35.
[24] **Dáil Debates**. Vol. 316, 14 November 1979: Sale of Goods and Supply of Services Bill: Committee Stage, col. 1646.
[25] Law Commission for England and Wales and Scottish Law Commission. 1978. **Consumer Remedies: A Consultation Paper**, p.59.
[26] Section 12 provides that there is an implied warranty that spare parts and an adequate after-sale service will be made available in such circumstances as are stated in an offer, description or advertisement by the seller, on a manufacturer's behalf or on his own behalf, for such period as is so stated or, if no period is stated, for a reasonable period. Section 13 provides, among other things, that in every contract for the sale of a motor vehicle, except where the buyer is a motor dealer, there is an implied condition that, at the time of delivery, the vehicle is free from any defect which would render it a danger to the public, including passengers. In a departure from the privity rule, the section also provides that a person using the vehicle with the consent of the buyer who suffers loss as a result of a breach of its implied terms may sue the seller as if he were the buyer. Section 14 provides for joint and

Act led the European Commission to refer subsequently to the 'pioneering, exemplary character' of Irish consumer sales law.[27]

1.15. If the substance of the 1980 Act was progressive in many ways, the form of the Act had less to commend it. The Act did not repeal and replace the 1893 Act as had been done by the UK Sale of Goods Act 1979 but, in addition to the sizeable number of new sections and Parts in the 1980 Act itself, opted to substitute a number of sections of the 1893 Act. The result was that, in order to understand the statutory rules governing sales contracts, it became, and remains necessary, to read the original Act of 1893, the sections substituted in the 1893 Act by the 1980 Act, the textual and non-textual amendments to the 1893 Act made by the 1980 Act and other enactments, as well as the new provisions of the 1980 Act. The reasons for proceeding in this way are not clear, but the outcome was neither in keeping with the principles of better regulation nor one conducive to the accessibility and understanding of the law, particularly as the text of the 1893 Act is not readily available to businesses or consumers.[28] Matters were improved somewhat with the publication in 2003 by the Attorney General's Office of a restatement of the 1893 Act and Part II of the 1980 Act,[29] but the form taken by the legislation still falls far short of what is desirable.

European Union Developments 1980-2010

1.16. If the legislation of the United Kingdom parliament and the decisions of the English courts exercised a major influence on Irish sales and consumer law over the first eight decades of the last century, the locus of influence shifted to the European

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several liability between sellers and finance houses for goods bought by a finance house under a repayment agreement with a consumer.

[27] Cited in White, F. The EC Directive on Certain Aspects of Consumer Sales and Associated Guarantees: one step forward, two steps back?', (2000) *CLP* (3) 1. The European Commission's 1993 Green Paper on Guarantees for Consumer Goods and After-Sales Services referred to the provisions of the 1980 Act on commercial guarantees as one of the 'two most forward-looking national texts in this domain' and also commended the Act's provisions on after-sale service. Commission of the European Communities. 1993. **Green Paper on Guarantees for Consumer Goods and After-Sales Services**. [Com (93) 509], pp. 80 & 96.

[28] The Bill that formed the basis of the 1980 Act was prepared well before the enactment of the UK 1979 Act. It is probable that it followed the model of the UK's Supply of Goods (Implied Terms) Act 1973 which substituted new sections for Sections 12-14 of the 1893 Act.

[29] Available at http://www.attorneygeneral.ie/slru/Restatement_Sale_of_Goods_Acts_1893_and_Part II_of_1980.pdf. A restatement is an administrative codification that incorporates all of the amendments made to an Act after its enactment.

Community thereafter.[30] From the mid-1980s on, a series of consumer protection Directives exerted an increasing influence on Irish law.[31] The origins of EU activity in the area of consumer protection can be traced to the Preliminary Programme for Consumer Protection and Information Policy published in 1975.[32] While the Programme identified consumer protection as an element of the Common Market as it was then known and enumerated a number of basic consumer rights,[33] specific actions to enhance consumer rights were hampered by the absence of a legal basis in the European Treaty. This gap was addressed in Article 95 of the Treaty adopted following the entry into force of the Single European Act in 1987.[34] A further change made as a result of the Maastricht Treaty of 1992 saw the inclusion in Article 153 of

[30] Mc Dermott, P.A.. 2003. 'The Europeanisation of Contract Law' in Lucey, M.C. & Keville, C. (eds), **Irish Perspectives on EC Law** (Dublin: Round Hall), pp. 173-95.

[31] Directive 84/450/EEC on Misleading Advertising implemented in Ireland by the European Communities (Misleading Advertising) Regulations 1988 (S.I. No. 134 of 1988); Directive 85/374/EEC on Liability for Defective Products implemented by the Liability for Defective Products Act 1991 and the European Communities (Liability for Defective Products) Regulations 2000 (S.I. No. 401 of 2000); Directive 85/577/EEC on Contracts Negotiated Away from Business Premises implemented by the European Communities (Cancellation of Contracts Negotiated Away from Business Premises) Regulations 1989 (S.I. No. 224 of 1989); Directives 87/102/EEC and 90/88/EEC on consumer credit implemented by the Consumer Credit Act 1995; Directive 90/314/EEC on Package Travel, Holidays and Tours implemented by the Package Holidays and Travel Trade Act 1995; Directive 93/13/EEC on Unfair Terms in Consumer Contracts implemented by the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 and 2000 (S.I. No. 27 of 1995 and S.I. No. 307 of 2000); Directive 94/47/EC on Timeshare Contracts implemented by the European Communities (Contracts for Time Sharing of Immovable Property – Protection of Purchasers) Regulations 1997 (S.I. No. 204 of 1997) and European Communities (Contracts for Time Sharing of Immovable Property – Protection for Purchasers) (Amendment) Regulations 2000 (S.I. 144 of 2000); Directive 97/7/EC on Distance Contracts implemented by the European Communities (Protection of Consumers in Respect of Contracts Made by Means of Distance Communications) Regulations (S.I. No. 207 of 2001); Directive 98/6/EC on product pricing implemented by the European Communities (Requirements to Indicate Product Prices) Regulations 2002 (S.I. No. 639 of 2002); Directive 98/27/EC on Injunctions for the Protection of Consumers' Interests implemented by the European Communities (Protection of Consumers' Collective Interests) Regulations 2001 (S.I. No. 449 of 2001); Directive 1999/44/EEC on Certain Aspects of Consumer Sales and Associated Guarantees implemented by the European Communities (Certain Aspects of the Sale of Consumer Goods and Associated Guarantees) Regulations 2003 (S.I. No. 11 of 2003); Directive 2000/31/EC on Electronic Commerce implemented by the Electronic Commerce Act 2000 and the European Communities (Directive 2000/31/EC) Regulations 2003 (S.I. No. of 68 of 2003); Directive 2002/65/EC on the Distance Marketing of Financial Products implemented by the European Communities (Distance Marketing of Financial Services) Regulations 2004 (S.I. No 853 of 2004); Directive 2005/29/EC on Unfair Business-to-Consumer Commercial Practices implemented by the Consumer Protection Act 2007; Directive 2008/48/EC on Consumer Credit implemented by the European Communities (Consumer Credit Agreement) Regulations 2010 (S.I. no 281 of 2010); and Directive 2008/122/EC on Time Share, yet to be transposed.

[32] European Economic Community. 1975. **Preliminary Programme for a Consumer Protection and Information Policy**. (1975 OJ C92/1).

[33] The protection of health and safety; the protection of economic interests; redress; information and education; and representation.

[34] This now forms Article 115(3) of the Treaty on the Functioning of the European Union [TFEU] and provides that 'the Commission in its proposals envisaged in para. 1 [dealing with the approximation of laws directly affecting the establishment or functioning of the Single Market] concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection'.

the Treaty of an explicit reference to consumer protection as a policy objective of the European Union.[35]

1.17. Some European Community consumer legislation, such as the Directives on Doorstep and Distance Selling, dealt with matters not previously covered by Irish domestic legislation and presented no significant difficulties of implementation or integration. Other Directives encroached more directly on domestic legislation. Directive 93/13/EEC on unfair terms in consumer contracts sought, among other things, to protect consumers 'against the abuse of power by the seller or supplier, in particular against one-sided standard contracts and the exclusion of essential rights in contracts.'[36] The guidelines set out in the Directive to assist in the assessment of the good faith element of the Directive's test of unfairness overlapped substantially with the criteria outlined in the Schedule of the 1980 Act for the purpose of determining whether a contract term exempting the implied statutory undertakings under the 1893 and 1980 Acts is fair and reasonable.[37]

1.18. The co-existence of the relevant provisions of the 1980 Act and the Regulations that give effect to Directive 93/13/EEC effectively means that there are two sets of unfair terms rules in Irish law. The provisions of the 1980 Act are broader in scope in that they cover business as well as consumer contracts, but the range of contracts they encompass is far narrower, being confined to terms which exclude the implied

[35] This now forms Article 169(1) of the TFEU and states: 'In order to promote the interests of consumers and to ensure a high level of consumer protection, the Union shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education, and to organise themselves in order to safeguard their interests.'

[36] Council Directive 93/13/EEC on Unfair Terms in Consumer Contracts, Recital 9.

[37] The Schedule to the 1980 Act states, among other things, that, in determining if a term is fair and reasonable, regard is to be had in particular to any of the following which appear to be relevant: (a) the strength of the bargaining position of the parties relative to each other, taking into account (among other things) alternative means by which the customers' requirements could have been met; (b) whether the customer received an inducement to agree to the term, or in accepting it had an opportunity of entering into a similar contract with other persons, but without having to accept a similar term; (c) whether the customer knew or ought reasonably to have known of the existence and extent of the term (having regard, among other things, to any custom of the trade and any previous course of dealing between the parties); (d) where the term excludes or restricts any relevant liability if some condition is not complied with, whether it was reasonable at the time of the contract to expect that compliance with that condition would be practicable; and (e) whether any goods involved were manufactured, processed or adapted to the special order of the customer. Recital 15 of the Directive sets out four guidelines as follows to which 'particular regard shall be had' in making an assessment of good faith: the strength of the bargaining position of the parties; whether the consumer had an inducement to agree to the term; whether the goods or services were sold or supplied to the special order of the consumer, and; the extent to which the seller or supplier has dealt fairly and equitably with the consumer whose legitimate interests he has to take into account.

statutory undertakings as to the quality of goods and services, and the title to goods and their correspondence with description and sample. Though the scope of Directive 93/13/EEC is limited to consumer contracts, it has a much wider scope of application in that it covers the non-core terms of all non-individually negotiated consumer contracts. As has been noted, the co-existence of these overlapping rules is 'a source of great complexity and not a little confusion'.[38]

1.19. The adoption of Directive 1999/44/EC on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees led to a more substantial encroachment of EU legislation into the sphere of domestic sale of goods legislation. The core provisions of the Directive are as follows:

- The seller of consumer goods must deliver goods that are in conformity with the contract in respect of compliance with description, fitness for a particular purpose made known by the consumer, fitness for the purposes for which goods of the same type are normally used, and that show the quality and performance which are normal in goods of the same types and which the consumer can reasonably expect given the nature of the goods.
- Where the seller has delivered goods which do not conform with the contract, the consumer may, in the first instance, require the seller to repair or replace them.
- Where the consumer is entitled neither to repair or replacement, or where either remedy has not been completed within a reasonable time or without significance inconvenience to the consumer, the consumer may require an appropriate reduction of price, or if the lack of conformity is not minor, have the contract rescinded.
- The seller is liable for lack of conformity of goods for a period of two years from their delivery.
- Unless proved otherwise, any lack of conformity which becomes apparent within six months of delivery is presumed to have existed at the time of delivery unless the presumption is incompatible with the nature of the goods or the lack of conformity.

The Directive further provides that commercial guarantees are legally binding under the conditions laid down in the guarantee statement and the associated advertising, and lays down information requirements to be met by such guarantees.

1.20. As this summary indicates, the Directive's scope is narrower than the Sale of Goods Acts by virtue, first, of its restriction to consumer sales and, second, of its focus on the standards of quality and fitness for purpose of goods and the remedies for

[38] Clark, R. 2008. **Contract Law in Ireland** (6th ed.) (Dublin: Thomson Round Hall): 260.

goods not in conformity with these standards. Though the Directive is silent on significant aspects of consumer sales such as title, risk, and the modalities of delivery, the matters with which it does deal are those that are of most concern to consumers and the cause of most disputes with sellers. When compared with the corresponding provisions in domestic legislation, the Directive gives additional protections in certain areas such as the reversal of the burden of proof where a lack of conformity becomes apparent within six months of delivery. In other areas, however, it offers a lower level of protection, in particular its relegation of the right to reject faulty goods to the status of a remedy of second resort and its two-year liability period for faulty goods compared with the six-year limit for contractual claims under Irish law.[39] The Directive's remedial scheme thus reflects the emphasis of civil law legal systems on the specific performance of legal rights and obligations rather than the common law emphasis on the right of the buyer to redress for breach of the contract through rejection of the goods and/or damages.

1.21. Disparities in the level of protection between the Directive and national legislation, however, did not lessen the rights of Irish or other European consumers because of the Directive's minimum harmonisation character.[40] The Regulations which give effect to the Directive in Ireland expressly state that their provisions are 'in addition to, and not in substitution for, any other enactment relating to the sale of goods' and further provide that where, the level of consumer protection afforded by a particular provision of any other enactment is greater than that afforded by the Regulations, or vice versa, the consumer can invoke the provision affording the higher level of protection to the exclusion of the other provision.[41]

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[39] The pros and cons of the two consumer protection regimes were summarised as follows by White: 'For the Irish shopper shopping in Ireland, the Directive brings some useful features. The inclusion of installation in the conformity requirements, the reversal of the burden of proof where the lack of conformity becomes apparent within six months after delivery; liability for associated advertising under guarantees, and the right of access to guarantee information are welcome improvements. Against this, the predominance of the right to reject as a remedy; the longer limitation period; the more detailed guarantee provisions; and the provisions on after-sale services under Irish law cannot be matched by the Directive.' White, F. 'The EC Directive on Certain Aspects of Consumer Sales and Associated Guarantees: One Step Forward, Two Steps Back?', op. cit., p.16. See also Bird, T.C. '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) *E.R.P.L.* 279.

[40] Article 8(2) of the Directive states that Member States 'may adopt or maintain in force more stringent provisions, compatible with the Treaty in the field covered by this Directive, to ensure a higher level of consumer protection.'

[41] European Communities (Certain Aspects of the Sale of Consumer Goods and Associated Guarantees) Regulations 2003 (S.I. No. 11 of 2003), Regulation 3.

1.22. The implementation of the Directive through free-standing Regulations, however, further aggravated the complexity and lack of coherence of Irish sales law. With very limited exceptions, the Regulations transposed the Directive more or less verbatim. While the provisions of Regulation 2 of the Regulations on conformity with the contract are superficially similar to the provisions of sections 13-15 of the Sale of Goods Acts on sale by description, implied undertakings as to quality or fitness, and sale by sample, there are significant differences, minor and not so minor, between the two. Regulation 5(2), for example, provides that goods are presumed to be in conformity with the contract if they meet the requirements set out in the Regulation; recital 8 of the Directive makes it clear that this presumption is rebuttable.[42] Goods which are in accordance with Regulation 5(2), consequently, may not be in conformity with the contract; conversely, there may be no lack of conformity even where goods are not in compliance with the requirements of the Regulation. The equivalent provisions in the 1893 Act, by contrast, are requirements which must be met in consumer sales. Similarly, while Regulation 5(2)(a) of the Directive stipulates that goods should comply with the description given 'by the seller', section 13(1) of the 1893 Act provides that, where goods are sold by description, the goods must comply with that description, and not just the description given by the seller. According to Regulation 5(2)(c) of the Regulations, the fitness for purpose of goods is assessable by reference to the purposes for which similar goods are 'normally used'. Under section 14(3) of the Act, however, goods are required to be fit for the purpose or purposes for which goods of that kind are 'commonly bought'. Goods commonly bought for a non-normal use could comply with the Act, therefore, while breaching the Regulations.

1.23. While further examples of the discrepancies between the domestic and EU enactments can be cited,[43] the starkest difference between the two regimes lies in the remedies available to the consumer for goods not in conformity with the contract. To simplify somewhat, the remedial scheme under the Sale of Goods Act 1893 for breaches of its implied quality and other conditions puts the right to reject the goods

[42] 'Whereas, in order to facilitate the application of the principle of conformity with the contract, it is useful to introduce a rebuttable presumption of conformity with the contract covering the most common situation', Directive 1999/44/EC of the European Parliament and of the Council on certain aspects of the sale of consumer goods and associated guarantees, recital 8.
[43] For a detailed account, see White, 'The EC Directive on Certain Aspects of Consumer Sales and Associated Guarantees: One Step Forward, Two Steps Back?', op. cit., pp. 6-13.

first and, where this has been lost through acceptance of the goods, offers a second-tier remedy of repair or replacement, with a restoration of the right to reject where the seller fails to provide the second-tier remedy within a reasonable time. The remedial scheme under the Regulations that implement the Directive, by contrast, prioritises the repair or replacement of goods not in conformity with the contract, and provides for termination of the contract only where the consumer is not entitled to these remedies or where the seller cannot perform them within a reasonable time or without significance inconvenience to the consumer. Each of these remedial schemes is complex in itself.[44] Having two parallel schemes compounds the complexity and confusion. Similar criticisms have been made in the United Kingdom where, despite a different method of transposition, the end result has been broadly similar.[45] As the UK's Davidson Review on the Implementation of EU legislation observed:[46]

> Although it is the case and is widely accepted that the law which was in place before the Directive was implemented is partly to blame for this complexity, there is still evidence that the way it was implemented has added to the confusion in an already complex area.

1.24. Irish sale of goods law was difficult to follow prior to the implementation of the Directive because, among other reasons, of the unsatisfactory way in which the 1980 Act amended and augmented the Act of 1893. The approach taken to the transposition of Directive 1999/44/EC aggravated this complexity. As Walley pointed out prior to the transposition:[47]

> Clarity is imperative in the law governing a consumer transaction. It sets a marker to the consumer, the retailer and the manufacturer on the relative standard required of products. It also aims at facilitating dispute resolution in an extra-judicial setting, most commonly the shop counter… Transposition of the Directive through statutory instrument will result in two overlapping systems with a different interpretation of defect, different scheme of remedies, different rules on liability and burden of proof. The resultant confusion would not alone nullify the minor improvements in the consumer's position brought about by this Directive, but would seriously impede

[44] For a discussion of the problems with the Directive's remedial framework, see Twigg-Flesner, C. & Bradgate, R. 'The EC Directive on Certain Aspects of the Sale of Consumer Goods and Associated Goods – All Talk and No Do?', (2000) *Web JCLI* (2) 1 at 15.

[45] The Directive was implemented in the UK by the Sale of Supply of Goods to Consumers Regulations 2002 [S.I. 2002/345]. The Directive's provisions on conformity with the contract were not directly transposed as these were considered to be covered adequately by the corresponding provisions of the Sale of Goods Act 1979. The Regulations inserted a new Part 5a into the 1979 Act setting out the new consumer remedies required by the Directive.

[46] Davidson Review. **Implementation of EU Legislation: Final Report**. 2006. (London: HMSO), p. 40 & pp. 38-42.

[47] Walley, A. 'The Directive on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees – Implications for Irish Consumer Sales Law'. (2000) *I.L.T.* 32-33.

the protective capacity of existing Irish law.

Nothing has occurred in the period since the implementation of the Directive to invalidate or lessen this criticism.

1.25. Directive 1999/44/EC on Consumer Sales and Guarantees will now remain in force following the failure to reach agreement on the inclusion of revised provisions on consumer sales in the proposed Consumer Rights Directive. This will provide an opportunity to put in place a clearer, more coherent, and unified set of provisions on consumer sales. The specific ways in which this should be done are discussed in subsequent parts of this Report, in particular Chapters 2, 4, 8 and 9.

1.26. Though EU legislation has mainly affected consumer sales law, Directive 2000/35/EC on Combating Late Payment in Commercial Transactions extended the influence of European law to business-to-business transactions. In particular, Article 4(1) of the Directive requires member states to provide, in conformity with applicable national provisions designated by private international law, that the seller retains title to goods until they are fully paid for if a retention of title clause has been expressly agreed between the buyer and seller before the delivery of the goods. Article 3(3) of the Directive requires member states to provide that an agreement on the date of payment or the consequences of late payment which is not line with the Directive's provisions on interest in case of late payment will either be unenforceable or will give rise to a claim to damages if it is grossly unfair to the creditor. Indicative criteria for determining whether an agreement is grossly unfair to the creditor are set out in the Directive and member states are required to ensure that adequate and effective means exist to prevent the continued use of such grossly unfair terms. While the regulation of unfair terms in commercial transactions was well established in many Member States prior to the Directive, provisions of this kind were more novel in the Irish context. The Directive was given effect by European Communities (Late Payment in Commercial Transactions) Regulations 2002.[48] It has recently been replaced by

[48] S.I. No. 388 of 2002. The Regulations do not directly transpose Article 4(1) on retention of title clauses, presumably on the ground that Irish law already made adequate provision for such clauses. Regulation 6 of the Regulations provides that a supplier who considers that the payment terms in a contract are grossly unfair by reference to the Regulations may apply to the Circuit Order or an arbitrator for an order to this effect.

Directive 2011/7/EU on Combating Late Payment in Commercial Transactions which member states are required to transpose by March 2013. The provisions of this Directive on retention of title clauses and grossly unfair payment terms are broadly similar to those of its precursor.

Other Developments 1980-2010

1.27. It would be misleading to suggest that the European Union was the sole source of change in sales law in the closing decades of the twentieth century and the first decade of the twenty-first. The growth of international trade in the decades after World War Two led to initiatives to bring greater uniformity to the regulation of international contracts of sale between businesses. While these efforts made limited progress at first, they achieved fruition in 1980 with the signature of United Nations Convention on the International Sale of Goods [CISG], commonly known as the Vienna Convention. The Convention was drawn up by experts on contract law from a number of different countries and represents an amalgam of civil law and common law approaches. It came into force in 1988 on receiving the requisite number of ratifications. To date, seventy six states, which between them account for the preponderant share of world trade, have ratified the Convention, including the US, China, Japan, and Germany. The only EU member states now outside the Convention are Ireland, the UK, Portugal and Malta.

1.28. The Vienna Convention constitutes a unified international sales law that deals with all of the main issues dealt with domestically by the Sales of Goods Acts – delivery, conformity with the contract, the passing of risk, and remedies for breach of contract by seller or buyer. Unlike Irish sale of goods legislation, it also contains detailed rules on the formation of the contract. Unless its terms are excluded by the express terms of a contract, the Convention's provisions are deemed to be incorporated in, and to supersede, domestic laws regulating contracts of sale between parties from different contracting states. This allows businesses engaged in international trade to avoid choice of law issues in favour of the greater certainty offered by common substantive rules. Though it applies on a default basis, the Convention has exerted an increasing influence on sales law in areas outside its scope. Its provisions were influential, for example, in the formulation of aspects of the EU

Directive on Consumer Sales and Guarantees.[49] The issue of Ireland's accession to the Convention is discussed in Chapter 15 of this Report.

1.29. In the United Kingdom, further significant changes were made to the Sale of Goods Act 1979 by a series of enactments passed in 1994 and 1995. The Sale and Supply of Goods Act 1994 replaced the century-old standard of 'merchantable quality' with a new criterion of 'satisfactory quality'.[50] The Act also set out a non-exhaustive list of aspects of the quality of goods – 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. Its other provisions included a stipulation that the right to reject would not apply in non-consumer cases where the breach was so slight that rejection would be unreasonable, and the introduction of a right of partial rejection in cases where a breach by the seller affected some but not all of the goods. The Sale of Goods (Amendment) Act 1994 repealed the market overt rule originally at section 22 of the 1893 Act whereby the buyer of goods sold in an open or public market according to market usage acquired a good title provided he bought them in good faith and without notice of the seller's title defect. Finally, the Sale of Goods (Amendment) Act 1995 addressed the consequences of the rule in the 1979 Act that property in goods could not pass until the goods had been ascertained for the sale of unascertained goods forming part of an identified bulk.[51] The effect of this rule had been that, where an unidentified and unascertained part of a identified and ascertained bulk was sold, no property could pass until the specific part had been physically severed from, or otherwise separately identified from, the remainder of the bulk. The 1995 Act dealt with the issue by providing that a pre-paying buyer in such cases is recognised as having a proprietary interest in the goods in the form of an undivided share in the bulk and becomes a tenant in common with the other owners. Though Irish sale of goods law remains similar to that in the UK in many respects, there are now significant divergences in key areas such as the quality standards for goods and the rules on acceptance. Given the paucity of Irish case law on the Sale of

[49] See Twigg-Flesner and Bradgate, 'The EC Directive on Certain Aspects of the Sale of Consumer Goods and Associated Goods – All Talk and No Do?', (2000) *Web JCLI* (2), op.cit., pp. 8-9.
[50] For a discussion see Howells, G. 'The Modernization of Sales Law?: The Sale and Supply of Goods Act 1994'. (1995) *L.M.C.L.Q.* 191.
[51] For a detailed discussion, see Law Commission for England and Wales. 1993. **Sale of Goods Forming Part of a Bulk** (Report No. 215).

Goods Acts, it is regrettable that the more extensive UK case law can no longer be drawn upon in these areas.[52]

1.30. Innovations in information and communications technologies, in particular the emergence of digital services, often supplied in immaterial form over the Internet, have presented challenges for the Sale of Goods Acts of a kind that could not have been envisaged in 1893 or even in 1980. These centre on the question of whether software and digital content can be classified as goods for the purposes of the Acts. The limited case law suggests that, in order to qualify as goods, software must be contained on a tangible medium. Where software or other digital content is downloaded from the Internet or transferred to the end-user by e-mail, there is no such tangible medium and these products cannot be regarded as goods for the purposes of sale of goods legislation. This leads to the plainly unsatisfactory situation that the law applicable to a transaction depends on whether the software or other content has been delivered on a physical medium such as a disk or CD (in which case it can be classified as a sale of goods and will come within the scope of the implied quality and other terms of the 1893 Act) or whether it has been delivered online (in which case it might be categorised as a supply of services or as a *sui generis* contract). This issue, and other matters relating to electronic contracts, are considered further in Chapter 2.

1.31. The foregoing account of the background to, and evolution of, the Sale of Goods Acts 1893 and 1980 highlights a number of themes that will recur in later Chapters. These include the need to distinguish between the provisions of the Acts that no longer serve a necessary or useful purpose in modern conditions and those that that remain relevant but require modification; the need to integrate the provisions of domestic and EU legislation in a more coherent and accessible way than has been done to date; and the necessity to achieve a workable balance between the partly common, partly separate requirements of the provisions governing consumer and commercial contracts of sale, while maintaining, as far as possible, a unified sales law regime.

[52] The UK case law on the 'satisfactory quality' standard and its relation to the case law on the 'merchantable quality' standard are discussed at paras. 4.39-4.40 below.

CHAPTER TWO SALE OF GOODS ACT 1893: INTERPRETATION OF TERMS AND SCOPE, SECTION 62

2.1. Like present-day United Kingdom legislation, but unlike post-Independence Irish statutes, the interpretation, or definitions, section of the Sale of Goods Act 1893 is located at the end of the Act.[53] As the definitions govern the scope of the legislation, we will, in keeping with the structure of domestic legislation, commence our survey of the 1893 Act with them. Most of the issues raised by the interpretation provisions centre on the definition, and classification, of goods. We will look first at this definition and at what it does, and does not, encompass, including the question of its application to software and digital content, a matter most definitely not within the contemplation of the Act's framers. We will then look at the Act's classification of goods as existing/future and specific/unascertained.

The Definition of 'Goods'

2.2. Section 62 defines 'goods' as follows:

> 'goods' include all chattels personal other than things in action and money[54] … The term 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.

The first part of the definition sets out the essential characteristics of goods; the second part, which we discuss briefly later, deals with the interface between goods and land. The term 'chattels personal' is made up of two sub-categories – 'things in possession' and 'things in action' - the second of which is expressly excluded from the scope of the definition of 'goods'. Things in possession include:[55]

> all things which are at once tangible, movable and visible, and of which possession can be taken, for example, animals, household articles, money, jewel, corn, garments, and everything else that can properly be put in motion and transferred from place to place.

Things in action comprise 'shares and other securities, debts, bills of exchange and other negotiable instruments, bills of lading, insurance policies, patents, copyrights and trade marks[56] and other incorporeal property'.[57] Though money is a thing in

[53] At section 62. Only the commencement provision which was repealed by the Statute Law Revision Act 1908, and the short title come after it.
[54] The first sentence of the definition also states that in Scotland 'goods' include 'all corporeal moveables except money'.
[55] Halsbury, **Laws of England** (4th ed), vol. 35, para. 1205.
[56] Though goods may clearly incorporate these intellectual property rights.

possession, it is excluded from the Act's definition of goods. Where coins or bank notes are bought and sold for qualities other than their face value as legal tender, however, these qualities may bring them within the definition of goods for the purposes of the Act.[58]

2.3. Before discussing matters to do with the substance of the definition, it is necessary to consider its form. The language in which the definition is couched is likely to strike today's readers of the Act, particularly those without a legal background, as archaic and obscure. As stated previously, one of the overall aims of our recommendations is to integrate as far as possible EU and domestic sales law. The Regulations which give effect to the EU Consumer Sales and Guarantees Directive reproduce its definition of 'consumer goods' verbatim at Regulation 2(1) as follows:[59]

> 'consumer goods' means any tangible, moveable item, other than -
> (a) goods sold by way of execution or otherwise by authority of law;
> (b) water or gas where it is not put up for sale in a limited volume or set quantity, and
> (c) electricity.

The core of this definition – the specification that goods are tangible and moveable – is similar to that under the Sale of Goods Act, but the terminology is clearer and less dated than that in the 1893 Act.[60] There is no difficulty in applying the definition to non-consumer goods as matters outside the scope of EU legislation are within the legislative discretion of member states. As the Directive is a minimum harmonisation measure, member states are also free to extend the definition provided that its substance is given effect in national legislation.

2.4. Recommendation

We recommend that the definition of 'consumer goods' in Directive 1999/44/EC as 'any tangible moveable item' should be the basis of the general definition of 'goods' in future legislation.

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[57] Guest A.G. et al. 2006. **Benjamin's Sale of Goods** (7th ed.) (London: Sweet & Maxwell), para. 1-080.
[58] Ibid., para 1-084. Bridge, **The Sale of Goods**, op. cit., para 2.20.
[59] European Communities (Certain Aspects of the Sale of Consumer Goods and Associated Guarantees) Regulations 2003 (S.I. No. 11 of 2003).
[60] Bradgate, R. & Twigg-Flesner, C. 2003. **Blackstone's Guide to Consumer Sales and Associated Guarantees** (Oxford: Oxford University Press), paras. 2.2.1.3. & 2.3.1.5.

2.5. We look next at a number of issues that have arisen under the existing definition of goods, beginning with the question of the classification of contracts for the supply of software.

Is A Contract for the Supply of Software a Sale of Goods?

2.6. Considerable uncertainty surrounds the existing law on the classification of contracts for the supply of software and digital content.[61] While there is no Irish authority in the matter, the UK Court of Appeal in *St. Alban's City and District Council v. International Computers Ltd.*[62] addressed the question of whether, in the absence of any express term, a contract for the supply of software was subject to any implied term as to quality or fitness for purpose. Sir Iain Glidewell expressed the view *obiter* that, where software was supplied on a computer disk, that physical medium was within the definition of goods for the purpose of the sale of goods legislation, while the computer program itself 'being instructions or commands telling the computer hardware what to do' was not.[63] Accordingly, when a defective program is encoded and sold or hired on a disk, the seller or hirer of the disk will be in breach of the implied terms as to quality and fitness in the Sale of Goods Act. In this case, an employee of the defendant went to the plaintiff's premises and installed the program directly into the plaintiff's computer system. In Sir Iain Glidewell's view, there was no transfer of goods and there could consequently be no statutory implication of terms as to quality or fitness for purpose. He was of the opinion however that, in the absence of an express term, such a contract would be subject to an implied term under general contract law that the program would be reasonably fit for purpose.

[61] The term 'software' is used in the broad sense to include not only computer programs, operating system software and application software, but also other digital content such as video, music and games either recorded on disk or downloaded online.

[62] [1996] All ER 481.

[63] *ibid*. at 493. In *London Borough of Southwark v IBM (UK) Ltd* [2011] EWHC 549 (TCC), Akenhead J. stated *obiter* that, in principle, software could be goods. He based this view on the fact that a CD is a physical object and is hence goods. The fact that a CD is impressed with electrons to add functions to it simply gives it a particular attribute and, just as a CD containing music is goods for the purpose of the Act and is required to be of satisfactory quality, a CD containing software is no different in this respect. Unlike the *St Alban's* judgment which distinguished between the software program and the disc carrying the program, the judgment in this case appeared not to think it necessary to distinguish or separate the two. Akenhead J's statement appears to be limited, however, to cases where software is contained on a physical medium such as a CD and to have no application to cases where software is downloaded from the Internet or supplied by e-mail or some other non-tangible medium.

Delivery of Software Online

2.7. A clear implication of the *St. Alban's* decision is that, if software is to be treated as goods, it must be contained on a tangible medium. Where software or other digital content is downloaded from the Internet or transferred to the end user by e-mail, no such tangible medium is involved. Programs delivered in this way cannot therefore be classified as 'goods' under existing sale of goods legislation. This 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).

2.8. In *Beta Computers (Europe) Ltd. v. Adobe Systems (Europe) Ltd*,[64] a Scottish case which dealt with the question of the effectiveness of a 'shrink-wrap' licence,[65] Lord Penrose considered *obiter* the question of whether software should be considered to be goods and observed:[66]

> This reasoning [that software is goods] appears to me to be unattractive, at least in the context with which this case is concerned. It appears to emphasise the role of the physical medium and to relate the transaction in the medium to sale or hire of goods. It would have the somewhat odd result that the dominant characteristic of the complex product, in terms of value or the significant interest of the parties, would be subordinated to the medium by which it was transmitted to the user in analysing the true nature and effect of the contract.

He went on to state that the supply of proprietary software for a price was a single contract *sui generis*, though it contained elements of contracts such as sales of goods and the grant of a licence. This decision is widely regarded as being commercially inconvenient and it has not been followed since.

2.9. The Regulations which give effect to the EU Consumer Sales and Guarantees Directive address a number of important aspects of sales law including provisions relating to the quality of goods supplied under consumer sales contracts, remedies for

[64] [1996] FSR 367. See also *Kingsway Hall Hotel Ltd v Red Sky IT* [2010] EWHC 965 (TCC).
[65] A 'shrink-wrap' licence refers to software supplied in a box covered with shrink-wrap film and on which the terms of the licence are readable on the box under the shrink wrap or on a sticky seal. Once the consumer opens the package, he is deemed to have accepted the contract terms.
[66] 1996 [FSR] 367 at 376.

non-conforming goods and guarantees. As noted above, the Directive and the implementing Regulations define goods 'as any tangible moveable item' and do not apply to services. The same loophole applies therefore as under the Sale of Goods Act when it comes to protecting consumers in regard to non-conforming software or digital content which is downloaded online.

Is a contract for the supply of software/digital content a supply of services?

2.10 Contracts for the supply of software tend to be very diverse and deciding when a contract is a service is often not straightforward. If software is not supplied on a physical medium, it will not be classified as a sale of goods for the purposes of the 1893 Act. However, even if software is supplied on a physical medium and can therefore be classified as goods, it may still be the case that it is not properly a sale of goods but rather a contract for work and materials (or more generally, services) rather than for goods. What is relevant here is the distinction between a contract for services which also involves goods and one that is simply for the sale of goods.[67]

Why is the Distinction Significant?

2.11. The classification of a transaction as either goods or 'work and materials' (services) is significant because the duties and liabilities of the seller of goods and the supplier of a service are different. Liability for goods under the Sale of Goods Act 1893 is strict, so that the seller is liable for defects even in the absence of negligence. In contrast, liability for the supply of services, under Part IV of the Sale of Goods and Supply of Services Act 1980, is fault-based. The supplier's duty is to supply the service with due skill, care and diligence and where materials are used there is an implied term that they will be sound and reasonably fit for the purpose for which they are required.[68] In addition, where the buyer is dealing as a consumer, any attempt to limit or exclude the implied statutory terms is void under section 55 of the 1893 Act, whereas under Part IV of the 1980 Act, a reasonable limitation or exclusion of the statutory implied terms is permitted where the purchaser of the service deals as a consumer.[69] The classification of a contract as either a contract for the sale of goods

[67] It is also possible that there may be held to be two separate contracts: one of sale and one for the supply of services. See further White, F. 2003. **Commercial Law** (Dublin: Thomson Round Hall), p. 202, and Bridge, **The Sale of Goods,** op. cit., para. 2.57.
[68] S.39 Sale of Goods and Supply of Services Act 1980.
[69] S.40 Sale of Goods and Supply of Services Act 1980.

or a contract for work and materials is also relevant in the context of the formalities required under Section 4 of the 1893 Act. Section 4(1) of the Act which derives from the Statute of Frauds (Ireland) 1695 provides that a contract for the sale of goods for the value of €12.70 or more is not enforceable in the absence of some note or memorandum in writing unless the buyer has accepted and received part of the goods or given something in earnest or payment.[70] Whether this stipulation has any real effect, however, once the contract is commenced is doubtful. There is no such requirement in relation to contracts for the supply of services.

2.12. The goods/services distinction is now well established at common law and two approaches have emerged when it comes to distinguishing between the different types of contract. In *Lee v. Griffin*,[71] it was held that the supply of dentures by a dentist was a supply of goods as, despite the employment of skilled services, the end result of the contract consisted in the production of goods. The essential test was whether anything that could be the subject matter of a sale had come into existence.[72] In *Robinson v. Graves*,[73] a contract was made with an artist for a portrait to be painted. The court held that it was a contract for the services of the artist, rather than one for the sale of goods. It was necessary in its view to look for the dominant element in the contract. If this was the end product, then it would be a contract for the sale of goods. But if the substance of the contract was that skill and labour had to be exercised for the production of the article and it was only ancillary to this that some materials would pass to the customer in tandem with the exercise of skill, it would be a contract for the supply of services. This has become known as the 'substance of the contract' approach. Benjamin is critical of this judgement on the ground that it overlooks the fact that what passes to the client is not the materials but the finished picture, of which both the work and the materials are components. *Lee v. Griffin* and *Robinson v. Graves* cannot be reconciled accordingly, and the reasoning in each case could have

[70] As discussed in Chapter 3, section 4 of the 1893 was repealed in the U.K. by the Law Reform (Enforcement of Contracts) Act 1954 and, as a consequence, the issue has ceased to be of importance in that jurisdiction.
[71] (1861) 1 B&S 272.
[72] 'If the contract be such that, when carried out, it would result in the sale of a chattel, the party cannot sue for work and labour; but if the result of the contract is that the party has done work and labour that ends in nothing that can become the subject of sale, the party cannot sue for goods sold and delivered', ibid. at 278.
[73] [1935] 1 KB 579.

been applied to the facts of the other.[74] The tests laid down in these cases have also been criticised on the basis that their application leads to uncertainty and unpredictability.[75] As a result, determining where a contract for the supply of software fits into the goods/services distinction can be difficult. The circumstances in which a transaction will be classified as a sale of goods or a supply of services will be decided in the context of the facts of the particular case.

Customised Software v. Off-the-Shelf Software

2.13. A distinction is sometimes drawn between a transaction for the supply of bespoke software made to the order of the customer and contracts involving standardised 'off-the-shelf' products. According to the 'substance of the contract test', one must look for the dominant element in the contract, namely whether this is the end product or the skill and expertise of the person providing the services. Using this test, the supply of customised or bespoke software could well be categorised as a supply of services rather than a sale of goods. On the other hand, the provision of standardised, or 'off-the-shelf' software supplied on a physical medium would be classified as the sale of goods.

2.14. In the Australian case of *Toby Construction Ltd. v. Computer Bar (Sales) Pty Ltd*.,[76] a contract for a computer system comprising computer hardware, a financial software package and a word processing package was held to be a sale of goods because there was a substantial hardware component. Rogers J dismissed the argument that the contract involved a supply of services:[77]

> Whilst representing the fruits of much research work, [the software] was in current jargon, off the shelf, in a sense, mass produced. There can be no comparison with a one-off painting. Rather is the comparison with a mass produced print of a painting.

The court suggested accordingly that mass production was a relevant factor in determining whether there was a sale of goods. However, the judgment failed to

[74] **Benjamin's Sale of Goods**, op. cit., para. 1-047 fn. 1.
[75] Ní Shúilleabháin, "Formalities of Contracting: A Cost-Benefit Analysis of Requirements that Contracts be Evidenced in Writing", (2005) *D.U.L.J* 113 at 117. Ní Shúilleabháin suggests that *Robinson v. Graves* can be explained by a desire to do justice on the merits of the case and to exclude the application of the Statute of Frauds where its application would have barred a legitimate claim.
[76] (1983) 2 NSWLR 48.
[77] ibid. p. 51.

address the question of the classification of a contract for the supply of software alone.

2.15. While the argument for treating digital content as a contract for the supply of services is strongest in the case of customised software, this assumption will not necessarily apply in every instance. One situation where a contrary view might be taken is that of the 'turn-key' contract. This type of agreement involves the complete installation of a system which is then simply handed over to the party to whom it is being supplied. As such, it is a contract purely concerned with results. It might more properly be regarded as a sale of goods rather than a supply of services even where it involves the supply of customised software.[78]

Distinction between Licences and Sales

2.16. In most transactions for the transfer of software, a licence will normally be involved and the person to whom the software is supplied will take it subject to copyright. It has been argued accordingly by some commentators that software cannot be goods within the meaning of sale of goods legislation because of the intellectual property rights involved and that, as a consequence, transactions involving software do not fall to be considered under this legislation.[79] Other commentators disagree with this view and argue that it is necessary to distinguish between the intellectual property transaction (the licensing agreement) and the goods transaction (the sale) and that the existence of intellectual property rights over a computer program does not necessarily preclude the supply of software from being treated as a sale.[80]

2.17. It has been suggested that the analogy of books, CDs and DVDs in physical form is relevant in this context. Though all are sold subject to copyright, the resultant restrictions are not seen as preventing transactions involving the transfer of such items from being sales. Others contend, however, that copyright restrictions have a different impact in the case of software than in the case of books or other products. The basic purpose for which a book or DVD is bought can be fulfilled without any need for the

[78] See further Rowland and MacDonald (2005). **Information Technology Law** (3rd ed.) (London: Cavendish Publishing), p.153.
[79] For example, see Horovitz, "Computer Software as a Good Under the Uniform Commercial Code: Taking a Byte out of the Intangibility Myth", (1985) *B.U.L. Rev* 129; Niranjan, 'A Software Transfer Agreement and its Implications for Contract, Sale of Goods and Taxation', (2009) *J.B.L.* 799.
[80] Green and Saidov, 'Software as Goods', (2007) *J.B.L.* 161.

purchaser to consider intellectual property rights. On the other hand, the use of software will entail copying it onto hardware, and in general intellectual property rights have a greater impact on the enjoyment of software.[81] Nevertheless, as Green and Saidov point out, an individual who buys a software package will generally do so in order to acquire its use value. The fact that the corresponding intellectual property rights over it are restricted will make no difference to the utility which that person derives from the transaction, and the issue of the restriction of intellectual property rights is unlikely to occur to the majority of purchasers. Purchasers who buy software to benefit from its use value should not be distinguished consequently from those who buy conventional goods with a similar purpose in mind.[82]

2.18. It can be argued, however, that in some instances the intellectual property rights so dominate the transaction as to prevent the supply of software from being regarded as a sale of goods. According to section 2(1) of the 1893 Act, a contract for the sale of goods is '...a contract by which the seller transfers or agrees to transfer the property in the goods to the buyer for a money consideration called the price.' The property in the goods refers to ownership. In the case of a software licence, the person to whom the goods are supplied will take them subject to the restrictions of copyright in the licence. The question may arise consequently as to whether those restrictions are such as to prevent the transferee from obtaining property in the goods. For example, some licensing agreements may require the return of the software in case a software user violates the agreement. Some agreements require periodic fees instead of a once-off fee. In some cases, the duration of the use of software may be limited and it may be supplied under an agreement that it will be returned when the program licence terminates. In cases such as these, the agreement may not come within the remit of sale of goods legislation. According to Green and Saidov:[83]

> The important point is that whether or not the existence of IP rights has an effect on the characterisation of the software transaction as sales is a matter of a particular case. A non-exhaustive list of relevant considerations includes such factors as whether the duration of using software is indefinite, whether payment is to be made once or periodically, and whether the licence can be revoked.

[81] See further Rowland and Macdonald, op. cit., fn.18, p.145. See also Green and Saidov, ibid.
[82] Green and Saidov, ibid., fn.20, p.176
[83] ibid. p.177.

These issues were among those considered recently by the English High Court in *London Borough of Southwark v IBM UK Ltd.*[84] The Council brought a claim for damages of £2.5m. against IBM on the ground that third-party software supplied by the company was not fit for purpose or of satisfactory quality. The court dismissed the claim and held, among other things, that the agreement between the parties was not a contract of sale within the meaning of the Sale of Goods Act 1979. In order for there to be a contract of sale under the Act there had to be a transfer of property in the goods and, as the parties had agreed that title to the software remained with the third party who had developed it, there was no such contract in this case. This conclusion was reinforced by the fact that the contract provided that all forms and copies of the software had to be destroyed on termination of the contract.

Exemption Clauses

2.19. Producers of software may be exposed to a greater degree of risk than producers of conventional goods. Unlike most manufactured products, where defects will typically be introduced at the production stage and affect only a portion of the products in question, in the case of software, if one copy is defective, it is likely that all copies will suffer from the same defects. The losses resulting from software faults, consequently, can be extensive and mainly economic in nature. The extent of claims may be hard to quantify in such cases and, as a result, difficult to insure against. For these reasons, it has been standard practice to seek to exclude and limit liability for some forms of loss in the terms of the end-user licence agreement (EULA) supplied with software.

2.20. In order to be effective, clauses that seek to exclude or limit liability must be incorporated into the contract, must be appropriately worded to cover the breach which has occurred and must be effective under applicable legislation. One practice which has developed is the supply of software subject to a 'shrink-wrap' licence. As noted earlier, the terms of the licence are printed clearly on a sticky seal, or are readable on the box which is covered with shrink-wrap film. Once the purchaser opens the packaging, they are deemed to have accepted the terms. Under UK law, several questions concerning the enforceability of such licences have been raised –

[84] [2011] EWHC 599 (TCC).

principally whether the terms have been validly incorporated into the contract - and their legal position remains unclear.[85] Increasingly common is the use of 'click-wrap' licences which require a higher level of affirmative action on the part of the user. Here, the purchaser must click an 'I accept' icon in relation to the EULA terms before being permitted to download or install software. It seems more likely that such terms would be taken to have been incorporated into the contract.[86]

2.21. Assuming such terms to have been incorporated, their validity would also have to be considered under the relevant legislation. Under the 1893 Act, the terms implied into contracts of sale by sections 12-15 of the Act can never be excluded where the buyer deals as a consumer. In non-consumer contracts, clauses seeking to exclude the implied terms will, with the exception of the implied terms as to title, not be enforceable unless shown to be fair and reasonable.[87] In the case of contracts for the supply of services, section 40 of the 1980 Act provides that the quality terms implied by section 39 may be excluded except where the recipient of the service deals as a consumer in which case it must be shown that the exclusion clause is fair and reasonable and has been specifically brought to the recipient's attention.

2.22. The enforceability of clauses excluding the implied terms in contracts for the supply of computer software will therefore depend on the classification of the contract as a sale of goods or supply of a service. In consumer contracts, these clauses would also fall to be considered under the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995. The Regulations which give effect to the Directive on Unfair Terms in Consumer Contracts[88] are applicable to goods and services alike and apply consequently whether software is sold as a tangible or intangible product. A term included in a standard form contract is generally regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract to the detriment of the

[85] In *Beta Computers v. Adobe Systems*[1996] FSR 387, the Scottish court upheld the validity of a shrink-wrap licence, emphasising the rights of the customer to return the software should the licence prove unsatisfactory. However, the validity of shrink-wrap licences has since been repeatedly questioned by academic commentators. See for example, Johnson, 'All Wrapped up? A Review of the Enforceability of Shrink-wrap and Click-wrap licences in the U.K. and the United States', (2003) *E.I. P.R* .98; Gringas, 'The Validity of Shrink-wrap licences', (1996) *IJLIT* 77.
[86] Johnson, *ibid*.
[87] S.55(4) Sale of Goods Act 1893. *Kingsway Hall Hotel Ltd v Red Sky IT* [2010] EWHC 965 (TCC).
[88] 93/13/EEC[1993] O.J. L95/29.

other party.[89] The Third Schedule to the 1995 Regulations contains an indicative list of contractual terms that may be regarded as unfair. One clause in this list which may be relevant in the context of end-user license agreements attaching to the supply of software relates to a clause that 'irrevocably binds the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract'. This could be relevant to the way the contract is formed in the cases of click-wrap or shrink-wrap transactions. In relation to the contract terms themselves, limitation of liability clauses may be considered unfair under the open norm laid down in the Regulations depending on the circumstances of the particular case.[90]

2.23. The present state of law in this area is particularly unsatisfactory in the case of business-to-business sales. If software is customised, then the supplier of defective software might successfully contend that the contract is one for services and is thus governed by the provisions of sections 39-40 of the 1980 Act as to the implied quality terms and their exclusion rather than the corresponding provisions on goods at sections 14 & 55 of the 1893 Act. As a disclaimer in a business-to-business services contract is not subject to a test of its fairness and reasonableness, the disclaimer will be effective in the context of a services contract. Irish law, moreover, does not provide the additional protections found in UK law, specifically sections 3 and 11 of the Unfair Contract Terms Act 1977.[91] We think that the present situation is anomalous and in Chapter 14 recommend changes to the existing statutory provisions.

Options for Reform

2.24. It is plainly unsatisfactory that the legal rights and remedies enjoyed by the purchasers of software of similar content vary with the medium on which the software is supplied. The difficulties that have arisen in this respect reflect the limitations of nineteenth century categories and concepts in the face of twenty-first century technologies and commercial practices. The most straightforward way of addressing the divergent legal treatment of software supplied via different media would be to regard all forms of software as goods for the purposes of sale of goods legislation. This has been done in New Zealand where the Consumer Guarantees Amendment Act

[89] Regulation 3(2) 1995.
[90] See further, Guibault, L. 'Accomodating the Needs of iConsumers: Making Sure They Get Their Money's Worth of Digital Entertainment', (2008) *J. Cons. Pol.* 409.
[91] *Kingsway Hall Hotel Ltd v Red Sky IT* [2010] EWHC 965 (TCC).

2003 substituted a new definition of goods as 'personal property of every kind (whether tangible or intangible), other than money and choses in action' in the Consumer Guarantees Act 1993.[92] The revised definition further provided that, 'to avoid doubt', goods 'includes … computer software.' While a parallel amendment of the definition of goods in the New Zealand Sale of Goods Act 1908 did not amend the main part of the definition, which remains similar to that at section 62 of the 1893 Act, it included a similar provision about computer software.[93]

2.25. Though we gave full consideration to a possible amendment to the definition of goods along these lines, it is not a change that, for a number of reasons, we can recommend. First, the inclusion of an intangible product such as computer software in the definition of goods (as choses in possession or chose in action) is open to the charge that it will cause confusion and distort the law of personal property. Intangible software does not fit within the two forms of personal property recognised by the common law. It cannot be classified as a chose in action as it has long been established that a chose in action is an intangible thing capable of being enjoyed only in the last resort by the exercise of a right of action. Clearly, software can be enjoyed and possessed without an action. Equally, it is not a chose in possession because to be possessed, a thing must be tangible.[94] The changes made to the definition of goods in New Zealand Consumer Guarantees Act have been the subject of domestic criticism on this ground:[95]

> Declaring one intangible to be goods is a momentous change to the law. The definition in the Act is inclusive and not exclusive. It could now be argued that other intangibles, so long as they are not choses in action, are goods.

Second, simply declaring software to be goods by definitional fiat would not address other issues raised by the incorporation of software within sale of goods legislation. The essence of a contract of sale consists in the transfer of property in the goods. In software transactions, however, the supplier typically does not transfer ownership of the software program to the end user but instead grants a licence for the use of the program subject to copyright conditions. Third, a number of provisions of the Sale of

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[92] No. 33 of 1993, section 3.
http://www.legislation.govt.nz./act/public/2003/0033/latest/DLM198910/html
[93] No. 35 of 2003, section 3.
http://www.legislation.govt.nz./act/public/2003/0035/latest/DLM198940.html.
[94] See Moon, 'Software: Tangible or Intangible', *Magazine of the Society for Computers and Law* June/July 2007, available at: http://www.ajpark.com/articles/2007/08/software_tangible_intangible.php
[95] Moon, 'Intangibles as Property and Goods', (2009) *NZLJ* 228.

Goods Act, such as those on the transfer of property and delivery, do not readily lend themselves to application to intangible products. Fourth, declaring software to be goods might well lead to demands for a similar status for other products. If software is classified as goods, it may well be asked why similar rights should not apply in the case of defective information such as that on websites or printed materials. The present law may be anomalous but it is not chaotic.

2.26. It is arguable in addition that further study, technical as much as legal, needs to be undertaken into the issues applicable to non-conforming software before final decisions are taken as to the substance and form of future legislative regulation in this area. It has been contended that software is qualitatively different from the traditional products which are the subject of sales transactions and that existing sales law rules are inherently unsuited to software transactions. The argument is made, for example that strict liability may not be an appropriate standard for software where the parties generally do not expect the product to function perfectly as soon as it is delivered, and where the fixing of bugs is part of the process.[96] Others counter this by arguing that the Sale of Goods legislation is sufficiently flexible to take account of these arguments and that under the implied terms, goods do not have to be perfect when delivered.[97] Although this may be accepted, the exact parameters of the supplier's responsibility and the extent to which the parties may limit or exclude liability is uncertain nevertheless, and can be held to pose another challenge to the application of sales law to software contracts.[98] The point is made by the software industry itself that the application of strict liability rules would be likely to stifle innovation in the sector.[99] These debates have led to calls to abandon the approach of trying to classify software as goods or services and to adopt a specialised instrument dealing

[96] The U.K. Court of Appeal has accepted that customised software may well carry defects on first release and will require further enhancement as defects come to light: In *Saphena Computing v. Allied Collection Agencies* [1995] FSR 616, Staughton LJ stated: '…software is not necessarily a commodity which is handed over or delivered once and for all at one time. It may well have to be tested and modified as necessary. It would not be a breach of contract at all to deliver software in the first instance with a defect in it…'(at 652) For further discussion, see Rowland and Macdonald, **Information Technology Law**, op. cit., fn.18 at pp 121-127

[97] Green and Saidov , (2007) 'Software as Goods', op. cit.

[98] See further, Atkins, 'Software asks the Questions: What's the Law's Response?' British and Irish Law, Education and Technology Association 2007 Annual Conference, available at: http://www.bileta.ac.uk/Document%20Library/1/Software%20asks%20the%20questions%20-%20what's%20the%20law's%20response.pdf ; Macdonald, 'Bugs and Breaches', (2005) *IJLIT* 118; Callaghan and O'Sullivan, 'Who Should Bear the Cost of Software Bugs?' (2005) *C.L.S.R.* 56.

[99] See 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

specifically with software transactions. Other differences between traditional sales of goods and digital services transactions have also been cited in support of the case for sector-specific digital services legislation.[100] While in conventional sales transactions, the interaction between seller and buyer typically ends as soon as the parties leave each others' presence, providers of digital content often interact with purchasers after the purchase in the form of updates, service customisation, and also through use of content control technologies and digital rights management.

2.27. In view of the absence of physical barriers to digital transactions, it is important in our view that proposals for change in the law regulating software and digital content in Ireland have close regard to possible legislative developments in the European Union and, given the close connections between the two legal systems, in the United Kingdom. The issue of protection for consumers in transactions for digital services is currently under consideration both at EU level and in the UK. Though the European Commission's 2006 Green Paper on the Review of the Consumer Acquis referred to the need to update consumer protection laws to take account of developments in digital technology and services, the subsequent proposal for a Directive on Consumer Rights did not contain any provisions of this kind.[101] The Commission decided instead, in view of the complexity of the issues, to commission a study from researchers at the University of Amsterdam on the legal framework for digital content services for consumers. This report is due to be published in 2011 and is expected to present policy recommendations on ways of guaranteeing consumers an adequate level of legal protection when purchasing digital services online. While it remains to be seen whether the European Commission will propose a new sector-specific legal instrument to deal with the range of issues facing consumers who purchase digital content, it would be inadvisable to propose far-reaching national reforms in this area pending a clear indication in the matter. In the UK, the White Paper, *A Better Deal for Consumers*, issued by the former Labour Government in July 2009 included a commitment to 'develop rules on new digital products to ensure that

[100] For example, Van Hoboken and Helberger, "Looking Ahead – Future Issues when Reflecting on the Place of the iConsumer in Consumer Law and Copyright Law" (2008) *J. Cons. Pol*. 489.
[101] European Commission. **Green Paper on the Review of the Consumer Acquis,** COM (2006) 744, para. 3.1.

the core principles of consumer protection apply'.[102] A research report on the legal issues and options for such rules was subsequently commissioned and published.[103]

2.28. Though we are not in a position for these reasons to recommend an overall solution to the legal classification of software and digital content, a number of our other recommendations will help to reduce the anomalies that currently exist where software is supplied through different media. We are recommending, in particular, that the rules governing exemption clauses for contracts of sale and contracts for services should be the same. In particular, business-to-consumer sales and services disclaimers should be void in the case of the implied statutory terms, while disclaimers in business-to-business sales and services contracts should be subject to a test of fairness and reasonableness in respect of those terms. We are recommending also that contracts for the supply of services should contain an implied term that the services are reasonably fit for any purpose, and are reasonably expected to achieve any particular result, made known by the purchaser. The formalities requirements applicable to contracts of sale under section 4 of the 1893 Act, but not to contracts for the supply of services, are also recommended for repeal. The combined effect of these changes would mean that it would matter substantially less in practical terms whether a contract was classified as being for the sale of goods or the supply of services. It is important to keep in mind also that case law suggests that quality terms not dissimilar to those applicable to goods under sale of goods legislation may be implied into software contracts by analogy at common law even if software is regarded as a contract *sui generis*.[104]

Recommendation

2.29. We do not recommend amending the definition of goods to include computer software. 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

[102] **A Better Deal for Consumers: Delivering Real Help Now and Change for the Future.** (London: HMSO) Cmnd. 7669, para. 4.2.3.
[103] Bradgate, R. September 2010. Consumer Rights in Digital Products: Research Report for the UK Department for Business, Innovation and Skills. http://www.bis.gov.uk./assets/biscore/consumer-issues/docs/c/10-1125-consumer-rights-in-digital-products
[104] *St. Albans City and District Council v. ICL*, above, fn.10.

transactions should be undertaken in advance of any further consideration of legislative regulation in this area.

Electricity, Water, and Gas

2.30. There is no clear-cut answer to the question of whether electricity, gas and water should be defined as 'goods' for the purposes of sale of goods legislation. As noted at paragraph 2.3 above, the EU Directive on Consumer Sales and Guarantees expressly excludes electricity from the definition of 'consumer goods' and includes gas and water only where sold in a limited volume or set quantity such as bottled water or cylinders of gas. The proposal for a Directive on Consumer Rights published in October 2008 contained a similar definition,[105] but the definition in the final text of the Directive which is to come into force later in 2011 does not expressly exclude electricity, gas, and water from its scope, but states instead that these 'shall be considered as goods within the meaning of this Directive where they are put up for sale in a limited volume or set quantity'.[106] Electricity has been regarded as 'goods', however, by the European Court of Justice for the purposes of the European Treaty provisions on the free movement of goods.[107]

2.31. The 1893 Act offers no specific guidance on the issue. While there is no doubt, as Benjamin observes, that energy in electrical or other form is capable of being bought and sold, there are clearly difficulties in attributing to it all the legal qualities of a physical object.[108] When we look at the Act as a whole, moreover, it is apparent that many of its provisions – such as those on delivery, examination, the transfer of property, and stoppage in transit – were conceived with physical objects in mind and cannot readily be applied to the supply of electricity or gas.[109] Though a case can more easily be made that water meets the criteria of being tangible and visible, the supply of water does not involve a finite moveable object in physical form in any

[105] European Commission. **Proposal for a Directive on Consumer Rights**. COM (2008) 614, Art. 2(4).
[106] **Proposal for a Directive of the European Parliament and of the Council on Consumer Rights**, Article 2(3). A provisional version of the final text of the Directive can be accessed at http://www.europarl.europa.eu/documents/activities/cont/201106/20110624ATT22578EN.pdf.
[107] Case C-393/92 *Almelo and Others* [1994] ECR I -1477, para. 28. Case C-158/94 *Commission v. Italy* [1997] ECR I – 5789; Case C-213/96 *Outukumpu* [1998] ECR I – 1777.
[108] **Benjamin's Sale of Goods**, op. cit., para. 1-085.
[109] As Bridge notes, however, the sale of bottled gas is clearly governed by the Act. Bridge, **The Sale of Goods**, op. cit., para. 2.15.

straightforward sense. The arrangements under which water is currently supplied to most domestic users in Ireland, moreover, are not those of a contract of sale by virtue of the absence of any money consideration, though this is set to change in the future.[110]

2.32. The limited case law on these issues is also inconclusive in the main. The supply of power (whether in the form of 'gas, electricity or any other motive power') was treated as occurring under a contract of sale in *Bentley Bros v Metcalfe*,[111] though the court was uncertain about the subject matter.[112] The question of whether the supply of electricity was a sale of goods was left open in *County of Durham Electrical Power Distribution Co v IRC*,[113] though in *East Midlands Electricity Board v Grantham*[114] electricity was held not to be goods for the purposes of companies legislation. In *Britvic Soft Drinks v Messer UK Ltd*,[115] the sale of carbon dioxide for use in the manufacture of sparkling drinks was treated as contract of sale within the meaning of the Sale of Goods Act 1979.

2.33. Part IV of the Sale of Goods and Supply of Services Act 1980 treats electricity as the supply of a service. Section 40 of the Act deals with the exclusion of the implied terms as to quality of service under section 39, with subsection 5(a) providing that nothing in section 40 shall invalidate 'a term of an agreement for the supply of electricity exempting the supplier from liability (arising otherwise than from his negligence) for an interruption, variation and defect of supply.' This attests to a clear intention on the part of the legislature to treat the supply of electricity as a service and not as goods. The Consumer Protection Act 2007, however, includes electricity, gas, and water within its definition of 'goods'.[116] For the purposes of Value-Added Tax,

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[110] In Bridge's view, the supply of running water should be regarded as a contact of sale of goods, especially if it is metered, the quantity recorded, and a unit price paid, ibid. para. 2.15.
[111] [1906] 2 KB 548 at 552-53.
[112] Bridge, **The Sale of Goods**, op. cit, para 2.15.
[113] [1909] 2 K.B. 604.
[114] [1980] C.L.Y. 271.
[115] [2002] EWCA Civ 548. Sealy observed of this case that, though goods as 'chattels personal' are defined as 'things at once tangible, movable and visible', there has never been any doubt that 'gases (and even air itself, e.g. as compressed air) are 'goods' within the Sale of Goods Act, despite lacking two of these three attributes.' Sealy, L.S. 'Sale of goods – reliance on a third party's skill and judgement' (2003) *C.L.J.* 260.
[116] Consumer Protection Act 2007 (No. 19/207), s. 2(1). As there are no differences in the treatment of goods and services under the Act, no practical consequences follow from the classification of electricity, gas and water as goods.

the Revenue Commissioners also treat the provision of electricity, gas and any form of power, heat, refrigeration or ventilation as a supply of goods.[117] With the partial exception of New Zealand, no other jurisdiction whose sales law is based on the 1893 Act has amended the definition of goods in its sale of goods legislation to include electricity, gas and water.[118] Despite the replacement of, and a succession of amendments to, the 1893 Act in the UK, the definition of 'goods' in the UK Sale of Goods Act 1979 remains the same as that in the 1893 Act. The UN Convention on the International Sale of Goods also excludes electricity from its scope.[119]

2.34. As stated in the preceding discussion of software and as elaborated in subsequent Chapters, we have sought where possible in our recommendations to minimise the differences in the legal treatment of contracts of sale and contracts for the supply of services. In the light of these changes, it would be materially less consequential whether electricity, gas and water were defined as goods or services. On balance, we think that the arguments for defining them as services are somewhat more persuasive. As noted in the discussion of software, we have concerns in particular about the implications of declaring intangible products to be goods for the coherence of the definition and the wider law of personal property. While it might be possible to apply the statutory quality standard applicable to goods to electricity and other utilities, it would present significant practical difficulties.[120]

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[117] Revenue Commissioners. 2008. **Guide to VAT** (11th edition), para. 3.1. The Guide equates 'supply' with 'sale' and states that 'a taxable supply of goods means the normal transfer of ownership by one person to another'.

[118] The definition of 'goods' in the New Zealand Consumer Guarantees Act 1993 was amended by the Consumer Guarantee Amendment Act 2003 to include electricity, gas, water and computer sofware. A similar change was made to the New Zealand Fair Trading Act 1986. According to one account, the amendment was made in response to a court decision which had held electricity to be neither goods nor services and was aimed in large part at addressing consumer issues that had arisen from electricity deregulation. Cox, N. 'The Definitions of Goods and Services in Consumer Protection Acts – Some Recent Changes', (2003) *NZLJ* 281. Though the definition of goods in the New Zealand Sale of Goods Act 1908 was also amended in 2003 to include computer software in 2003, it was not similarly extended to electricity, gas and water. There have been calls subsequently to amend the Sale of Goods Act in the interests of consistency with other statutes. Moon, K. 'Intangibles as property and goods', [2009] *NZLJ* 281.

[119] United Nations Convention on Contracts for the International Sale of Goods, Art. 2(f).

[120] Howells, G. & Twigg-Flesner, C. (eds). 2010. **Consolidation and Simplification of UK Consumer Law** (Department for Business, Innovations & Skills), paras. 3.124-3.128.

2.35. Recommendation

We recommend 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.

Human Body Parts and Remains

2.36. Like digital content, this is an area where scientific advances are presenting new challenges to the law.[121] The main matters at issue are anterior to the question of whether transactions involving parts of the human body are contracts of sale, but concern rather whether human remains and parts of the body can be owned and whether there are, or should be, specific statutory prohibitions on commercial transactions involving human remains and organs. In the case of human remains, the law has traditionally recognised no right of property in a dead body or any part thereof with the result that these are not ordinarily regarded as 'goods' that can be bought or sold.[122] In an Australian case, *Doodeward v Spence*,[123] which has been followed in the UK,[124] parts of a corpse were regarded, however, as capable of constituting property because they had undergone sufficient transformation by virtue of the lawful application of human skill such as embalming.[125] The *Doodeward* exception has been enshrined in the UK Human Tissue Act 2004 which exempts from the Act's general prohibition on commercial dealing in human organs and tissue material that is the subject of property because of an application of skill.

2.37. The law relating to tissue and organs taken from the living has seen far-reaching developments in recent decades.[126] While earlier cases tended to centre on bodily

[121] The issues that have arisen to date concern organs and tissue taken from the dead or the living. Recent advances in regenerative medicine, however, have seen new bladders grown from cells cultured in a laboratory and the development of prototype 'bioprinters' that may prove capable at some point of 'manufacturing' human tissue and organs. 'Printing body parts', *The Economist* 20 February 2010.
[122] Creagh, C. 'Property in the dead body' (2000) *Bar Review* 301. As Bridge observes, however, it is 'a commonplace that human skeletons are owned by medical students and bought and sold accordingly'. Human hair has also 'been bought and sold without controversy' for centuries. Bridge, **The Sale of Goods**, op. cit., para. 2.16
[123] 6 CLR 406, 413-14.
[124] *Dobson v Northern Tyneside Health Authority* [1996] 4 All ER 474.
[125] In a more recent UK case, it was held that a hospital acquired proprietary and possessory rights to organs removed from a dead baby's body following a post-mortem on the grounds that the work and skill of the pathologists in removing the organs and preparing the blocks and slides for histological examination came within the *Doodeward* exception. *Re Organ Retention Group Litigation* [2004] EWHC 644 QB, para. 257.
[126] Creagh, C. 'Property in the living body', (2001) Bar Review 209.

products, notably blood,[127] the focus of more recent attention has been on organs for use in transplantation and on genetic material. A US case, *Moore v Regents of the University of California*,[128] found that a patient had no property rights in parts of his body - spleen and genetic materials – following their removal in surgery. In a subsequent American case, *Colavito v New York Organ Donor Network*,[129] the court was more equivocal on the question and suggested that cases of lost or misdirected organs could involve deprivation that would justify a property claim. In the UK, the recent landmark judgement by the Court of Appeal in *Yearworth & Others v North Bristol NHS Trust*[130] rejected the *Doodeward* exception as the only basis for the existence of property in the living body. The case concerned semen taken from cancer patients, with a view to later use, that became irreversibly damaged because of deficiencies in the hospital's storage system. The court found that the claimants – though no other person, human or corporate - had ownership of the sperm and that there had been a bailment of it to the hospital capable of giving rise to liability. Though the bailment arrangements were not commercial, they were closely akin to contracts and came within the established principles on breach of contract. The significance of the *Yearworth* judgement lies in the fact that it moved beyond the *Doodeward* exception as the only basis of property in human tissue, and that the court's reasoning is potentially applicable to other cases involving gametes and possibly embryos, though not necessarily other human tissue.[131]

2.38. Even this brief discussion is sufficient to establish the complexity and sensitivity of the matters at issue. Though Ireland has yet to enact legislation on the model of the UK Human Tissue Act 2004, legislation along these lines has been on the policy agenda since the publication in 2006 of the Madden Report on Post Mortem Practice

[127] One US case , *Perlmutter v Beth David Hospital* 123 N.E. (2d) 792 (1955), held that the supply of blood for a transfusion was a contract for the provision of services to which the supply of blood was incidental, while a later US case, *Belle Bonfils Memorial Blood Bank v Hansen* 579 P (2d) 1158 (1978), held the supply of blood by a blood bank to be a sale of goods. A Canadian case, *Pitman Estate v Bain* (1994) 112 DLR (4th) 257, found that, because a patient in receipt of blood was not charged, there was no money consideration and hence no sale of goods. In another Canadian case, *ter Neuzen v Korn* (1993) 103 DLR (4th) 473, artificial insemination using HIV-infected semen was held not to be a sale of goods, and the doctor who supplied it was found not to owe the recipient the strict warranty obligations of a contract of sale.
[128] 51 Cal. 3rd 120 (1990).
[129] No. 2 438 F. 3d. 214 (2006).
[130] [2009] EWCA Civ 37.
[131] Quigley, M. 'Property: the future of human tissue?', (2009) *Med. L. Rev.* 465.

and Procedures.[132] In 2009, the Department of Health and Children undertook a public consultation on the General Scheme of the Human Tissue Bill 2009.[133] Its provisions included a prohibition on the commercialisation of organs and tissues for transplantation. Though the Bill itself has yet to be published, it is understood to be in preparation. These issues are more appropriate to special legislation of this kind than to sale of goods legislation, and we make no recommendations in the matter accordingly.

Sale of Goods and Sale of Interests in Land

2.39. As noted earlier, the second part of the definition of goods at section 62(1) of the 1893 Act deals with the demarcation between the sale of goods and the sale of land or interests in land. Its purpose, and the issues to which it has given rise, are consequently of a more conventional character than many of the questions raised by the first part of the definition. One of the main reasons for the inclusion of an interpretation provision which sought to differentiate between the two types of contract lay in the different formalities requirements applicable to sale and land contracts under the Statute of Frauds.[134]

2.40. The second part of the 1893 Act's definition of goods provides that the term 'goods' includes

- 'emblements' – annual crops produced by agricultural labour such as corn, grain and labour, sometimes referred to as *fructus industriales* [135].

- 'industrial growing crops' – according to Benjamin**,** this term was added to the definition when the Act was extended to Scotland, though it does not appear to be an expression in regular use in Scots law. While Benjamin and White consider that it may refer to crops produced by agricultural labour which take

[132] The Report concluded, among other recommendations, that 'human tissue legislation is urgently required to deal with issues relating to the removal, storage and uses of human biological material from the living and the deceased.' **Report of Dr. Deirdre Madden on Post Mortem Practice and Procedures. 2006**. (Dublin: Stationery Office), para. 1.9. The only current legislation in this area, the European Communities (Quality and Safety of Human Tissues and Cells) 2006 (S.I. No. 158 of 2006) does not deal with property in, or the sale of, human tissue.

[133] http://www.dohc.ie/consultations/closed/human_tissue_bill/draft_proposals.pdf?direct.

[134] While the requirement that the agreement itself, or some note or memorandum thereof, be in writing was common to both types of transaction, section 13 of the Statute of Frauds 1695 on contracts for the sale of 'goods, wares and merchandizes', unlike section 2 on contracts for the sale of 'lands, tenements or hereditaments or any interest in or concerning them', exempted contracts under £10, and its requirements could be met by proof of part acceptance, part payment or the giving of an earnest. The substance of section 13 was incorporated in section 4 of the 1893 Act, and the provision itself was later repealed by the Statute Law Revision (Pre-Union Irish Statutes) Act 1962.

[135] **Goode on Commercial Law**, op. cit., p. 213 fn. 45.

more than a year to mature, Bridge suggests that it appears to serve as the Scots equivalent of *fructus industriales*.[136]

- 'things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale'. This is the broadest category of this part of the definition and can include crops that are the natural growth of the soil (*fructus naturales* as opposed to *fructus industriales*) such as grass and, in many cases, fruit and timber, as well as buildings, fixtures, minerals and soil.[137]

Though the definition declares things attached to or forming part of land to be 'goods' if they are agreed to be severed before sale or under the contract of sale, this has by no means resolved all of the issues surrounding the two types of contract. In *Saunders v Pilcher*,[138] a cherry orchard was sold along with its crop of cherries that was almost ready to be picked. The Court of Appeal rejected the buyer's contention that the sale of cherries as goods was severable from the conveyance of the land. While the Court recognised that the 1893 Act had extended the scope of 'goods', cherries as *fructus naturales* were part of the land. In Bridge's view, there seems no reason to doubt consequently that crops and natural produce might be the subject of both a sale of land and a sale of goods.[139] It is unclear similarly if a contract for the sale of minerals to be extracted by the buyer is to be regarded as a contract for the sale of goods. In *Morgan v Russell and Sons*,[140] a contract for the sale of cinders and slag which were to be removed by the buyer was held not to be a sale of goods under the 1893 Act.

2.41. The distinction between contracts for the sale of goods and contracts for the sale of land or an interest in land will remain important. The substance of the requirement that land contracts be evidenced in writing has been re-enacted in the Land and Conveyancing Law Reform Act 2009.[141] The Act's retention of the formalities requirement reflects the fact that, as a recent review of the issue put it, 'notwithstanding all the difficulties which may be caused by a requirement of written

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[136] **Benjamin's Sale of Goods**, op. cit., para. 1-093 & fn. 99. White, **Commercial Law**, op. cit., p. 195; Bridge, **The Sale of Goods**, op. cit., para. 2.09.
[137] **Benjamin's Sale of Goods**, op. cit., para. 1-100.
[138] [1949] 2 All E.R. 1097.
[139] Bridge, op. cit., **The Sale of Goods**, para. 2.10.
[140] [1909] 1 K.B. 357.
[141] No. 27 of 2009, section 51. The Act repealed section 2 of the Statute of Frauds (Ireland) 1695 insofar as it applied to contracts for the sale of land or an interest in land. It followed a recommendation to this effect in the Law Reform Commission's 2005 Report on Reform and Modernisation of Land Law and Conveyancing Law.

evidence, there is a general consensus that such a requirement is necessary in the case of contracts of sale of land.'[142] As noted in Chapter 3 below, the consensus in the case of contracts of sale of goods, however, is that a formalities requirement of this kind is unnecessary and burdensome. We consider consequently that there remains a need for a modified provision along the lines of that in the second part of the current definition of goods.

2.42. Recommendation

We recommend that that part of the definition of 'goods' at section 62(1) 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. The term 'emblements' should be replaced by more modern language which clarifies that it does not apply only to annual crops produced by cultivation. This would permit the deletion of the confusing and probably superfluous reference to 'industrial growing crops'.

2.43. We gave some consideration to the possibility of a more substantial recasting of this part of the definition of goods. Again, the only jurisdiction to have done so to date is New Zealand which has amended the definition at section 2(1) of the Consumer Guarantees Act 1993, though not in its Sale of Goods Act 1908. The relevant part of the revised New Zealand definition states that goods include:

> (b) (i) goods attached to, or incorporated in, any real or personal property:..
> (iv) minerals, trees, and crops, whether on, under, or attached to land or not:
>
> (c) despite paragraph (b)(i) (goods) does not include a whole building, or part of a whole building, attached to land unless the building is a structure that is easily removable and is not designed for residential accommodation.

While this definition has interesting features, its provisions on buildings or fixtures attached to, or incorporated in real property, represent a considerable departure from the existing provision in Irish law and may give rise to as many, if not more problems, as they resolve. The adoption of substantially altered wording along these lines would also have the undesirable effect of invalidating some of the existing case law. On the other hand, there are advantages in providing a degree of statutory clarity on questions

[142] Ní Shúilleabháin, M. 'Formalities of contracting: a cost-benefit analysis of requirements that contracts be evidenced in writing', op. cit. at 133-36.

such as whether portakabins are goods when intended for use on a construction site, while temporary accommodation units would not be so considered. As these issues have implications that extend beyond our terms of reference, however, we make no positive recommendation on the adoption of a provision along the lines of paragraph (d) of definition in the New Zealand Act. Submissions should be invited, however, as to whether the simplification effected by paragraph (b) of the definition in the New Zealand Act should be considered for adoption in future sale of goods legislation, particularly as it is not exhaustive in nature and is a common form of definition in Irish law.

Undivided Shares in Goods

2.44. Section 1(1) of the 1893 Act provides that there may be a contract of sale between one part owner and another. In Benjamin's view, this subsection was probably inserted in order to remove any doubt on the issue, it being taken for granted that the owner of a part interest in goods could sell it to any person other than a co-owner.[143] In their 1993 report on Sale of Goods Forming Part of a Bulk, the Law Commissions for England and Wales and the Scottish Law Commission concluded that there was an 'element of doubt' as to whether an undivided share in goods, expressed as a fraction such as a third or a half, qualified as 'goods' for the purposes of the Sale of Goods of Act 1979.[144] There was a possibility in the Commissions' view that a sale of a part share in goods could be regarded as a thing in action or incorporeal property. They recommended accordingly that the definition of goods in the Act should be amended to include an undivided share in goods. The UK Sale of Goods (Amendment) Act 1995 duly extended the definition of goods at section 61(1) of the 1979 Act by adding the words 'and includes an undivided share in goods'. This has removed any doubt that a sale of an undivided share in goods (such as a half interest in a horse), whether by a sole or part owner, is a sale of goods within the meaning of the Act. In making their recommendation, the Law Commissions acknowledged that some of the Act's provisions – such as the implied undertaking as to quiet possession and the rules on delivery – were not readily applicable to an undivided share in goods by virtue of the fact that such a share is incapable of being

[143] Benjamin, **The Sale of Goods**, op. cit., para. 1-081.
[144] The Law Commission and the Scottish Law Commission. 1993. **Sale of Goods Forming Part of a Bulk** (Law Com. No. 215 and Scot. Law Com. No. 145), para. 5.3

physically possessed or delivered separately from the goods as a whole. In the Law Commissions' view, however, any resultant problems were not sufficiently serious to merit a complicated set of special statutory rules.[145] Though the doubt that exists on the issue is a minor one, it is desirable in our view that it be removed. A similar amendment to the definition of 'specific goods' is proposed in the next section of this Chapter.

2.45. Recommendation

We recommend that the definition of 'goods' in future legislation should include an undivided share in goods.

Classes of Goods

2.46. The 1893 Act contains two classifications of goods: first, existing and future goods; and second, specific and unascertained goods. We will look at each of these classifications in turn, the issues they raise, and their inter-relation.

Existing and Future Goods

2.47. Section 5(1) of the 1893 Act states that the goods which form the subject of a contract of sale may be either:

1) 'existing goods owned or possessed by the seller', or

2) 'goods to be manufactured or acquired by the seller after the making of the contract of sale … called 'future goods'.

Section 62 of the Act contains a definition of future goods – 'goods to be manufactured or acquired after the making of the contract of sale' – which replicates that in section 5(1), but does not contain a similar reiteration of the definition of existing goods. [146]

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[145] In the Commissions' view, the Act's provisions based on possession or physical delivery 'will simply disapply themselves and the intentions of the parties will prevail', ibid. para. 5.5.

[146] Benjamin suggests a more elaborate classification of future goods as follows: (a) goods to be manufactured by the seller, whether from materials which are now in existence or not; (b) goods which are to become or may become, the property (or come into possession) of the seller, whether by purchase, gift, succession, occupation (eg. wild animals) or otherwise; (c) goods expected to come into existence as the property of the seller in the ordinary course of nature, eg. the young to be born of his livestock, or the milk to be produced by his cows; (iv) things attached to or forming part of the land (whether belonging to the seller or not) which are to be severed in the future, e.g. minerals to be won, timber to be cut, fixtures to be detached; and (e) crops in the category *fructus industriales* to be grown by the seller in the future. **Benjamin's Sale of Goods**, op.cit., para.1-102.

2.48. Bridge observes that the distinction between 'existing' and 'future' goods 'comprises the universe of goods: all goods are either one or the other but may not be both'.[147] Goods which are the property, or are in the possession, of a person other than the seller at the time the contract is made and have yet to be acquired by the latter, however, are existing goods in the ordinary sense of the term but are 'future goods' for the purposes of the Act. The distinction between the two types of goods is relevant, first, to the nature of the contract of sale. While both types of goods can form the subject matter of a sales contract, a contract for the sale of future goods operates as an agreement to sell the goods – that is one in which the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled. The classification of goods as 'existing' or 'future' is relevant, second, to one of the rules at section 18 of the Act for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer.

Specific and Unascertained Goods

2.49. The Act's second classification, that between 'specific' and 'unascertained' goods, is both more complex and more consequential. Section 62 defines 'specific goods' as 'goods identified and agreed upon at the time a contract of sale is made' – for example, a particular car with a specified registration number and not a car identified by reference to a generic marque. The critical attribute of specific goods is that only the individual item which has been identified and agreed upon will fulfil the contract. Alternative items, even if similar, will not suffice for this purpose. Many everyday consumer transactions involve specific goods. As Goode observes:[148]

> …if I go into a shop and buy two pounds of potatoes which I take away with me, or if I try on and purchase a suit which I arrange to be sent to my home, the goods are in each case specific goods, for the precise articles I am buying are known at the time I agree to buy and do not depend on any later selection, made either by the shopkeeper or by me from among the former's stock.

2.50. The Sale of Goods Act does not define 'unascertained goods' but, as Benjamin notes, this must by inference mean goods not identified and agreed upon at the time

[147] Bridge, **The Sale of Goods**, op. cit., para. 2.42.
[148] **Goode on Commercial Law**, op. cit., p. 228.

the contract is made.[149] The term applies therefore to goods that have not been individually identified and distinguished, but have been defined only by description. As with existing and future goods, the distinction between specific and unascertained is similarly intended to exhaust the universe of goods at the contract date. It has been suggested that the category of unascertained goods comprises two distinct sub-divisions: first, wholly unascertained goods for which the parties have not designated a source of supply in the contract and, second, what are referred to as 'quasi-specific' goods because of an agreement between the parties that they will be supplied from an identified source – for example, 100 tons of wheat from a larger consignment on a particular ship.[150] For the purposes of the Act, however, such quasi-specific goods remain unascertained.[151]

2.51. Finally, the Act refers in section 16 to unascertained goods becoming 'ascertained' and in sections 17(1) and 52 uses the expression 'specific or ascertained goods'. Though 'ascertained' is not defined in the Act, it clearly means goods that were initially unascertained but which have subsequently become identified to the contract. For both of the Act's classifications of goods – existing/future and specific/unascertained – the time at which the nature of the goods is determined is the time at which the contract is made. As discussed in subsequent Chapters, the distinctions between specific, unascertained and ascertained goods are relevant to the Act's provisions on the perishing of contract goods, specific performance and, in particular, the passing of property.[152]

Issues Arising

2.52. The Act's two-fold classification of goods is not a model of clarity, particularly in regard to the overlap between the binary categories. It follows from the respective

[149] **Benjamin's Sale of Goods**, op. cit., para. 1-113.
[150] White, **Commercial Law**, op. cit., p. 196. Benjamin identifies three main categories of unascertained goods as follows: (a) generic goods or goods referred to only as being of a particular kind of description such as 100 tons of barley or a new Ford Fiesta car; (b) goods not yet in existence which have to be manufactured or produced by the seller or to accrue to him in some other way; and (c) a part as yet unidentified of a specified bulk such as 100 tons out of the 1,000 tons stored in the seller's warehouse., ibid. para 1-117.
[151] In *R v Wait* [1927] 1 Ch 606, it was held that that a sale of 5,000 tons of wheat out of a cargo of 10,000 tons on a particular ship was not a sale of specific or ascertained goods within the meaning of section 52 of the Act on specific performance.
[152] Prior to an amendment made by the 1980 Act, breach of contract for specific goods the property in which had passed to the buyer could only be treated as a breach of warranty and, in the absence of a contract term to this effect, not as a ground for rejecting the goods.

definitions that existing goods can be specific or unascertained and that future goods can be unascertained. While there is some dispute as to whether future goods can be specific, the broad, though not the universal, view is that, while this is not ordinarily the case, it can be so in some circumstances.[153] Bridge is of the view that the Act's two categories amount to a case of 'statutory over-classification', and argues that:[154]

> a modern Sale of Goods Act does not need to have a conceptual distinction between specific and unascertained goods (though it does need to have a notion of goods that have not yet been ascertained). Even less does it need to have a distinction between future and existing goods, which, with little forcing, could be accommodated within the distinction between specific and unascertained goods if this latter distinction were thought to be worth preserving.

2.53. We have some sympathy with this view but have decided on balance against recommending any substantial change in either of the Act's classifications. While it is may well be correct to say that a present-day Sale of Goods Act would not adopt these classifications in their existing form, they are an established part of the architecture of the existing Act and, for the most part, present no significant problems. No demand for their repeal or reform has been made to us from any quarter nor has there any been such repeal or reform in any of the other jurisdictions whose sales law remains based on the 1893 Act. While we do not recommend any fundamental changes to these provisions, a number of minor changes could bring greater clarity to them. It would be helpful to make it clear in the Act that existing goods can be either specific or unascertained and that future goods can be specific. The inclusion of a definition of unascertained goods would also be of benefit.

2.54. As noted at paragraph 2.44 above, the UK Sale of Goods (Amendment) Act 1995 extended the definition of goods by adding the words 'and includes an undivided share in goods' in order to clarify that an undivided share in goods (e.g. a half share in a horse or a third share in a boat) qualifies as 'goods' for the purposes of

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[153] Benjamin, Bridge, Goode and White are of the view that, while future goods are usually unascertained, they can be specific. **Benjamin's Sale of Goods**, op. cit, paras. 1-101 & 1-114; Bridge, **The Sale of Goods**, op. cit., para. 2.44; **Goode on Commercial Law**, op. cit., p. 250; White, **Commercial Law**, op. cit., p. 196. The last-named source cites the example of a contract to purchase the first car off a particular production line at a particular plant at a specified future date. Atiyah, however, states that it 'is probably safe to say that future goods can never be specific goods within the meaning of the Act', though he adds that, in cases under section 7 of the Act, 'future goods, if sufficiently identified, may be specific goods in the limited sense that their destruction may frustrate the contract.' Atiyah, **The Sale of Goods**, op. cit, pp. 80-81.

[154] Bridge, 'Do we need a new Sale of Goods Act?', op. cit., paras. 2.13-2.14.

the parent Act. The 1995 Act made a corresponding amendment to the definition of 'specific goods' by means of the addition of the words 'and includes an undivided share, specified as a fraction or percentage, of goods identified and agreed on as aforesaid.' The Law Commission for England and Wales and the Scottish Law Commission, on whose joint recommendation the amendment was made, expressed the rationale for the change as follows:[155]

> … where there is a sale of an undivided share, specified as a fraction of specific goods (such as a horse, or greyhound, or item of furniture, or the cargo of a named ship) it would be inconvenient if the share were to be regarded as unascertained goods. That would mean that, in the case of property which could not be divided without losing its identity (such as a living horse), property in the share could never pass.

The Commissions recommended accordingly that the Sale of Goods Act should provide that an undivided share, specified as a fraction, in specific goods is itself regarded as specific goods.

2.55. Recommendations

Future legislation should include a definition of 'unascertained goods' and should also clarify the relations between the categories of future/existing and specific/unascertained goods.

The definition of 'specific goods' in future legislation should be extended to provide that an undivided share in specific goods which is specified as a fraction is itself specific goods.

[155] The Law Commission and the Scottish Law Commission. 1993. **Sale of Goods Forming Part a Bulk** . 1993 (Law. Com No. 215, Scot. Law Com. No. 145), para. 5.4.

CHAPTER THREE SALE OF GOODS ACT 1893: FORMATION OF THE CONTRACT, SECTIONS 1-9 & 58

3.1. Part I of the Sale of Goods Act 1893 comprises sections 1-15 and is titled 'Formation of the Contract'. As has been observed, however, these sections of the Act do not deal with the formation of the contract in the sense in which these words are normally used.[156] The only section of the Act that deals with contract formation proper is in fact section 58 on auction sales which is located in Part VI. This Chapter of the Report deals with sections 1-9 of the Act on the contract of sale (sections 1-2); formalities of the contract (sections 3-4); subject matter of the contract (sections 5-7); the price (sections 8-9); and, in view of the fact that the provision would be more appropriately placed in Part I of the Act, auction sales (section 58). The final section of the Chapter considers the case for including substantive provisions on contract formation in future sale of goods legislation. Chapter 4 of the Report considers the remaining sections of Part I of the 1893 Act on conditions and warranties (sections 11 & 13-15) other than section 12 which is discussed in Chapter 7.

I SECTIONS 1-9 SALE OF GOODS ACT 1893
CONTRACT OF SALE

Section 1 Sale and agreement to sell

(1) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in the goods to a buyer for a money consideration, called the price. There may be a contract of sale between one part owner and another.

(2) A contract of sale may be absolute or conditional

(3) Where under a contract of sale the property in the goods is transferred from the seller to the buyer the contract is called a sale; but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled the contract is called an agreement to sell.

(4) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred.

3.2. Section 1 specifies the essential characteristics of the contract of sale and, in so doing, differentiates it from other transactions. It should be read in conjunction with section 62(1) of the Act which defines the main elements of Section 1 (other than price which is defined in section 1) – contract of sale, sale, buyer, seller, property, and goods. Per section 62(1), 'contract of sale includes 'an agreement to sell as well as a sale'. A sale proper is thus both a contract and a conveyance under which the property

[156] Atiyah, **The Sale of Goods,** op. cit., p.34.

in the goods is transferred to the buyer, while an agreement to sell is only a contract.[157] Section 62(1) further provides that a sale 'includes a bargain and a sale as well as a sale and delivery', thus reinforcing the point made in section 1 and elsewhere in the Act that delivery is not an essential element of a contract of sale and that the property in the goods may pass prior to delivery to the buyer.

3.3. The specification of the characteristics of the contract of sale in section 1 of the 1893 Act serves to mark off this type of transaction from a number of related transactions:

- A sale is distinguished from a bailment,[158] such as a contract of hire, by virtue of the fact that property in the goods is not intended to pass in the latter transaction.
- A sale is distinguished from a hire purchase transaction – for example, a finance lease - which is a form of bailment with an option, but not an obligation, to purchase the goods. There is only a contract of sale when the option to purchase is exercised and property in the goods passes.
- A sale is distinguished from a gift which constitutes a transfer of property without consideration.
- A sale is distinguished for an exchange of goods with no specification of a money price by virtue of the absence of a money consideration in the latter transaction.[159]
- A contract of sale of goods is distinguished from a contract for the supply of services by reason of the subject-matter of the contract.

These non-sale transactions, and the law regulating them, are considered further in Chapter 14.

Issues Arising

3.4. Section 1 of the Act raises no major issues of itself and has not been subject to any substantive amendment in the successive revisions of the 1893 and 1979 Acts in

[157] **Benjamin's Sale of Goods**, op. cit., para. 1-028.
[158] A bailment is defined by Benjamin as 'a delivery of a thing by one person to another for a limited purpose upon the terms that the bailee will return the same thing to the bailor, or deliver it to someone in accordance with the bailor's instructions, after the purpose has been fulfilled', ibid. para. 1-057.
[159] A part-exchange transaction in which an agreed price is paid partly in money and partly in other goods, however, is a sale. *Aldridge v. Johnson* (1857) 7 E &B 885; *Clarke v. Reilly & Sons* [1962] 96 I.L.T.R. 96 and *Flynn v. Mackin & Mahon* [1974] I.R. 101.

the United Kingdom. Its interaction with the definition of contract of sale in EU legislation, particularly the recently agreed Directive on Consumer Rights, is somewhat more problematical however. Directive 1999/44/EC on Consumer Sales and Guarantees does not contain a definition of sales contract. The scope of such contracts is broader than under Irish legislation, however, by virtue of the provision at Article 2(5) of the Directive that any lack of conformity of goods with the contract resulting from their incorrect installation is deemed to be equivalent to lack of conformity of the goods if installation forms part of the contract of sale of goods. The Directive on Consumer Rights which is due to come into force later in 2011 goes further, however, and includes the following definition of 'sales contract':[160]

> any contract under which the trader transfers or undertakes to transfer the ownership of goods to the consumer and the consumer pays or undertakes to pay the price, including any contract having as its object both goods and services.

In treating mixed-purpose contracts as contracts of sale, this definition is at odds with the approach of the common law to the distinction between a sale of goods and a supply of services. While, as discussed at paragraph 2.12 above, the courts have applied different and not always consistent tests in seeking to distinguish the two types of transaction, the prevailing tendency appears now to involve an assessment of the substance of the contract with a view to determining which element of the contract is predominant. Where the exercise of skill and labour is primary and the supply of materials secondary, the contract will be regarded as one for the provision of a service; where the supply of a finished product by way of sale is primary, the contract will be treated as a sale of goods.[161]

3.5. When the Directive on Consumer Rights comes into force, Ireland and other member states will have to implement its definition of 'sales contract' by the end of the stipulated transposition period. It will be within our legislative discretion, however, whether or not to apply this definition to commercial contracts of sale. As discussed further in Chapter 14, the practical significance of the distinction between sales and related contracts has narrowed somewhat in recent decades as the implied terms governing contracts of sale have been applied to consumer contracts such as hire and hire purchase, though not to commercial hire-purchase and hire

[160] **Proposal for a Directive of the Parliament and of the Council on Consumer Rights**, Article 2(5), a provisional version of the text can be accessed at http://www.europarl.europa.eu/documents/activities/cont/201106/20110624ATT22578EN.pdf

[161] **Goode on Commercial Law**, op. cit., pp. 214-15.

agreements.[162] While a number of our recommendations will further reduce the significance of these differences, they will remain significant for some purposes, notably whether liability for breach is strict as for contracts for the sale of goods, or mainly fault-based as will remain the case for contracts for the supply of services.[163]

3.6. We have mixed views about the definition of sales contract contained in the proposed Consumer Rights Directive. On the one hand, the adoption of the definition has the potential to simplify the law and to resolve the uncertainty currently caused by the seemingly irreconcilable cases of *Robinson v. Graves*[164] and *Lee v. Griffin*.[165] On the other hand, treating all mixed contracts as contracts of sale would limit the flexibility that the courts have traditionally shown in their approach to so-called hybrid contracts, particularly commercial contracts, with regard to their classification and to the determination of issues such as remedies applicable in the event of breach.[166] The equation of mixed-purpose contracts with contracts of sale may also give rise to issues in the case of contracts for the supply of goods to be manufactured and produced where some or all of the materials necessary for the manufacture or

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[162] The implied statutory terms applied to commercial hire-purchase agreements under the Hire Purchase Act 1946 and the Sale of Goods and Supply of Services Act 1980, but the Consumer Credit Act 1995 restricts their application to hire-purchase agreements to which a consumer is a party.

[163] As Goode notes, the significance of whether a transaction is or is not a contract of sale depends on the circumstances. 'In some cases such a finding will make little or no difference to the rights of the parties. In other situations the impact may be dramatic.' Whether a transaction is to be characterized as a contract of sale or some other type of transaction may affect 'the nature and extent of the rights of the parties inter se; the position of a third party who purchases from one of the contracting parties when that party does not have, or has ceased to have, a good title; the liability of the contract document to stamp duty, and the amount of such duty; the tax position of the parties; the existence and extent of statutory duties of which a breach would attract civil or criminal sanctions; the availability of government grants and tax allowances.' Ibid., pp. 221-222.

[164] [1935] 1 KB 579.

[165] (1861) 1 B & S 272.

[166] The modern view of shipbuilding contracts, for example, is that they are of a hybrid nature. This has had proved significant in determining the parties' accrued rights upon cancellation of the contract. In *Hyundai Heavy Industries Co. Ltd v Papadopoulous* [1981] 1 WLR 219, the buyer defaulted on the second instalment due under the contract and the builder exercised his right under the contract to terminate it. The issue for the court was whether the second instalment was payable by the guarantor. It was held that it was. The House of Lords ruled that the contract was not just for the sale of goods, but insofar as the construction of the ship was concerned, the contract resembled a building contract. The court therefore declined to apply a rule that there were no accrued rights to be enforced after termination of the contract. Had the contract been construed purely as a contract of sale, however, there would have been no such no accrued rights. As noted by Madakara-Shepherd: 'A large part of a shipbuilding contract is directed towards the regulation of a substantial and complex construction project in which each party assumes long term obligations to the other and bears significant commercial risks. Although the ultimate purpose of the contract is to transfer the legal title in the ship upon payment of the price, to categorise the contract as belonging to one or the other category would be misleading'. Madaraka-Sheppard, A. 2007. **Modern Maritime Law** (2nd ed.) (London: Routledge Cavendish), p. 423.

production are provided by the customer. Under the definition in the proposed Directive, this type of transaction would be treated as a contract of sale. It is open to question, however, if this is necessarily the most appropriate approach in all such cases. In Benjamin's view, there can be no sale unless there is a specific transfer of the materials followed by a repurchase of the product.[167] In a situation in which each party supplies some of the materials or components, the court will ask which of them has supplied the prinicipal materials. According to Benjamin, the materials supplied by the other then vest by accession in the owner of the principal materials. The question of who supplies the principal materials depends on all the circumstances, and the relative value of each part is not decisive in the matter.[168] While this may not be a major issue in the context of consumer sales, it can be more significant in commercial contracts of sale. It is noteworthy in this connexion that Article 3(1) of the CISG provides that:

> Contracts for the supply of goods to be manufactured or produced are to be considered sales unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production.

Article 3 further states that the Convention does not apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services.

3.7. Ireland and other Member States will be required to apply the definition of 'contract of sale' in the proposed Directive on Consumer Rights to consumer contracts of sale. The matter at issue accordingly is whether the definition should also be applied to commercial contracts of sale. Though we are in favour as far as possible of having common rules for consumer and commercial contracts, we do not consider on balance that the definition of commercial contracts of sale should include mixed purpose contracts having as their object both goods and services.

3.8. Recommendation

While the definition of contract of sale in the recently agreed Consumer Rights Directive will require the corresponding definition in future Irish legislation to

[167] **Benjamin's Sale of Goods**, op. cit., para.1-044
[168] *ibid*.

include consumer contracts having as their object both goods and services, this part of the definition should not apply to commercial contracts of sale.

Section 2 Capacity to buy and sell

> Capacity to buy and sell is regulated by the general law concerning capacity to contract, and to transfer and acquire property. Provided that where necessaries are sold and delivered to an infant, or minor, or to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price therefor. Necessaries in this section mean goods suitable to the condition in life of such infant or minor or other person, and to his actual requirements at the time of the sale and delivery.

3.9. Minor or infant is a person, who has not reached the age of majority, which in Ireland since the Age of Majority Act 1985 has been eighteen, or if a person under that age marries, upon marriage per section 2(1)(b) of that Act.[169] At common law, a minor's contract which does not involve the supply of necessaries, or is not a beneficial contract of service, is voidable - that is, a contract which a party is entitled to rescind but which is valid and binding until rescinded. Following *Imperial Loan Company v Stone*,[170] the relevant rule regarding contracts entered into by persons of diminished mental capacity is that a contract is valid unless a) the mental illness was such as to prevent the sufferer from knowing the nature of his actions, and b) the other party was aware of that mental illness. Contracts for necessaries are enforceable at a reasonable price even if the other party knew of the mental illness. The position of drunks is similar to that of the mentally ill. Before any question of unenforceability arises, the party must be so drunk as not to know the nature of his actions; mild inebriation will not suffice in such a case. Once this fact is established, then if the contract concerns necessaries, the drunken party, like the minor or the person of diminished mental capacity, will be bound to pay a reasonable price therefor, even if the other party knew of his drunkenness. In the case of non-necessaries, the party will be bound unless he can establish that the other party was aware of the intoxication at the time of the making of the contract. When this is established, the party may elect to affirm or repudiate the contract on sobering up. Recourse to the equitable doctrine of unconscionable bargain is also available in this context.[171]

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[169] For an overview of the law on contractual capacity, see Clark, **Contract Law in Ireland**, op. cit., pp. 485-516.
[170] [1892] 1 QB 559.
[171] In *White v McCooey*, Unreported High Court, June 24, 1976, a challenge by a person to a contract made while he was drunk was rejected on the basis that, although his inhibitions were undoubtedly

3.10. The necessaries rule at section 2 of the 1893 Act reflects the common law position, and the definition of the term also largely reproduces the common law definition as it has developed through case law. Where necessary goods (as distinct from services) have been sold and delivered to a minor or a person incompetent to contract by virtue of mental incapacity or drunkenness, section 2 requires that he pay a reasonable price for them. If the goods have not yet been delivered or have been delivered but the property has not passed to the buyer, the common law, and not the section, applies.[172] Whether goods constitute necessaries in a particular case is a matter of law and fact, and the onus of proving that goods are necessaries rests with the seller. The term is not limited to essentials such as food, clothing or medicine but can include other items as long as they are not purely ornamental.[173] Though services are not governed by section 2, they may also be held to be necessaries at common law.[174]

Issues Arising

3.11. The necessaries rule at Section 2 of the 1893 Act has twice been considered by the Law Reform Commission. The Commission's 1985 report on Minors' Contracts examined it in the context of an overall review of minors' contractual capacity. The report's main recommendation was for legislation that would introduce a general principle of restitution whereby a contract made by a minor with an adult would be enforceable by the minor against the adult but not vice versa.[175] The adult, however,

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lowered, he was not so drunk as not to understand what he was doing. Nevertheless it was held by the court that the contract was so one-sided as to justify its rejection on the grounds of unconscionability.

[172] Bridge, **The Sale of Goods**, op. cit., para. 1.40.

[173] **Benjamin's Sale of Goods**, op. cit, para. 2-031. Law Reform Commission. 1985. **Report on Minors' Contracts**, pp. 6-12. In *Skrine v Gordon* (1875) IR 9 CL 479, a horse required for stag hunting was not a necessary, but was regarded instead as a luxury or amusement. Per *Ryder v Wombell* (1868) LR 4 Ex 32, jewelled cufflinks were also held not to be a necessary. In *Nash v Inman* [1908] 2 KB 1, fancy waistcoats were found not to be a necessary where an infant had sufficient clothing already. In *Prokopetz v Richardsons Marina* [1979] 93 DLR (3d) 442, a motorboat was decided not to be a necessary. However, a vehicle required for work or domestic purposes may be a necessity as in *First Charter Financial Bank v Musclow* [1974] 49 DLR (3d) 138, as may books for a student per *Soon v Wilson* [1962] 33 DLR (2d) 428.

[174] Re Rhodes (1890) 44 Ch D 94. In *Chapple v Cooper* (1844) 13 M & W 252, funeral services for a spouse were held to be a necessary. The case also gives a useful definition of necessaries: 'Things necessary are those without which an individual cannot reasonably exist. In the first place, food, raiment, lodging and the like. About these there is no doubt. Again, as the proper cultivation of the mind is as expedient as the support of the body, instruction in art or trade, or intellectual, moral and religious information may be a necessary also', per Alderson B. Legal advice which results in substantial benefits to an infant may also be a necessary service per *Helps v Clayton* (1864) 17 C.B (N.S) 553.

[175] Law Reform Commission. 1985. **Report on Minors' Contracts**, p. 158.

would be entitled to apply to the court for compensation from the minor based on restitutionary rather than contractual principles. The Commission decided against the retention of the necessaries rule by way of an exception to the restitutionary principle, but recommended that the legislation should include specific provisions enabling the Court, in applying the restitutionary principle, to have regard to whether the goods or services covered by the contract were suitable to the condition of life of the minor and to his requirements at the time of the contract so far as the other party was, or could reasonably be aware, having regard to the circumstances.[176]

3.12. The Law Reform Commission returned to the topic in its 2006 Report on *Vulnerable Adults and the Law*.[177] It concluded that the necessaries rule had a useful dual function in relation to adults with limited decision-making capacity. On the one hand, it facilitated the purchase of everyday items by such adults and ensured that these were paid for and, in this way, encouraged independent living by persons of restricted capacity. On the other, the rule had a protective function in that its application was limited to items which could be regarded as necessary in the light of the individual's needs. As it stipulated that a reasonable price was to be paid, it also prevented claims being made for exorbitant sums. The Commission recommended accordingly that proposed mental capacity legislation should include an amended necessaries rule whereby an adult who lacked capacity to enter a contract for the sale of goods or supply of services would be obliged to pay the supplier a reasonable sum for necessaries supplied at his or her request. The reference to 'mental incapacity' at section 2 of the Sale of Goods Act 1893 should consequently be repealed. 'Necessaries' should be defined as 'goods or services supplied which are suitable to the individual's personal reasonable living circumstances but excluding goods and services which could be classed as luxury in nature in all the circumstances'. Unlike the 1893 Act which confines the necessaries rule to 'goods sold and delivered', the Commission's recommendation that it should apply to 'goods or services supplied' would, in addition to extending the rule to services contracts, mean that it would also apply where goods were supplied under non-hire contracts such as hire-purchase or hire.

[176] Ibid., pp. 103-04 & 159.
[177] Law Reform Commission. 2006. **Report on Vulnerable Adults and the Law** (LRC 83-2006).

3.13. The Law Reform Commission's recommendation on necessaries and mental incapacity is in line with the present legislative position in England and Wales. The Mental Capacity Act 2005 which applies in England and Wales includes a necessaries rule along the lines of that in the UK Sale of Goods Act 1979, and repealed the reference to mental incapacity in the latter enactment. The provision in the 2005 Act also applies to services as well as goods, and clarifies the uncertainty over executory contracts by providing that the rule applies 'at the time when the goods or services are supplied'. The necessaries rule in the Sale of Goods Act 1979 (the wording of which is similar to that at section 2 of the 1893 Act) still applies in England and Wales to contracts for the sale of necessaries to minors and persons incompetent to contract because of drunkenness. In Scotland, however, following an amendment effected by the Age of Legal Capacity (Scotland) Act 1991, the necessaries provisions of the Sale of Goods Act 1979 no longer applies to contracts with minors but continues to apply to persons incompetent to contract by virtue of mental incapacity or drunkenness.[178]

3.14. We are in agreement with the reformulation of the necessaries rule recommended by the Law Reform Commission. The changes proposed to the definition of the term would both update the concept of necessaries and extend it to encompass services, while the express exclusion of luxury goods from the definition would more accurately reflect the proper purpose of the rule. As the Law Reform Commission has stated,[179] that purpose is:

> to enable day-to-day living, not to provide an across the board solution where contractual capacity is not present. The understanding of luxury will vary according to the individual's living circumstances.

As noted above, the Law Reform Commission's report recommended that the necessaries rule relating to mental incapacity should be contained in legislation on mental capacity rather than in sale of goods legislation. The Programme for Government 2011 includes a commitment to introduce a Mental Capacity Bill that is

[178] The Act provides that a person under the age of sixteen shall have legal capacity to enter into a transaction (a) of a kind commonly entered into by a person of his age and circumstances, and (b) on terms which are not unreasonable. It also provides that a person aged under twenty one may apply to the court to set aside a 'prejudicial' transaction he entered into between the ages of sixteen and eighteen. Age of Legal Capacity (Scotland) Act 1991, sections 2 & 3.

[179] Law Reform Commission. **Report on Vulnerable Adults and the Law,** op. cit., para. 3.05.

in line with the UN Convention on the Rights of Persons with Disabilities,[180] but it is not clear at this point whether or how this the proposed legislation will deal with contractual capacity in respect of necessaries.[181] If the legislation deals with the necessaries issue, the reference to mental capacity should be deleted from the necessaries provision to be included in future legislation on the sale of goods and supply of services.

3.15. Recommendation

The Group recommends that the necessaries rule in future legislation on the sale and supply of goods and the supply of services legislation should be amended in line with the Law Reform Commission's 2006 Report on Vulnerable Adults and the Law to provide as follows:

- **A person who lacks capacity to enter a contract for the sale of goods would be obliged to pay a reasonable sum for necessaries supplied at his or her request.**
- **'Necessaries' would be defined as 'goods or services which are suitable to the individual's personal reasonable living circumstances at the time when the goods are supplied but excluding goods and services which could be classed as luxury in nature in all the circumstances'.**
- **The reference to 'mental capacity' should be excluded from the necessaries provision in future legislation on the sale and supply of goods and the supply of services if proposed legislation on mental capacity includes provisions on contractual capacity in relation to necessaries.**

FORMALITIES OF THE CONTRACT

Section 3 Contract of sale, how made

> Subject to the provisions of this Act and of any statute in that behalf, a contract of sale may be made in writing (either with or without seal), or by word of mouth, or may be implied from the conduct of the parties. Provided that nothing in this section shall affect the law relating to corporations.

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[180] Programme for Government 2011, http://www.taoiseach.gov.ie/eng/Publications/Publications_2011/Programme_for_Government_2011.pdf pdf, p. 37.

[181] A Private Members Bill, the Mental Capacity and Guardianship Bill, sponsored by a number of independent Senators was introduced in 2007 and 2008, but lapsed on the dissolution of the Seanad in April 2011. It was based on the Draft Scheme of the Mental Capacity and Guardianship Bill in the Law Commission's Report on Vulnerable Adults and the Law, and included provisions which gave effect to the Commission's recommendations on necessaries, http://www.oireachtas.ie/documents.bills28/bills/2008/1308/b1038s.pdf.

Section 4 Contract of sale for ten pounds and upwards

1) A contract for the sale of any goods of the value of ten pounds[182] or upwards shall not be enforceable by action unless the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf.
2) The provisions of this section apply to every such contract, notwithstanding that the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery.
3) There is an acceptance of goods within the meaning of this section when the buyer does any act in relation to the goods which recognises a pre-existing contract of sale whether there be an acceptance in performance of the contract or not.

3.16. Section 3(1) of the Act reflects the common law position which requires no formalities to be met for the creation of a contract for the sale of goods. The provision is subject to section 4 of the Act and also to formalities required by other enactments such as the Consumer Credit Act 1995 and the Regulations which give effect to the Distance Selling and Doorstep Selling Directives.[183]

3.17. Section 4 of the 1893 Act incorporated the substance of section 13 of the Statute of Frauds (Ireland) 1695, the preamble to which Act described its aim as the 'prevention of many fraudulent practices which are commonly endeavoured to be upheld by perjury and subornation of perjury'.[184] Its provisions were aimed at preventing courts from being persuaded of the existence of contracts on the basis of false oral testimony.[185] At the time of the adoption of the Statute, parties with an

[182] By virtue of Council Regulation (EC) No. 1103/97 on Certain Provisions Relating to the Introduction of the Euro and Council Regulation (EC) No. 2866/98 on the Conversion Rates Between the Euro and the Currencies of Member States Adopting the Euro, the sum of 10 pounds in section 4(1) is now €12.70.
[183] Ss. 32 & 58 of the Consumer Credit Act 1995 require that hire-purchase and consumer hire agreements be made in writing and be signed by the hirer and all other parties to the agreement. Regulation 5 of the European Communities (Protection of Consumers in Respect of Contracts Made by Distance Communications) Regulations 2001 provides that a distance contract is not enforceable by the supplier unless the consumer has received confirmation in writing or on another durable medium of the information requirements of the Regulations. Regulation 4 of the European Communities (Cancellation of Contracts Negotiated Away from Business Premises) Regulations 1989 provides that a contract is not enforceable against the consumer unless the supplier has provided a written cancellation notice and form in accordance with the information and other requirements of the Regulations. For other examples of statutory requirements relating to contract formalities, see Ní Shúilleabháin, M. 'Formalities of Contracting: A Cost-Benefit Analysis Of Requirements That Contracts Be Evidenced in Writing', op. cit.
[184] Statute of Frauds (Ireland) 1695 (7 Will 3 ch.12). Section 13 was repealed by the Statute Law Revision (Pre-Union Irish Statutes) Act 1962 (s.1 & Schedule).
[185] Ní Shuilleabháin, 'Formalities of Contracting: A Cost-Benefit Analysis Of Requirements That Contracts Be Evidenced in Writing', op. cit, p.115.

interest in the outcome of a case were precluded from testifying in court proceedings, a rule which has long since been discarded.

3.18. Though section 4 is sometimes said to stipulate that contracts of the value of €12.70 or more are unenforceable unless evidenced in writing, it provides in fact for the enforceability of sales contracts of this value in a number of ways:

1) acceptance and receipt of part of the goods sold;[186]
2) the giving of something in earnest to bind the contract;[187]
3) the giving of part payment; and
4) a note or memorandum in writing of the contract signed by the party to be charged or his agent.

Issues Arising

3.19. Section 3 of the 1893 Act gives rise to no significant issues and can be retained in its present form. Section 4, by contrast, has been the subject of extensive comment and criticism. It has been claimed that its original rationale no longer applies in view of the fact that the parties to a contract are no longer prohibited from giving evidence.[188] Its application to sales contracts has been questioned on the basis that the regular, often everyday, character of these transactions makes requirements for formal documentation particularly inappropriate.[189] 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.[190] As Lord Bingham noted of the application of the Statute of Frauds to a verbal guarantee:[191]

> If the 17th century solution addressed one mischief it was capable of giving rise to another: that a party, making and acting on what was thought to be a binding oral agreement, would find his commercial expectations defeated when the time for enforcement came and the other party successfully relied on the lack of a written memorandum or note of the agreement.

3.20. It has also been suggested that, as contracts for work and materials are not subject to section 4, the courts have sometimes conflated the distinction between these

[186] The definition of 'acceptance' for the purposes of the Section at section 4(3) of the 1893 Act is broader than that which applies for the purposes of section 35 of the Act.
[187] Per Clark, **Contract Law in Ireland**, op. cit, p. 120, this 'ancient and obscure provision' would be satisfied if the buyer gave his business card as a gesture of his good faith or supplied his credit card number.
[188] Law Revision Committee. 1937. **Statute of Frauds and the Doctrine of Consideration: Sixth Interim Report** (London: Stationery Office). Cmd. 5449., para. 9.
[189] Stephen, J.F. & Pollock, F. 'Section 17 of the Statute of Frauds' (1885) 1 *L.Q.R* 1.
[190] Ní Shuilleabháin, 'Formalities of Contracting: A Cost-Benefit Analysis Of Requirements That Contracts Be Evidenced in Writing', op.cit., pp. 117-19.
[191] *Actionstrength v International Glass* [2003] 2 W.L.R. 1060 at 1062.

and contracts of sale in order to find a way around the formalities requirements applicable to the latter transactions.[192] Lastly, and most obviously, the threshold of €12.70 which currently applies for the purpose of section 4 is now wholly out of date. When originally fixed in the late 17th century and even when re-enacted in 1893, this level of threshold would have excluded a great range of routine sale transactions that now come within its compass.

3.21. Most, not though all, of the jurisdictions which have based their sales law on the 1893 Act have repealed section 4.[193] In the United Kingdom, the section was repealed over half a century ago by the Law Reform (Enforcement of Contracts) Act 1954. In New Zealand, the equivalent provision was repealed by the Contracts Enforcement Act 1956. In Australia, it has 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.[194] 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. In the United States, the Uniform Commercial Code [UCC] has taken a different approach to the reform of formalities requirements. The threshold at which such formalities apply is currently set at $5,000, while contracts of this value are also enforceable in ways not provided for under Section 4 of the 1893 Act.[195]

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[192] Ní Shúilleabháin has commented that: 'Faced with unmeritorious formalities-based defences, some judges appear to have strained other concepts of law in order to exempt a contract from such a rule. There is some evidence of such interpretative bias in cases concerning the boundary-line between contracts for goods and contracts for services.' Ní Shúilleabháin, 'Formalities of Contracting: A Cost-Benefit Analysis Of Requirements That Contracts Be Evidenced in Writing', op. cit., p. 119.

[193] See Annex IV, sections 2.1., 3.2.,4.1., 5.1., 6.1., and 7.1.

[194] The Law Reform Commission of Western Australia recommended repeal of the provision in 1998 but its recommendation has yet to be implemented. Law Reform Commission of Western Australia. 1998. **The Sale of Goods Act 1895: Report**, para. 2.8.

[195] As well as situations where goods or payment are received and accepted, the UCC allows for enforcement where: (i) in a transaction between merchants, confirmation of the contract is received within a reasonable time and is not objected to; and (ii) in the case of goods specially manufactured for the buyer and not suitable for sale to others, a substantial beginning to their manufacture has been made, or commitments have been made for their procurement. Uniform Commercial Code, Article 2.201.

3.22. The reform of section 4 is long overdue in our opinion and it is surprising in many respects that, over a quarter of a century after its repeal in the United Kingdom, the Sale of Goods and Supply of Services Act 1980 left the section untouched. The only matter for decision is whether the provision should be repealed as has been done in most jurisdictions or substantially recast and updated as has been done in the United States. While a large increase in the monetary threshold and a widening of the bases for enforceability would address some of the concerns raised by the present formalities rule, we do not consider that there is a convincing case for the retention of even a modified provision.

3.23. Recommendation

Section 4 of the 1893 Act should be repealed.

SUBJECT MATTER OF CONTRACT

Section 5 Existing or future goods

(1) The goods which form the subject of a contract of sale may be either existing goods, owned or possessed by the seller, or goods to be manufactured or acquired by the seller after the making of the contract of sale, in this Act called "future goods".[196]

(2) There may be a contract for the sale of goods, the acquisition of which by the seller depends upon a contingency which may or may not happen.

(3) Where by a contract of sale the seller purports to effect a present sale of future goods, the contract operates as an agreement to sell the goods.

3.24. Per section 5, a seller can enter into a contract to sell goods that do not exist either because they have yet to be manufactured by him or because they are the property of another person and have yet to be acquired by the seller. As discussed at paragraphs 2.47-2.48 above, goods that the seller neither owns nor possesses may be 'existing' in the ordinary sense of the term, therefore, but will be 'future' goods for the purposes of the Act. The significance of Section 5 lies in the express statement that future goods may be the subject of a contract of sale, a point reinforced by the stipulation at section 5(2) that the seller's acquisition of future goods may depend upon a contingency. Although a contract for the sale of future goods is valid, section

[196] Section 62 of the Act contains a definition of 'future goods' – 'goods to be manufactured or acquired by the seller after the making of the contract of sale' - which replicates that in section 5(1), but does not contain a similar reiteration of the definition of 'existing goods'.

5(3) makes clear that such a contact can be only an agreement to sell and that there can thus be no passing of property in future goods. As discussed in Chapter 5, the classification of goods as 'existing' or 'future' is also relevant to the rules on the passing of property at section 18 of the Act.

Section 6 Goods which have perished

> Where there is a contract for the sale of specific goods, and the goods without the knowledge of the seller have perished at the time when the contract is made, the contract is void.

Section 7 Goods perishing before sale but after agreement to sell

> Where there is an agreement to sell specific goods, and subsequently the goods, without any fault on the part of the seller or buyer, perish before the risk passes to the buyer, the agreement is thereby avoided.

3.25. Sections 6 and 7 introduce the category of 'specific goods' which, together with its converse 'unascertained goods', forms the second of the Act's binary classifications of goods, and one of central importance to the Act's provisions on the passing of property and risk.[197] These terms are discussed in more detail at paragraphs 2.49-2.51 of Chapter 2 above. For the purpose of the substantive rules on perished goods in sections 6 and 7, it is sufficient to recall that section 62 defines 'specific goods' as 'goods identified and agreed upon at the time a contract of sale is made' – for example, a particular car with a specified registration number and not a car identified by reference to a generic marque. The two sections deal, from different temporal vantage points, with the case of goods which have perished – section 6 with the situation where, at the time the contract is made, the goods have perished without the knowledge of the seller, and section 7 with the situation where the goods perish after the making of the contract but before the property in them has transferred to the buyer. The result is the same in both cases - the parties are relieved of all of their obligations under the contract. Section 6 reflects the common law doctrine under which a mistake which is common to both parties and which relates to a fundamental matter of fact such as the existence of the goods that form the subject matter of the contract may lead to the contract being declared void. Section 7 reflects the common law doctrine of frustration under which parties may be relieved of contractual obligations that cannot be performed because of circumstances outside their control.

[197] Prior to an amendment made by the 1980 Act, the breach of a contract for specific goods the property in which had passed to the buyer could, in the absence of a term to the contrary, be treated only as a breach of warranty, and not as a ground for rejecting the goods.

3.26. As noted in the survey of sales law in other jurisdictions at Annex I, sections 6 and 7 have remained unchanged in the United Kingdom and other jurisdictions for a century or more. Though this suggests that their provisions have not been a cause of major difficulties, it does not mean that the sections raise no issues at all. We will look next at the main such issues: the meaning of 'perish', the nature of the rule at section 6, and the implications for sections 6 & 7 of the inclusion of 'an undivided share in goods' within the definition of 'specific goods'.

Meaning of 'perish'

3.27. 'Perish' is defined neither in sections 6-7 nor in the interpretation provisions at section 62 of the 1893 Act. While the term might suggest that it denotes the actual destruction of goods, case law has held goods to have perished when they have ceased to exist in a commercial sense as the contract goods – that is if their merchantable character, as such, has been lost - or if they suffer such a change in their nature as to prevent their use for the purposes contemplated by the transaction. In *Asfar v. Blundell*,[198] dates which became contaminated and had begun to ferment after being under water for two days were held to have ceased to exist in a commercial sense as 'dates', even though they still existed after their retrieval from submersion and could be used to distil with alcohol. This decision is difficult to reconcile, however, with a later case *Horn v. Minister of Food*[199] in which it was held *obiter* that potatoes, unfit for consumption, could still be described as 'potatoes' and, thus, had not perished in the meaning of Section 6. Atiyah suggests that the interpretation taken in this case cannot be supported.[200] White considers similarly that *Asfar* is a better view in general, but warns of the danger of equating 'perishing' with merchantable quality given the divergent rules applicable to the two situations (voidness of the contract as opposed to rejection, a claim for a refund of the price, or an action for damages for non-delivery).[201]

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[198] *Asfar & Co. v. Blundell* [1896] 1 Q.B. 123. Lord Esher MR observed as follows in this case: 'We are dealing with dates as a subject matter of commerce; and it is contended that, although these dates were under water for two days, and when brought up were simply a mass of pulpy matter impregnated with sewage and in a state of fermentation, there had been no change in their nature, and they still were dates. There is a perfectly well known test which has for many years been applied to such cases as the present – that test is whether, as a matter of business, the nature of the thing has been altered.', ibid. at 127.

[199] *Horn v. Minister of Food* [1948] 2 All E.R. 1036.

[200] Atiyah, **The Sale of Goods**, op. cit, p. 106.

[201] White, **Commercial Law** op. cit., p. 395.

3.28. Stolen goods were also held to have perished within the meaning of Section 6 in *Barrow, Lane & Ballard Ltd v Phillip Phillips & Co. Ltd.*[202] In this case, 109 bags of a specific parcel of 700 bags of groundnuts had been stolen, and the view was taken that the parcel had ceased to exist in the commercial sense. Benjamin questions, however, whether the mere theft of, for example, a car means that it has 'perished' in a commercial sense, or whether instead it should be regarded as having done so only after all hope of its recovery has been abandoned.[203] *Barrow, Lane & Ballard Ltd v Phillip Phillips & Co. Ltd.* is also authority for the proposition that, where a contract for the sale of a specific parcel of goods is indivisible, the perishing of part of the goods will render the contract void under Section 6. Benjamin submits that it would appear to follow that, where the contract is divisible, the destruction of part of the goods will not avoid the contract for the remainder – however the mere fact that the goods, or the price are divisible will not oblige either party to perform the contract as regards the remainder after a part has been destroyed. *H R & S Sainsbury v Street*,[204] although not itself falling under section 7, suggests that, where only part of the goods perish, the seller may well be obliged to offer the remaining goods to the buyer. The buyer, however, may not be obliged to take them. Benjamin also notes that it is possible that goods which have been requisitioned or condemned as prize would be held to have perished.[205] In view of the uncertainty on the point in the case law, it would be helpful in our opinion if statute law offered guidance as to the meaning and scope of 'perish'.

3.29. Recommendation

We recommend that future legislation should clarify that the term 'perish' should be construed so as to cover situations where goods perish in a commercial as well as in a physical sense.

Construction of Section 6

3.30. As Bridge notes, section 6 enacts 'what appears to be an inflexible rule of law making no allowance for a contrary intention that the seller should be contractually liable if by words or conduct he expressly or impliedly warrants the existence of the

[202] *Barrow, Lane & Ballard Ltd v Phillip Phillips & Co. Ltd.* [1929] 1 K.B. 574.
[203] **Benjamin's Sale of Goods**, op.cit, para. 1-126.
[204] [1972] 1 WLR 834.
[205] **Benjamin's Sale of Goods**, op. cit., para. 1-126.

goods'.[206] Unlike most other contractual provisions of the 1893 Act, the section is not expressed as a default rule.[207] It is not clear either that section 55, which permits the parties to negative or vary 'any right, duty or liability' that arises under a contract of sale by implication of law, is applicable to section 6. The purpose of section 6 after all is to prevent any right, duty or liability arising. The effect of the section, moreover, is arguably to abort any contract of sale to which section 55 could apply.

3.31. Atiyah suggests that the 'extraordinary result' under which a seller who contracts that goods exist can avoid all liability by invoking section 6 can best be avoided by taking a liberal interpretation of section 55.[208] This is consistent with the aim of section 55, namely to enable parties to vary, by agreement, all those provisions of the Act which do not affect third parties. Atiyah submits, therefore, that if, on the true construction of the contract, it appears that the seller is contracting that the goods do exist, section 6 should not apply and the seller will be liable for non-delivery. We consider that the uncertainty on this point should be addressed by means of an express provision that would clarify that parties to a commercial contract, though not a consumer contract, could vary the application of section 6.

3.32. Recommendation

We recommend that section 6 of the 1893 Act should be amended along the following lines to enable the parties to a commercial contract, though not a consumer contract, to vary its application.

(1) Subject to subsection (2) below, where there is a contract for the sale of specific goods, and the goods without the knowledge of the seller have perished at the time the contract is made, the contract is void.

(2) Where the buyer does not deal as consumer, the parties are free to stipulate expressly on which of them any loss is to fall.

Amendment of Definition of 'Specific Goods'

3.33. As discussed at paragraph 2.44 above, the UK Sale of Goods (Amendment) Act 1995 extended the definition of goods by adding the words 'and includes an undivided share in goods'. The Act made a corresponding amendment to the definition of specific goods by means of the addition of the words 'and includes an

[206] Bridge, **The Sale of Goods**, op. cit., para. 4.70.
[207] The other exceptions being sections 12 and 21-26 on the implied undertakings as to title and the transfer of title.
[208] Atiyah, **The Sale of Goods**, op. cit, p. 102. See also Bridge, **The Sale of Goods**, op. cit., para. 4.72.

undivided share, specified as a fraction or percentage, of goods identified and agreed on as aforesaid.' Thus, Sections 6 and 7 now apply to contracts for sale of undivided share in specific goods, specified as a fraction or percentage, for example a quarter-share in an identified racehorse or a 50 per cent share in the cargo of oil aboard a named ship. In the case of the cargo of oil at least, the terms of the contract may save the contract from being void when part has perished – when the cargo is apportioned, the buyer would be entitled to take delivery of a predetermined percentage or quantity out of what remains. We have recommended similar changes at paragraphs 2.45 and 2.55 above to the definitions of 'goods' and 'specific goods' in future Irish legislation.

3.34. The report of the English and Scottish Law Commissions on which the 1995 Act was based did not consider the implications of the extended definition of 'specific goods' in contexts other than the passing of property, delivery and acceptance.[209] It is clear that sections 6 and 7 (perishing of specific goods) and section 52 (specific performance) will now apply to contracts for the sale of part-interests in specific goods. Benjamin notes that it remains to be seen whether the change will be of any practical consequence in these areas.[210]

THE PRICE

Section 8 Ascertainment of Price

1) The price in a contract of sale may be fixed by the contract, or may be left to be fixed in manner thereby agreed, or may be determined by the course of dealing between the parties

2) Where the price is not determined in accordance with the foregoing provisions the buyer must pay a reasonable price. What is a reasonable price is a question of fact dependent on the circumstances of each particular case.

Section 9 Agreement to Sell at Valuation

1) Where there is an agreement to sell goods on the terms that the price is to be fixed by the valuation of a third party, and such third party cannot or does not make such valuation, the agreement is avoided; provided that if the goods or any part thereof have been delivered to and appropriated by the buyer he must pay a reasonable price therefor.

2) Where such third party is prevented from making the valuation by the fault of the seller or buyer, the party not in fault may maintain an action for damages against the party in fault.

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[209] The Law Commission for England and Wales and the Scottish Law Commission. 1993. **Sale of Goods Forming Part of a Bulk** (Law Com. No. 215, Scot Law Com. No. 145), paras. 5.3-5.7.
[210] **Benjamin's Sale of Goods**, op. cit., para. 1-116.

3.35. Section 8(1) commences by stating that the parties to a contract of sale are free to settle the price in the contract and goes on to say that the price may be left to be fixed 'in a manner agreed by the contract' or may be determined 'by the course of dealing' between the parties. While this provision appears straightforward, it is not as unproblematical as it first appears. The section assumes that a contract has been made by the parties and then proceeds to set out the methods by which the price may be ascertained. The absence of agreement on something as fundamental as price, however, may mean that there is no binding contract in place. In *May & Butcher v The King*,[211] the House of Lords held that an agreement for a sale of goods, where the price and other details were to be agreed later, was void for uncertainty. It should be noted, however, that the case involved an executory transaction – that is, one in which no part had been performed - and the agreement was not merely silent on the points in question but expressly stated that further agreement was necessary on them.[212] As Atiyah observes, the later case of *Hillas & Co. Ltd v. Arcos Ltd*[213] shows that *May* should not be seen as laying down a general rule. In *Foley v Classique Coaches Ltd*,[214] the Court of Appeal ruled that an agreement to supply petrol 'at a price to be agreed by the parties' was a binding contract as the parties had clearly demonstrated an intention to be bound. The contract also contained an arbitration clause under which a reasonable price could be fixed in the event of disagreement. Though there is still some uncertainty as to the status of 'agreements to agree', the courts appear to regard the intention of the parties as the critical factor. Where the parties intend to be bound, and the terms of their agreement are sufficiently complete to be enforced as a contract, failure to agree on certain terms, even one as important as price, will not necessarily vitiate the existence of a contract. This is more likely to be the case in executed or partly executed, as opposed to executory, contracts.[215]

3.36. The 'reasonable price' to be paid for goods in accordance with Section 8(2) is typically set by reference to the current market price at the time and place of delivery, although other factors, such as the cost of production, may also be taken into account.

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[211] (1929) [1934] 2 KB 17.
[212] White, **Commercial Law**, op. cit, p.192 fn. 2
[213] (1932) 147 LT 503.
[214] [1934] 2 KB 1.
[215] Bridge, **The Sale of Goods**, op. cit, para. 1.43.

That the market price may not be the sole or conclusive test, was made clear in *Acebal v Levy*[216] where it was held that a reasonable price:

> may or may not, agree with the current price of the commodity at the port of shipment, at the precise time when such shipment is made. The current price of the day may be highly unreasonable from accidental circumstances as on account of the commodity having been purposely kept back by the vendor himself, or with reference to the price at other ports in the immediate vicinity or from various other causes.

3.37. Section 9 deals with an agreement to sell rather than a sale; the passing of property in the goods in such a case is conditional upon the making of the valuation as to the price. Subsection (1) covers two scenarios:

(i) where the valuation machinery breaks down because the appointed valuer cannot or will not perform his function – in such circumstances the agreement is avoided;

(ii) where the machinery breaks down but the goods, or any part of them, have been delivered to and appropriated by the buyer – the buyer is bound to pay a reasonable price for those goods.

Subsection (2) provides for a special statutory action in damages where either the buyer or the seller is in fault in causing the valuation machinery to break down. This could occur, for example, where one of the parties refuses to carry out an undertaking to name one of two agreed joint valuers, or where the seller refuses to allow the valuer access to the goods for the purpose of making the valuation.

3.38. In Benjamin's view, the wording of section 9 is appropriate to a case where a specific person is identified under the contract as the intended valuer.[217] In *Sudbrook Trading Estate v Eggleton*,[218] a case concerning an option to purchase land, the House of Lords drew a distinction between a contract of this kind and one where the price is to be fixed by a valuer or valuers to be chosen by the parties at a later date. The latter contract could be seen as an agreement to sell at a fair and reasonable price, and if the proposed arrangements for fixing the price broke down, the court could substitute its own price ascertainment mechanism and enforce the contract accordingly. Though this judgement did not involve a contract for the sale of goods, Benjamin argues that

[216] (1834) 10 Bing. 376
[217] **Benjamin's Sale of Goods**, op. cit., para 2-050.
[218] [1983] 1 A.C. 444.

nothing in section 9 would appear to prevent the application of its reasoning to sales contracts. In *Gillatt v. Sky Television*,[219] however, it was held that an agreement to refer the valuation to an 'independent chartered accountant' was an essential term of the contract and that the court was not entitled to substitute its own view as to the valuation.

3.39. By virtue of section 9(1), if the valuer refuses to act or is unable to do so for whatever reason, neither party has any remedy against the other except for the restitution of his money or property.[220] Although a valuer cannot be compelled to act by the parties to the contract, he may be liable in damages if he refuses to act after contracting to do so.[221] The parties are normally bound by a valuation made pursuant to contract even if the valuer has been negligent or has set about his task in an unprofessional manner. As Lord Denning stated in *Campbell v Edwards*:[222]

> If two persons agree that the price of the property should be fixed by a valuer on whom they agree, and he gives that valuation honestly, they are bound by it. If there were fraud or collusion, of course, it would be very different.

The valuer may be liable for negligence, however, if he has arrived at his valuation on a manifestly unsound or incorrect basis.[223]

3.40. Sections 8 and 9 have not been amended in the United Kingdom or the other common law jurisdictions whose sales law is based on the 1893 Act. Though section 8 raises some issues, these are not of a kind that can be satisfactorily dealt with by a legislative change and are best addressed by the courts on a case-by-case basis. In the case of section 9, we consider that the provision that the contract is void where the valuer cannot or does not make a valuation is unwarranted. It would be preferable in such cases to provide that the buyer should pay a reasonable price for the goods.

3.41. Recommendation

Section 9 of the 1893 Act should be amended to provide that, where the valuer cannot or does not make a valuation, the buyer should be required to pay a

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[219] [2000] 1 All E.R. (Comm.) 461.
[220] **Benjamin's Sale of Goods**, op. cit, para. 2.051.
[221] *Cooper v Shuttleworth* (1856) 25 L.J. Exch. 114.
[222] [1976] 1 WLR 403.
[223] *Wright v Frodoor* [1967] 1 WLR 506; *Burgess v Purchase & Sons (Farms) Ltd* [1983] Ch 216. *Dennard v Price Waterhouse Cooper plc* [2010] EWHC 812 (CA).

reasonable price for the goods.

II AUCTION SALES

SECTION 58

In the case of a sale by auction –

1) Where goods are put up for sale by auction in lots, each lot is *prima facie* deemed to be the subject of a separate contract of sale;

2) A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer, or in other customary manner. Until such announcement is made any bidder may retract his bid;

3) Where a sale by auction is not notified to be subject to a right to bid on behalf of the seller, it shall not be lawful for the seller to bid himself or to employ any person to bid at such sale, or for the auctioneer knowingly to take any bid from the seller or any such person: Any sale contravening this rule may be treated as fraudulent by the buyer;

4) A sale by auction may be notified to be subject to a reserved or upset price, and a right to bid may also be reserved expressly by or on behalf of the seller. Where a right to bid is expressly reserved, but not otherwise, the seller, or any one person on his behalf, may bid at the auction.

3.42. The 1893 Act does not define 'sale by auction' nor is the term defined in other Irish legislation. Benjamin defines auction sale as 'a sale by competitive bidding normally held in public, at which prospective purchasers are invited to make successively increasing bids for the property, which is then usually sold to the highest bidder.'[224] Though Directive 1999/44/EC on the Sale of Good and Associated Guarantees contains a discretionary provision permitting member states to exclude second-hand goods sold at public auction where the consumer has the opportunity to attend the sale in person, it does not contain a definition of 'public auction'. The recently agreed Directive on Consumer Rights, however, will include a definition of 'public auction' as 'a method of sale where goods are offered by the trader to consumers, who attend or are given the possibility to attend the auction in person, through a transparent competitive bidding procedure run by an auctioneer and where the highest bidder is bound to purchase the goods.'[225]

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[224] **Benjamin's Sale of Goods**, op. cit., para. 2-004.

[225] **Proposal for a Directive of the European Parliament and of the Council on Consumer Rights**, Article 2.15. This definition has been included in the text of the proposed Directive for the purpose of the exclusion of contracts concluded at public auction from the right of withdrawal for distance and off-premises contracts. As the exclusion is confined to public auctions, consumer sales concluded through online auctions will, as discussed at paragraph 3.53 below, be subject to a right of withdrawal. A provisional version of the final text of the Directive can be accessed at http://www.europarl.europa.eu/documents/activities/cont/201106/20110624ATT22578EN.pdf

3.43. Section 58 of the 1893 Act codifies the common law rules governing certain aspects of auction sales. In particular, subsection (2) provides that a sale by auction is concluded when the auctioneer announces its completion by the fall of the hammer or in some other customary manner. Per subsection (1), the contract thus concluded relates to the particular lot which has been declared to be the subject of the bidding. In accordance with common law rules, the display of the goods by the auctioneer and the request for bids are an invitation to treat, and the bids made at the auction are offers.[226] A bidder can thus withdraw his bid prior to the fall of the hammer, the prospective seller can similarly withdraw the goods from sale even after the auction has begun,[227] and the auctioneer as, agent for the seller, is entitled to accept or refuse any bid.[228]

3.44. Section 58(4) of the 1893 Act provides that a sale by auction may be subject to a reserve price, and such auctions can constitute an exception to the binding nature of contracts concluded through the auctioneer's announcement of the completion of the sale. As Atiyah notes, however, this subsection has independent force only where the auctioneer mistakenly knocks the goods down below the reserve price by virtue of the prior rule that no contract of sale is concluded until a bid has been accepted.[229] In *McManus v Fortescue*,[230] the items for sale at an auction were stated beforehand to be subject to a reserve price but the auctioneer knocked the goods down to the plaintiff for less than this price. On realising his mistake, the auctioneer refused to sign the memorandum of sale. The Court of Appeal held that the auctioneer was not liable for breach of his warrant of authority as the prior statement that the auction was subject to a reserve price had clearly indicated to those in attendance that the auctioneer's authority was limited. As well as providing that auction sales may be subject to a reserve price, section 58(4) states that they may be advertised as subject to a right to bid by, or on behalf of, the seller. Where a right to bid is so notified, the seller, or any one person acting on his behalf, may bid at the auction. If no such notification is

[226] In so-called 'Dutch auctions', however, the auctioneer states the price at which he is willing to sell and, if no bidder is prepared to meet this price, progressively reduces the price until a bidder is prepared to meet it. In such cases, the auctioneer is making an offer and the buyer's bid is an acceptance.
[227] *Fenwick v Macdonald Fraser & Co* [1904] 6 F 850.
[228] *British Car Auctions v Wright* [1972] 3 All ER 462.
[229] Atiyah, **The Sale of Goods**, op. cit., p.35.
[230] [1907] 2 KB 1.

made, it is unlawful for the seller or a person acting for him to make a bid. An auctioneer who knowingly accepts such a bid also acts unlawfully. A sale concluded after an unlawful bid of this kind may be treated as fraudulent by the buyer.

Issues Arising

3.45. While section 58 is reasonably clear about auctions where a reserve price is notified, matters are less straightforward where no reserve price is advertised, particularly if the goods are withdrawn before the sale is complete. As, per section 58(2), a bid remains an offer even in a sale without reserve, the remedy available to the highest bidder in this event cannot be sought on the basis of a concluded contract of sale. In *Barry v Davies*,[231] the Court of Appeal held that there was a collateral contract between the auctioneer and the highest bidder in such a case. This contract was constituted by the offer made by the auctioneer to sell to the highest bidder, acceptance of which occurred when the bid was made. The consideration necessary for the contract came from the detriment to the bidder in making a bid that could be accepted and the benefit to the auctioneer from the increased attendance likely at a sale without reserve and the prospect of the bids being driven up. Because there was only one bidder in this case, the question of whether there was a contract between the auctioneer and all of the bidders at an auction without reserve, or even all those attending the auction, was not considered. As it cannot be known at the time a bid is made whether or not it will be the highest bid, it is possible to make the case that there is a contract with all bidders, though these under-bidders would not usually be able to show loss.

3.46. We consider that there is merit in incorporating in future sale of goods legislation the case law rulings that a notification that a sale by auction is not subject to a reserve price constitutes a collateral contract on the part of the auctioneer to sell

[231] *Barry v Davies* [2000] 1 WLR 1962. The case concerned the sale of two machines valued at £14,000 each that were put up for sale in an auction stated to be 'without reserve'. The only bid received, however, was for £200 per machine. The auctioneer withdrew the machines and they were sold shortly afterwards for £750 each after being advertised in a magazine. The court awarded the plaintiff damages of €27,600 on the market rule – the machines to the value of £28,000 which he would have owned if the contract had not been broken less the £400 of his bid. The judgement drew on the reasoning in *Warlow v Harrison* [1858] 1 E&E 295 on the existence of a contract between bidder and auctioneer, though not on the measure of damages. In *Tully v Irish Land Commission* [1961] 97 I.L.T.R. 1974, the High Court held similarly that a statement in the conditions of sale of an auction of land that the highest bidder would be the purchaser was an offer which could be accepted by a bid, and could constitute a contract between the seller and the highest bidder.

the goods to the highest bidder. Though not subsequently implemented, the draft Sale of Goods Act prepared by the Uniform Law Conference of Canada provided that, in a sale by auction without reserve, after the auctioneer calls for bids on an article or lot, that article or lot cannot be withdrawn unless no bid is made within a reasonable time.[232] It has been suggested that, if an auctioneer is required to sell the goods to the highest bidder in a sale without reserve, there should be a corresponding obligation on the bidder in such cases not to withdraw a bid if, for example, he discovers that it is unrealistically high.[233] The assumption of equivalence that underlines this suggestion is not valid in our view, and we would not favour a statutory provision along these lines. As auctioneers' terms and conditions will commonly have a provision precluding retraction of a bid in such circumstances, moreover, a statutory rule of this kind would be unnecessary in many cases. We note in this connection that the draft Canadian Uniform Sale of Goods Act provided that, in a sale by auction with or without reserve, the bidder may retract his bid until the auctioneer's announcement of completion, but a bidder's retraction would not revive any previous bid.[234]

3.47. Recommendations

Future legislation should provide that:

- **In a sale by auction without reserve, a lot cannot be withdrawn from the sale by the owner or auctioneer after the auctioneer has called for bids unless no bid is made within a reasonable period of time.**
- **Where goods are stated to be sold at auction 'without reserve', that statement shall be binding upon the auctioneer once bidding commences. Without prejudice to the remedy of specific performance, the highest *bona fide* bidder at the time the hammer falls, or when the sale is stopped by the auctioneer, shall have a right to damages for the loss occasioned by the breach of the collateral contract.**

[232] Uniform Law Conference of Canada. 1981. Draft Sale of Goods Act, s.25(5). Section 25(4) of the Draft Act provided that, in a sale by auction with reserve, the auctioneer may withdraw the goods at any time until he announces completion of the sale.
[233] Foster, S. 'Auctions without reserve: *Warlow v Harrison* revisited', (2000) *Cov L.J.* 5(2) 108-113.
[234] Uniform Law Conference of Canada. 1981. Draft Sale of Goods Act, s.25(6).

Auction 'Rings'

3.48. Benjamin notes that an agreement between bidders to form a 'ring' - that is, to refrain from bidding in competition with each other in order to depress the price - is not illegal at common law.[235] In the UK, however, this practice is the subject of specific statutory regulation. The Auctions (Bidding Agreements) Acts 1927 and 1969 provide that it is an offence for a dealer to give any gift or consideration to another person as an inducement to, or reward for, abstaining from bidding at an auction; it is also an offence for another person to accept a gift or consideration in such circumstances.[236] The Acts further provide that, where goods are purchased at auction by a person who has entered into an agreement with others to abstain from bidding, the seller may avoid the contract. *Bona fide* agreements by prospective buyers to purchase goods on a joint account, however, are permitted by the Acts if a copy of the agreement is deposited with the auctioneer before the goods are purchased.

3.49. We considered the case for introducing similar criminal legislative provisions here, but are not convinced of its necessity. This type of practice would appear to be adequately covered by the provisions at section 6 of the Criminal Justice (Theft and Fraud Offences) Act 2001 on making gain or causing loss by deception.[237] It would appear also to come within the scope of section 4 of the Competition Act 2002 on anti-competitive agreements and concerted practices. However, there may be merit in introducing a provision dealing with the rights of the seller of goods by auction where goods have been purchased following a collusive agreement on bidding. Such a provision could be modelled on section 3 of the U.K Auctions (Bidding Agreements) Act of 1969, the relevant parts of which provide as follows:

1) Where goods are purchased at an auction by a person who has entered into an agreement with another or others that the other or the others (or some of them) shall abstain from bidding for the goods (not being an agreement to purchase the goods bona fide on a joint account) and he or the other party, or one of the other parties, to the agreement is a dealer, the seller may avoid the contract under which the goods are purchased.

[235] **Benjamin's Sale of Goods**, op. cit., para. 3-009. See *Rawlings v General Trading Co.* [1921] 1 K.B. 635; *Cohen v Roche* [1927] 1 K.B. 169.

[236] Auctions (Bidding Agreements) Act 1927 (1927 Chapter 12). Auctions (Bidding Agreements) Act 1969 (1969 Chapter 56).

[237] The effectiveness of the UK legislation on bidding agreements is also open to question. There have been only two reported cases of criminal proceedings under the 1927 Act in the eight decades since its enactment. Harvey, B.W. 2008. 'Misadventures of the Consumer in the Auction Room' in Twigg-Flesner, C. et al (eds), **The Yearbook of Consumer Law 2008** (Aldershot: Aldgate), p. 354.

2) Where a contract is avoided by virtue of the foregoing subsection, then, if the purchaser has obtained possession of the goods and restitution thereof is not made, the persons who were parties to the agreement that one or some of them should abstain from bidding for the goods the subject of the contract shall be jointly and severally liable to make good to the seller the loss (if any) he sustained by reason of the operation of the agreement.

5) For the purposes of this section, the expression 'dealer' means a person who in the normal course of his business attends sales by auction for the purpose of purchasing goods with a view to reselling them.

3.50. Recommendation

Future legislation should provide that, where goods are purchased at auction by a person who has entered into agreement with others to abstain from bidding, the seller may avoid the contract. Where a contract is avoided in such circumstances and the purchaser has obtained possession of the goods without restitution therefor being made to the seller, the parties to the agreement to abstain from bidding should be jointly and severally liable to make good to the seller any loss he has sustained by reason of the agreement.

Online Auctions

3.51. Online auctions afford another example of how technological change has given rise to types of commercial transaction that were not envisaged when the provisions of the Sale of Goods Acts were being framed and which do not readily fit within the parameters of those provisions. It is necessary to distinguish in this context between, on the one hand, conventional auctioneers who use the Internet as a supplementary or additional means of conducting auction sales and, on the other, online platforms such as eBay which provide an infrastructure for the holding of online auctions. As Benjamin observes, the latter type of auction involves 'no act of the auctioneer corresponding to the fall of the hammer'.[238] It is usual instead to 'set a closing time on the website, by which time all bids must be placed and (unless there is a reserve price which has not been reached) the highest bid is deemed to have been accepted when the auction closes.'

3.52. The courts in Ireland and in the United Kingdom have yet to rule on whether auctions conducted by means of online platforms come within the scope of section 58

[238] **Benjamin's Sale of Goods**, op. cit., para. 2-004.

of the 1893 Act. Different views have been expressed on the question of whether online auctions of this kind are equivalent to traditional auctions for legal purposes. Some commentators contend that the providers of platforms for online auctions differ fundamentally from traditional auctioneers in that they do not act as agent for the sellers.[239] Nor do these providers write or post the listing of the goods, control the duration of the auction, or take possession of the goods. Furthermore, they neither perform the function of completing the auction sale or have the authority to do so. The dominant online auction platform, eBay, emphasises that it is not an auction house and that the transactions concluded on its website are not auctions, though it also wishes to be treated on the same basis as conventional auctioneers for the purpose of the application of the EU rules governing distance contracts, in particular their exemption from the right of withdrawal.[240] Others maintain, however, that the features of the traditional auction absent in the online context (the existence of an auctioneer controlling the sale in a physical setting) are relevant to the practical conduct of the auction rather than being essential to its legal classification.[241] On this view, auctions conducted via online platforms share many of the key features of conventional auctions in that the provider organises the means by which buyers and sellers interact and sets the rules under which the sale is conducted. The buyers bid in succession and, subject to a reserve price, the highest bidder wins the contract. On this view, consequently, the legal rules governing auctions should apply therefore to auctions conducted on online platforms.

3.53. The status of online auctions has also been an issue in the context of EU consumer legislation. Directive 97/7/EC on distance sales excludes contracts concluded at auction from its scope. The German Federal Supreme Court has held that an Ebay-type auction is not an auction within the meaning of the Directive and is hence subject to the rules on distance sales, including the right of withdrawal.[242] A

[239] Riefa C., 'To be or not to be an Auctioneer? Some thoughts on the legal nature of online "eBay" auctions and the protection of consumers', (2008) *J Consum. Policy* (31), 167.
[240] See eBay's submission to the Green Paper on the review of Consumer Acquis, http://ec.europa.eu/consumers/cons_int/safe_shop/acquis/responses/eBay.pdf; and eBay's submission to the Public Consultation on the implementation of the Distance Selling Directive (Directive 1997/7/EC) http://ec.europa.eu/consumers/rights/gen_rights_en.htm#distsell.
[241] Niemann, J-M., 'Online auctions under German contract law', (2001) *CLSR* 115. Hornle, J. 'Is an online auction an "auction" in law?' (2007) *EBL* 7-9.
[242] Hornle, op. cit. Schulte-Nolke, H. et al (eds). 2008. **EC Consumer Law Compendium: Comparative Analysis**, p. 524.

similar position obtains in number of other EU Member States, including France, Spain, Finland, Denmark and Sweden. The proposed Consumer Rights Directive sought to place online and conventional auctions on the same footing for the purpose of the rules governing distance contracts. The original text of the proposal included a definition of 'auction' as follows which was intended to encompass both types of auction:[243]

> 'auction' means a method of sale where goods or services are offered by the trader through a competitive bidding process which may include the means of distance communication and where the highest bidder is bound to purchase the goods or the services.

It further provided that, while both types of auction would be subject to the information requirements governing distance contracts, they would not be subject to the right of withdrawal. A majority of Member States were opposed, however, to treating conventional and online auctions as equivalent for this purpose, and the final text of the Directive is set to exclude this definition of 'auction' but to include the definition of 'public auction' cited at paragraph 3.42 above. This definition would limit the scope of the term to auctions which consumers attend, or are given the possibility to attend, in person.

Options for Reform

3.54. As section 58 of the 1893 Act was not drafted with online auctions in mind, it is scarcely surprising that it is not readily applicable to such auctions, particularly in respect of the emphasis put on the role of the auctioneer. In our view, the central issue is not whether online auctions are auctions within the meaning of the section, but rather what type of provisions, including those in section 58, would serve a useful purpose in regulating this type of transaction. We consider that some of the provisions of the section – in particular those restricting the right of sellers to bid or to employ others to bid – could be applied to online auctions. EBay's rules for sellers, for example, prohibit so-called 'shill bidding'. As in the case of conventional auctions, therefore, the law could provide that an auction in which the seller bids, or gets someone to bid, without prior notification of the fact may be treated as fraudulent by the buyer.[244] The application of other elements of section 58 to online auctions is less

[243] European Commission. **Proposal for a Directive on Consumer Rights**, COM (2008) 614, Article 2(15). The definition further provided that 'a transaction concluded on the basis of a fixed-price offer, despite the option given to the consumer to conclude it is not an auction.'

[244] http://pages.ebay.co.uk/help/policies/seller-shill-bidding.html

straightforward and should be assessed following consultation with industry and consumer interests. While section 58(2) of the 1893 Act provides, for example, that a bidder may retract his bid prior to the completion of the auction sale, eBay's policies regard bids as a 'binding contract' that can only be retracted in 'exceptional circumstances'.[245] As we received no submissions on these issues, we are reluctant to make hard-and-fast recommendations on them.

3.55. Recommendation

The provisions of section 58(3) of the Sale of Goods Act 1893 regulating bids by sellers, or persons employed by sellers to bid, should apply to auctions conducted on online platforms as well as to conventional auctions. The recommendations at paragraph 3.50 on the right of the seller to avoid the contract where goods are purchased at auction by a person who has entered into an agreement with others to abstain from bidding, and the liability of the parties to any such agreement for any loss to the seller, should also apply to online auctions. Issues of definition and the application of the other provisions of section 58 of the 1893 Act to online auctions, or the introduction of rules specific to such auctions, should be the subject of consultation with industry and consumer interests.

III CONTRACT FORMATION AND SALE OF GOODS LEGISLATION

3.56. As noted at paragraph 3.1 above, the only section of the Sale of Goods Act 1893 which regulates the formation of the contract of sale is section 58 on auction sales. It follows, however, from section 62(2) of the Act that the general principles of contract law on the formation of contracts are applicable to contracts of sale. In accordance with those general principles, the formation of a contract depends on agreement which is usually shown by a valid offer and the acceptance of that offer. The making and communication of offer and acceptance and the rules on revocation and termination of offers are all to be found in general contract law principles. There are also statutory rules on electronic communications in the Electronic Commerce Act 2000 and the European Communities (Directive 2000/31/EC) Regulations 2003 (S.I. No. 68 of 2003).

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[245] http://pages.ebay.co.uk/help/buy/questions/retract-bid.html

3.57. Though the existing Sale of Goods Acts contain no such provisions, it can validly be asked if future sale of goods legislation should include detailed rules on key aspects of contract formation such as offer and acceptance, the 'battle of the forms', and parol evidence. A number of matters relating to electronic contract formation, such as when a contract is formed online or by e-mail and the incorporation of e-contract terms, also call for consideration. We will look at each of these issues in turn.

Should Future Sale of Goods Legislation Contain Rules on Contract Formation?

3.58. Other jurisdictions where the Sale of Goods Act 1893 applies, or whose sale of goods legislation is based on the 1893 Act, have not amended their legislation to include detailed provisions on contract formation. Both the United Nations Convention on the International Sale of Goods [CISG] and the Draft Common Frame of Reference, however, contain detailed provisions on contract formation. Proposals to incorporate provisions of this kind in national legislation have also been made in the past in both Scotland and Canada.

United Nations Convention on the International Sale of Goods [CISG]

3.59. Rules on the formation of sales contracts are set out in Articles 14-24 of the Convention. Per Article 14, an offer to contract must be addressed to one or more persons and be sufficiently definite – that is, describe the goods, quantity and price; and indicate an intention for the offeror to be bound on acceptance. Unlike the common law, the CISG does not appear to recognise unilateral contracts but, subject to clear indication by the offeror, treats any proposal not addressed to a specific person as only an invitation to make an offer (Article 14(2)). Generally, an offer may be revoked provided the withdrawal reaches the offeree before or at the same time as the offer, or before the offeree has indicated acceptance (Articles 15 and 16). Some offers may not be revoked, for example when the offeree reasonably relied upon the offer as being irrevocable.(Article 16(2)). Article 17 provides that an offer comes to an end when a rejection reaches the offeror. In general, under Article 18, a positive act is required to indicate acceptance; silence or inactivity are not acceptance. Of particular note is Article 18(2) which provides that 'an acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror.' This contrasts with the present postal rule of acceptance under Irish law whereby, contrary

to the general rule that an acceptance becomes effective when it is communicated to the offeror, a postal acceptance becomes effective when the letter is posted.

3.60. Article 19 of the Convention deals with qualified acceptance and what is known as the 'battle of the forms'. This refers to the issue that arises when a purported acceptance of an offer contains some additional or different terms, perhaps in a standard form used by the offeree generally, which do not materially affect the terms of the offer and which are ignored by the offeror. The classic common law approach is that an acceptance has to meet the offer precisely or it will not conclude a contract. If a purported acceptance contains different or additional terms, the traditional solution is that this is a counter-offer which kills the original offer so that the person who wins the battle of the forms will be the person who last submits the counter-offer which is accepted by the other party, regardless of whether the original terms have been materially altered.[246] This approach has attracted criticism on the grounds that it pays insufficient regard to how the parties actually contract, is too rigid and makes it difficult for the courts to propose a fair compromise.[247] Article 19(2) of the CISG attempts to solve the problem by providing that a reply to an offer which purports to be an acceptance but contains additional or different terms that do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a note to that effect. If he does not so object, the terms of the contract are the terms of the offer together with the modifications contained in the acceptance. Article 19(3) of the Convention provides that additional terms relating to the price, payment, the quality and quantity of goods, the place and time of delivery, the extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially. Article 20 deals with the calculation of the time for acceptance, and Article 21 with the effect of late acceptance. Article 22 provides for withdrawal of acceptance, and Article 23 with the conclusion of contracts by acceptance.

3.61. Article 8 of the CISG deals with the admissibility of extrinsic evidence in relation to the interpretation of statements and the conduct of the parties, or what is

[246] *Butler Machine Tool Co Ltd. v. Ex-Cell-O Corporation (England) Ltd*. [1979] WLR 401.
[247] For example, see Siems, 'Unevenly Formed Contracts: Ignoring the Mirror of Offer and Acceptance', (2004) *E.R.P.L.* 771. Forte and McQueen, 'Contract Procedure, Contract Formation and the Battle of the Forms', (1986) *J. Law Soc. Sc.* 224.

known as parol evidence. The parol evidence rule in common law systems is a substantive rule in contract cases that prevents a party to a written contract from presenting oral evidence that contradicts or alters the written terms of the final contract.[248] The rationale for the rule is that, as the parties have expressed their agreement in final written form, extrinsic evidence relating to other matters should not be considered in interpreting that agreement in view of the parties' decision to exclude those matters from the written contract.[249] In relation to such extrinsic evidence, Article 8(3) of the CISG provides that 'in determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.'

Scottish Law Commission Report on Formation of Contracts

3.62. In 1993, the Scottish Law Commission recommended the adoption of provisions based on the CISG as part of the general law of Scotland relating to the formation of contracts, and prepared a draft Bill to give effect to this recommendation.[250] The proposed rules were to apply to contracts in general and not just to contracts of sale. In the Commission's view, the UN Convention comprised a modern set of agreed rules on contract formation that were widely applied in international trade. As the CISG rules were an amalgam of civil and common law traditions, they were also similar to the existing rules of Scottish law. The Commission concluded consequently that the rules on contract formation in the Convention would offer a suitable basis for Scottish domestic law in this area. Though the Commission's consultation showed considerable support for its proposals, the proposed legislation on contract formation was not subsequently enacted.

[248] For a discussion of the rule, and the exceptions to it, see Clark, **Contract Law in Ireland**, op. cit, pp. 147-158.
[249] The rule was stated in the following terms by Lord Morris in *Bank of Australasia v Palmer*: 'parol testimony cannot be received to contradict, vary, add to or subtract from the terms of a written contract or the terms in which the parties have deliberately agreed to record any part of their contract'. [1897] A.C. 540 at 545.
[250] Scottish Law Commission. 1993. **Report on Formation of Contract: Scottish Law and the United Nations Convention on Contracts for the International Sale of Goods**. The CISG provisions recommended for adoption with minor modifications were Articles 4, 6-10, and 13-24.

Draft Uniform Sale of Goods Act 1981

3.63. Inspired in part by the Uniform Commercial Code in force in the United States, the impetus for reform of Canadian sales law gathered pace in the late 1970s with the report of the Ontario Law Reform Commission.[251] The Commission recommended that a committee be appointed to consider the need for new uniform federal sale of goods legislation. The Sale of Goods Committee established in 1979 drafted a Uniform Sale of Goods Act, Part 4 of which dealt with matters of contract formation.[252] While some sections of the draft Act such as the rules on capacity to contract restated the provisions of the Sales of Goods Act, there were significant new provisions, based on both the UCC and the CISG, on matters such as the battle of the forms,[253] the abolition of the parol evidence rule,[254] and changes to the doctrine of consideration including provisions that offers may be irrevocable without consideration and that variations may be binding without new consideration. For reasons discussed further in Annex III, the draft Act was never implemented and sales law in the Canadian Provinces continues to be based on the 1893 Act.

Draft Common Frame of Reference (DCFR)

3.64. The European Commission's Communication of 2001 on European Contract Law initiated a consultation on the problems arising from differences in contract law in Member States and on possible responses to such problems.[255] This was followed in 2003 by an Action Plan which proposed to improve the quality of European contract law by establishing a Common Frame of Reference containing common principles, terminology and model rules to be used by EU legislators. The European Commission also financed the work of an international academic network on the Common Frame of Reference, work which led in 2008 to the publication of the Draft

[251] Ontario Law Reform Commission. 1979. **Report on Sale of Goods, Volumes I & II**.

[252] Uniform Law Conference of Canada. **Sale of Goods Act**. http://www.ulcc.ca/en/cls/index.cfm?sec+2. Also **Proceedings of Annual Meeting 1981**, Appendix S, pp. 185-321.

[253] The draft Act provided that a reply to an offer purporting to be an acceptance but containing different or additional terms that did not materially alter the terms of the offer constituted acceptance. This did not apply where the offeree notified the offeror within a reasonable time of his objection to the terms. Terms relating to price, payment, quality, quantity, place and time of delivery, liability, and disputes were classed as terms that materially altered the offer.

[254] Section 17 of the draft Act provided that: 'No rule of law or equity respecting parol or extrinsic evidence and no provision in writing prevents or limits 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.'

[255] COM (2001) 398, 11 July 2001.

Common Frame of Reference (DCFR).[256] The DCFR comprises principles, definitions and rules of civil law, including contract and tort, and covers both commercial and consumer contracts. Book II, Chapter 4 of the proposed Frame of Reference contains rules on contract formation, including offer, revocation of offer, rejection of offer, acceptance, time of conclusion of contract, time limit for acceptance, late acceptance, modified acceptance and conflicting standard terms (battle of the forms). Its provisions on the 'battle of the forms' are similar to those of the UN Convention on the International Sale of Goods[257] and, like the Convention, the DCFR further provides, contrary to the postal rule, that the contract is concluded when the acceptance reaches the offeror.[258]

3.65. While the shape of further initiatives on the Common Frame of Reference was uncertain for some time, 2010 saw the publication of a Green Paper outlining a number of policy options for future action.[259] These ranged from the anodyne – the Common Frame of Reference to serve as an optional 'source of inspiration' to national and EU legislators and to contracting parties – to the far-reaching, the adoption of a Regulation for a European Contract Law or even a European Civil Code. In order to facilitate possible future actions, the European Commission also established an Expert Group in April 2010 to study the feasibility of a user-friendly instrument of European contract law.[260] The Group's main task was to identify the provisions of the Draft Common Frame of Reference of most relevance to such a contract law instrument and to consider whether or how those provisions should be amended or augmented. The Expert Group produced a Feasibility Study in May

[256] Von Bar, C. et al. (eds). 2009. **Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference**. (Munich: Sellier). The DCFR built in particular on the work of a previous network of European academics entitled the Commission on European Contract Law which prepared Principles of European Contract Law with the aim of establishing a uniform contract law for the European Union.

[257] 'If businesses have concluded a contract but have not embodied it in a final document, and one without undue delay sends the other a notice in textual form on a durable medium which purports to be a confirmation of the contract but which contains additional or different terms, such terms become part of the contract unless: (a) the terms materially alter the terms of the contract; or (b) the addressee objects to them without undue delay. Ibid., II.4: 210.

[258] Ibid., II.4: 205.

[259] European Commission. 2010. **Green Paper on Policy Options for Progress Towards a European Contract Law for Consumers and Businesses**.

[260] Commission Decision of 26 April 2010 setting up the Expert Group on a Common Frame of Reference in the Area of European Contract Law (OJ L 105, 27.4.2010, p. 109).

2011.[261] Following a public consultation on the Green Paper, the EU Justice Commissioner, Viviane Reding, announced in June 2012 that a legislative proposal would be brought forward for a voluntary instrument of European contract law which, when selected by the parties, would provide the basis for both consumer and commercial contracts.[262]

Conclusion

3.66. There is little doubt in our view that several aspects of contract formation would benefit if an opportunity to restate, clarify or alter the position at common law presented itself. Though we gave some consideration for this reason to the inclusion of rules on contract formation in future sale of goods legislation, this is not a step that we can recommend. First, such a change would involve a fundamental change in the structure of our sale of goods legislation towards a code along the lines of that in Article 2 of the Uniform Commercial Code or in the draft Canadian Uniform Sales Act. Whether such an approach is suited to the Irish legal system is questionable, and it would involve a major departure from the approach to the reform of sales law followed in most other jurisdictions whose law is based on the 1893 Act. Secondly, and more fundamentally perhaps, statutory rules on contract formation should arguably be of general application and not apply only to contracts of sale. This was the approach recommended by the Scottish Law Commission. A general recommendation of this kind, however, would exceed our terms of reference and would also require detailed consideration of a range of other contract law issues such as the doctrine of privity of contract. Thirdly, any action at national level in this area will have to be considered in the light of future developments in the area of a European contract law regime. There is little merit in proposing the introduction of national rules on contract formation based on the provisions of the UN Convention on the International Sale of Goods while a legislative proposal for an optional EU contract law instrument is awaited. Fourthly, it is not altogether certain that the adoption of rules based on the CISG in areas such as 'the battle of the forms' would

[261] **A European Contract Law for Consumers and Businesses: Publication of the Results of the Feasibility Study Carried out by the Expert Group on European Contract Law**, http://ec.europa.ie/justice/contract/files/feasibility-study_en.pdf

[262] Viviane Reding, EU Justice Commissioner & Vice-President of the European Commission, 3 June 2011. 'The Next Steps Towards a European Contract Law for Businesses and Consumers.'

make a substantial difference in practice. Such rules might instead give rise to difficulties of their own.[263]

Issues in Electronic Contract Formation

3.67. The Electronic Commerce Act 2000 and the European Communities (Directive 2000/31/EC) Regulations 2003 (S.I. No. 68 of 2003) provide important clarification on the time and place of dispatch and receipt of electronic communications. The moment of formation of electronic contracts, however, continues to be governed by the traditional contract law rules on formation – that is, offer, acceptance and invitation to treat. A number of issues arise as follows with regard to electronic contract formation:

a) Is a web advertisement an offer or an invitation to treat?
b) Should the postal rule or the receipt rule apply to online contracts?
c) Is E-mail subject to the postal rule?
d) The incorporation of contract terms and the use of so-called 'click-wrap' and 'browse-wrap' methods of contracting.

We will look at each of these issues briefly in turn. As the matters at issue fall outside our terms of reference, no recommendations are made in respect of them. In view of the growing prevalence of digital commerce, however, it is important in our view that these matters receive appropriate further consideration as some key issues - such as the provisions on the placing of orders pursuant to electronic contracts under Regulation 14 of the 2003 Regulations - are treated ambiguously by the Act and the Regulations.

Is a web advertisement an offer or an invitation to treat?

3.68. One of the problem issues in electronic contracting is the categorisation of a website as either a binding offer or a non-binding invitation to treat. The classification which is adopted can have great significance for the online vendor who could be found to be bound by statements on a website. Under general contract law principles, it appears to be broadly accepted that, in the case of a web-based supplier communicating automatically with a customer who is purchasing online, the web page

[263] Vergne, 'The Battle of the Forms under the 1980 United Nations Convention on Contracts for the International Sale of Goods', (1985) *Am. J. Comp. L.* (33) 233. Scottish Law Commission, **Report on Formation of Contract: Scottish Law and the United Nations Convention on the International Sale of Goods**, op. cit, pp. 29-30

is an invitation to treat. The analogy of the display of goods in a shop will apply in such cases.[264] However, it is possible that a web advertisement could be treated as a unilateral offer to the world at large in accordance with the principles in *Carlill v. Carbolic Smokeball Co*.[265] where the placing of the advertisement effectively deprived the trader of his right to refuse. As a result, web traders are generally advised to provide for this situation in the design of their websites.

The postal rule or the receipt rule?

3.69. The general rule is that acceptance becomes effective when it is communicated to the offeror. There are two rules with regard to the moment of acceptance for the formation of contracts: the postal rule and the receipt rule. As noted earlier, where an acceptance is communicated by post, the contract is formed at the moment the letter of acceptance is posted.[266] The receipt rule provides that, where the parties have continuous communications on a face-to-face basis or over the telephone, the contract is formed as soon as the offeror hears the acceptance. The courts have also applied this rule to so-called 'instantaneous' methods of communication such as telex and fax.[267] In *Brinkibon*, however, the House of Lords refused to lay down a universal rule for all telex communications given the many variants which may occur in the context of such communications.[268] Where an advertisement is made on a website, the advertisement would normally be interpreted as an invitation to treat. The customer makes the offer and the trader accepts the offer. This is an instantaneous method of communication and therefore the receipt rule applies. The contract will be made as soon as the customer receives the acceptance.

Is E-mail subject to the Postal Rule?

3.70. Debate continues about whether e-mail should be subject to the postal rule or not. The argument centres around whether e-mail is an instantaneous method of communication. The Internet is not wholly reliable and communications by e-mail can get lost, delayed or fail to reach their destination. Some argue therefore that it is

[264] *Pharmaceutical Society of Great Britain v. Boots.* [1952] 2 All ER 456).
[265] [1893] 1 QB 256.
[266] *Adams v. Lindsell* (1818) 1 B & A 681.
[267] *Entores v. Miles Far East Corp* [1955] 2 QB 327. *Brinkibon v. Stahag Stahl* [1983] 2 AC 34.
[268] Per Lord Wilberforce in *Brinkibon*: 'No universal rule can cover such cases: they must be resolved by reference to the intentions of the parties, by sound business practice and in some cases by a judgment where the risks should lie.' Ibid. at 43.

analogous to post. However, others argue that, in terms of speed of transmission, e-mail generally equates to fax, telex and telephone, so that the receipt rule is the appropriate one. There has been no resolution of this issue and much academic commentary as to which rule should apply.[269] As outlined above, the E-Commerce Act and Regulations do not clarify whether the postal rule applies to e-mail communication, but do clarify when and where electronic communications are deemed to have been sent and received.

Incorporation of Terms

3.71. The use of so-called 'click-wrap' and 'browse-wrap' methods of contracting also raises questions as to whether terms have been validly incorporated. 'Click-wrap' contracts occur when a link is posted on a website which states that when clicked it amounts to agreement. For example, the purchaser of goods or services may click on an icon with 'I Agree' on it. The online vendor has usually displayed its terms and conditions and, in order to proceed with the transaction, the consumer must agree to be bound by those terms and conditions by the act of clicking the button. The purchase of goods or the download of music or software cannot proceed until the user clicks the button. This is a convenient method for the vendor as the purchaser must actively assent to the terms presented before the contract proceeds. However, there may be a question as to whether such terms have been validly incorporated. Traditional cases such as *Interfoto Picture Library Ltd. v. Stiletto Visual Programmes Ltd*[270] may apply and, if terms are considered to be unusual or unreasonable, they may have to be specifically brought to the attention of the customer. A court may question how prominently the terms were posted and whether it was possible to click the 'I Agree' button without seeing the terms. In the recent High Court case of *Ryanair v. Billefleuge*,[271] the court had regard to such traditional common law principles in finding that the terms of use on the Ryanair website had been validly incorporated.

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[269] See Fasciano, P 'Internet electronic mail: A last bastion for the mailbox rule', (1997) *Hofstra L. Rev***.** 971; Christensen, S, 'Formation of contracts by e-mail – Is it just the same as post?', (2001) 1 QUTLJJ 1; Rogers, K, 'Contract conclusion on the web: Untangling the weakest link', (2002) 36 *Law Teach* 220; Houghton, K and Vaughan-Neil, K, 'E-Mail and the postal rule', (2002) 12 *C&L* (5) 31; Watnick, V, 'The electronic formation of contracts and the common law "mailbox" rule', (2004) 56 *Baylor L. Rev.* 175; Al Ibrahim, Ababneh, Tahat, 'The postal rule in the digital age', (2007) *JICLT* 47.

[270] [1989] QB 433.

[271] High Court, unreported 26th February 2010.

3.72. Browse-wrap agreements do not require any physical act by the user indicating acceptance of the terms and conditions of the agreement before purchasing goods or services or downloading or accessing material from the site. Generally a website using this form of agreement requires the user to browse the website, often by clicking on a hyperlink that will take the user to another web page on the website to find the terms and conditions. Such an agreement then states that, by using or browsing the site, the user is assenting to the terms and conditions. The use of the browse-wrap form of agreement is more controversial. Though courts in the United States have held that the terms are binding where the person browsing the site knew of the terms or ought reasonably to have known of them, there is continuing uncertainty on the point in the absence of clear criteria as to what constitutes notice to the offeree of the terms and conditions of a browse-wrap agreement sufficient to make such an agreement enforceable. It seems likely that a court would take into account factors such as how the terms are physically presented, the size and type of font, and the location of the hyperlink to the terms and conditions. In *Specht v. Netscape*,[272] a U.S. District Court for the District of New York decision, the court noted that there was no constructive notice of the terms of the agreement because the user had to scroll down the page to the next screen before coming to the invitation to view the full terms available by hyperlink, and such notice of the terms of the agreement were not reasonably conspicuous to the average user.

3.73. The use of standard terms in click-wrap and browse-wrap consumer contracts may also be subject to a test of fairness under the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995. For example, one of the terms on the Directive's indicative list of terms regarded as unfair includes those which 'irrevocably binds the consumer to terms with which he had no real opportunity of becoming acquainted before conclusion of the contract.' [273]

3.74. The next Chapter looks at sections 11 and 13-15 of the 1893 Act together with a number of related provisions from the 1980 Act. Section 10 of the 1893 Act which deals with stipulations as to time is discussed in Chapter 8 along with the provisions of Part III of the 1893 Act on delivery and payment. Section 12 of the 1893 Act

[272] 150 F. Supp. 2d 585 (S.D.N.Y.2001).
[273] S.I. 27 of 1995, Regulation 3(7) & Schedule 3.

concerning implied undertakings as to title is considered in Chapter 7 together with the provisions of sections 21-26 on the transfer of title.

CHAPTER FOUR SALE OF GOODS ACTS 1893 AND 1980: CONDITIONS AND WARRANTIES, SECTIONS 11 & 13-15 1893 ACT AND SECTIONS 12-14 1980 ACT

4.1 Sections 11 and 13-15 of the 1893 Act contain a number of its most important provisions – the apparent bifurcation of contract terms into conditions and warranties, the creation of implied statutory conditions as to the quality or fitness for purpose of goods, and the need for goods to correspond with sample and description. In this Chapter, we also consider a number of related provisions at sections 12-14 of the 1980 Act concerning statements purporting to restrict the rights of buyers, the implied warranty for spare parts and after-sale service, the implied condition on the safety of motor vehicles, and the liability of finance houses. As outlined in Chapter 1, the provisions at sections 13-15 of the 1893 Act were substantially revised by the 1980 Act in order primarily to strengthen the position of consumer buyers. These sections of the Act have also undergone far-reaching amendment in other jurisdictions, most notably the United Kingdom, again with the principal aim of improving protections for consumer purchasers. Critically, the provisions at section 13-15 of the Act overlap directly with the rules on the quality of goods and their correspondence with description and sample in Directive 1999/44/EC on Consumer Sales and Guarantees.

4.2 Before we look at the substance of the provisions on the quality and other aspects of goods, it is necessary first to discuss their form. This involves, first, the consideration of the use of the technique of implied statutory terms and, second, the differentiation of those implied terms into conditions and warranties.

The Implication of Terms by Statute

4.3 The implied terms in sections 13 to 15 of the 1893 Act are based on provisions in the original Act as amended by the Act of 1980. As we saw in Chapter 1, those provisions were drawn from implied terms developed by the courts in a series of cases during the nineteenth century. Though the rights that buyers of goods enjoy under these sections of the Acts are rights conferred by statute, breaches of their provisions do not involve a breach of the Sale of Goods Acts *per se*. Because the terms are inserted into the contract between seller and buyer, their breach takes the form of a breach of the contract between the parties. If goods do not meet the implied quality or

other terms under these sections of the Act, therefore, it is up to the buyer to pursue a remedy for breach of the contract.

4.4 A recent report on the reform of UK consumer law has suggested a severing of the link between consumer rights and the underlying contract.[274] It argues that the current reliance on implied terms injects an additional layer of complexity into the law and that the imposition of statutory requirements on a seller, vis-à-vis the goods sold, independent of an underlying agreement between the parties would provide a simpler and sounder basis for consumer rights. While statutory requirements of this kind need not differ in content from the existing implied terms, they would provide protections for consumers independent of their contractual or other relationship with the supplier of the goods. As possible models for such a change, the report instances, first, the Draft Common Frame of Reference which, instead of implying terms into contracts, applies a standard of contractual conformity which is independent of the individual contract and which, if breached, allows the consumer a remedy against the supplier.[275] As discussed below, Directive 1999/44/EC on Consumer Sales and Guarantees is based on a variant of this approach. The report cites, secondly, the New Zealand Consumer Guarantees Act 1993 which sets out a range of statutory guarantees on quality, fitness for purpose and other matters that apply in all cases where goods are supplied to a consumer and which provides a right of redress against the supplier and/or manufacturer where goods fail to comply with these guarantees.[276]

4.5 We are not persuaded, for a number of reasons, that placing statutory obligations of this kind on the seller of goods other than through the implication of terms into the contract is a change worth pursuing. The terms implied into contracts of sale by the Sale of Goods Acts are just one element of the contract. Placing the implied terms on a non-contractual footing while the other terms remain contractual in nature would do little to simplify or rationalise consumer rights. It is difficult to see, moreover, that such a change would make any significant difference in practice. Though the quality and other stipulations inserted into the contract by the Sale of Goods Acts are classed

[274] Howells, G. & Twigg-Flesner, C. (eds). 2010. **Consolidation and Simplification of UK Consumer Law** (Department for Business, Innovation and Skills).
[275] Von Bar, C. et al (eds). 2009. **Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference** (Munich: Sellier), IV. A. 2.301-2.302.
[276] Consumer Guarantees Act 1993 (No. 91), Part 1.

as contract terms, they are effectively statutory rules, particularly in consumer contracts where their exclusion is prohibited. Their substance would remain broadly similar if they were restated in some other way and, though the grounds for action where goods failed to meet the statutory standard would be couched in different terms, the consumer would still have to pursue a remedy against the trader who had sold or supplied them. Though, as recommended in this and other Chapters, the existing provisions can be improved in a range of ways, the model that underpins them remains essentially sound in our view. As a separate UK study of consumer rights for digital products has recently argued,[277] the potency of the implied terms under the Sale of Goods Act for consumer protection purposes stems from the following characteristics:

- they are classed as conditions so that any breach allows the buyer to reject the goods and demand a refund;
- they are easy to prove and establish;
- liability for their breach is strict;
- they cannot be excluded nor liability for their breach limited;
- they provide a remedy against the retailer who will generally be relatively accessible to the consumer;
- they are familiar to, and understood by, both consumers and retailers.

While this assessment may understate some of the practical difficulties consumers can face in making use of the implied terms, it is broadly correct in its evaluation of the overall strengths of the existing statutory regime. We are not in favour moreover of an approach that would isolate consumer sales law from general sales law. The Group agrees with the underlying notion that contracts freely negotiated between parties of equal bargaining power should, as a matter of public policy, be enforced. The existing law recognises the utility of implied terms for business purchasers while also acknowledging issues of differential market power with consequential advantages in terms of uniformity of application.

4.6. The preceding discussion is relevant to the assessment of the way in which the quality and related terms in Directive 1999/44/EC are framed. Article 2(1) of the Directive sets out the general obligation on the seller to deliver goods in conformity with the contract. Article 2(2) provides next that goods 'are presumed to be in conformity with the contract' if they satisfy certain requirements in relation to

[277] Bradgate, R. 2010. **Consumer Rights in Digital Products: A Research Report for the UK Department for Business, Innovation and Skills**, p. 30 & pp. 18-27.

compliance with description, sample and model, fitness for purpose, and quality and performance. This presumption is rebuttable so that goods which satisfy Article 2(2) may be found not to be in conformity with the contract, most obviously where they do not conform to an express term of the contract.[278] Though it would be difficult for a seller successfully to argue the point, it is possible also that goods which do not comply with the requirements of Article 2(2) could be in conformity with the contract.[279] Unlike the corresponding implied terms in the Sale of Goods Act, the Directive does not lay down a clear and unequivocal requirement that goods should comply with its stipulations.

4.7 The Regulations that give effect to Directive 1999/44/EC adhere closely to the wording of the Directive for the most part.[280] As stated in previous Chapters, the failure to integrate the Directive's provisions with those contained in domestic legislation has brought about a situation in which there are two parallel, and in some respects conflicting, sets of rules on key aspects of consumer sales. In the interests of legislative coherence and comprehensibility, it is essential that there is a single set of rules in this area in the future. The presumption of conformity formula employed in the Directive is, in our view, a less satisfactory basis for consumer rights than the implied terms approach adopted in the Sale of Goods Acts, and the latter should accordingly be retained in future legislation. The substance of the Directive's quality and related provisions can be accommodated within the framework of the Sale of Goods Acts. In contrast to the Irish approach, the transposition of Article 2 of the Directive in the UK was effected by means of relatively minor additions to the implied terms at sections 13-15 of the Sale of Goods Act 1979.[281] This way of proceeding is consistent with the legal nature of Directives under the EU Treaty and

[278] Recital 8 of the Directive states, among other things, that 'in order to facilitate the application of the principle of conformity with the contract, it is useful to introduce a rebuttable presumption of conformity with the contract covering the most common situations.'
[279] Bradgate, R. and Twigg-Flesner, C. **Blackstone's Guide to Consumer Sales and Associated Guarantees**, op. cit., pp. 41-43.
[280] The European Communities (Certain Aspects of the Sale of Consumer Goods and Associated Guarantees) Regulations 2003 (S.I. No. 11 of 2003). The Regulations, however, did not transpose Article 2(1) of the Directive which fixed a liability period of two years for goods not in conformity with the contract. The Directive's minimum harmonisation basis permitted the retention of the general six-year time limit for contractual claims.
[281] Bradgate, R. and Twigg-Flesner, C., op. cit., p. 71.

can thus be followed in Irish legislation.[282] As discussed in Chapter 9, more systematic adjustments are required to the provisions of domestic and EU legislation regarding remedies for goods that do not conform to the contract.

SECTION 11 WHEN CONDITION TO BE TREATED AS WARRANTY

(1) Where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive the condition, or may elect to treat the breach of such condition as a breach of warranty, and not as a ground for treating the contract as repudiated.

(2) Whether a stipulation in a contract of sale is a condition, the breach of which may give rise to a right to treat the contract as repudiated, or a warranty, the breach of which may give rise to a claim for damages but not to a right to reject goods and treat the contract as repudiated, depends in each case on the construction of the contract. A stipulation may be a condition, though called a warranty in the contract.

(3) Where a contract of sale is not severable, and the buyer has accepted the goods, or part thereof, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty, and not as a ground for rejecting the goods and treating the contract as repudiated, unless there be a term of the contract, express or implied, to that effect.

(4) Nothing in this section shall affect the case of any condition or warranty, fulfilment of which is excused by law by reason of impossibility or otherwise

Conditions and Warranties

4.8 The division of contract terms into conditions and warranties reflects the origins of the 1893 Act in the common law of the nineteenth century. The Act does not define 'condition' in either section 11 or section 62, but instead characterises it by reference to its legal effect compared with that of warranty. Atiyah defines 'condition' as follows:[283]

> … in its usual meaning a condition is a term which, without being the fundamental obligation imposed by the contract, is still of such vital importance that it goes to the root of the transaction. The importance of a condition in contracts for the sale of goods is that its breach, if committed by the seller, may give the buyer the right to reject the goods completely and to decline to pay the price, or, if he has already paid it, to recover it.

Section 62 of the 1893 Act defines 'warranty'as:[284]

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[282] Per Article 288(3) of the Treaty on the Functioning of the European Union: 'A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.'

[283] Atiyah, **The Sale of Goods**, op. cit., p. 86.

[284] Warranty is also commonly used to refer to manufacturers' or product guarantees, particularly those which offer extended protections in return for a payment. This meaning of the term should not be confused with the legal warranty under consideration here. Manufacturers' guarantees are considered

> an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of such contract, the breach of which gives rises to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated.

The definition of 'warranty' thus sets out both the meaning and the legal effect of the term. Though the description of warranties as 'collateral' to the main terms of the contract might suggest that these are in some way separate from the contract, they are plainly a term of the contract.

4.9 The division of contract terms into 'conditions' and 'warranties' cross-cuts the division between express and implied terms. Express terms are those specifically mentioned and agreed by the parties at the time the contract is made, whether orally or in writing. In addition to the express terms, other terms can be implied into a contract in various ways, including by prior course of dealing, custom or usage, rules of the common law, and statute.[285] The last-mentioned is the most important for our purposes, particularly the terms implied by Sections 13-15 of the amended 1893 Act which are considered in this Chapter. All of these implied terms are classed as conditions under the Act, though two of the implied terms as to title under section 12 of the Act discussed in Chapter 7 are classed as warranties.

Innominate Terms

4.10 The common law distinction between conditions and warranties that was incorporated in the 1893 Act related to contract terms at the time the contract was made and, as such, did not require regard to be had to the actual effects of any subsequent breach. This led to a tendency for many contract terms to be regarded as conditions even where their breach had caused minor, or even no, loss or inconvenience.[286] 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. The decision in 1962 of the English Court of Appeal in *Hong Kong Fir*

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in Chapter 13. To compound the confusion, 'warranty' has a number of other meanings, including an older sense of the term which refers to representations that have contractual effect, regardless of the associated remedy for breach, as opposed to 'mere representations' which do not. Clark, **Contract Law in Ireland**, op. cit., p. 145. In insurance law, moreover, 'warranty' is used to refer to a core or central term of the contract, breach of which allows the innocent party to repudiate the contract.

[285] **Goode on Commercial Law**, op. cit, pp. 96-98.

[286] Atiyah, **The Sale of Goods**, op. cit., p. 87.

Shipping Co. Ltd. v *Kawasaki Kisen Kaisha*,[287] however, signalled a major change of judicial thinking in the matter. The case concerned an express term relating to the seaworthiness of a vessel chartered by the plaintiffs to the defendants. The court found that the duty to provide a seaworthy vessel was neither a condition, whose breach would permit the charterer to terminate the contract, nor a warranty, whose breach could give rise only to a claim for damages. It belonged instead to a separate category of innominate or intermediate terms, the applicable remedy for breach of which would depend on the nature and effect of the breach.[288]

4.11 A subsequent case, *The Hansa Nord*,[289] applied the reasoning in *HongKong Fir* to a contract of sale. The case concerned a shipment of citrus pulp pellets intended for processing as animal feed, part of which had suffered damage, though not of a substantial kind, while in transit. The express terms of the contract required the pellets to be 'in good condition' and the purchasers, who had paid for them against the shipping documents, rejected the goods on the grounds of both this requirement and of the implied condition of merchantability, and sought the return of the price. With the market price in decline, they proceeded through an agent to repurchase the goods for a third of the contract price.[290] The English Court of Appeal held that the express 'good condition' stipulation in the contract was an innominate term and that the breach of the term in this case was not sufficiently serious to justify rejection of the goods. Though it was argued that section 11 of the Sale of Goods Act 1893 required that all contract terms had to be classified as either conditions or warranties, the Court ruled that section 62 of the Act permitted express terms in a contract of sale to be subject to the general law of contract. While the judgment confirmed that the terms implied by the Act, including the condition relating to merchantability, were

[287] *Hong Kong Fir Shipping Co. Ltd.* v *Kawasaki Kisen Kaisha* [1962] 2 Q.B. 26.
[288] The test laid down by Diplock L.J. for the purpose of determining whether the remedy of rescission becomes available to the injured party requires an affirmative answer to the following question: 'Does the occurrence of the event deprive the party who has further undertakings still to perform of substantially the whole benefit which it was the intention of the parties as expressed in the contract that he should obtain as the consideration for performing those undertakings.', ibid at p.66. The test was applied in the Irish courts by Costello, J. in *Irish Telephone Rentals v Irish Civil Service Building Society Ltd* [1991] I.L.R.M. 377, although the case primarily concerned the implied terms under section 39 of the Sale of Goods and Supply of Services Act 1980 which are not classified as conditions or warranties. This case is discussed further in Chapter 14.
[289] *Cehave NV* v *Bremer Handelsgesellschaft* [1976] Q.B. 44.
[290] The contract price was €100,000; the market price at delivery for sound goods was estimated at €86,000; a reasonable adjustment for the damage was put at €20,000; and the buyers' agents paid €33,720 for the goods; ibid., pp. 55-56.

conditions in the strict sense of the term, the merchantability condition was held not to have been breached in the particular circumstances of the case.[291]

4.12 These judgements notwithstanding, the courts remain prepared to accord the status of condition to some contract terms, particularly stipulations relating to time of performance in commercial contracts. In *Bunge Corporation v Tradax S.A.*,[292] the House of Lords upheld the ruling of the Court of Appeal that an express obligation requiring the buyers of a bulk shipment of soya beans to give fifteen days notice of their readiness to load the cargo was a condition. Though the contract did not expressly provide for a remedy of rescission, the need for certainty in the planning and management of this type of transaction justified treating time obligations as conditions which, if breached, gave the injured party the right to terminate without regard to the effects of the breach. Lord Wilberforce observed that, while the courts 'should not be too ready to interpret contractual clauses as conditions', they should not be reluctant 'in suitable cases … if the intentions of the parties, as shown by the contract so indicate, to hold that an obligation has the force of a condition, and that indeed they should usually do so in the case of time clauses in mercantile contracts. To such cases … the 'gravity of the breach' approach of the *Hongkong Fir* case … would be unsuitable.'[293] Bridge has summarised the position regarding termination rights following this judgement as follows:[294]

> … the decision accepted in principle intermediate stipulations whilst denying their application to time provisions in commercial contracts. The autonomy of the parties in grading a contractual term as a condition if they so wished was also underwritten. In consequence the approach to termination rights is a two-fold one: first, the construction of the contract to see if the term breached was a condition; and secondly, failing this, the appraisal of the effects of the breach to see if it went to the root of the contract. As a summary of the antecedent law, *Bunge* suggests a basic distinction between quality and time obligations. The former are particularly apt for an intermediate stipulations approach, though the implied conditions of quality, fitness and description are put beyond the reach of this by the Sale of Goods Act.

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[291] Atiyah observes that, 'in order to arrive at a reasonable result, the court had to conclude that the goods in this case were merchantable, but not 'in good condition', a somewhat contradictory holding.' Atiyah, **The Sale of Goods**, op. cit., p. 88.

[292] 1981 1 W.L.R. 71. This approach to the contractual status of time obligations in commercial contracts has been upheld in subsequent cases. *Cie Commercial Sucres et Denrées v C Czarnikow Ltd (The Naxos)* [1990] 1 W.L.R. 1337. *The Seaflower [2001] 1 Lloyd's Rep. 341.*

[293] *Bunge Corporation v Tradax S.A.* 1981 1 W.L.R. at pp. 715-716.

[294] Bridge, **The Sale of Goods**, op. cit., para. 10.35.

Issues Arising

4.13 The principal issue raised by of section 11 is that of the retention of the distinction between conditions and warranties in its present form. Change could be effected in either of two ways. First, the distinction between conditions and warranties could simply be abolished and it could be provided that all implied and express terms in contracts of sale would be innominate in character. Second, the distinction could be retained, but future legislation could expressly provide that the implied statutory terms were variously conditions, warranties or innominate terms.[295]

4.14 We are not in favour of a change along either of these lines. In our view, 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. 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.[296] Third, the loss of automatic entitlement to the right to reject in consumer cases would considerably weaken the position of, and protections available to, consumers. A provision that damages would be the only remedy for some breaches of the implied terms in consumer sales contracts, furthermore, would not be in compliance with the remedies requirements of Directive 1999/44/EC on consumer sales and guarantees. The relation between the remedies regime under the Directive and under the Sale of Goods Act is discussed further in Chapter 9.

4.15 We see no advantage similarly in providing that the terms implied by the Act could be innominate in character. There is possible merit in clarifying in the

[295] This is effectively the present position if both the 1893 and 1980 Acts are considered. Most of the implied terms as to goods under the 1893 and 1980 Acts are conditions, but a small number are warranties. The implied undertakings as to services at section 39 of the 1980 are said to be 'terms of the contract', and have been treated as innominate terms by the courts.

[296] Case law on insurance, for example, reflects a judicial reluctance to move away from an *a priori* classification of terms as conditions: Legh-Jones, M. et al (eds). 2008. **MacGillivray on Insurance Law** (London: Sweet & Maxwell), para. 10-014. Certainty of result is a much valued policy objective in commercial contracts.

legislation that express terms can be innominate[297] but, as in the case of terms implied by way of custom and practice, it is arguable that the process of construction approach in *Hong Kong Fir* already does this and that legislation on these lines would achieve little. With the exception of the implied undertakings as to freedom from undisclosed charges or encumbrances and quiet possession under section 12, all of the implied terms relating to goods under the 1893 Act have the status of conditions. While the exclusion or limitation of these implied terms is void in consumer contracts, it is permissible in commercial contracts where the restriction is shown to be fair and reasonable. As discussed in Chapter 5, we propose to retain the existing rules governing exemption clauses in contracts of sale and are of the view that these rules give the required degree of protection in consumer cases and the desired level of flexibility in commercial transactions. The implied terms in contracts for the supply of services under Part IV of the 1980 Act, which are not expressly classified as conditions or warranties, are discussed in Chapter 14.

4.16 Though the rules governing termination rights under the Sale of Goods Act should broadly be maintained in their existing form, some rebalancing is justified in the case of commercial contracts of sale. In the UK, the Sale and Supply of Goods Act 1994 introduced a limitation on the right of buyers in non-consumer sales to terminate for slight breach of the implied conditions as to quality, fitness for purpose, and correspondence with description and sample. The provision which inserted a new section 15A in the Sale of Goods Act 1979 states as follows:

> (1) Where in the case of a contract of sale –
> the buyer would, apart from this subsection, have the right to reject goods by reason of a breach on the part of the seller implied by section 13, 14, or 15 above, but the breach is so slight that it would be unreasonable for him to reject them, then, if the buyer does not deal as 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.

A provision along these lines had been recommended by the Law Commission for England and Wales and the Scottish Law Commission in order to 'prevent rejection in

[297] In New South Wales, for example, the Sale of Goods (Amendment) Act 1988 inserted a new section 4(5) as follows in the Sale of Goods Act 1923: 'Nothing in this Act shall be construed as excluding a right to treat a contract of sale as repudiated for a sufficiently serious breach of a stipulation that is neither a condition nor a warranty but is an intermediate stipulation.'

bad faith where the breach was really so insignificant that, as a matter of justice, rejection should not be permitted.'[298] The Commissions viewed the proposal as a 'slight change' which 'aimed to preserve the present law as far as possible whilst lessening the risk of its abuse.' The 'slight breach' limitation it proposed fell considerably short of the more exacting test set out in the *Hong Kong Fir* case, namely whether the breach was so serious as to deprive the affected party of substantially the whole benefit of the contract. As enacted, moreover, the provision allows contracting parties, expressly or impliedly, to exclude its application. The inclusion of a provision giving buyers the option of partial rejection of goods where a breach does not affect all of the goods under contract is considered in chapter 8.

4.17 Recommendations

Future legislation should retain the distinction between conditions and warranties. The legislation should clarify, however, that express contractual terms may be innominate in character where the ordinary principles of construction of the contract, lead to such a conclusion.

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.

SECTION 13 SALE BY DESCRIPTION

13. (1) Where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description; and if the sale be by sample as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.

(2) A sale of goods shall not be prevented from being a sale by description by reason only that, being exposed for sale, they are selected by the buyer.

(3) A reference to goods on a label or other descriptive matter accompanying goods exposed for sale may constitute or form part of a description.

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[298] The Law Commission and the Scottish Law Commission. 1987. **Sale and Supply of Goods** (Law Com. No. 160. Scot. Law Com. No. 104), para. 4.18 & paras. 4.16-4.17 & 4.19-4.24. The Commissions saw no case for the application of a similar provision to consumer contracts because of consumers' weaker bargaining power and the fact that remedies other than rejection were less appropriate to consumer transactions.

4.18 Subsections (2) and (3) were inserted in the 1893 Act by the Sale of Goods and Supply of Services 1980, while subsection (1) remains unchanged from the original provision in the 1893 Act. Subsection (2) is based on a provision first included in the UK Supply of Goods (Implied Terms) Act 1973 with the aim of clarifying that section 13 applied to cases where the buyer selected the goods in a self-service store.[299] There is no provision corresponding to subsection (3) in UK legislation. The corresponding provision at Article 2(2)(a) of Directive 1999/44/EC on Consumer Sales and Guarantees provides that goods are presumed to be in conformity with the contract if they comply 'with the description given by the seller'. Public statements by the seller and producer, particularly in advertising or on labelling, are relevant in respect of quality under Article 2(2)(d) of the Directive and would overlap with the provisions on 'description' under section 13 of the 1893 Act. Article 2(2)(a) of the Directive was transposed verbatim at Regulation 5(2)(a) of the European Communities (Certain Aspects of the Sale of Consumer Goods and Associated Guarantees) Regulations 2003.

4.19 Though section 13 appears relatively straightforward, it has given rise to a sizeable number of issues of interpretation and application.[300] Most of these have revolved around the related issues of what constitutes a sale by description and what statements are to be regarded as forming part of the contractual description. More 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?[301] The next sections look at each of these issues in turn.

What Is Sale by Description?

4.20 Though section 13 applies only to contracts for the sale of goods by description, it does not define sale by description. It is clear, however, that the term covers all contracts for the sale of unascertained goods – that is goods not identified and agreed

[299] The then Minister for State at the Department of Industry, Commerce and Energy explained the rationale for the subsection as follows: 'The benefits of section 13 which provides for the implied condition that goods being sold by description must correspond with the description are being extended so as to apply to goods selected off the shelf in a shop.' **Dáil Debates**, Vol. 309, 16 November 1978. Sale of Goods and Supply of Service Bill 1978 Second Stage: col.1107.

[300] In Benjamin's opinion, 'Conceptually this [s.13] is one of the most troublesome sections of the Act.' **Benjamin's Sale of Goods**, op. cit., para. 11-002.

[301] Or as the old canard has it: A contract to sell a man a golf cloth cap 'is not fulfilled by sending him a stylish silk hat'. Dodd J. in *Fogarty v Dickson* (1913) 47 ILTR 281.

upon at the time the contract is made. It also effectively covers all contracts for the sale of future goods – that is goods to be manufactured or acquired after the making of the contract of sale. In *Varley v Whipp*,[302] a case decided just a few years after the enactment of the section, the court held that:

> the term 'sale of goods by description' must apply to all cases where the purchaser has not seen the goods, but is relying on the description alone… The most usual application of that section no doubt is the case of unascertained goods.

Though the case concerned specific goods – a 'second-hand self-binder reaping machine' – it was found to come within the scope of the section as the buyer had not seen it before agreeing to the sale. Subsequent cases ruled that there could be a sale by description even where the buyer had seen the goods. In the words of Lord Wright in *Grant v Australian Knitting Mills Ltd*:[303]

> It may also be pointed out that there is a sale by description even though the buyer is buying something displayed before him on the counter: a thing is sold by description, though it is specific, so long as it sold not merely as the specific thing, but as a thing corresponding to a description, e.g. woollen undergarments, a hot-water bottle, a second-hand reaping machine to select a few obvious illustrations.

Subsequent cases have confirmed the readiness of the courts to give an expansive interpretation to sale by description.[304] It has been held that a sale could be by description where the buyer had carefully examined the goods prior to the sale,[305] and where he had personally selected the goods from stock shown him by the seller.[306] As Salmond J stated in *Taylor v Combined Buyers Ltd*:[307]

> In the case of specific articles … it is possible to sell them without any description at all… In practice, however, even specific articles are generally sold by description in some sense. They are sold as being of some specified or disclosed nature.

It is reasonable to conclude therefore that almost all sales are sales by description. As Atiyah observes,[308] 'it is probably true to say that the only case of a sale not being by description occurs where the buyer makes it clear that he is buying a particular thing because of its unique qualities and that no other will do.'

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[302] *Varley v Whipp* [1900] 1 QB 513.
[303] [1936] AC 85, 100. The 'illustrations' referred to are drawn from the case law on section 13.
[304] This tendency may have been influenced by the fact that, prior to 1973 in the UK and 1980 in Ireland, the implied condition as to merchantable quality under section 14 of the 1893 Act applied only to goods 'bought by description from a seller who deals in goods of that description'.
[305] *Beale v Taylor* [1967] 1 WLR 1193.
[306] *H Beecham & Co Pty Ltd v Francis Howard & Co Pty Ltd* [1921] VLR 28.
[307] [1924] NZLR 627, 633-34.
[308] Atiyah, **The Sale of Goods**, op. cit., p. 151.

4.21 Though the courts have accorded a broad meaning to sale by description, they have shown themselves prepared in recent decades to restrict the application of section 13 on other grounds. In particular, it has been held that not all statements of description come within the scope of the section and give rise to a right to terminate the contract if the description is not complied with.[309] In accordance with traditional common law doctrine, some such statements may be mere representations with no contractual effect. In *Harrison v Knowles and Foster*,[310] statements about the deadweight capacity of two vessels were judged to be mere representations. A similar view was taken of statements by a private seller to a dealer concerning the age of a car in *Oscar Chess Ltd v Williams*.[311] A restrictive reading of description was evident similarly in *Ashington Piggeries Ltd v Christopher Hill Ltd*.[312] The sellers contracted to sell herring meal to the buyers to be compounded and used as feed for mink. The meal was treated with a preservative which reacted with it to produce a toxin that proved fatal when fed to the mink. The buyers contended, inter alia, that the feed did not comply with its description. The House of Lords held, however, that there was no breach of section 13.[313] The feed was still capable of being described as herring meal. The judgement thus excluded what were held to be non-essential parts of the description from the scope of the implied condition under the section. In *Reardon Smith Line v Yngvar Hansen Tangen*,[314] Japanese shipbuilders contracted to charter a tanker to the defendant to be built to a detailed specification at Osaka and to be known as Yard No. 354 until named. In the event, the construction of the ship was subcontracted to a different yard and given a different identifying name. By the time the vessel was built, the market for tankers was in decline and the charterer sought to reject the ship on the ground that it did not comply with its description. The House of Lords found for the shipbuilder and held that the words identifying the vessel and the location of its construction were only 'simple substitutes for a name' and did not form part of the contractual description of the goods. Lord Wilberforce drew a distinction

[309] In Ireland, though not the UK, section 13(3) provides that a reference to goods on a label or other descriptive material accompanying the goods (such as a sales brochure or manufacturers' guarantee) may form part of the contractual description.
[310] [1918] 1 KB 608.
[311] [1957] 1 WLR 370.
[312] [1972] AC 441.
[313] The buyer's claim for a breach of the implied quality terms under section 14 of the Act was upheld however.
[314] [1976] 1 W.L.R. 989. Although not a sale of goods case, a detailed account of it can be found in Bridge, M. 'Description and the sale of goods: the Diana Prosperity' in Mitchell, C. & Mitchell, P. (eds). 2008. **Landmark Cases in the Law of Contract** (Oxford: Hart), pp. 321-49.

between words which state or identify 'an essential part of the description of the goods' and words which merely 'provide one party with a specific indication (identification of the goods) so that he can find them'.[315]

4.22 It has further been held that, in order for a sale to be by description for the purposes of section 13, the description must be influential in the sale so as to constitute an essential element of the contract. *Harlingdon and Leinster Enterprises Ltd v Christopher Hull Fine Art Ltd*[316] concerned the sale for £6,000 of a painting described as a work by Gabriele Munter, a German expressionist artist. The seller was not a specialist in fine art and made this known in the course of the sale while the buyer was a dealer who specialised in German expressionism and had inspected the painting prior to the sale. The painting was later discovered to be a fake worth no more than £100 whereupon the buyer sought to reject it and to recover the price on the ground of nonconformity with description in breach of section 13. The Court of Appeal held that the sale was not by description as, per Nourse LJ, 'the description must have a sufficient influence in the sale to become an essential term of the contract and the correlative of influence is reliance.'[317] There had been no such reliance in this instance.

Issues Arising

4.23 For some commentators, the main issue raised by section 13, as it has come to be interpreted by the courts, is that it states as an implied term an obligation which is central to the contract as an express term, namely to deliver the agreed goods under the contract.[318] Apart from labelling the obligation as a condition, the section, on this view, does nothing that is not also done by section 27 which stipulates that it is the duty of the seller to deliver the goods in accordance with the terms of the contract of

[315] Ibid., at p. 999.
[316] [1990] 1 All E.R. 737.
[317] Ibid., at p. 744. Bridge has commented of the judgement that: 'There is nothing in the text and little in the history of section 13 of the Sale of Goods Act that requires the buyer, as a condition of the seller's liability, to rely upon descriptive words uttered by the seller. Yet this requirement was entrenched in the law by the Court of Appeal in a development that reconciled description to the perceived requirements of the law of express warranty, thus averting the type of divergence between the Sale of Goods Act and the complementary general law of contract that would have been most harmful for the rational development of the law.' Bridge, M. 2007. 'Do We Need a New Sale of Goods Act?', op. cit, para. 2.11
[318] Atiyah, **The Sale of Goods**, op. cit., p. 155; Bridge, 'Do We Need a New Sale of Goods Act?', op. cit., para. 2.10; **Goode on Commercial Law**, op. cit., p. 325.

sale. As well as contending that it is redundant, critics of section 13 argue that the treatment of what is properly an express term as an implied term may give rise to difficulties where, for example, a contract clause provides for the exclusion of implied terms.[319]

4.24 While we have some sympathy with this view, we cannot go as far as to recommend that future sale of goods legislation should dispense with a provision on correspondence with description. First, as noted above, Directive 1999/44/EC includes a requirement on compliance with description and it is far from clear that the obligation on Member States to give effect to this provision would be met by the statement of the seller's duty to deliver the goods at section 27 of the Act. Secondly, something that is obvious to experts in contract law should not be assumed to be similarly obvious to businesses and consumers. Statute law serves a function in setting out in a clear manner the duties and obligations of the parties, and a provision like section 13 may serve this purpose even if its effect is limited in strictly legal terms. As Atiyah notes, a statutory codification may include 'propositions … which are not designed in any sense to alter the law'.[320] Section 13 provides the parties to a contract of sale with a convenient reminder of a key contractual requirement and should accordingly be retained. It is noteworthy in this context that, despite the academic commentary on the redundancy of section 13, no jurisdiction whose sales law is based on the 1893 Act has repealed the section to date.[321] Though the draft 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 and the other provisions in the draft Act have still to be implemented.[322]

4.25 It has been suggested that reliance on a provision along the lines of section 13 to give effect to Article 2(2)(a) of Directive 1999/44/EC on correspondence with description may be problematical in that the latter provision appears to require absolute correspondence with description to satisfy the presumption of conformity.[323] As we have seen, however, the interpretation of section 13 by the courts has held that

[319] **Benjamin's Sale of Goods**, op. cit., para. 11-003.
[320] Atiyah, **The Sale of Goods**, op. cit., p. 149.
[321] Annex IV, section 8.4.11.
[322] Ibid., section 3.1.
[323] Bradgate, R. and Twigg-Flesner, C. 2003. **Blackstone's Guide to Consumer Sales and Associated Guarantees**, op. cit., para. 3.4.1.1.

not all descriptive words applied to goods form part of the contract; some have no contractual effect, while others which have contractual effect do not form part of the description for the purposes of the section. Though there is a point to this concern, it is not sufficient in our view to preclude implementation of Article 2(2)(a) by means of a provision along the lines of section 13. In the case of consumer goods, it will be up to the courts to interpret a section 13 type provision in the light of the corresponding provision in the Directive. There are grounds moreover for holding that it may be legitimate to restrict the scope of the Directive's provision on description to descriptions that a reasonable person would regard as contractual.[324] Though we gave consideration to the inclusion of a definition of 'sale of description' in future legislation, a definition that reflected the case law on the section might give rise to an issue about whether the Directive had been correctly transposed and, on balance, would be better excluded.

4.26 Article 2(2)(a) further provides that goods are presumed to be in conformity with the contract if they comply with the description *given by the seller*, although, as noted above, statements by producers and in advertising are relevant under Article 2(2)(d) of the Directive. Section 13 contains no such limitation and, in fact, subsection 3 states 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. As the descriptions that influence consumer decisions are more likely to come from manufacturers than from sellers, use should be made of the Directive's minimum harmonisation basis to retain a provision in future legislation along the lines of section 13(3) of the Sale of Goods Act.

Recommendation

4.27 Section 13 of the 1893 Act should be retained in its present form in future legislation.

SECTION 14 IMPLIED UNDERTAKINGS AS TO QUALITY OR FITNESS

1) Subject to the provisions of this Act and of any statute in that behalf, there is no implied condition or warranty as to the quality or fitness for any particular purpose of goods supplied under a contract of sale.

[324] Ibid., pp. 55-56.

2) 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 have revealed.

3) Goods are of merchantable quality if they are as fit for the purpose or purposes for which goods of that kind are commonly bought and as durable as it is reasonable to expect having regard to any description applied to them, the price (if relevant) and all the other relevant circumstances, and any reference in this Act to unmerchantable goods shall be construed accordingly.

4) Where the seller sells goods in the course of a business and the buyer, expressly or by implication, makes known to the seller any particular purpose for which the goods are being bought, there is an implied condition that the goods supplied under the contract are reasonably fit for the purpose for which such goods are commonly supplied, except where the circumstances show that the buyer does not rely, or that it is not unreasonable for him to rely on the seller's skill or judgment.

5) An implied condition or warranty as to quality or fitness for a particular purpose may be annexed to a contract of sale by usage.

6) The foregoing provisions of this section apply to a sale by a person who in the course of a business is acting as agent for another as they apply to a sale by a principal in the course of a business, except where that other is not selling in the course of a business and either the buyer knows that fact or reasonable steps are taken to bring it to the notice of the buyer before the contract is made.

Per section 61 of the 1893 Act, the 'quality of goods includes their state and condition.'

4.28 Section 14 must be considered in conjunction with the parallel provisions on the conformity of goods with the contract in the European Communities (Certain Aspects of the Sale of Consumer Goods and Guarantees) Regulations 2003 which give effect to Article 2 of Directive 1999/44/EC. Regulations 5 and 6 of the Regulations provides as follows:

5. (1) The consumer goods delivered under a contract of sale to the consumer must be in conformity with the contract.

(2) For the purposes of these Regulations, consumer goods are presumed to be in conformity with the contract if they:
   (a) comply with the description given by the seller and possess the qualities of the goods which the seller has held out to the consumer as a sample or model,
   (b) are fit for any particular purpose for which the consumer requires them and which he or she made known to the seller at the time of conclusion of the contract and which the seller has accepted,
   (c) are fit for the purposes for which goods of the same type are normally used,

(d) show the quality and performance which are normal in goods of the same type and which the consumer can reasonably expect, given the nature of the goods and taking into account any public statements on the specific characteristics of the goods made about them by the seller, the producer or his representative, particularly in advertising or on labelling.

(3) There shall be deemed not to be a lack of conformity for the purposes of these Regulations if either –

(a) at the time the contract was concluded, the consumer was aware, or ought reasonably have been aware the lack of conformity, or

(b) the lack of conformity has its origin in materials supplied by the consumer.

6. (1) The seller shall not be bound by a public statements referred to in Regulation 5(2)(d) if the seller:

(a) shows that he was not, and could not reasonably have been, aware of the statement,

(b) shows that by the time of conclusion of the contract the statement had been corrected, or

(c) shows that the decision to buy the consumer goods could not have been influenced by the statement.

(2) Any lack of conformity resulting from incorrect installation of the consumer goods shall be deemed to be equivalent to lack of conformity of the goods if installation forms part of the contract of sale of the goods and the goods were installed by the seller or under his responsibility. This shall apply equally if the product, intended to be installed by the consumer, is installed by the consumer and the incorrect installation is due to a shortcoming in the installation instructions.

As compliance with description has been discussed above and the duty to supply goods which are in compliance with sample is discussed later in the Chapter, the focus of the following paragraphs is on the provisions of section 14 of the 1893 Act which correspond to Regulation 5(2) of the Regulation.

4.29 As Atiyah notes, the seller's obligations as to the quality of goods are 'at the very heart of the law of sale' and are 'in many respects the most important part' of that law.[325] It is no surprise consequently that these obligations have given rise to a good deal of case law on the subject, together with substantial legislative reform of the original statutory provisions. We will look first at the evolution of section 14 before considering what further changes may be necessary to its provisions. As the relevant Irish legislative provisions throughout this period have been modelled on those in United Kingdom legislation and as the main cases of note have also arisen in the UK, the account will necessarily deal in some detail with developments in the UK.

[325] Atiyah, **The Sale of Goods**, op. cit., p. 157.

Evolution of Section 14

4.30 Over the course of the nineteenth century, courts became more willing in certain circumstances to imply terms as to quality into contracts of sale.[326] As well as cases where the description of goods contained an implied undertaking that they be merchantable, the courts were disposed to imply a term of this kind where the buyer had not been in a position to assess the quality of the goods prior to the contract of sale, whether because the goods were unascertained or the buyer had had no opportunity to inspect them.[327] The courts were more likely also to import quality obligations into contracts for manufactured goods than for natural products on the ground that defects could be more readily prevented in the former than in the latter case.[328]

4.31. The principal provisions of the implied conditions as to quality or fitness as originally enacted in section 14 of the 1893 Act were as follows:

- The preamble to the section restated the *caveat emptor* orthodoxy that, subject to the provisions of the Act, there was no implied warranty or condition as to the quality or fitness for purpose of goods supplied under a contract of sale.

- Subsection (1) implied a condition that goods of a description which it was in the sellers' business to supply should be reasonably fit for any particular purpose made known, expressly or by implication, by the buyer so as to show that he relied on the seller's skill or judgement.

- Subsection (2) implied a condition that goods bought by description from a seller who dealt in goods of that description should be of merchantable quality provided that, if the buyer had examined the goods, there should be no such implied condition as regards defects which that examination ought to have revealed. 'Merchantable quality' was not defined in the section or elsewhere in the Act.[329]

- Subsection (3) provided that an implied warranty or condition as to quality or fitness for a particular purpose could be annexed by the usage of trade, and subsection (4) stated that an express warranty or condition did not negative a warranty or condition implied by the Act unless it was inconsistent with it.

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[326] Mitchell, P. 'The Development of Quality Obligations in Sale of Goods', (2001) *L.Q.R* (117) 645.
[327] Writing in 1868, Benjamin was unable to express a general rule as to when an obligation of quality would be implied, stating only that there was no warranty where the sale concerned 'an ascertained specific chattel, already existing, and which the buyer has inspected'. Cited in ibid., pp. 655-56.
[328] Ibid., pp. 651-652. Bridge, M. 'The evolution of modern sales law', (1991) *L.M.C.L.Q*. 52 at 55.
[329] According to Benjamin, merchantable quality 'has always been a commercial man's notion: this explains why the original Act did not define it – commercial juries needed no direction on how to make the appropriate findings.' **Benjamin's Sale of Goods**, 2nd ed. (1981), cited in The Law Commission and the Scottish Law Commission. **Sale and Supply of Goods,** op. cit., para. 2.10.

4.32. The cases decided in the decades subsequent to the introduction of the implied conditions under section 14 pointed up the difficulties encountered in seeking to regulate the great range and diversity of sale transactions by means of a single standard of quality. These difficulties were aggravated by the fact that changes in technology and markets increasingly meant that the type of goods covered by the Act's standard of quality were different to those featuring in the cases which had given rise to that standard. As the English and Scottish Law Commissions noted in 1987:[330]

> … the word 'merchantable' was derived from Victorian cases where (putting the matter at its simplest) the question was, 'were the goods of such a quality that one merchant buying them from another, would have regarded them as saleable.' But as so often happens, although the word had been perfectly apt on the facts of the cases in which it was first used by the judges, when the word became of universal application in the 1893 Act, it was gradually seen not to be suitable for *all* cases… A sale may be of a new jet aircraft from the manufacturers to a major international carrier, of a washing machine still in its packaging from a department store to a young married couple, of a catapult to a child, of an old motor car from a backstreet garage to a student, of a breeding ewe from one farmer to another, of thousands of tons of a primary product, such as wheat, from one trader to another (neither of whom will ever see the goods), of a newspaper or a box of matches from a street vendor to a passer-by.

4.33. Eight decades were to elapse from the enactment of section 14 to its first substantive amendment in the UK or Ireland. It is difficult to discern a consistent thread in the approach of the courts over this period to the interpretation of the quality and fitness obligations placed on sellers by the section. In *Bristol Tramways Carriage Co. Ltd v Fiat Motors Ltd*,[331] a case decided less than two decades after the passing of the 1893 Act, Farwell L.J. treated merchantable quality as akin to a minimum acceptable standard of quality, holding it:[332]

> as meaning that the article is of such quality and in such condition that a reasonable man acting reasonably would after a full examination accept it under the circumstances of the case in performance of his offer to buy that article whether he buys it for his own use or to sell again.

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[330] The Law Commission and the Scottish Law Commission. **Sale and Supply of Goods**, op. cit., para. 3.7.

[331] [1910] 2 KB 831.

[332] Ibid. at 841. In *Australian Knitting Mills v Grant* (1933) 50. C.L.R. 387 at 418, Dixon J. used a modified version of this test, holding that the goods 'should be in such an actual state that a buyer fully acquainted with the facts and, therefore, knowing what hidden defects exist and not being limited to their apparent condition would buy without abatement of the price obtainable for such goods if in reasonably sound order and condition and without special terms.'

He added that the term seemed 'more appropriate to a retail purchaser buying from a wholesale firm than to private buyers, and to natural products such as grain, wool, or flour, than to a complicated machine, but it is clear that it extends to both.'[333] In a subsequent New Zealand case, *Taylor v Combined Buyers*,[334] Salmond J criticised the approach in *Bristol Tramways* and restated a more traditional market-oriented view of the Act's quality standard:

> … the term merchantable does not mean of good, fair or average quality. Goods may be of inferior or even of bad quality but yet fulfil the legal requirement of merchantability. For goods may be in the market in any grade, good, bad or indifferent, and yet all equally merchantable. On a sale of goods there is no implied condition that they are of any particular grade or standard. If the buyer wishes to guard himself in this respect he must expressly bargain for the particular grade or standard that he requires. If he does not do so, caveat emptor, and he must accept the goods, however inferior in quality, so long as they conform to the description under which they are sold and are of merchantable quality.[335]

In *Cammell Laird & Co Ltd. v Manganese Bronze and Brass Co. Ltd*,[336] Lord Reid put the emphasis on the fitness for purpose of goods, stating that goods would not be merchantable where they were 'of no use for any purpose for which such goods would be ordinarily used and hence … not saleable under that description.'

Legislative Developments in the UK to 1979

4.34. As noted in Chapter 1, there was increasing pressure from the 1950s onwards in the UK to adapt the implied quality and other terms in the 1893 Act to reflect the growing importance of consumer sales. Though the UK's Molony Committee on Consumer Protection did not propose changes to the merchantable quality standard, it recommended the removal, first, of the restriction of the implied quality term to goods bought by description and, second, of the implied fitness term to goods of a

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[333] [1910] 2 KB at 840.
[334] [1924] NZLR 627.
[335] Ibid. at 646. Salmond J. added that 'goods sold by description are merchantable in the legal sense when they are of such quality as to be saleable under that description to a buyer who has full and accurate knowledge of that quality, and who is buying for the ordinary and normal purposes for which goods are bought under that description in the market.' Bridge has commented that, though the case at issue concerned manufactured goods, Salmond J's observations 'belong to a world of horse and agricultural produce sales'. Bridge, **The Sale of Goods**, op. cit., para. 7.43.
[336] [1934] A.C. 402 at 430. This test was essentially restated by Lord Reid in *Henry Kendall & Sons v William Lillico & Sons Ltd.* [1969] 2 A.C. 31 at 77 when he stated that what was meant by merchantable quality was that 'goods in the form in which they were tendered were of no use for any purpose for which goods which complied with the description under which these goods were sold would normally be used, and hence were not saleable under that description.'

description which it was in the seller's course of business to supply.[337] The restriction of the merchantable quality standard to sales by description had contributed in some cases to a tendency to invoke the fitness for purpose provision of section 14 rather than the quality term.[338] In addition to endorsing the Molony Committee's recommendations, the Law Commission for England and Wales and the Scottish Law Commission subsequently proposed other substantial changes to section 14, most notably the inclusion of a definition of 'merchantable quality'.[339] These recommendations were given effect by the Supply of Goods (Implied Terms) Act 1973 which substituted a new section 14 for that in the original Act.[340] The new section included a definition of merchantable quality based on the concept of the fitness of goods for the usual purposes for which they were bought. The 1893 Act's restriction of the implied condition of merchantable quality condition to goods 'bought by description from a seller who deals in goods of that description' was replaced by a provision that the condition applied 'where the seller sells goods in the course of a business'. The Act retained the substance of the 1893 Act's limitation of the implied quality condition where the buyer had examined the goods in respect of defects which the examination ought to have revealed, adding a new exemption in respect of defects specifically drawn to the buyer's attention before the contract was made. The 'in the course of a business' stipulation was applied to the fitness for particular purpose provision; this provision was otherwise broadly similar to that in the 1893 Act. Finally, a new provision dealt with sales by an agent (such as an auctioneer) acting for a principal in a contract of sale, and provided that the implied condition of merchantable quality applied where the agent sold goods in the course of a business unless the principal was not so acting, and the buyer was either aware of this fact or reasonable steps were taken to bring it to his attention. The provisions relating to the sale of goods in the UK Act of 1973 were repealed and replaced by the Sale of Goods Act 1979 prior to the passing of the Sale of Goods and Supply of

[337] **Final Report of the Committee on Consumer Protection**. 1962. (London: HMSO). Cmd. 1781: paragraphs 441-447.
[338] **Benjamin's Sale of Goods**, op. cit., para. 11-025.
[339] The Law Commission and the Scottish Law Commission. 1969. **Exemption Clauses in Contracts First Report: Amendments to the Sale of Goods Act 1893** (Law Com. No. 24, Scot Law Com. No. 12), paras. 27-56.
[340] Supply of Goods (Implied Terms) Act 1973. 1973 c.13, sections 3 & 7.

Services Act 1980 in Ireland.[341] The 1979 Act was essentially a consolidating statute and, apart from the inclusion of a provision relating to credit brokers in the subsection on fitness for particular purpose, the implied terms about quality and fitness under section 14 were similar to those in the 1973 Act.

Legislative Developments in Ireland: The Sale of Goods and Supply of Services Act 1980

4.35. The Whincup Report and the National Consumer Advisory Council recommended amendments to section 14 of the 1893 in line with those effected by the UK Act of 1973.[342] The new section 14 on implied undertakings as to quality or fitness substituted by the Sale of Goods and Supply and Services Act 1980 for the section in the Act of 1893 was identical to that in the UK Supply of Goods (Implied Terms) Act 1973 save in one significant respect. The definition of merchantable quality in the Irish Act provides however, unlike that in the UK provision on which it was based, that goods should be 'as durable as it reasonable to expect' having regard to description, price and all other relevant circumstances. In the second stage speech introducing the legislation, the then Minister for State at the Department of Industry, Commerce and Energy referred to the reforms of the implied terms at Sections 11 to 14 of the 1893 Act as 'the heart of the matter' when it came to improving the buyer's lot under the Act.[343] She added that the proposed legislation would also remedy the 'weaknesses' in section 14 of the original Act caused by the absence of a definition of merchantable quality and the fact that the section did not cover those acting as agents rather than dealers in goods.

Developments in the UK since 1979

4.36. In 1987 the Law Commission for England and Wales and the Scottish Law Commission produced a joint report which dealt, among other things, with the implied

[341] As noted in Chapter 1, however, the Bill that led to the Sale of Goods and Supply of Services Act 1980 was first published in 1978 and, as a result, was influenced by the UK Supply of Goods (Implied Terms) Act 1973 rather than by the Sale of Goods Act 1979.

[342] National Prices Commission. 1973. Occasional Paper No. 9. **Consumer Protection Law in America, Canada and Europe** (Dublin: Stationery Office), p. 204. National Consumer Advisory Council. December 1974. **Submission to the Minister for Industry and Commerce on Proposals for Legislation to Assure the Consumers' Interests** (Dublin: Stationery Office), pp. 15-16.

[343] **Dáil Debates**, Vol. 309 16 November 1978, Sale of Goods and Supply of Services Bill Second Stage, cols. 1107-08.

term as to quality under section 14 of the Sale of Goods Act 1979.[344] The report made three main criticisms of the existing statutory provision. First, the term 'merchantable' was outmoded and inappropriate. Second, the definition of merchantable quality focused too much on fitness for purpose and did not make it sufficiently clear that other aspects of quality, such as appearance and finish and freedom from minor defects, could also be important. A new car, for example, should be capable not only of being driven safely and effectively on the road but, in the words of Mustill LJ in *Rogers v Parish Motors (Scarborough) Ltd.*, should also do so 'with the appropriate degree of comfort, ease of handling, and reliability … and of pride in the vehicle's outward and interior appearance'.[345] Third, the definition did not expressly deal with either the safety or durability of goods.

4.37. The recommendations of the Law Commissions in their 1987 Joint Report amounted to a substantial overhaul of section 14. First, the existing definition of merchantable definition should be repealed and replaced by a new two-pronged definition – a basic principle formulated in language sufficiently general to apply to all kinds of goods and a list of specific aspects of quality, any of which could be important in a particular case. Secondly, the basic principle should be that of *acceptable quality*, namely that the quality of goods sold or supplied under a contract should be such as would be acceptable to a reasonable person having regard to the description of goods, the price (if relevant) and all the other circumstances. The Commissions settled on acceptable quality after considering a number of other options, both qualitative (good, sound) and neutral (suitable, proper, appropriate). Thirdly, the specific aspects of quality that would supplement the general principle should include the fitness of goods for all their common purposes; appearance and finish; freedom from minor defects; safety; and durability. The suggested substitution of the fitness of goods 'for all their common purposes' for the 1979 Act's wording of fitness 'for the purpose or purposes for which goods of that kind are commonly bought' was intended to address a possible concern that goods would be held to be merchantable if they were fit for some common purpose consistent with their

[344] The Law Commission and the Scottish Law Commission. 1987. **Sale and Supply of Goods** (Law Com. No. 160, Scot Law Com. No. 104), paras. 3.1-3.66 & 8.1.
[345] [1987] 2 All ER 232.

description and price even if the buyer had in mind a different but still common purpose.[346]

4.38. The Sale and Supply of Goods Act 1994 substantially adopted the Commissions' recommendations as regards section 14, but opted for 'satisfactory quality' rather than their preferred option of 'acceptable quality'.[347] Section 14(2)(a) of the 1979 Act, as amended in 1994, provides that 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. Section 14(2)(b) lists a number of 'aspects of the quality of goods' that may apply '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.

4.39. There have been relatively few cases of substantive significance on the interpretation of 'satisfactory quality' since the enactment of the 1994 Act.[348] The report of the Law Commissions which was the basis for the statutory amendments had stated that the proposed reforms were 'intended to be useful but not revolutionary'.[349] The substitution of 'satisfactory quality' for 'merchantable quality' was intended to reflect the approach to the interpretation of the latter term taken by the courts in cases such as *Rogers v Parish*.[350] It was, as Bridge has observed, 'largely a terminological change designed to reflect the altered emphasis of the law that took effect over a lengthy period.'[351] The case law since the 1994 Act would tend to support this

[346] It had been held in the pre-1979 Act cases of *James Drummond and Sons v EH Van Ingen & Co* (1887) 12 App. Cas. 284 and *Henry Kendall & Sons v William Lillico & Sons Ltd.* [1969] 2 AC 31 that goods with a number of purposes were of merchantable quality if fit for at least one purpose that came within the ambit of their ordinary purposes. Despite the changes made by the inclusion of the definition of merchantable quality in the 1979 Act, the Commissions were of the view that the definition was not intended to change the law on this point. See further *Aswan Engineering Establishment Co v Lupdine Ltd* [1987] 1 All ER 135.

[347] 'Satisfactory' was preferred to 'acceptable' as it was thought to denote a more demanding standard. During the Bill's second reading, its sponsor stated that 'a non-complaining buyer might decide reluctantly that goods he bought were of acceptable quality, even if by objective standards the quality was not satisfactory.' Cited in Ervine, W.C.H., 'Satisfactory Quality: What Does It Mean?', (2004) *J.B.L.* 684 at 688.

[348] **Benjamin's Sale of Goods**, op. cit., para.

[349] The Law Commission and the Scottish Law Commission. 1987. **Sale and Supply of Goods** (Law Com. No. 160, Scot Law Com. No. 104), para. 1.11.

[350] [1987] 2 W.L.R. 353.

[351] Bridge, **The Sale of Goods**, op. cit., para. 7.32.

view.[352] The reformulation of the definition in terms of the buyer's reasonable expectations, however, has arguably encouraged a more explicit reliance on this test. In *Jewson Ltd v Boyhan*,[353] Sedley LJ observed that the 'satisfactory quality' standard was 'directed principally to the sale of substandard goods … [and] the court's principal concern is to look at their intrinsic quality using the tests indicated.' The 'reasonable person' was 'a construct by whose standards the judge is required to evaluate the quality of the goods'.[354] The nature of the 'reasonable person' in any given case would depend in part on the nature of the product; the safety and durability of a child's toy, for example, would have to be assessed by how a child would handle it. In *Bramhill v Edwards*,[355] Auld LJ elaborated as follows on the application of the 'reasonable person' test:

> The reasonable person must be one who is in the position of the buyer, with his knowledge, for it would not be appropriate for the test to be that of a reasonable third party observer not acquainted with the background of the transaction.

4.40. The outcomes of the cases decided to date are consistent with the flexibility inherent in this test. *Jewson v Boyhan*[356]concerned boilers bought by a property developer for installation in a number of newly-converted apartments. Though they functioned properly, the boilers proved to have a low energy rating and the developer claimed that this adversely affected the marketability of the apartments. The Court of Appeal held that the boilers were of satisfactory quality in that they were fit for all the purposes for which goods of this kind were commonly supplied, rejecting the claim that one such purpose was that of ensuring that the goods did not make the apartments difficult to sell. As Sedley LJ observed,[357] the buyer:

> … got exactly what he had bargained for: twelve boilers which worked perfectly well.

In *Clegg v Anderson*,[358] a new yacht that had cost £250,000 had a keel substantially heavier than the manufacturer's specification with the result that the rigging was

[352] Ervine, 'Satisfactory Quality: What Does It Mean?', op. cit, p. 684.
[353] [2003] EWCA Civ 1030 at 77.
[354] Ibid., at 77.
[355] [2004] EWCA Civ 403 at 39.
[356] [2003] EWCA Civ 1030.
[357] Ibid at 79. A separate claim that the boilers were unsatisfactory for the particular purpose for which they were required was also rejected by the Court of Appeal on the ground that this purpose had not been made clear by the buyer.
[358] [2003] EWCA Civ 320.

potentially unsafe. The Court of Appeal held that the vessel did not meet the standard of satisfactory quality, with Hale LJ observing *obiter*:[359]

> … [in] some cases, such as a high priced quality product, the customer may be entitled to expect that it is free from even minor defects, in other words perfect or nearly so.

In *Thain v Anniesland Trade Centre*,[360] by contrast, the Sheriff Principal of Glasgow held on appeal that a fault in the gear box which materialised two weeks after the purchase of a five-year-old Renault car with a mileage of 80,000 was not in breach of the satisfactory quality requirement, stating that:

> … the sheriff's conclusion can only be described as that of the reasonable person. Even a negligible degree of durability may not represent unsatisfactory quality where the second-hand car supplied is as old and as heavily used as the Renault had been…Durability, in all the circumstances, was simply not a quality that a reasonable person would demand of it.

In *Britvic Soft Drinks Ltd v Messer UK Ltd*,[361] the defendants had supplied carbon dioxide to the plaintiffs for use in drinks. The carbon dioxide was contaminated by a carcinogen, though not to an extent that posed a health risk. The Court of Appeal upheld the view of the trial judge that:[362]

> … it is impossible to conclude that a reasonable person would regard the CO2 supplied as meeting a satisfactory standard. Consumers would not wish to drink products which had been inadvertently contaminated with a measurable quantity of a known carcinogen, notwithstanding the quantity was not harmful to their health.

In Ervine's view, it is doubtful if any of these cases would have been decided any differently under the previous merchantable quality standard.[363] In all of these cases, finally, it is relevant to note that little or no use was made of earlier case law on 'merchantable quality'.[364] Academic commentary, however, tends to be of the view that this case law can still serve a purpose in some instances, if a limited one. Though acknowledging that the 1994 amendments marked a more thoroughgoing break with

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[359] Ibid., at 72.
[360] [1997] S.L.T. (Sh. Ct.) 102 at 106. Ervine is critical of the judgment in this case, though he notes that is of limited application. Ervine, 'Satisfactory Quality: What Does It Mean?', op. cit., at 701-02.
[361] [2002] EWCA Civ 548.
[362] [2002] 1 Lloyd's Rep. 20 at 92.
[363] Ervine, 'Satisfactory Quality: What Does It Mean?'', op. cit.: 703.
[364] Ibid.: 689-90.

the preceding provisions than those made in 1979, Howells and Weatherill suggest nevertheless that:[365]

> … as the essential question remains the same – what is the minimum standard expected of goods? – judges (and advocates) will still seek to rely on existing case law, although perhaps in a more indirect, inspiration-seeking way than in the past.

Issues Arising

4.41. Section 14 gives rise to one relatively straightforward matter and to a number of more complex questions. The straightforward matter is the replacement of the term 'merchantable quality'. In our opinion, the term is archaic and unsuited to modern day legislation. While it is sometimes suggested that it remains relevant to commercial, though not consumer, sales, we do not share this view. Most people engaged in business are no more likely to understand, or be familiar with the term, than are consumers.[366] The main issues of a less straightforward nature raised by section 14 are as follows:

- What form should the implied quality term take? Should it include a single quality standard expressed in adjectival form?
- Should there be a common quality standard for consumer and commercial sales or is there now a case for having separate rules for the two types of contract?
- What should be the substance of the quality term? Should it be based on the implied terms in Sale of Goods legislation here and in other jurisdictions?

Form of the Quality Term

4.42. The quality rules under a range of regulatory legislative – the Sale of Goods Act 1979 in the UK, the Australian Competition and Consumer Act 2010, the New Zealand Consumer Guarantees Act 1993, Directive 1999/44/EC on Consumer Sales and Guarantees, the United Nations Convention on the International Sale of Goods, and the US Uniform Commercial Code – share in their respective ways a similar structure, namely a statement of general principle as to the general quality of goods that is to be (i) interpreted in the light of specified factors and (ii) supplemented by more specific elaborations of particular dimensions of quality. This model seeks to

[365] Howells, G. & Weatherill, S. 2005. **Consumer Protection Law** (2nd ed.). (Aldershot: Ashgate): 173.

[366] Over thirty years ago, Ormrod L.J. noted in *Cehave NV* v *Bremer Handelsgesellschaft* [1976] Q.B. 44. that 'merchantable' had 'fallen out of general use and largely lost its meaning, except to merchants and traders in some branches of commerce.'

balance the imperatives of clarity and flexibility and has obvious merits in our view. The first question presented in respect of any such statement of general principle of quality is whether it should take the familiar epithetical form, be it 'satisfactory quality' as in the UK, 'acceptable quality' as in Australia and New Zealand, or some other variant. It is not difficult to make the case against this type of summary statement of quality. As noted earlier, contracts of sale cover transactions of quite different kinds for a very wide range of goods. It is difficult as a result to conceive of a single all-purpose statement of quality capable of adequately encompassing this diversity of circumstances. As Rougier J noted in *Bernstein v Pamson Motors (Golders Green) Ltd*.:[367]

> Any attempt to force some exhaustive, positive and specific definition of such a [quality] term, applicable in all cases, would soon be put to mockery by some new undreamt of set of circumstances.

Though there is force in this argument, we are reluctant nevertheless to recommend that the quality provisions in future sale of goods legislation should dispense with a summary statement of quality such as 'satisfactory' or 'acceptable'. While the substance of the quality rules must necessarily be found in the more developed general principle and its elaborations, such a statement can serve an important purpose in encapsulating the quality rules in a form accessible to, and understandable by, consumers and businesses.[368] On balance, we think that 'satisfactory quality' is preferable for this purpose to 'acceptable quality' or any of the other possible options. We consider this, however, to be a recommendation that is primarily directed at the removal of archaic language rather than at making any substantive change to the law.

4.43. Recommendation

'Satisfactory quality' should replace 'merchantable quality' as the standard for the purpose of the implied terms as to the quality of goods.

4.44. It is sometimes argued that the difficulties with section 14 and other elements of the Sale of Goods Act stem in part from the fact that the same provisions are called

[367] [1987] 2 All ER 220 at 222.

[368] As Ervine notes: 'This aspect of the inclusion of a definition is not to be discounted given that most disputes about substandard goods never reach the courts and, indeed, will not have the benefit of high level advice.' Ervine, W.C.H., 'Satisfactory Quality: What Does It Mean?'op. cit., p. 694.

upon to regulate both consumer and commercial sales.[369] We are not in favour, however, of having different implied quality terms for consumer and commercial sales. First, the retailer who sells goods to a consumer has in most cases bought those goods from a manufacturer or distributor. If there were different implied terms for the two types of sale, the retailer could find himself in breach of contract with the consumer in circumstances where the same fault in the same goods would not involve a breach of contract on the part of the supplier, thereby creating problems where liability is sought to be passed down the supply chain. In our view, this would not be a desirable or reasonable outcome. Secondly, the dividing line between cases where a strict quality standard is merited and cases where a more flexible standard is appropriate does not coincide neatly with the division between consumer and commercial sales. Both consumers and businesses commonly buy high-specification manufactured goods to which exacting standards of quality properly apply. Both types of buyer also purchase products, such as commodities or foodstuffs, where gradations of quality are recognised. What is necessary, therefore, is a standard that, as far as possible, can accommodate these kinds of variation within and between goods. Rules permitting discrimination between consumer and commercial sales transactions are more appropriate to the provisions governing exemption clauses and remedies than to the quality standard of goods itself. Thus, we have recommended at paragraph 4.17 above that rejection of the contract would no longer be permissible for slight breach of the implied terms in commercial sales.

Substance of the 'Satisfactory Quality' Standard

4.45. As stated earlier in the Chapter, the statutory standard of quality to apply to contracts of sale in future legislation should be drawn from the Sale of Goods Act rather than from the EU Directive on Consumer Sales. As well as the advantages of retaining familiar terminology and permitting existing case law to be drawn on for guidance where appropriate, this standard is a more suitable basis for rules that must accommodate both consumer and business sales. When it comes to the substance of the general statement of quality, there seem to us to be two principal options. The first is that which has applied in UK legislation since 1994, and is also broadly in line with the provisions in consumer legislation in Australia and New Zealand:

[369] Bridge, M. 'The Sale and Supply of Goods Act 1994' [1995] *J.B.L.* 401. **Goode on Commercial Law**, op. cit., p. 206.

> … 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.

While all tests of this kind must rely in large part on an evaluation of reasonableness, this formulation is open to the charge of being circular in character - goods are satisfactory if they meet the standard that a reasonable person would regard as satisfactory.

4.46. The other option is to adopt a modified version of the existing provision at section 14 of the 1893 Act along the following lines:

> Goods are of satisfactory quality if they are as fit for all the purposes for which goods of that kind are commonly supplied as it is reasonable to expect having regard to any description of the goods, the price (if relevant) and all the other relevant circumstances.

Apart from the substitution of 'satisfactory for 'merchantable', the other substantive changes to the existing provision that are necessary involve, first, the substitution of 'all the purposes for which goods of that kind are commonly supplied' for the existing formulation of 'the purpose or purposes for which goods of that kind are commonly bought.' This is in line with the change in the corresponding provision in UK legislation and is intended to ensure that goods will not meet the quality standard if they are fit for some, but not other, of the purposes common to the goods in question. This change would, in tandem with the elaboration of the specific aspects of quality, address the main criticism levelled at the existing definition, namely that it stresses fitness for purpose to the exclusion of other dimensions of quality such as the appearance of goods.[370] The 'fitness for all purposes' proviso would be subject to a test of reasonableness in the light of the description of the goods, their price, and other relevant circumstances. This should be sufficient in our view to prevent it from operating in a manner that would be unfair to sellers. The second change that we propose to the existing definition is the deletion of the stipulation that the goods should be as durable as it is reasonable to expect. This now features in the separate list of specific aspects of quality discussed below. Though there is no great difference

[370] As Atiyah notes, however, fears that the definition of merchantable quality in the UK Supply of Goods (Implied Terms) Act 1973 would lead the courts to have insufficient regard to the non-functional aspects of quality were not borne out by subsequent case law. Atiyah, **The Sale of Goods**, op. cit., p. 179.

of substance between the two definitions, our preference is for a definition similar to that at section 14(2)(a) of the UK Sale of Goods Act 1979 as this would give us the benefit of being able to draw upon the greater volume of UK, Australian and New Zealand case law when interpreting the test in the Irish courts.

4.47. The general definition of 'satisfactory quality' in future legislation should be further supplemented by an indicative list of aspects of the quality of goods as follows:

1) appearance and finish,
2) freedom from minor defects,
3) safety, and
4) durability.

These aspects of the quality of goods also feature in the UK Sale of Goods Act 1979, and in consumer legislation in Australia and New Zealand. In line with section 14(2)(b) of the UK Act, it should be provided that these aspects of the quality of goods and the fitness for all common purposes proviso apply 'in appropriate cases'.

4.48. Recommendations

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'.

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.

Other Changes to Section 14

4.49. Sections 14(4), (5) and (6) of the 1893 Act on fitness for particular purpose made known by the seller, the annexation of implied conditions by usage, and sales by persons acting as agents are broadly satisfactory in our view and do not require substantive amendment. A number of other changes to the section, mainly of a minor nature, are however necessary or desirable. First, while section 14 satisfies the main requirements of Article 2 of Directive 1999/44/EC, its provisions on public statements

about the specific characteristics of goods have no direct equivalent in the Sale of Goods Acts and would need to be incorporated in future sale of goods legislation. Article 2(2)(c) of the Directive provides that goods are presumed to be in conformity with the contract if they show the quality and performance normal in goods of the same type and which the consumer can reasonably expect given the nature of the goods, taking into account any public statements on the specific characteristics of the goods made about them by the seller, the producer or his representative, particularly in advertising or on labelling. Such statements could be regarded as constituting 'relevant circumstances' to be taken into account under our proposed definition of 'satisfactory quality'. Article 2(4) of the Directive provides that the seller shall not be bound by such a public statement where he shows that he was not, or could not reasonably have been, aware of it, or where it had been corrected at the time of the conclusion of the contract, or where he shows that the decision to buy the goods could not have been influenced by the statement. Secondly, as noted earlier, the provision at section 62 of the 1893 Act that the quality of goods includes 'their state or condition' should be among the specific aspects of the quality of goods in future legislation. Thirdly, section 14 begins at subsection (1) with a statement of nineteenth century orthodoxy to the effect that, except as provided by the Act or other legislation, there is no implied condition as to the quality or fitness for purpose of goods supplied under a contract. As Bridge has observed, the subsection 'is the husk of a general rule, deprived of almost all content by the various exceptions'.[371] We note that section 14(1) has been repealed in Hong Kong[372] and consider that this could should be done here also.

4.50. Recommendations

The provisions of Article 2(2)(c) of Directive 1999/44/EC relating to public statements about the specific characteristics of goods should be incorporated in the provisions on implied quality terms in future legislation.

The definition of the quality of goods as including their state or condition now at section 62 of the 1893 Act should be incorporated in the provision on the specific aspects of the quality of goods in future legislation.

[371] Bridge, M. 'The evolution of modern sales law', (1991) *L.M.C.L.Q* 54.
[372] Hong Kong Sale of Goods Ordinance Cap 26.

Section 14(1) of the 1893 Act should not be retained in future sale of goods legislation.

SECTION 15 SALE BY SAMPLE

15.(1) A contract of sale is a contract for sale by sample where there is a term in the contract, express or implied, to that effect.

(2) In the case of a contract for sale by sample–

(a) there is an implied condition that the bulk shall correspond with the sample in quality:

(b) there is an implied condition that the buyer shall have a reasonable opportunity of comparing the bulk with the sample:

(c) there is an implied condition that the goods shall be free from any defect, rendering them unmerchantable, which would not be apparent on reasonable examination of the sample.

4.51. Together with sections 11-14, this section was inserted in the 1893 Act by the Sale of Goods and Supply of Services Act 1980 in substitution for the original section. Unlike sections 11-14, however, section 15 was not amended by the substitution and remains as enacted in 1893. The equivalent provision at Article 2(2)(a) of Directive 1999/44/EC on Consumer Sales and Guarantees provides that goods are presumed to be in conformity with the contract if they 'possess the qualities which the seller has held out to the consumer as a sample or model'. This was transposed verbatim at Regulation 5(2)(a) of the European Communities (Certain Aspects of the Sale of Consumer Goods and Associated Guarantees) Regulations 2003.

4.52. Though section 15(1) purports to define sale by sample, it is not especially helpful in clarifying the scope of this type of sale. Where there is an express provision that goods will be sold 'as per sample', the sale will be by sample. The standard form contracts of some trade associations in the commodity sector, for example, include provisions on the methods of taking samples with a view to ensuring that they are representative of the bulk.[373] The mere display of a sample prior to sale, however, will not of itself mean that the sale is by sample. As Goode notes:[374]

[373] As Bridge observes, however, in modern commodities trading goods are more likely to be sold according to grades based upon content analysis formulated by inspection agencies than by sample. Bridge, **The Sale of Goods**, op. cit., para. 7.134.

[374] **Goode on Commercial Law**, op. cit., p. 353.

> It is necessary that the sample displayed be intended to form the contractual basis of comparison with the bulk subsequently tendered. As a working rule, it may be said that a sale is unlikely to be considered a sale by sample unless the sample is released by the seller to the buyer or to a third party for the purpose of providing a means of checking whether the goods subsequently tendered correspond with the sample.

4.53. The leading judicial statement on the nature of sale by sample is that of Lord Macnaghten in *Drummond v Van Ingen*:[375]

> The office of a sample is to present to the eye the real meaning and intention of the parties with regard to the subject matter of the contract which, owing to the imperfection of language, it may be difficult or impossible to express in words..

Sample can serve accordingly both as an alternative or, more commonly perhaps, as a complement to description. Where a sale is by description and by sample, sections 13 and 15 of the 1893 Act will both apply. As noted above, section 13(1) acknowledges the fact in providing that, where a sale is by sample as well as description, it is not sufficient if the bulk of the goods corresponds with the sample if the goods do not also correspond with the description. The examination referred to in section 15(2)(c) must be 'reasonable' in the circumstances having regard factors such as the practice in the trade in question. As further stated in *Drummond v Van Ingen*:[376]

> The sample speaks for itself. But it cannot be treated as saying more than such a sample would tell a merchant of the class to which the buyer belongs, using due care and diligence, and appealing to it in the ordinary way and with the knowledge possessed by merchants of that class at that time. No doubt the sample might be made to say a great deal more. Pulled to pieces and examined by unusual tests which curiosity or suspicion might suggest, it would doubtless reveal every secret of its construction. But that is not the way in which business is done in this country.

4.54. In *Steels & Busks Ltd v Bleecker Bik & Co*,[377] a quantity of crepe rubber was supplied which, because of a preservative added in the course of its manufacture, discoloured materials exposed to it. The preservative was not present in the sample but, as its absence from the bulk could only have been verified by a complex technical examination, the seller was held not to be in breach of section 15. In *Godley v Perry*,[378] a retailer buying plastic catapults tested a sample of the items by pulling back the elastic. When one of the catapults was later found to be unmerchantable, the court held that the examination in this case was in accordance with the requirements

[375] (1887) 12 App Cas 284, 297.
[376] Ibid.
[377] [1956] 1 Lloyds Rep. 228.
[378] [1960] 1 W.L.R. 9.

of the section, noting that the Act 'speaks not of a "practicable" but of a "reasonable" examination'.[379] Atiyah notes, however, that it is likely nowadays that samples will be expected to be subjected to extensive scientific examination in which case judicial dicta along these lines such as this will not apply.[380] It should be noted, furthermore, that section 15(2)(c) excludes the implied condition that goods will be free of any defect rendering them unmerchantable if the defect would have been apparent on a reasonable examination of the sample regardless of whether or not such an examination has been undertaken. This exclusion is presumably grounded in an assumption that, in the case of a sale by sample, an examination of the sample will be made. If the buyer chooses not to do so, it is appropriate that he be denied a statutory remedy in respect of any defects that a reasonable examination would have revealed. The examination provision under Section 15 differs in this respect from the implied term as to merchantable quality under section 14(2). The implied term in regards to defects which an examination ought to have revealed is excluded in that case only if the buyer has actually examined the goods.

4.55. Consumer sales may sometimes involve the display of a sample as, for example, where a small sample of carpet is shown to prospective buyers. It is common, however, in consumer transactions for prospective buyers to be shown a model or specimen of the goods rather than a sample. The goods with which the consumer buyer is typically supplied in such a situation will not be the specific item which he examined but an identical item which remains unexamined in its packaging at the time of the purchase or may be delivered subsequently. These transactions do not fit readily within the Act's notion of sale by sample with its emphasis on the correspondence of bulk with sample. Atiyah suggests that these instances might instead be called 'sale by model'.[381] As noted above, Directive 199/44/EC requires that, in order to be presumed to be in conformity with the contract, goods must be possess the qualities which the seller has held out to the consumer as a model as well as a sample.

[379] Ibid. at 15.
[380] Atiyah, **The Sale of Goods**, op. cit., fn. 364 at p.205.
[381] Atiyah, **The Sale of Goods**, op. cit., p. 207.

Issues Arising

4.56. As with section 13 on sale by description, the first question raised by section 15 is whether the provision is necessary at all. Atiyah, Bridge, Murdoch and White have all queried whether the section does anything that is not otherwise done by sections 13, 14 and 34 of the Act.[382] While there is substance to this contention, we cannot recommend, for reasons similar to those given for the retention of section 13, that future sale of goods legislation should dispense with a provision on sale by sample. Directive 1999/44/EC provides that the presumption of conformity with the contract requires that goods possess the qualities which the seller has held out as a sample or model and, to avoid doubt that it has been effectively transposed, there should be an express provision to this effect in future legislation. Such a provision will need to be broader than the present provision at section 15 of the 1893 Act. First, as we have seen, 'sale by sample' would appear to have a more restricted scope than that entailed in holding out goods as a sample. Secondly, the requirement in the Directive that goods 'possess the qualities' of the sample is arguably broader than the stipulations in section 15 that the bulk correspond with the sample in quality and be free of defects not apparent on a reasonable examination. Thirdly, the existing provision does not deal expressly with correspondence with model as opposed to correspondence with sample.

4.57. Recommendation

Section 15 of the 1893 Act should be retained in amended form in future legislation to provide also for sale by model and the other requirements of Article 2(2)(a) of Directive 1999/44/EC on Consumer Sales and Guarantees.

4.58. A number of further changes are necessary in our view to the provision on sale by sample in future legislation. As noted at paragraph 4.54 above, there is a difference between the examination rule applicable to the implied condition of merchantable quality under section 14(2)(b) of the Sale of Goods Act 1979 and the examination rule applicable to the implied condition of merchantable quality in the case of sale by sample at section 15(2)(c) of the Act. Where the buyer examines the goods before the contract is made, the implied condition of merchantable quality under section 14(2)(b)

[382] Ibid., p. 215; Bridge, **The Sale of Goods**, para. 7.139; Murdoch, J.R., 'Sale by Sample – A Distinction without a Difference? (1981) *MLR* 388; White, **Commercial Law**, op. cit., p. 215.

does not apply in respect of defects which that examination ought to have revealed. The implied quality condition applies without limitation, however, where no such examination takes place. Section 15(2)(c) provides that, in the case of a contract for sale by sample, there is an implied condition that the goods shall be free from any defect rendering them unmerchantable which would not be apparent on reasonable examination of the sample. Unlike in the case of section 14(2)(b), therefore, the merchantable quality condition under section 15(2)(c) will not protect the buyer where he failed to examine the sample but would have discovered a defect had he done so. As section 14(2)(b) covers sale by sample as well as all other sales, however, there is nothing to prevent a buyer in this situation from circumventing the restriction in section 15(2)(c) by having recourse to section 14(2)(b). When the Law Commission for England and Wales and the Scottish Law Commission reviewed these provisions, they concluded that this possibility was a cause of uncertainty as well as being contrary to the policy intention behind section 15(2)(c).[383] They recommended accordingly that the Act should make clear that section 15(2)(c) should prevail over section 14(2)(b) in the case of sale by sample. The Sale and Supply of Goods Act 1994 subsequently inserted a new section 14(2)(c) in the UK Sale of Goods Act 1979 which provides that the implied quality term under the section does not extend to any matter making the quality of the goods unsatisfactory in the case of a contract for sale by sample which would have been apparent on a reasonable examination of the sample. As the relevant subsections of the Sale of Goods Act 1893 are similar to those then to be found in the UK Sale of Goods Act 1979, the Commissions' analysis is applicable to the present Irish law. Though the discrepancy between the two provisions is likely to arise only in very limited circumstances, it is desirable in our view that inconsistencies of this kind between statutory provisions are minimised.

4.59. The wider issue raised by section 15(2)(c) is that of its relevance to consumer contracts of sale. In our view, a good case can be made that the subsection's restriction of the implied condition of merchantable quality in the case of defects that should have been apparent on a reasonable examination of the sample is a provision appropriate to the circumstances of commercial transactions but not to those of

[383] The Law Commission and the Scottish Law Commission. **Sale and Supply of Goods**, op. cit., paras. 6.24-6.27.

consumer transactions. Benjamin points out that consumer sales are less likely to be regarded as sales by sample precisely because of the fact that the specific examination rule which applies to these sales may not be appropriate in the circumstances of consumer contracts.[384]

4.60. Recommendations

Section 15(2)(c) of the 1893 Act which limits the implied condition as to quality in the case of sale by sample to defects which would not be apparent on reasonable examination of the sample should not apply to consumer contracts of sale.

Under section 14(2)(b) of the 1893 Act, the implied general condition as to quality applies in the case of sale by sample where the buyer fails to examine the sample, while the implied condition as to quality specific to sale by sample under section 15(2)(c) of the Act does not apply where the buyer fails to examine the goods and the defect is one that would have been apparent on a reasonable examination of the sample. Future legislation should address this inconsistency by providing that, in the case of commercial contracts of sale by sample, the implied general condition as to quality does not apply to any defect that would have been apparent on a reasonable examination of the sample.

4.61. The UK Sale and Supply of Goods Act 1994 made a further change to section 15 of the Sale of Goods Act 1979, on the recommendation of the Law Commissions. As noted earlier in this Chapter, the 1994 Act included a provision which removed the right to reject in commercial sales for slight breach of the implied terms under sections 13-15. Because the slight breach proviso could not readily be applied to the implied condition of reasonable opportunity to compare the bulk with the sample under section 15(2)(b), this was deleted from section 15 and transferred in substance to section 34 of the Act. The right of examination under section 34 of the UK Sale of Goods Act 1979 now reads:

> Unless otherwise agreed, when the seller tenders delivery of the goods to the buyer, he is bound on request to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract and, in the case of a contract for sale by sample, of comparing the bulk

[384] **Benjamin's Sale of Goods**, op. cit, para. 11-075.

with the sample.

Though the reasonable opportunity to compare bulk with sample is no longer an implied condition, we agree with the Law Commissions that this change does not effect any substantial alteration in the law.[385] As we have recommended the introduction of a similar restriction on rejection for slight breach in commercial sales, we recommend that the same consequential amendments should be made to sections 15 and 34 of the Act.

4.62. Recommendation

The implied condition at section 15(2)(b) of the 1893 Act that the buyer shall have a reasonable opportunity of comparing the bulk with the sample should be replaced by a substantively similar right of examination at section 34 of the Act.

SECTION 12 SALE OF GOODS AND SUPPLY OF SERVICES ACT 1980 IMPLIED WARRANTY FOR SPARE PARTS AND SERVICING

(1) In a contract for the sale of goods there is an implied warranty that spare parts and an adequate after-sale service will be made available by the seller in such circumstances as are stated in an offer, description or advertisement by the seller on behalf of the manufacturer or on his own behalf and for such period as is so stated or, if no period is so stated, for a reasonable period.

(2) The Minister may, after such consultation with such interested parties as he thinks proper, by order define, in relation to any class of goods described in the order, what shall be a reasonable period for the purpose of subsection (1).

(3) Notwithstanding section 55(1) of the Act of 1893 (inserted by section 22 of this Act) any term of a contract exempting from all or any of the provisions of this section shall be void.

4.63. This section of the 1980 Act was based on a recommendation in the Whincup and National Consumer Advisory Council reports, and sought to tackle claims about after-sales service and spare parts 'given lightly as a selling device', particularly in the motor trade.[386] It gives the status of a warranty – not a condition as with most of the implied terms under the 1893 Act - to undertakings by a seller as to the future supply of spare parts and availability of after-sale service. If a period for the availability of

[385] The Law Commission and the Scottish Law Commission. **Sale and Supply of Goods**, op. cit., para. 6.28.
[386] **Dáil Debates**. Vol. 309, 16 November 1978. Sale of Goods and Supply of Service Bill 1978: Second Stage, col. 1111.

parts or after-sale service is stated by the seller, that is the period of the warranty. If no such period is indicated, the warranty applies for a 'reasonable period'. The duration of this period is a question of fact having regard to the nature and quality of the goods.[387] Though subsection (2) empowers the Minister for Jobs, Enterprise and Innovation to define by order what is a 'reasonable period' for goods of a specified class, no such order has been made in the three decades since the enactment of section 12. Subsection (3) provides that contract terms which exclude the implied warranty are void. It is relevant to note in the context of the section that section 43(3) of the Consumer Protection Act 2007 provides, among other things, that a commercial practice is misleading if it includes the provision of false information in relation either to the after-supply assistance available to consumers in relation to a product or to the need for any part, replacement, servicing or repair in relation to the product.

Issues Arising

4.64. Prior to the deletion of Chapter IV of the proposed Consumer Rights Directive, it was assumed that the proposal's full harmonisation status would preclude the retention of section 12. The subsequent deletion of the relevant provisions of the proposed Directive, however, means that the following three options apply in respect of the section:

1) retain it in its existing form;
2) repeal it;
3) extend it to provide more substantive contractual entitlements to after-sale service and the availability of spare parts.

4.65. The strongest statutory provisions on after-sale service of which we are aware are to be found in the Consumer Protection Act 1996 in the Canadian province of Saskatchewan.[388] Section 48 of the Act includes the following among the warranties deemed to be given by retail sellers to consumers:

> (h) where the product normally requires repair that spare parts and repair facilities will be reasonably available for a reasonable period after the date of sale of the product.

Section 12 of the New Zealand Consumer Guarantees Act 1993 includes among the statutory guarantees conferred by the Act:[389]

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[387] Grogan, V. et al. **Sale of Goods and Supply of Services: A Guide to the Legislation**, op. cit, para. 36.
[388] The Consumer Protection Act 1996. Chapter c-30.1 of the Statutes of Saskatchewan 1996.
[389] Consumer Guarantees Act 1993, Public Act 1993 No. 91.

> (1)… where goods are first supplied to a consumer in New Zealand (whether or not that supply is the first-ever supply of the goods) there is a guarantee that the manufacturer will take reasonable action to ensure that facilities for repair of the goods and supply of parts for the goods are reasonably available for a reasonable period after the goods are so supplied.

Under section 41 of the New Zealand Act, however, this guarantee does not apply where reasonable action is taken to notify the consumer, at or before the time the goods are supplied, that the manufacturer does not undertake that repair facilities and parts will be available for the goods. A broadly similar provision on after-sale service and spare parts is also to be found in Australian consumer legislation.[390]

4.66. A case can certainly be made in principle for an obligation on sellers to make after-sale service and spare parts available for a reasonable period of time after purchase. Goods and equipment are increasingly complex technologically, and correct maintenance and repair often requires both specialist knowledge and non-standard parts that may be available only from the manufacturer. The lack of facilities for parts or service post-purchase can, therefore, erode the practical value of the implied undertakings as to quality and fitness for purpose. It is arguable that the Saskatchewan provision is more balanced than it first appears in that it draws a distinction between goods that are normally repaired (such as cars and large white goods) and those that are not (such as toasters, kettles and other small household appliances). Despite such arguments, however, we are not convinced that a provision of this kind is a practical proposition.[391] In a globalised economy, the goods on sale in Irish stores increasingly come from all parts of the world and there can be a lengthy supply chain between manufacturer and final seller. It would be neither fair nor realistic in this situation to impose a general obligation on retailers in respect of spare parts and after-sale service. The cost of complying with such an obligation could also be significant and would ultimately have to be met by consumers.

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[390] Competition and Consumer Act 2010, s.58. See also the discussion of the three options – 'regulatory', 'voluntary' and 'information-type' - for provisions on after-sale service in the European Commission's 1993 Green Paper. Commission of the European Communities. 1993. **Green Paper on Guarantees for Consumer Goods and After-Sales Services**. Com (93) 509.

[391] The inclusion in the Sale of Goods Act and related legislation of an implied statutory term on spare parts and after-sale facilities was considered and rejected by the Law Commission for England and Wales in 1979 and the Law Commission for England and Wales and the Scottish Law Commision in 1987. Law Commission for England and Wales. 1979. **Report on Implied Terms in Contracts for the Supply of Goods** (Law Com. No. 95), para. 115. Law Commission for England and Wales and Scottish Law Commission. 1987. **Sale and Supply of Goods**, op. cit., para. 3.36.

4.67. The provisions in force in New Zealand and Australia do not require sellers to offer after-sale and spare facilities in the same way as those in Saskatchewan and are thus closer to section 12 of the 1980 Act. While the 1980 Act creates a warranty only where an express commitment to the provision of after-sale service and spare parts is stated by the seller, the New Zealand and Australian provisions create a statutory guarantee as to repairs and spare parts in the absence of an express disclaimer by the seller. We think, on balance, that this would impose too great an obligation on retailers, particularly small retailers. Though section 12 has probably had a limited impact in practice, it can still serve a purpose in enhancing the rights and remedies of buyers where the seller, whether on his own behalf or on behalf of the manufacturer, states that after-sale service and spare parts will be available post-purchase. We invite observations as to whether the failure by successive Ministers to use section 12(2) to define a 'reasonable period' for the purpose of the 1980 Act's provisions on spare parts and after-sale service has contributed to the under-utilisation of the provision. Observations should also be sought from interested parties as to what would constitute a 'reasonable period' in respect of certain classes of goods.

4.68. Recommendation

The implied warranty as to the availability of spare parts and an adequate after-sale service at section 12 of the 1980 Act should in principle be retained in future legislation. The operation of the section, including the reasons for its under-utilisation, should be the subject of consultation with interested parties.

SECTION 13 IMPLIED CONDITION ON SALE OF MOTOR VEHICLES

4.69. Section 13 which inserts into contracts for the sale of motor vehicles a condition that the vehicle be free from defects that would render it a danger to the public, including persons travelling in the vehicle, is a lengthy provision that we will summarise, rather than reproduce, here. A number of the section's provisions are premised on the making of Regulations about certificates of roadworthiness that, in the event, were never made. The main provisions of the section are as follows:

- The implied condition as to freedom from dangerous defects is in addition to other conditions and warranties, including the implied terms as to merchantability and fitness under the 1893 Act, but does not apply in the case of the sale of a motor vehicle to a dealer (sub-section 2).

- The implied condition can be excluded where it is agreed between seller and buyer that the vehicle is not intended for use in the condition in which it is to be delivered under the contract, a document to this effect is signed by the parties to the contract, and the agreement between the parties is fair and reasonable (sub-section 3).

- A person using a motor vehicle with the consent of the buyer who suffers loss as a result of a breach of the implied condition may maintain an action for damages against the seller as if he were the buyer (sub-section 7). In this event, the action must be brought within two years of the date on which the cause of action accrued, and not within the general six-year time limit for actions for breach of contract set by the Statute of Limitations 1957 (sub-section 8).

- Any term of a contract exempting from all or any of the provisions of the section shall be void (sub-section 9).

4.70. The inclusion of section 13 in the 1980 Act followed a recommendation in the Whincup Report that was based on a provision in the Ontario Highway Traffic Act, and was subsequently endorsed by the National Consumer Advisory Council.[392] The rationale for the provision was that faults in motor vehicles, unlike in other consumer goods, could seriously affect persons other than the purchaser, most obviously where those faults resulted in an accident.[393] There was a demonstrable need accordingly for a 'high level of mechanical efficiency and roadworthiness in all motor vehicles sold for ordinary road use'. The departure from the doctrine of privity of contract entailed by the extension of the right of warranty to persons using the vehicle with the owner's consent reflected, 'whatever the theoretical considerations involved … a pragmatic approach when dealing with a product which if defective can constitute a grave personal and public hazard.' The first case to be considered under the section, *Glorney v O'Brien*,[394] involved a car sold for £250 which crashed three weeks after the sale due to a failure in its suspension. The High Court dismissed the contention that, in view of its low price, the vehicle was intended for spare parts rather than for use, stating:

> … no matter how old or cheap a motor vehicle may be it must not be sold to an ordinary member of the public not in the motor trade in a condition which would

[392] National Prices Commission. 1973. Occasional Paper No. 9. **Consumer Protection Law in America, Canada and Europe** (Dublin: Stationery Office), pp. 66-67. National Consumer Advisory Council. December 1974. **Submission to the Minister for Industry and Commerce on Proposals for Legislation to Assure the Consumers' Interests** (Dublin: Stationery Office), p. 16.
[393] **Dáil Debates**. Vol. 309, 16 November 1978. Sale of Goods and Supply of Service Bill 1978 Second Stage: cols. 1110-1111.
[394] High Court, Unreported, 14 November 1988. See also *Flynn v Dermot Kelly* [2007] IEHC 103.

render it a danger to the public including the occupants of the vehicle if driven on the road.

Damages totalling £18,650 were awarded to the driver and passenger in respect of injuries sustained in the crash.

Issues Arising

4.71. The implied condition specific to motor vehicles is a provision virtually unique to Ireland among the jurisdictions whose sales law is based on the 1893 Act. In those other jurisdictions, vehicle safety is covered by the implied statutory terms on the quality or, in some cases, the safety of goods. As with the implied warranty on after-sale service and spare parts, it was assumed, prior to the narrowing of the scope of the proposed Consumer Rights Directive, that retention of section 13 would be incompatible with the proposal's full harmonisation status. While this is no longer the case, the retention of the provision can be queried on other grounds. Motor vehicles are safer and more reliable now than when the 1980 Act was enacted and their roadworthiness must be assessed at regular intervals under mandatory vehicle testing requirements. We have also recommended at paragraph 4.48. above that safety should be one of the express aspects of the quality of goods for the purposes of the implied undertaking as to quality in future sale of goods legislation.

4.72. While the case for a provision along the lines of section 13 may not be as strong as in the past, the retention of the core elements of the section remains justified in our view. Though the safety of motor vehicles has undoubtedly improved, there are still significant safety issues with second-hand and reconditioned vehicles. The distinction between private and commercial sales can also be blurred in some segments of the car market and, as the quality terms under section 14 are confined to sales in the course of a business, their application can be uncertain. Section 13 is wider in scope than the implied quality and fitness conditions under section 14 in two important respects. First, it is not restricted to sales by the seller in the course of a business; the sole exclusion is the sale of a vehicle to a buyer. Second, the exception to the privity rule which gives a right of action to persons using a vehicle with the owner's consent does

not apply to the implied conditions under section 14.[395] Motor vehicles remain more likely than the generality of consumer goods to cause loss or injury to persons other than their owners. The fact that sellers are only liable if the vehicle is dangerous (as distinct from being merely unfit for purpose or unmerchantable) justifies the retention of this provision in our view. The section is simple and capable of being used by third parties as well as the buyer and, in the interests of road safety, we believe that even a private seller should not be able to rely on the principle of *caveat emptor* in this situation.

4.73. Recommendation

A provision along the lines of Section 13 of the Sale of Goods and Supply of Services Act 1980 on the implied condition of freedom from dangerous defects in motor vehicles should be retained in future legislation, and should be supplemented by a presumption that the defect existed in the vehicle at the time of the contract of sale. The burden of proof should be on the seller to show either that the defect was drawn specifically to the attention of the buyer who undertook to repair it before use, or that the defect arose after the contract was concluded.

SECTION 14 LIABILITY OF FINANCE HOUSES

> Where goods are sold to a buyer dealing as a consumer and in relation to the sale an agreement is entered into by the buyer with another person acting in the course of a business (in this section referred to as a finance house) for the repayment to the finance house of money paid by the finance house to the seller in respect of the price of the goods, the finance house shall be deemed to be a party to the sale and the finance house and the seller shall, jointly and severally, be answerable to the buyer for breach of contract of sale and for any misrepresentations made by the seller with respect to the goods.

4.74. This section of the 1980 Act applies to transactions in which the purchase price of goods sold to a consumer is paid to the seller by a finance house and the consumer enters an agreement with the finance house for the repayment of the money advanced to fund the purchase.[396] The main aim of the section was to address problems caused

[395] Though the Law Reform Commission has proposed the introduction of legislation for a comprehensive scheme of third party rights, it recommended that existing statutory exceptions to the privity rule, such as section 13 of the 1980 Act, should be retained. Law Reform Commission. 2008. **Report on Privity of Contract and Third Party Rights**, paras. 3.80-87.

[396] In *O'Callaghan v Hamilton Leasing (Ireland) Ltd* [1984] I.L.R.M. 146 a claim against a finance house in respect of a vending machine purchased through a finance house under a leasing agreement

to consumer buyers in such cases by the doctrine of privity of contract.[397] As payment for the goods was made to the seller by the finance house, the consumer buyer might be held not be to a party to the contract of sale and, as a consequence, to have no right of action under the express or implied terms of the contract if the goods proved defective or were otherwise in breach of contract. As the seller and the finance house were typically part of a joint venture in such cases, it was thought appropriate consequently to make them jointly and severally liable for breach of the contract of sale and for any misrepresentations made by the seller. Under the section, the agreement with the finance house must be 'in relation to the sale' and the money to be repaid must be money paid by the finance house 'in respect of the price of the goods.' General advances of money to consumers to fund purchases, such as those under credit card agreements, are, unlike the provision at section 75 of the UK Consumer Credit Act 1974 on which the section is based, excluded from its scope.

Issues Arising

4.75. Section 14 remains a useful measure in our view and the main issues it presents concern its relation to not dissimilar provisions in consumer credit legislation. Section 42 of the Consumer Credit Act 1995, which gave effect to Article 11 of Directive 87/102/EEC on Consumer Credit, covers situations where, in order to buy goods or services, a consumer enters into a credit agreement with a person other than the supplier, and the creditor and supplier have a pre-existing agreement under which credit is made available exclusively by that creditor to customers of that supplier. Where the goods or services in question are not supplied in full or part, or are not in conformity with the contract, and the consumer has unsuccessfully sought a remedy to which he is entitled from the supplier, the section grants him the right to take proceedings against the creditor. The section also expressly provides that the existence of a credit agreement shall not affect the rights of a consumer under the 1980 Act against the supplier of goods or services purchased by means of such an agreement.

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was rejected by the High Court on the ground that the contract was made in the course of the plaintiff's business and, as a consequence, was outside the scope of section 14 as a result. While the plaintiff argued that he did not intend to deal further in the goods, the court held that this was not sufficient to render him a consumer for the purposes of the section.

[397] National Prices Commission. 1973. Occasional Paper No. 9. **Consumer Protection Law in America, Canada and Europe** (Dublin: Stationery Office), pp. 130-31 & 206. **Dáil Debates**. Vol. 309, 16 November 1978. Sale of Goods and Supply of Service Bill 1978: Second Stage, col. 1109.

4.76. Directive 87/102/EEC has since been repealed and replaced by Directive 2008/48/EC on Consumer Credit Agreements. Article 15 of the new Directive contains a provision on linked credit agreements which is broadly similar to Article 11 of its precursor. Article 15(3) further states that its provisions are without prejudice to national rules rendering the creditor jointly and severally liable in respect of any claim which the consumer may have against the supplier where the purchase of goods or services from the supplier has been financed by a credit agreement. Though Article 15 has been transposed by Regulation 18 of the European Communities (Consumer Credit Agreements) Regulations 2010 (S.I. No. 281 of 2010), section 42 of the Consumer Credit Act 1995 also remains in force. The co-existence of the overlapping provisions in the 1980 and 1995 Acts and the 2010 Regulations is a source of confusion, and it is to be regretted that the opportunity for their rationalisation presented by the transposition of Directive 2008/48/EC was not taken. As our remit does not extend to consumer credit legislation, the question we have had to consider is whether the provisions of the Consumer Credit Act 1995 and the Consumer Credit Agreement Regulations 2010 make section 14 of the 1980 Act redundant. The relevant provisions in these two pieces of consumer credit legislation are more restrictive than those in the 1980 Act in that they apply only where there is a pre-existing and exclusive agreement between the creditor and the supplier of the goods or services, and give the consumer a right of action against the creditor only where he has tried and fail to obtain satisfaction from the supplier. There remains a case accordingly for the retention of section 14 of the 1980 Act and, indeed, for its extension to services. As Directive 2008/48/EC on Consumer Credit Agreements expressly permits the maintenance of national rules on the joint and several liability of suppliers and creditors, this suggests that there is an appreciation at EU level that such rules have a role to play alongside the Directive's provisions on linked credit agreements.

Recommendation

4.77. Section 14 of the 1980 Act on the liability of finance houses should be retained in future legislation , and extended to cover similar transactions involving the supply of services.

CHAPTER FIVE SALE OF GOODS ACT 1893: EXCLUSION OF IMPLIED TERMS AND CONDITIONS, SECTION 55

SECTION 55 EXCLUSION OF IMPLIED TERMS AND CONDITIONS

(1) Subject to the subsequent provisions of this section, where any right, duty or liability would arise under a contract of sale of goods by implication of law, it may be negatived or varied by express agreement, or by the course of dealing between the parties, or by usage if the usage is such as bind both parties to the contract.

(2) An express condition or warrant does not negative a condition or warranty implied by this Act unless inconsistent therewith.

(3) In the case of a contract of sale of goods, any term of that or any other contract exempting from all or any of the provisions of section 12 of this Act shall be void.

(4) In the case of a contract of sale of goods, any term of that or any other contract exempting from all or any of the provisions of section 13, 14, 15 of this Act shall be void where the buyer deals as a consumer and shall, in any other case, not be enforceable unless it is shown that it is fair and reasonable.

(5) Subsection (4) shall not prevent the court from holding, in accordance with any rule of law, that a term which purports to exclude or restrict any of the provisions of section 13, 14, 15 of this Act is not a term of the contract.

(6) Any reference in this section to a term exempting from all or any of the provisions of any section of this Act is a reference to a term which purports to exclude or restrict, or has the effect of excluding or restricting, the operation of all or ay of the provisions of that section, or the exercise of a right conferred by any provision of that section, or any liability of the seller for breach of a condition or warranty implied by any provision of that section.

(7) Any reference in this section to a term of a contract includes a reference to a term, which although not contained in a contract is incorporated in the contract by another term of the contract.

(8) This section is subject to section 61(6) of this Act.

The section was substituted by section 22 of the 1980 Act for the original section in the 1893 Act. Subsection (1) is the only part of the section carried over from the latter Act. The equivalent provision at section 40 of the Sale of Goods and Supply of Services Act 1980 which deals with the exclusion of the implied terms as to the quality of services at section 39 of the 1980 Act is discussed in Chapter 14.

5.1. Section 55(4) has to be read in conjunction with the Schedule to the 1980 Act on 'Fair and Reasonable Terms'. This states as follows:

1) In determining for the purposes of section 13, 31, 40 or 46 of this Act or section 55 of the Act of 1893 (inserted by section 22 of this Act) if a term is fair and reasonable the test is that it shall be a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to

have been, known to or in contemplation of the parties when the contract was made.

2) Regard is to be had in particular to any of the following which appear to be relevant:
   (a) The strength of the bargaining position of the parties relative to each other, taking into account (among other things) alternative means by which the customer's requirements could have been met;
   (b) Whether the customer received an inducement to agree to the term, or in accepting it had an opportunity of entering into a similar contract with other persons, but without having to accept a similar term;
   (c) Whether the customer knew or ought reasonably to have known of the existence and extent of the term (having regard, among other things, to any custom of the trade and any previous course of dealing between the parties);
   (d) Where the term excludes or restricts any relevant liability if some condition is not complied with, whether it was reasonable at the time of the contract to expect that compliance with that condition would be practicable;
   (e) Whether any goods involved were manufactured, processed or adapted to the special order of the customer.

5.2. Though the Sale of Goods Act 1893 imported rules into contracts of sale in respect of merchantable quality and other matters, these rules were firmly subordinated to the autonomy of the contracting parties. Section 55 as originally enacted provided that any right, duty or liability arising under a contract of sale by implication of law could be negatived or varied by agreement between the parties, by the course of dealing between them, or by usage of a kind binding both parties to the contract. As noted in Chapter 1, the widespread recourse to exemption clauses – that is, contractual provisions which oust or qualify the implied or express terms of the contract - had come to be seen as a significant problem by the 1950s, particularly in standard form consumer contracts. Two main types of exemption clause are commonly distinguished – exclusion clauses which exempt all liability, and limitation clauses which curtail liability or the buyer's remedies in some way, for example by stipulating that damages cannot not exceed a specified figure.[398] While the distinction is relevant, it can be one of degree rather than kind.[399] In some cases, moreover, clauses may not be expressed so as to exclude the seller's obligations in respect of the

[398] For a detailed account of the different forms that such clauses can take, see **Benjamin's Sale of Goods**, op. cit., paras. 13-020-13-041.

[399] As Atiyah points out, if a clause limits a party's liability to a trivial sum which bears no relation to the likely loss or damage, it is misleading to treat it as something wholly different from an exclusion clause. Exclusion and limitation clauses can sometimes also be found in one contract. Atiyah, **The Sale of Goods**, op. cit., p. 220.

implied terms, but can have this effect in practice as, for example, with a clause requiring a buyer to accept goods 'with all faults'.[400]

5.3. The response to the increased recourse to exemption clauses was two-fold. First, the courts sought to curb the use of these clauses by developing and deploying the doctrine of fundamental breach.[401] In a number of decisions from the mid-1950s, it was held that exemption clauses could not protect against liability where there had been a 'fundamental breach' of the contract or a breach of a fundamental term of the contract.[402] While the doctrine was expressed as a corollary of the rules of contract construction in some cases, in others it appeared to have the status of an independent rule of law. Secondly, pressure grew for legislative measures to curb this type of clause. The Molony Committee on Consumer Protection which reported to the UK government in 1962 recommended that contracting out of the implied terms should be prohibited in consumer transactions.[403]

5.4. In 1967 the House of Lords rejected the doctrine of fundamental breach as a substantive rule of law in *Suisse Atlantique*, with Lord Reid making the case as follows that exemption clauses should be subject to legislative regulation:[404]

> Exemption clauses differ greatly in many respects. Probably the most objectionable are found in the complex standard conditions which are now so common. In the ordinary way the customer has no time to read them, and if he did read them he probably would not understand them. And if he did understand and object to any of them, he would generally be told he could take it or leave it. And if he then went to another supplier the result would be the same. Freedom to contract must surely imply some choice or room for bargaining.

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[400] Bridge, **The Sale of Goods**, op. cit, para. 9.02.

[401] The courts also found against exemption clauses on the ground that they had not been incorporated into the contract in accordance with the basic principles of contract law. Such clauses could also be ruled out under the *contra proferentem* rule under which any ambiguity or omission in a contract term is to be construed against the person proferring it for his protection. Bridge, ibid., paras. 9.04-9.13.

[402] *Karsales (Harrow) Ltd v Wallis* [1956] 1 WLR 936; *Yeoman Credit Ltd v Apps* [1962] 2 QB 508; *Charterhouse Credit Co. Ltd v Tolly* [1963] 2 QB 683. In the first of these cases, Denning LJ stated that 'exempting clauses of this kind, no matter how widely they are expressed only avail the party when he is carrying out the contract in its essential respects… They do not avail him when he is guilty of a breach that goes to the root of the contract. The thing to do is to look at the contract apart from the exempting clause and see what are the terms, express or implied, which impose an obligation on the party. If he has been guilty of a breach of those obligations in a respect which goes to the very root of the contract, he cannot rely on the exempting clauses.' Ibid., at 938.

[403] **Final Report of the Committee on Consumer Protection**. 1962. (London: HMSO Cmd. 1781): paras. 431-435.

[404] *Suisse Atlantique Societe d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361 at 406.

> At the other extreme, is the case where parties are bargaining on terms of equality and a stringent exemption clause is accepted for a *quid quo pro* or other good reason. But this rule [fundamental breach] appears to treat all cases alike. There is no indication in the recent cases that the courts are to consider whether the exemption is fair in all the circumstances or is harsh and unconscionable or whether it was freely agreed by the customer… This is a complex problem which intimately affects millions of people and it appears to me that its solution should be left to Parliament.

Despite this judgement, the fundamental breach doctrine lingered on in the UK until its conclusive disavowal by the House of Lords in *Photo Production Ltd v Securicor Transport Ltd*[405] and *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd*.[406]

5.5. In 1969, the Law Commission for England and Wales and the Scottish Law Commission recommended a ban on the contracting out of the conditions and warranties implied by the Sale of Goods Act in consumer sales contracts.[407] Though Commissioners were agreed that the protection against contracting out should not be limited to sales to consumer buyers, they were divided as to the extent of the protection that should be provided to business buyers. Some Commissioners favoured extending the ban on contracting out to transactions in which consumer-type goods were sold to businesses. Others supported making exemption clauses in business contracts subject to a reasonableness test that would allow a court to render unenforceable any such clause that it did not find to be fair or reasonable. The UK Supply of Goods (Implied Terms) Act 1973 subsequently gave effect to these recommendations; in the case of commercial contracts, the main emphasis was put on subjecting exemption clauses in commercial contacts to a test of reasonableness. In 1977, the provisions of the 1973 Act were incorporated in the UK Unfair Contract Terms Act which, in addition to the implied terms under the Sale of Goods Act, also regulates avoidance of liability for negligence causing death, personal injury or other loss or damage, the exclusion or restriction of liability for breach of contract, and unreasonable indemnity clauses.

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[405] [1980] 2 WLR 283.

[406] [1983] 2 A.C. 803. For an account of the doctrine in this period, see **Benjamin's Sale of Goods**, op. cit., paras. 13-046-049.

[407] The Law Commission and the Scottish Law Commission. **Exemption Clauses in Contracts First Report: Amendments to the Sale of Goods Act 1893**, op. cit., paras. 64-123.

5.6. The introduction of statutory controls on exemption clauses in Ireland was proposed by both the Whincup report and the National Consumer Advisory Council.[408] Their recommendations were acted upon in the Sale of Goods and Supply of Services Act 1980, one of whose main aims was to bring exemption clauses under statutory control. In introducing the Bill in Dáil Eireann, the then Minister for State at the Department of Industry, Commerce and Energy stated:[409]

> Another aspect of the 1893 Act which has led to an erosion of the buyer's position is the regular use by many suppliers of the provision … in section 55 of that Act whereby the seller can exclude his contractual liabilities to the buyer. I am sure that every member of this House, at one time or another, has experienced the device of the exclusion clause. Its purpose and effects have been to trim or undermine entirely the implied rights of buyers. We have all lived with the fiction that the buyer willingly accepted these clauses excluding his rights.

5.7. In prohibiting exemption clauses in consumer contracts and subjecting them to a reasonableness test in commercial contracts, the 1980 Act closely followed the substance and form of the corresponding provisions in UK legislation. The approach taken to the regulation of contracting out in consumer and commercial contracts respectively was stated as follows in the second stage speech on the legislation:[410]

> A good deal of thought was given to the question of whether the use of exclusion clauses should be debarred only in the case of consumer sales or whether the prohibition should extend also to business sales. The House will, for instance, recognise that it would be unfair that a small retailer should be robbed of his right of redress against a large corporation through the use by the latter of an exclusion clause particularly as the retailer would himself be liable for any deficiency in the goods when sold to consumers. Whilst the complete prohibition of exclusion clauses will apply only in the case of consumer sales, in the case of sales between business people there is provision … for a test of reasonableness to be determined by the courts in respect of exclusion clauses. This … strikes a fair balance between the need on the one hand to guard against exploitation of the small man by economically stronger and more resourceful groups and on the other the need to allow reasonable freedom to strong groups to bargain with each other on whatever terms they please.

In contrast to the UK Unfair Contract Terms Act 1977, however, the Act's regulation of exemption clauses did not extend beyond clauses excluding or limiting the quality

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[408] National Prices Commission. 1973. Occasional Paper No. 9. **Consumer Protection Law in America, Canada and Europe** (Dublin: Stationery Office), pp. 89-91. National Consumer Advisory Council. December 1974. **Submission to the Minister for Industry and Commerce on Proposals for Legislation to Assure the Consumers' Interests** (Dublin: Stationery Office), p. 17.

[409] **Dáil Debates**, vol. 309 16 November 1978, Sale of Goods and Supply of Services Bill Second Stage: col. 1104.

[410] Ibid., cols. 1108-09.

and other terms implied into sales, services, hire-purchase and consumer hire contracts by the 1893 and 1980 Acts.[411]

5.8. Unlike in the United Kingdom, the doctrine of fundamental breach has not been expressly overturned by the courts in Ireland. In the leading case of *Clayton Love v B+I Transport*,[412] there was a contract between the parties for the transport of frozen scampi from Dublin to Liverpool. The loading was conducted in conditions that led the scampi to be unfit for consumption. The plaintiffs sued and the defendants cited two exemption clauses in the contract, the second of which debarred claims that were not made within three days of loss or injury. The Supreme Court applied the doctrine of fundamental breach to preclude reliance on this limitation clause, with Ó Dálaigh C.J. stating that:[413]

> In my opinion the basis on which this doctrine rests requires that a party, who like the defendants, has been held to be in breach of a fundamental obligation cannot rely on a time bar in a contract to defeat a claim for damages.

Though repudiation of this approach must await a Supreme Court decision, a number of subsequent High Court cases have cited with approval the contrary UK case law to the effect that the application of exclusion clauses to breaches of contract is always dependent on the construction of the contract.[414] Most recently, in *ESL Consulting Ltd v Verizon (Ireland) Ltd*,[415] Finlay Geoghegan J, though not disavowing the ruling in *Clayton Love*, suggested *obiter* that fundamental breach should not apply in commercial contracts, stating that:

> … if I was free to decide the issue in the light of subsequent judgements in other jurisdictions, as has been observed already by a number of my colleagues in the High Court, there appear to be strong arguments in favour of the reconsideration of the application of the so-called doctrine of fundamental breach to agreements between two commercial entities for the reasons outlined by the House of Lords in *Photo Production Ltd v Securicor Transport Ltd* …

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[411] As noted in Chapter 1, the 1980 Act had a long gestation and was first published in Bill form in 1977. It is likely therefore that the Bill's main elements were framed before the enactment of the 1977 Act in the UK.
[412] [1970] 104 I.L.T.R. 157.
[413] Ibid. at 170.
[414] *Western Meats v National Ice and Cold Storage Co*. [1982] I.L.R.M. 101. *Fitzpatrick and Harty v Ballsbridge International Bloodstock Sales*, unreported High Court, 25 February 1983. For a discussion, see Clark, R., **Contract Law in Ireland**, op. cit, pp. 209-211.
[415] [2008] IEHC 369 at 383.

5.9. As a High Court judge, Finlay Geoghegan J. was seeking to limit the scope of the fundamental breach doctrine to take account of the fact that, until the Supreme Court reviews *Clayton Love*, a High Court judge is bound by stare *decisis* to follow that decision. Happily, the Sales Law Review Group does not operate under any such restriction. Insofar as many of the cases in which fundamental breach was applied were sales contracts, argued before the 1973 reforms in the United Kingdom and the 1980 reforms in Ireland were in place, we think that the 'fundamental breach as a rule of law' approach has outlived its usefulness. We propose accordingly that this rule, inconsistent as it is with the statutory framework for regulating exemption and limitation clauses in contracts for the sale of goods and the supply of services, should be abrogated in the future legislation to replace the 1893 and 1980 Acts.

5.10 Recommendation

The 'fundamental breach' of contract as a rule of law should not be applied in any contract for the sale of goods or the supply of services and the new legislation that will replace the 1893 and 1980 Acts should specifically abrogate that rule.

Exemption Clauses and Unfair Terms in Consumer Contracts

5.11. The European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 and 2000 which give effect to Directive 93/13/EEC provide for more extensive regulation of unfair terms in consumer contracts. Unlike the corresponding provisions of the 1893 and 1980 Acts which apply only to exemption clauses, the Regulations cover any non-individually negotiated term in a consumer contract other than the definition of the main subject matter of the contract and the adequacy of the price. Under the Regulations, a contract term is regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations to the detriment of the consumer, taking into account the nature of the goods or services, all circumstances attending the conclusion of the contract, and all other terms of the contract. Schedule 2 of the Regulations sets out the following guidelines for the application of the test of good faith:

> In making an assessment of good faith, particular regard shall be had to
> - the strength of the bargaining position of the parties,
> - whether the consumer had an inducement to agree to the terms,
> - whether the goods or service were sold or supplied to the special order of the

consumer,
- the extent to which the seller or supplier has dealt fairly and equitably with the consumer whose legitimate interests he has to take into account.

5.12. The Schedule to the Regulations derives from recital 16 of the Directive which in turn was heavily influenced by the criteria for the reasonableness of contract terms at Schedule 2 of the UK Unfair Terms Act 1977.[416] As the test for the fairness and reasonableness of clauses that seek to exclude or limit the implied terms under the Sale of Goods Act contained in the Schedule to the 1980 Act was also based on the UK Unfair Terms Act, there are underlying similarities between the two fairness tests in Irish legislation. Despite this common basis, there are some significant differences of approach and effect between the Sale of Goods Acts and the Unfair Terms Regulations. While the Acts render exemption clauses in consumer clauses automatically ineffective, such clauses are unfair under the Regulations only if found to be so by reference to its test of fairness. Schedule 3 of the Regulations includes the following term among 'an indicative and non-exhaustive list of terms which may be regarded as unfair' pursuant to that test:

> Terms which have the object or effect of:...
>
> (b) inappropriately excluding or limiting the legal rights of the consumer vis-à-vis the seller or supplier or another party in the even of total or partial non-performance or inadequate performance by the seller or supplier of any of the contractual obligations, including the option of offsetting a debt owed to the seller or supplier against any claim which the consumer may have against him.

5.13. The adoption of Directive 1999/44/EC on Consumer Sales and Guarantees created an additional complication. The Directive was given effect in Ireland by the European Communities (Certain Aspects of the Sale of Consumer Goods and Guarantees) Regulations 2003 (S.I. No. 11 of 2003). Regulation 10 which transposes Article 7(1) of the Directive in virtually verbatim form states as follows:

> Any contractual terms or agreements concluded with the seller before the lack of conformity is brought to the seller's attention which purport directly to waive or restrict the rights resulting from these Regulations shall not be binding on the consumer.

[416] Directive 93/13/EEC was first transposed in the UK by the Unfair Terms in Consumer Contracts Regulations 1994 (S.I. 3159/1994). This gave effect to the good faith guidelines at recital 16 of the Directive in the form of a Schedule identical to that in the Regulations implemented in Ireland in 1995. The 1994 Regulations were later replaced, however, by the Unfair Terms in Consumer Regulations 1999 (S.I. 2013/1999) in which the Schedule does not feature.

Thus clauses which exempt the implied quality and related terms in consumer contracts of sale are (i) void under the Sale of Goods Act 1893, (ii) may be regarded as unfair under the Unfair Terms in Consumer Contracts Regulations 1995, and (iii) are not binding on the consumer under the Consumer Sales and Guarantees Regulations 2003.

Issues Arising

5.14. We consider that the broad approach to the regulation of exemption clauses in contracts of sale at section 55 of the 1893 Act remains valid in its essentials, namely that such clauses should be prohibited in consumer contracts and subject to a test of fairness in business contracts. In its present form, however, section 55 raises a number of issues in respect of its application to both consumer and commercial contracts.

Exemption Clauses in Consumer Sales Contracts

5.15. 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. As other of our recommendations would mean that there would no longer be separate consumer sales enactments based on domestic and EU legislation, the dual regulation of such clauses under the Sale of Goods Acts and the Consumer Sales and Guarantees Regulations would be brought to an end. The overlap in respect of exemption clauses under sale of goods legislation and the Unfair Terms Regulations, however, would not be addressed by this change. In our view, the Unfair Terms Regulations are the most appropriate vehicle for the regulation of exclusion clauses in consumer sale and related contracts. Such clauses should be deemed automatically unfair under the Regulations, however, rather than being assessable by reference to the criteria governing fairness. The effect of unfairness under the Regulations – with unfair terms being no longer binding on the consumer but with the contract otherwise continuing to bind the parties if it is capable of remaining in force without the unfair terms – is appropriate to exemption clauses.[417] A precedent for this type of provision can be found at section 19(6) of the Arbitration Act 2010 which provides that, without prejudice to the generality of the European Communities

[417] As Bridge notes: 'In the case of exemption clauses, as integral as they may be to the bargain, it ought to be the case that the contract is capable of continuing despite their excision.' Bridge, **The Sale of Goods**, op. cit, para. 9.43.

(Unfair Terms in Consumer Contracts) Regulations 1995 and 2000, an arbitration agreement to which one of the parties is a consumer and a term of which provides that each party shall bear his or her own costs shall be deemed to be an unfair term for the purposes of those 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 and related contracts.

RECOMMENDATION

5.16. Clauses exempting the implied statutory terms as to goods in consumer sale and related contracts should be automatically unfair in all circumstances under the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 and 2000. The 1995 Regulations should be amended in order to give effect to this recommendation.

'Deals As Consumer'

5.17. Section 55(4) of the 1893 Act provides that terms in contracts of sale which exempt any or all of the provisions of sections 13-15 of the Act shall be void where the buyer 'deals as consumer' and shall, in any other case, not be enforceable unless shown to be fair and reasonable. Section 3 of the 1980 Act defines 'dealing as consumer' as follows:

1) In the Act of 1893 and this Act a party to a contract is said to deal as consumer in relation to another party if –
   (a) he neither makes the contract in the course of a business nor holds himself out as doing so, and
   (b) the other party does make the contract in the course of a business, and
   (c) the goods or services supplied under or in pursuance of the contract are of a type ordinarily supplied for private use or consumption.

2) On -
(a) a sale by competitive tender, or
(b) a sale by auction –
   (i) of goods of a type, or
   (ii) by or on behalf of a person of a class
   defined by the Minister by order,
the buyer is not in any circumstances to be regarded as dealing as consumer.

3) Subject to this, it is for those claiming that a party does not deal as consumer to show that he does not.

The provision on 'dealing as consumer' also governs the application of section 14 of the 1980 Act on the liability of finance houses which was discussed in Chapter 4, section 53 of the 1893 Act on cure remedies for breach of warranty which is discussed in Chapter 11, and section 40 of the 1980 Act on the exclusion of the implied terms in contracts for the supply of services which is discussed in Chapter 14.[418]

5.18. The Act's definition of 'deals as consumer' was taken from the UK Supply of Goods (Implied Terms) Act 1973 where it served a similar purpose in demarcating contracts in which exemption clauses would be void from those in which they would be subject to a test of reasonableness. It originated in the proposals of the Law Commission for England and Wales and the Scottish Law Commission which sought to ensure that some purchases of consumer-type goods by businesses would enjoy statutory protection in respect of exemption clauses.[419] The definition was then incorporated in the UK Unfair Contract Terms Act 1977 where, with some subsequent modifications, it continues to apply.

5.19. The 'deals as consumer' provision is not fit for purpose in our view for a number of reasons. First, with its convoluted tripartite structure, it is too complex for the purpose it is intended to serve. Both buyers and sellers need to know whether the other party to the transaction is dealing as a consumer without having to engage in the kind of detailed analysis required by the provision. Second, the construction of the provision is problematical in that it applies the same formulation to businesses in their capacity as buyers and sellers. If a restrictive interpretation is given to 'in the course of a business' test in subsection (1)(a), business buyers, including companies, will be regarded as 'consumers' for the purposes of certain transactions. A similarly restrictive reading of 'in the course of a business' in subsection (1)(b), however, will see business sellers treated as 'consumers' in other cases to the detriment of an actual consumer buyer.[420] In *R&B Customs Brokers v United Dominion Trust*,[421] the Court

[418] Prior to the repeal of the section by the Consumer Credit Act 1995, the 'deals as consumer' test also applied to section 31 of the 1980 Act on the exclusion of the implied terms in hire-purchase agreements.
[419] The Law Commission and the Scottish Law Commission. **Exemption Clauses in Contracts First Report: Amendments to the Sale of Goods Act 1893**, op. cit., paras. 90-94.
[420] Macdonald, E. ''In the course of a business' – a fresh examination.' (1999) *Web JCLI* 3.
[421] [1988] 1 All ER 847. The judgement in this case relied on a House of Lords decision in *Davies v Sumner* [1984] 1 WLR 1301 which involved a similarly worded provision in the Trade Descriptions Act 1968. The latter case concerned the sale by a self-employed courier of a car with a false odometer

of Appeal ruled that the purchase of a car by a shipping broker for the use of two directors of the company was not made 'in the course of a business'. The purchase was held to be incidental and not integral to the buyer's business activity, and transactions of this kind would have to take place on a regular basis in order for them to be regarded as occurring 'in the course of a business'. On the basis of the approach followed in this case, a subsequent private purchaser of the same car would not be 'dealing as a consumer' either by virtue of the test's requirement that one party to the transaction must act in the course of a business. By extending the protections afforded consumers to business purchasers in some cases, therefore, this approach denies those protections in other cases to consumer purchasers with a better claim to them. In a subsequent case, *Stevenson v Rogers*,[422] which involved the interpretation of 'in the course of a business' in the context of section 14(2) of the Sale of Goods Act 1979, the Court of Appeal ruled that the sale of a fishing boat by a fisherman was made in the course of a business. Potter LJ observed that the purpose of this formulation was:

> … to distinguish between a sale made in the course of a seller's business and a purely private sale of goods outside the confines of the business (if any) carried on the seller.

The Court made clear, however, that the reasoning in *R&B Customs Brokers* remained valid for the purposes of the Unfair Contract Terms Act 1977.[423]

5.20. The two Irish cases which have considered the meaning of 'dealing as consumer' have both involved section 14 of the 1980 Act on the liability of finance houses. In *O'Callaghan v Hamilton Leasing (Ireland) Ltd*,[424] the High Court held that the lessee of a drinks vending machine which was supplied for use in his take-away food business was not dealing as a consumer within the meaning of the section and that, as a consequence, the exclusion of liability in the leasing agreement with the finance house was effective.[425] In *Cunningham v Woodchester Investments Ltd*,[426] the

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reading. The court held, while the use of a car was integral to the way in which a courier carried on his business, its sale of a car was not unless such sales were made on a regular basis.

[422] [1999] Q.B. 1028 (CA (Civ Div)).

[423] Sealy, L.S. 'When is a sale made 'in the course of a business?' (1999) *C.L.J.* 277. **Benjamin's Sale of Goods**, op. cit., para. 13-074.

[424] [1984] ILRM 146.

[425] McWilliam J. observed that: 'It seems to me that this contract was made in the course of the plaintiff's business. It was certainly made for the purpose of his business. .. In order to interpret the words of s.3 otherwise I would have to amend paragraph (a) of subsection (1) by reading it as though it provided 'in the course of a business which includes a further dealing with the goods' or some words of that sort. I cannot depart from the clear words of a Statute and try to construe it in accordance with my

High Court ruled that an agricultural college which had leased an automated telephone system was not 'dealing as consumer'. Though the college was a non-profit making venture, it had an extensive farming business and a substantial annual turnover. These activities could not be seen as anything other than a business, and the evidence indicated that the telephone equipment was mainly or largely intended for use in connection with them. While these judgments may suggest a disposition on the part of Irish courts to take a broader interpretation of 'in the course of a business' test than their English counterparts, the goods in neither case could be regarded as being of a type ordinarily supplied for private use or consumption.

5.21. While the problems posed by the existing provision are sufficient grounds for change, we consider that such change is also justified on policy grounds. Exemption clauses in contracts between businesses should not be automatically ineffective in our view. It is proper and sufficient that they should be subject to a test of fairness and reasonableness.[427] The existing test, and the guidelines for its application in the Schedule to the 1980 Act, allow disparities in bargaining power between the parties to business contracts and other relevant factors to be taken into account.[428] The definition of a consumer for the purpose of the regulation of exemption clauses in future sale of goods legislation should refer accordingly to a natural person acting for purposes unrelated to his or her business.

5.22. RECOMMENDATIONS

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.

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view of an unexpressed intention of the Legislature although I suspect that the legislature was more concerned with the business of engaging in further dealings with the goods.' Ibid. at 146.

[426] Unreported, High Court 16 November 1984.

[427] The report of the Law Commission for England and Wales and the Scottish Law Commission which was the basis for the legislative provisions governing exemption clauses in the UK and subsequently in Ireland put forward as alternatives the proposals for (i) a fairness test and (ii) provisions permitting certain types of purchase by businesses to be regarded as consumer purchases. In the event, however, both options were included in the legislation in the UK and Ireland.

[428] It is interesting to note that, in *R&B Customs Brokers*, the court was inclined to the view that, had it been treated as a non-consumer sale, the requirement of reasonableness would have been met. The buyer had bought cars on similar terms on two or three previous occasions and were not lacking in commercial experience while the seller was a finance company that had not seen the car. Atiyah, **The Sale of Goods**, op. cit., p. 241.

The 'deals as consumer' test at section 3 of the 1980 Act which governs the application of section 55 of the 1893 Act and a number of the provisions of the 1980 Act should be repealed. The definition of 'consumer' for the purposes of the regulation of exemption and other clauses in future legislation should refer accordingly to a natural person acting for purposes unrelated to his or her business.

5.23. We wish to make clear that our conclusions regarding the adequacy of the provisions at section 55 of the Act for the regulation of contracts between businesses relate only to their application to clauses exempting the terms implied by the Act. As noted above, the regulation of exemption clauses under Irish legislation is narrower than in the UK where the Unfair Contract Terms Act 1977 applies to a wider range of exclusion and indemnity clauses. The UK Act has itself been criticised for the relative narrowness of its scope compared with unfair terms legislation in other countries.[429] While the introduction of broader statutory provisions regulating unfair terms in business-to-business contracts is a legitimate and important and legitimate topic, it is not one that comes within our original terms of reference.

5.24 A further issue that requires consideration in this context is the differential treatment of exemption clauses in respect of sections 12 and 13 of the 1980 Act. As discussed earlier in the Chapter, these sections deal respectively with the implied warranty for spare parts and servicing and the implied condition on the sale of motor vehicles. The implied terms under each section apply equally to consumer and business buyers and, in both cases, any term of a contract exempting any or all of these terms is void regardless of whether the buyer deals as consumer or otherwise. We see no reason why the treatment of exemption clauses in respect of these provisions should differ from the treatment of clauses exempting the implied terms in respect of quality, fitness for purpose and correspondence with description and sample. Future sale of goods legislation should provide accordingly that exclusion of implied terms regarding spare parts and servicing and the safety of motor vehicles

[429] Benjamin points out, for example, that the UK Unfair Terms Act is limited to exemption clauses (albeit widely defined) and has no application to other forms of unfair contract term regulated in other jurisdictions such as price escalation clauses, clauses providing for forfeiture and clauses providing that the agent of the party acts as agent of the other in certain respects. **Benjamin's Sale of Goods**, op. cit., para. 13-063.

should be automatically unfair in consumer contracts and enforceable in business contracts only if shown to be fair and reasonable. It may be argued that terms exempting the implied condition of safety in motor vehicles should always be ineffective. Section 13 currently makes provision, however, for the implied term not to apply in specified circumstances. The safety of goods other than motor vehicles is encompassed by the implied term as to quality under section 14 and this can be excluded in the case of business contracts where shown to be fair and reasonable.

5.25. RECOMMENDATION

The provisions at sections 12(3) and 13(9) of the Sale of Goods and Supply of Services Act 1980 regarding contract terms which exempt any or all of the implied terms as to spare parts and after-sale service and the safety of motor vehicles should be amended so that they apply on the same basis as the provisions governing the exemption of other terms implied by the 1893 Act.

Other Changes to Section 55

5.26. Subsection 1 of the section, the only one carried over from the original Act of 1893, restates the nineteenth century view of freedom of contract, though it adds that it is subject to the subsequent provisions of the section. Those other provisions undermine that assumption of contractual autonomy in stipulating that the terms implied into contracts by the Act cannot be excluded or varied in consumer sales and can only be excluded in commercial sales where shown to be fair and reasonable. Subsection 1 no longer serves a function in our view and should not be retained in future sale of goods legislation.

5.27. Section 13(1) of the UK Unfair Contract Terms Act 1977 contains a useful elaboration of the varieties of exemption clause as follows:

> To the extent that this Part of the Act prevents the exclusion or restriction of any liability it also prevents -
>
> (a) making the liability or its enforcement subject to restrictive or onerous conditions;
>
> (b) excluding or restricting any right or remedy in respect of the liability, or subjecting a person to any prejudice in consequence of his pursuing any such right or remedy;
>
> (c) excluding or restricting rules of evidence or procedure.
>
> and (to that extent) … (the relevant sections of the Act) also prevent excluding or restricting liability by reference to terms and notices which exclude or restrict the relevant obligation or duty.

A provision along these lines should be included in future Irish sale of goods legislation.

5.28 By virtue of the definition of 'dealing as consumer' at section 3 of the 1980 Act, section 55 and a number of provisions of the 1980 Act are restricted in their application to consumer sales to goods or services 'of a type ordinarily supplied for private use or consumption'. The definition also provides that, in the case of a sale by competitive tender, the buyer is not in any circumstances to be regarded as dealing as consumer. A similar restriction in the case of sale by auction which was conditional on the making of a Ministerial order has not come into effect as no such order has been made. These restrictions are not compatible in our view with the requirement to give effect to Directive 1999/44/EEC and should be repealed in future legislation. The UK Regulations which gave effect to the Directive repealed similar restrictions in the UK Unfair Contract Terms Act 1977.[430] Though Ireland is not currently in breach of the Directive by virtue of the fact that the Regulations which give effect to the Directive contain no such restrictions, our recommendation for the abolition of the present regime of dual regulation of consumer sales would mean an end to separate Regulations of this kind in the future.

5.29 RECOMMENDATIONS

The provisions regulating exemption clauses in future legislation should include a provision on the model of section 13(1) of the UK Unfair Terms Act 1977 that would specify, and prohibit, the principal ways in which liability is excluded or restricted.

[430] The Sale and Supply of Goods to Consumers Regulations 2002 (S.I. 3045/2002), Regulation 14. Article 1(3) of Directive 1999/44/EC on Consumer Sales and Guarantees gives Member States the option of excluding 'second-hand goods sold at public auction where consumers have the opportunity of attending the sale in person' from the definition of 'consumer goods'. The UK exercised this option, while Ireland did not. The UK Regulations which give effect to the Directive exclude buyers of second-hand goods at public auction from the scope of 'dealing as consumer' for the purposes of the remedial scheme derived from the Directive and incorporated at Part 5A of the Sale of Goods Act 1979. The UK Regulations also amended section 12 of the Unfair Contract Terms Act 1977 to remove the previous blanket exclusion of sales by competitive tender and auction from the scope of 'dealing as consumer', but inserted a new provision that an individual buyer of second-hand goods sold at public auction is not to be regarded as dealing as consumer. The terms implied into contracts of sale by the UK Sale of Goods Act 1979 may be excluded in such cases consequently if the exclusion satisfies the test of reasonableness under section 6 of the Unfair Contract Terms Act 1977.

Subsection (1) of section 55 of the 1893 Act is at odds with the substance of the remainder of the section and should not be retained in future legislation.

The restriction of section 55 of the 1893 Act and of a number of the provisions of the 1980 Act in their application to consumer sales and services to 'goods or services of a type ordinarily supplied for private use or consumption' and the exclusion of sales by competitive tender which results from the definition of 'deals as consumer' is not compatible with Directive 1999/44/EC and should not be retained in future legislation.

SECTION 11 1980 ACT STATEMENTS PURPORTING TO RESTRICT RIGHTS OF BUYER

(1) Subsections (2) and (3) apply to any statement likely to be taken as indicating that a right or the exercise of a right conferred by, or a liability arising by virtue of, section 12, 13, 14 or 15 of the Act of 1893 is restricted or excluded otherwise than under section 55 of that Act.

(1) It shall be an offence for a person in the course of a business to do any of the following things in relation to a statement to which subsection (1) refers:

(a) to display on any part of any premises a notice that includes any such statement, or

(b) to publish or cause to be published an advertisement which contains any such statement, or

(c) to supply goods bearing, or goods in a container bearing, any such statement, or

(d) otherwise to furnish or to cause to be furnished a document including any such statement.

(3) For the purposes of this section a statement to the effect that goods will not be exchanged, or that money will not be refunded, or that only credit notes will be given for goods returned, shall be treated as a statement to which subsection (1) refers unless it is so clearly qualified that it cannot be construed as applicable in circumstances in which the buyer may be seeking to exercise a right conferred by any provision of a section mentioned in subsection (1).

(4) It shall be an offence for a person in the course of a business to furnish to a buyer goods bearing, or goods in a container bearing, or any document including, any statement, irrespective of its legal effect, which sets out, limits or describes rights conferred on a buyer or liabilities to the buyer in relation to goods acquired by him or any statement likely to be taken as such a statement, unless that statement is accompanied by a clear and conspicuous declaration that the contractual rights which the buyer enjoys by virtue of sections 12, 13, 14 and 15 of the Act of 1893 are in no way prejudiced by the relevant statement.

Section 41 of the Sale of Goods and Supply of Services Act 1980, which contains a similar provision relating to statements purporting to restrict the rights of recipients of services, is discussed in Chapter 14.

5.30. Section 11 of the 1980 Act was introduced essentially as a back-up to the restrictions on exclusion clauses at section 55 of the Act. As section 55 was modelled on the UK Supply of Goods (Implied Terms) Act 1963, section 11 was based on the UK Consumer Transactions (Restrictions of Statements) Order 1976. The rationale for the section was outlined as follows in the second stage speech introducing the proposed legislation:[431]

> To support these provisions making the various implied terms inescapable in contracts it is also necessary to ensure that they cannot be evaded in any other way and that sellers cannot even claim or pretend to withhold them by notices or advertisements. This is done in section 11 of the Bill which makes it an offence to put up notices in shops that goods will not be exchanged or money refunded and so on .

Though the reference to notices in shops makes clear that consumer protection was the main rationale of the provision, the scope of section 11, unlike that of the UK Order on which it was based, is not restricted to consumer transactions. While breach of the implied terms under the 1893 Act or of the Act's restrictions on exclusion clauses is a civil matter the remedy for which must be pursued by the injured party, breach of section 11 is a criminal offence. Responsibility for the investigation of alleged offences under the section and for any subsequent enforcement action now rests with the National Consumer Agency.

5.31. Despite the fact that section 11 has been in force for thirty years, it is not uncommon for retailers to display statements that *prima facie* are in breach of it. Notices that simply state 'No Refunds' or 'No refunds on Sale Items' are clearly in contravention of the section. The more common form of such notices states 'No Refunds: This Does Not Affect Your Statutory Rights.' As those statutory rights give consumers a right to reject the goods and obtain a full refund of the price where goods which have not been accepted by the buyer are in breach of the implied statutory terms,[432] such statements are likely in our view to be taken as indicating that a right conferred by, or a liability arising under, sections 12-15 of the 1893 Act is restricted

[431] **Dáil Debates**, vol. 309 16 November 1978, Sale of Goods and Supply of Services Bill Second Stage: col. 1109.

[432] Or where, in accordance with section 53 of the 1893 Act, a seller has refused to comply with a request, or fails to do so within a reasonable time, from a buyer dealing as consumer that the seller either remedy a breach of any condition which the buyer is compelled to treat as a breach of warranty or replace any goods not in conformity with the condition.

or excluded otherwise than under section 55 of that Act. They do not appear to us either to meet the requirement of section 11(3) of being so clearly qualified that they cannot be construed as applicable in circumstances where the buyer is seeking to exercise a right conferred by the relevant sections of the 1893 Act. The same can be said of statements which limit the buyer's remedies for breach of the implied terms to a credit note that can only be redeemed by another purchase or purchases from the same seller. As the present wording of section 11 appears to us to be adequate to preclude such statements, the issue would appear to be primarily one of enforcement.

Issues Arising

5.32 The main issue raised by section 11 is whether it remains necessary in view of section 43 of the Consumer Protection Act 2007 which gives effect to the provisions of the Unfair Commercial Practices Directive on false, misleading and deceptive information. Sections 43 (1) & (3)(j) of the Act state as follows:

> 43(1) A commercial practice is misleading if it includes the provision of false information in relation to any matter set out in subsection (3) and that information would be likely to cause the average consumer to make a transactional decision that the average consumer would not otherwise make.
>
> (3)(j) the legal rights of a consumer (whether contractual or otherwise) or matters respecting when, how or in what circumstances those rights may be exercised.

Per section 47 of the Act, a trader who engages in any misleading commercial practice described in section 43 commits an offence. Though section 43(3)(j) of the Consumer Protection Act is clearly aimed at the type of practices covered by section 11 of the 1980 Act, it is expressed in more general and less detailed form. If section 11 Act is to be retained, however, the full harmonisation nature of the Unfair Commercial Practices Directive would appear to require the application of the Directive's average consumer and transactional decision tests to any such provision in future legislation that is applicable to consumer transactions.[433]

[433] Twigg-Flesner, C. et al. 2005. **An Analysis of the Application and Scope of the Unfair Commercial Practices Directive: A Report Prepared for the Department of Trade and Industry**, pp. 158-62.

5.33. Though the Consumer Protection Act 2007 applies only to business-to-consumer commercial practices, the European Communities (Misleading and Comparative Marketing Communications) Regulations 2007[434] contain equivalent prohibitions of misleading marketing communications in transactions between traders. Regulation 3(4)(j) which is worded identically to section 43(3)(j) of the 2007 Act prohibits misleading marketing communications about the legal rights of the trader. Unlike in the case of the Consumer Protection Act, breach of the Regulations is not a criminal offence, but injured parties can apply to the Circuit Court or the High Court for an order prohibiting the offending communication.

5.34. Though a case might be made for retaining section 11 of the 1980 Act by reason of its more detailed and specific provisions, its purpose and function are adequately met in our view by the provisions of the Consumer Protection Act 2007 and the European Communities (Misleading and Comparative Marketing Communications) Regulations 2007. As statutory duplication of this kind is inherently undesirable, we favour the repeal of section 11. We note in this connection that the UK Regulations which gave effect to the Unfair Commercial Practices Directive revoked the Consumer Transactions (Restrictions of Statements) Order 1976 on which section 11 was based.[435]

5.35 RECOMMENDATION

Section 11 of the Sale of Goods and Supply of Services Act 1980 should be repealed as it duplicates the provisions of the Consumer Protection Act 2007 and the European Communities (Misleading and Comparative Marketing Communications) Regulations 2007.

[434] S.I. No. 774/2007.
[435] Consumer Protection from Unfair Trading Regulations 2008 (S.I. 1277/2008), Regulation 30 & Schedule 4, Part 2.

CHAPTER SIX SALE OF GOODS ACT 1893: TRANSFER OF PROPERTY AS BETWEEN SELLER AND BUYER, SECTIONS 16-20

6.1. As discussed in Chapter 3, the distinguishing feature of a contract of sale is the transfer of property from seller to buyer. As Bridge observes,[436] the passing of property in goods:

> …affects contractual rights and duties. It is the fulcrum on which depends issues as diverse as the seller's entitlement to sue for the price and the incidence of risk of loss or casualty to the goods. The passing of property may also have an incidental effect on the remedies of the parties, including specific performance… The passing of property is also of prime significance in defining the position of buyer and seller on the other's insolvency. The whereabouts of the property may affect third parties as it touches upon liability in conversion, insurable interest, liability in tax, criminal responsibility, and the amenability of goods to execution of goods and insolvency creditors.

The rules regulating the transfer of property and the related issues of the reservation of the right of disposal of goods and the passing of risk are contained in section 16-20 of the 1893 Act. As the rules on the passing of property in sections 16-18 apply differently to specific and unascertained goods, the first part of this Chapter will consider the two types of goods in turn. The provisions applicable to specific goods are set out in section 17 and rules 1-4 of section 18 of the Act, while those applicable to unascertained goods are contained in section 16 and rule 5 of section 18. The Chapter will then consider section 19 on the reservation of the right of disposal, and will conclude with an examination of section 20 on the passing of risk.

I THE PASSING OF PROPERTY

The Passing of Property in Specific Goods

Section 17: Property Passes when Intended to Pass

(1) Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

(2) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties, and the circumstances of the case.

6.2. Specific goods are defined in section 62 of the 1893 Act as 'goods identified and agreed upon at the time the contract of sale is made' - a particular car or other item and not a car or other item of a generic kind. Though 'ascertained' is not defined in

[436] Bridge, **The Sale of Goods**, op. cit., para. 3.01.

the Act, it means goods that have been identified to the contract; as discussed later in the Chapter, section 16 of the Act refers to unascertained goods becoming 'ascertained'. Section 17(1) stipulates that the intention of the parties is the paramount criterion for the purposes of the passing of property, and section 17(2) provides that the terms of the contract, the conduct of the parties and the circumstances of the case are to be taken into account in ascertaining these intentions. A retention of title clause stipulating that property will not pass until the price has been paid, for example, is a clear expression of the intention of the parties. As some contracts, however, do not deal explicitly with the question of when property is to pass, section 18 contains four rules for the purpose of ascertaining the intention of the parties in respect of specific goods. These rules, and the fifth rule concerning the passing of property in unascertained goods, are presumptive. The law permits the parties to 'settle the point for themselves by any intelligible expression of their intention.'[437] We will look at each of these rules in turn.

Section 18: Rules for Ascertaining Intention

> Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer.
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> Rule 1.—Where there is an unconditional contract for the sale of specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed.

6.3. The critical aspect of Rule 1 is the presumption that, in the absence of a contrary intention, the property in specific goods passes at the time the contract is made regardless of when delivery or payment take place. Though the Rule expressly states that the postponement of the time of payment or delivery is immaterial for the purposes of the passing of property, such a postponement cannot be entirely disregarded in that it may be indicative of a contrary intention.[438]

6.4. While Rule 1 is relatively straightforward, some of its elements have given rise to uncertainty. The first such uncertainty concerns the meaning of the term 'unconditional contract'. Commentaries on the Act are in agreement that the correct interpretation of 'unconditional' is that the contract is not subject to any condition

[437] *McEntire v Crossley Bros Ltd* [1895] A.C. 457 at 467.
[438] Atiyah, **The Sale of Goods**, op. cit., p. 315.

precedent, such as a retention of title clause, intended to determine the passing of the property in the goods.[439] A number of English cases in the first six decades of the twentieth century, however, suggested that the term referred to a contract containing no 'conditions' in the sense of essential terms, breach of which would give the buyer the right to treat the contract as repudiated. In *Varley v Whipp* which concerned the sale of a particular reaping machine, Channell J. held that, notwithstanding the absence of any suspensive condition, section 18(1) did not apply as 'this was not an unconditional contract for the sale of specific goods'.[440] It is possible, however, that this interpretation was influenced by a desire to circumvent the bar on the right of rejection which, by virtue of section 11(1)(c) of the 1893 Act, then applied to the sale of specific goods in which the property had passed. Though the subsequent repeal of this particular provision may have lessened the likelihood that this interpretation would now be followed, it would be beneficial to clarify the matter in future legislation.

6.5 Recommendation

Rule 1 of section 18 of the 1893 Act should be amended to make clear that the term 'unconditional contract' does not refer to conditions in the sense of essential terms of the contract.

6.6. A second issue raised by Rule 1 is that of the meaning of the words 'deliverable state'; this term is also found in Rules 2, 3 and 5 of section 18. Per section 61(4) of the 1893 Act, goods 'are in a deliverable state within the meaning of this Act when they are in such a state that the buyer would under the contract be bound to take delivery of them.' It can be argued that goods are not in a deliverable state if they are in breach of an express or implied condition relating to their state or quality as the buyer would not be bound to take delivery of them in such an event. In practice, however, the requirement in Rule 1 has been given a more restrictive interpretation with the result that goods may be defective and yet be in a deliverable state. Bridge suggests that 'deliverable state' can be 'sensibly confined to the performance by the sellers of duties such as packing, repair, dismantling, and servicing between the

[439] Atiyah, **The Sale of Goods**, op. cit., pp. 311-13. **Benjamin's Sale of Goods**, op. cit., para. 5.19. Bridge, **The Sale of Goods**, op. cit., para. 3.10. White, **Commercial Law**, op. cit., p. 370.
[440] [1900] 1 QB 513. See also *Ollett v Jordan* [1918] 2 KB 41; *Leaf v International Galleries* [1950] 2 KB 86; and *Long v Lloyd* [1958] 1 WLR 753.

contract date and the delivery.'[441] As discussed below, this eventuality is expressly provided for in rule 2 of Section 18. In *Underwood Ltd v Burgh Castle Brick and Cement Syndicate*,[442] a contract was made for the sale 'free on rail' of an engine weighing thirty tons. At the time the contract was made, the engine was fixed to the floor of the plaintiff's premises and had to be separated from its base and dismantled before it could be delivered. The engine was damaged while being loaded onto a railway truck. The Court of Appeal held that the property had not passed at the time the contract was made and the engine was still at the seller's risk. The engine was not in a deliverable state in accordance with the requirement of Rule 1 as it had to be detached and dismantled before it could be put in a condition in which the buyer would be bound to accept it. Bankes L.J. observed:[443]

> A 'deliverable state' does not depend upon the mere completeness of the subject matter in all its parts. It depends on the actual state of the goods at the date of the contract and the state in which they are to be delivered by the terms of the contract.

> Rule 2.—Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods, for the purpose of putting them into a deliverable state, the property does not pass until such thing be done, and the buyer has notice thereof.

6.7. This Rule appears to be operative only where there is a term of the contract requiring the seller to do something to the goods to put them in a deliverable state. It would not apply where, for example, the seller agreed to undertake repairs or adjustments that were not needed in order for the goods to be in a deliverable state.[444] Once goods have been put in a deliverable state, the buyer must be given notice of the fact before the property will pass. As the Rule does not stipulate that the seller shall give notice, but that the buyer shall have notice, Benjamin suggests that 'notice' means 'knowledge'.[445] Notice, however, must be actual and not constructive.[446]

> Rule 3.—Where there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test, or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or thing be done, and the buyer has notice thereof.

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[441] Bridge, **The Sale of Goods**, op. cit., para. 3.12.
[442] [1922] 1 K.B. 343.
[443] Ibid., at 345.
[444] Atiyah, **The Sale of Goods**, op. cit. p. 317.
[445] **Benjamin's Sale of Goods**, op. cit., para. 5.034.
[446] Ibid., para. 5.034. **Bridge, The Sale of Goods**, para. 58.

6.8. The duty to weigh, measure, test etc. under this Rule must be one which has to be performed by the seller and not by the buyer or a third party.[447] The acts to be performed by the seller must also be for the purpose of ascertaining the price. If the seller is not bound to do some act for this specific purpose, the Rule does not apply. It is not applicable, consequently, where goods are sold for a lump sum which is unaffected by any acts of weighing, measurement etc that are to be performed.[448]

> Rule 4.—When goods are delivered to the buyer on approval or "on sale or return" or other similar terms the property therein passes to the buyer:—
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> (a) When he signifies his approval or acceptance to the seller or does any other act adopting the transaction:
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> (b) If he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time. What is a reasonable time is a question of fact.

6.9. Rule 4 deals with two types of transaction, 'sale on approval' and 'sale or return', but does not define either. Though these transactions have been differentiated in a number of ways, there is no conclusive authority on the distinction. Atiyah suggests that a sale on approval may legally amount to a contract of sale with a condition subsequent which permits the buyer to rescind the transaction if he finds the goods unsuitable, while a sale or return may not be a contract of sale but rather an offer to sell, accompanied by delivery, which must be accepted before it becomes a contract of sale.[449] Bridge maintains that there is no contract of sale, as defined by the section 1 of the 1893 Act, in either of these cases as the buyer has not yet bought or agreed to buy the goods.[450] Prior to any contract of sale, the goods are held under a contractual bailment with the buyer having an option to buy. In *Atari Corp (UK) Ltd v Electronics Boutique (UK) Stores Ltd*,[451] the Court of Appeal held that 'sale or return' contracts are contracts of bailment up to the time when property passes. Bridge notes that, while 'sale on approval' seems primarily to deal with the acquisition of goods for personal use, and 'sale or return' with the acquisition of goods for resale, the latter is not invariably linked with resale.[452] The true distinction between the two transactions

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[447] *Nanka-Bruce v Commonwealth Trust Ltd* [1926] A.C. 77.
[448] *Hansen v Meyer* (1805) 6 East 614; *Alexander v Gardner* (1835) 1 Bing (NC) 671; *Lockhart v Pannell* (1873) 22 UCCP 597 (Can).
[449] Atiyah, **The Sale of Goods**, op. cit., p. 318.
[450] Bridge, **The Sale of Goods**, op. cit., para. 3.17.
[451] [1998] QB 539.
[452] Bridge, **The Sale of Goods**, op. cit., para.3.16.

may lie, therefore, in the active duty to return goods in 'sale or return' transactions, while in 'sale on approval' cases the obligation is to make them available to the bailor.

6.10. In the absence of any contrary intention in the matter, rule 4 provides that property in the goods under sale on approval or sale or return arrangements passes to the buyer in any of the following circumstances :

1) When the buyer signifies approval or acceptance of the goods to the seller;

2) When the buyer does any other act adopting the transaction, for example by reselling or pledging the goods or taking any other action inconsistent with his free power to return the goods. In *Kirkham v Attenborough*,[453] a buyer of goods on sale or return pledged them with a pawnbroker. The Court of Appeal held that the property in the goods had passed to the buyer by this Act with the result that the pawnbroker acquired a good title to them, with Lord Esher stating that:[454]

   > There must be some act which shows that he adopts the transaction; but any act which is consistent only with his being the purchaser is sufficient.

3) When the buyer retains the goods, without giving notice of rejection, beyond the time set for their return. The form of the notice will depend on the terms, express or implied, of the contract between the parties. In *Atari v Electronics Boutiques*,[455] the Court of Appeal held that, in the absence of any contrary intention, the notice did not have to be in writing. In addition, it did not have to identify the precise goods subject to return; a generic designation (such as 'unsold stock') which would permit individual identification at a later stage sufficed for this purpose.

4) When no time limit is fixed for the return of the goods, on the expiry of a reasonable time. What is reasonable will depend on the circumstances of the case; a shorter time will be allowed, for example, for perishable items than for durable goods.[456] In *Poole v Smith's Cars (Balham) Ltd*,[457] the lapse of a 'reasonable time' in a sale or return transaction between two car dealers was assessed by reference to a range of factors including the state of the second-hand car market at the time of the year, the car's depreciation, the bailor's repeated requests for the return of the car, and the apparently short-term nature of the bailment.

[453] [1897] 1 Q.B. 201.
[454] Ibid., at 203.
[455] [1998] QB 539.
[456] White, **Commercial Law**, op. cit., p.374.
[457] [1962] 1 WLR 744.

The Passing of Property in Unascertained Goods

Section 16: Goods must be ascertained

> 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.

6.11. The 1893 Act does not define 'unascertained goods' but, as discussed at paragraph 2.50. above, the term mean goods not identified and agreed upon at the time the contract is made. Though future goods can be specific in certain circumstances, this does not hold in the case of the passing of property. Goods must be either future or specific for this purpose.[458] As further outlined in Chapter 2, there are two distinct categories of unascertained goods: first, wholly unascertained goods for which the parties have not designated a source of supply in the contract and, second, 'quasi-specific' goods which are to be supplied from an specified bulk and are thus partially identified – for example, 100 tons of wheat from a consignment of 1,000 tons on a named ship. For the purposes of the 1893 Act, however, such quasi-specific goods remain unascertained.

6.12. Section 16 lays down the fundamental and mandatory rule that property cannot pass until goods are ascertained. This rule cannot be excluded or altered by the terms of the contract or the intention of the parties. As Mustill J. stated in *Karlshamns Oljefabriker v Eastland Navigation Corp*[459]:

> Whatever the intention of the parties, where there is a contract for the sale of unascertained goods, no property can pass until the goods are ascertained… Once ascertainment has taken place, the passing of property depends on the intention of the parties and the circumstances of the case.

Per Atkin LJ in *re Wait*, goods which are not ascertained at the time of the contract become ascertained by becoming 'identified in accordance with the agreement after the time a contract of sale is made.'[460] In Goode's view[461], the identification of goods to the contract involves two stages separated by a temporal interval:

> At the moment the contract is made, the parties must, as terms of the contract, agree upon the characteristics by which the goods to be supplied are to be identified. This means at least some verbal description in writing or by word of mouth… At the second stage, goods possessing the specific characteristics must be set aside and appropriated to the contract, so that the seller ceases to be entitled to proferr or the buyer to take other goods, even if having all the designated characteristics.

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[458] White, **Commercial Law**, op. cit., p. 384.
[459] [1982] 1 All ER 208 at 212.
[460] [1927] 1 Ch. 606 at 630.
[461] **Goode on Commercial Law**, op. cit., p.233.

6.13. In the leading case of *re Wait*,[462] the buyer purchased 500 tons of wheat from a shipment of 1,000 tons. Before the ship reached its destination, however, the seller, Wait, became bankrupt. The Court of Appeal held that, although the buyer had part-paid for the wheat, his share of the bulk had not been earmarked, identified or appropriated as the wheat to be delivered under the contract. The goods were unascertained, consequently, and the property in them had not passed. The buyer was left to claim repayment of the price as an unsecured creditor and was also precluded from obtaining a decree of specific performance of the contract. In *re London Wine Co. (Shippers) Ltd*.,[463] the company sold wine to consumers as an investment and stored the wine on their behalf. The purchasers paid the price and the costs of insurance and storage and, in return, received certificates of title for the wine. The wine was stored in common, however, and was not earmarked or designated for individual buyers. The seller subsequently went insolvent and the buyers failed in their attempt to secure a proprietary right to the wine on the ground that, as it had not been ascertained, the property in it had not passed to them. A different outcome ensued, however, in another wine investment case, *re Staplyton Fletcher*.[464] The sellers were wine merchants who stored wine for their customers. Though specific cases were not earmarked for individual purchasers, detailed records were kept of the wine bought by each customer and the customers' wine was kept separate from the company's own stock. The court held that the separation of the wine from this stock rendered it sufficiently ascertained to enable property to pass with the customers owning it as tenants in common. The problems resulting from section 16 were again apparent, however, in *re Goldcorp Exchange Ltd*[465] in which the seller misled over 1,000 New Zealand investors in gold and other precious metals into believing that he would store their bullion free of charge in a vault. The buyers received a certificate of ownership which indicated the quantity of bullion purchased and entitled them to take delivery of that quantity. Pending delivery, however, the bullion was kept as part of the company's general stock and was not apportioned to individual purchasers. When the company became insolvent, there was insufficient bullion to meet the claims of purchasers, and the available bullion was claimed in its entirety by a bank that had a floating charge over the company's assets. The buyers' claim for a share in the bullion

[462] [1927] 1 Ch. 606.
[463] [1986] P.C.C. 121.
[464] [1994] 1 WLR 1181.
[465] [1995] 1 AC 74.

failed. The Privy Council held that their contracts were for the sale of unascertained goods and, as a consequence, that they had no proprietary rights to the bullion.

6.14. A specified quantity of unascertained goods forming part of an identified bulk may become ascertained, however, by a process of exhaustion. In *Wait and James v Midland Bank*,[466] the buyers purchased 1,250 quarters of wheat under three separate contracts from a bulk held in a warehouse. The buyers took delivery of 400 quarters of their order and, over time, following deliveries to other purchasers, only 850 quarters of the original bulk remained in the warehouse, all of which was originally owned by the sellers. The court held that the wheat remaining in the warehouse had been ascertained as the quantity of goods agreed to be sold by the sellers to the buyers and that the property had passed. In *Karlshamns Oljefabriker v Eastport Navigation Co. Ltd (The Elafi)*,[467] the plaintiff purchased 6,000 tons of copra (dried coconut flesh used to make coconut oil) from a larger quantity on board the Elafi. The rest of the cargo was sold to other buyers. The plaintiffs then bought a further 500 tons from one of these other buyers. All but the 6,500 tons of the consignment was discharged at Rotterdam and Hamburg. The ship then sailed to Karlshamn where the remaining cargo was damaged by sea water. The court held that, while no property had passed on shipment as the copra was shipped in undivided bulk, the goods had been ascertained by exhaustion at Hamburg when all the copra meant for other buyers had been unloaded. The court further held that the property should pass even though it was not possible to say which part of the copra constituted the 6,000 tons sold directly by the main seller and which part comprised the additional quantity purchased under a separate contract from the other seller. The situation in which goods forming part of a bulk become ascertained when separate contracts become vested in a single buyer, or when the whole of the bulk is sold under separate contracts to a single buyer, is sometimes referred to as ascertainment by consolidation.[468]

6.15. Section 16 does not say when property will pass once the goods are ascertained. This will depend on the intention of the parties. In deciding what the parties intended, regard will be had, in accordance with section 17(2), to the terms of the contract, the

[466] (1926) 31 Com. Cas. 172.
[467] [1981] 2 Lloyd's Rep 679.
[468] **Benjamin's Sale of Goods**, op. cit., para. 5-063.

conduct of the parties and the circumstances of the case. In the absence of a clear expression of the parties' intention, the passing of property will be governed by Rule 5 of section 18.

> Rule 5.—(1) Where there is a contract for the sale of unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be express or implied, and may be given either before or after the appropriation is made:
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> (2) Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee or custodier (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract.

This rule provides that, under a contract for the sale of unascertained or future goods by description, property passes to the buyer when goods of the contract description are 'unconditionally appropriated to the contract' by one party with the assent of the other. This requirement of unconditional appropriation essentially means that 'some ascertained and identified goods must be irrevocably attached and earmarked for the particular contract in question'.[469] Actual delivery of the goods to the buyer is the most straightforward form of appropriation. Rule 5(2) expressly provides that delivery to a carrier or other bailee or custodier will also suffice for this purpose.

6.16. Appropriation can also occur while goods remain in the possession of the seller. In *Aldridge v Johnson*,[470] the plaintiff agreed to buy 100 quarters of barley from a bulk of 200 quarters which he had seen and agreed to. He then sent two hundred sacks to the defendants to fill with the barley. The defendants filled 155 sacks, but subsequently emptied these shortly before becoming insolvent. The House of Lords held that the goods had been unconditionally appropriated when they were placed in the sacks and that the property in them had passed at that point. In *Carlos Federspiel & Co SA v Charles Twigg & Co Ltd*,[471] however, the setting aside, labelling and packing of goods was held not to amount to unconditional appropriation. The defendant agreed to manufacture and ship a consignment of bicycles to the plaintiff in Costa Rica. The latter paid in advance and the bicycles were placed in crates marked with the buyer's name on board a ship. The defendant became insolvent before the

[469] Atiyah, **The Sale of Goods**, op. cit., p. 323.
[470] (1857) 7 E. & B. 885.
[471] [1957] 1 Lloyd's Rep 240 at 255.

delivery took place and the receiver refused to deliver the goods. The court held that the goods had not been unconditionally appropriated to the contract. Pearson J stated that:[472]

> A mere setting apart or selection by the seller of the goods which he expects to use in performance of the contract is not enough. If that is all, he can change his mind. and use those goods in performance of some other contract and use some other goods in performance of this contract. To constitute an appropriation of the goods to the contract the parties must have had, or be reasonably supposed to have had an intention to attach the contract irrevocably to those goods, so that those goods and no others are the subject of the sale and become the property of the buyer. …

He added that 'usually but not necessarily, the appropriating act is the last act to be performed by the seller.'[473] In *Hendy Lennox Ltd v Grahame Puttick Ltd*,[474] it was held that electricity generators ordered by the buyers had been unconditionally appropriated to the contract with their assent when the goods were ready for delivery, and invoices and delivery notes, identifying the particular items to be delivered, had been received by them. At this point the sellers had done everything required of them under the contract of sale and could no longer substitute other generators for those designated for the buyer without the latter's agreement.

Issues Arising

The Basis of the Rules

6.17. The provisions of the 1893 Act on the passing of property raise a number of different issues. At the most general level, some commentators such as Bridge deprecate the pre-eminence of property in sales law, contending that this is out of step with both modern commercial realities and with a consumer society in which goods are more often than not bought to be consumed rather than retained.[475] The Uniform Commercial Code which makes the transfer of possession, rather than property, the pivotal event for determining many of the rights and duties of sellers and buyers offers, on this analysis, a more coherent and practical basis for a modern sales law regime. Though a cogent case can be made for change along these lines, reform of the law of this nature and on this scale would require a major commitment of resources

[472] Ibid., at 255.
[473] Ibid., at 256.
[474] [1984] 2 All ER 252.
[475] Bridge, M.G. 'The Evolution of Modern Sales Law', (2003) *L..M.C.L.Q*. 52 at 63.

and a clear indication of political support.[476] In the absence of evidence that the existing provisions are a cause of substantial practical difficulty or of any appreciable demand for change from business or consumer interests, fundamental reform of this element of the Sale of Goods Acts is not a practical proposition at the present time in our opinion. It is telling in this context that, apart from the United States, no jurisdiction whose sales law is based on the 1893 Act has seen fit to amend sections 16-20 in order to make delivery or possession, rather than the passing of property, the fulcrum of the legislation.

6.18. Though the UCC model has undoubted merits, it would be wrong, moreover, to assume that it would resolve all of the problems that have arisen in this area of the law. It is interesting to note in this connection that the editors of Atiyah's *Sale of Goods* who had previously been supportive of a rule that would see the property in goods pass on, and not before, delivery, have expressed reservations on the issue more recently, stating:[477]

> The truth is that the problems concerned cannot be eliminated by changing the rules about the transfer of property. Questions will still arise (for instance) as to who is the proper plaintiff to sue a third person when goods are damaged en route; questions will still arise about risk; and the right to sue for the price. Above all, questions will still arise about the claims of a buyer against an insolvent seller (and those claiming through him) as well as about the claims of a seller against an insolvent buyer (and likewise those claiming through him). These claims must be disposed of by the law somehow. One way of doing it is the traditional common law way of trying to use a concept like 'property' to decide most of the problems, while recognising that many exceptions must be made. This has the disadvantage … that the exceptions seem to eat up the rule.
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> Alternatively, the law might have abandoned the conceptual approach altogether and adopted the 'specific issue' approach, that is, have dealt with each specific question, such as the buyer's ability to pass title to a third party, the passing of risk, liability for the price etc. without reference to the passing of property. That is the approach of Article 2 of the Uniform Commercial Code… But the alternative approach, while it has many attractions, fails to provide answers to new problems

[476] Goode, R. 'Removing the obstacles to commercial law reform', [2007] *L.Q.R.* 123. Bridge has also acknowledged the practical obstacles to large-scale reform of sales law, stating that: '[there] is little sign of any widespread concern with some of the more recondite features of the Sale of Goods Act … The spirit of the times favours piecemeal reform of those aspects of the Act that need particular attention from the point of view of a consumer or small-scale commercial buyer… As much as a legal purist might argue the case for a wholesale revision of sales law, it is quite plain that such a project is not sufficiently economically important to lay claim to a substantial share of the nation's wealth. It is also quite plain that the great diversity among sales transactions would make that a most difficult venture.' Bridge, ibid., p. 68.

[477] Atiyah, **The Sale of Goods**, op. cit., pp. 309-310.

> unforeseen by the law, or indeed to problems newly created by subsequent laws … the traditional common law approach has at least the virtue that in principle there is always a way of meeting new problems, namely by looking to see who has the property in the goods at the relevant moment, and treating that person as owner, with consequences which are assumed to meet the new problems.

In a later Chapter, however, the Group does, however, invite submissions as to whether reform of section 49 is possible or desirable as a 'stand-alone' reform (paragraph 11.5.).

The Complexity of the Rules

6.19. There is no doubt that the rules governing the passing of property are complex. They involve three different categories of goods (specific, unascertained, and future). A different core rule applies to the passing of property in the two main categories of specific and unascertained goods, while there are four rules for ascertaining the intention of the parties in respect of the passing of property in specific goods, and a further rule, in two parts, for elucidating intention in regard to unascertained goods. As discussed above, the terminology in these rules – 'unconditional contract', 'deliverable state', sale 'on approval', 'sale or return' 'unconditionally appropriated' - is not a model of clarity, nor is the case law on some of these terms a model of consistency.

6.20. A recent report on the consolidation of UK consumer law has put forward proposals for simplifying the provisions on the passing of property in specific goods at Rules 1-4 of Section 18.[478] The main elements of these proposals are as follows:

1) The 'deliverable state' concept should be removed from Rule 1 as it is largely superfluous in consumer sales. As the risk of loss or damage to goods in consumer sales does not pass until delivery following legislative changes made in the UK in 2002, it is no longer necessary to provide that risk stays with the seller until he has completed whatever must be done to put the goods in a deliverable state. The only significance of the 'deliverable state' concept consequently is in relation to the passing of property and there is no good reason for its passing to be delayed on this ground.

2) If the 'deliverable state' concept is removed from Rule 1, Rule 2 would need to be abolished as the only point of the latter Rule is to address the situation in which the goods were not in a deliverable state at the time of the conclusion of

[478] Howells, G. & Twigg-Flesner, C. (eds). **Consolidation and Simplification of UK Consumer Law**, op. cit., paras. 8.59-8.69. .

the contract. In other words, ownership would pass under Rule 1 so long as the contract was unconditional and it would not matter that something had to be done to the goods to make them deliverable.

3) Rule 3 should also be abolished as its abolition would seem to follow logically from the deletion of the 'deliverable state' concept. If there is no real reason to delay the passing of property until goods are deliverable, the corollary is that there is no reason to delay it until the precise price is determined, particularly as the degree of price variation is likely to be marginal in consumer cases.

4) Rule 4 should be abolished and replaced by a simpler provision stating that, in the case of 'sale or return', property passes at the time of the contract but would revest in the seller if the buyer chooses not to buy the goods.

As well as significantly simplifying the rules on the passing of property, the proponents of these reforms suggest that they would also reduce the risk posed by insolvency. Consumers are currently exposed to this risk where the requirements of Rules 2, 3 and 14 of section 18 remain to be satisfied. If Rules 2 and 3 were abolished, ownership would pass despite the fact that goods had still to be put in a deliverable state or had still to be weighed, measured or tested. Ownership would also pass to the consumer where goods were obtained on a sale or return basis, subject to the possibility of ownership re-vesting in the seller if the consumer chose not to buy the goods. While these reforms would strengthen the position of consumers, their proponents contend that they would not prejudice the position of sellers. If the consumer refused to pay for the goods, the seller would not be obliged, in accordance with section 27 of the Act, to deliver them. It would remain open to the parties, moreover, to stipulate that ownership would not transfer until payment had been made. We discuss this issue further at paragraphs 6.27 to 6.32. in relation to pre-paying consumers, and are not recommending changes to section 18, rules 1 to 4 on that ground. In this context, we do not see a case for adjusting rules to deal indirectly with insolvency considerations that have no real impact on consumers, particularly when contractual 'boilerplate' clauses could step around the reform in any event.

Unascertained Goods Forming Part of a Bulk

6.21. As outlined above, case law on section 16 highlighted the vulnerable position of pre-paying buyers of goods in bulk in that, despite having paid for the goods and perhaps even receiving a document purporting to be a document of title to them, the

buyer had no property rights over the goods while they remained part of the larger bulk. The issue received further prominence in 1985 as a result of *The Gosforth*, a case decided by the Commercial Court in Rotterdam on the basis of the English law that governed the contract.[479] The case aroused concern among commodity traders, and the Law Commission for England and Wales was approached by a leading international commodity trading association, the Grain and Feed Trade Association, and asked to review the relevant law. Following a number of consultation papers, the Law Commission and the Scottish Law Commission issued a joint final report in 1993 on Sale of Goods Forming Part of a Bulk.[480] The report concluded that the rule in section 16 was contrary to the principle of freedom of contract and to the reasonable expectations of contracting parties. The rule applied in an anomalous and inconsistent way in that, first, it appeared not to prevent property passing to a buyer who agreed to buy an undivided share in a bulk expressed as a fraction of the whole (e.g. half the cargo from a named ship), but did prevent it passing where a specified quantity from a larger bulk was purchased (e.g. 500 tons from 1000 tons aboard a named ship). Secondly, it did not prevent property passing where a buyer purchased the whole bulk under one contract, or where one buyer purchased the whole bulk under several contracts. If the whole bulk was purchased by different buyers under separate contracts, however, none of them acquired any property in any goods. Thirdly, it appeared that, if a buyer contracted to buy goods from a bulk and the contract quantity was momentarily separated and then returned to the bulk, the buyer became the co-owner, as tenant in common with the seller, of the new bulk. The effect of section 16 was particularly harsh where the buyer had paid the price but the seller became insolvent before the goods were ascertained. The buyer was then left as an unsecured creditor and might see the goods re-sold and the proceeds used to pay other creditors.

6.22. The recommendations put forward by the Law Commissions to address these deficiencies were implemented in the Sale of Goods (Amendment) Act 1995 which inserted new sections 20A and 20B in the UK Sale of Goods Act 1979. These sections provide that, where there is a contract for the sale of a specified quantity of unascertained goods forming part of an identified bulk, a buyer who has paid for some

[479] For a discussion of the case, see Davenport, B. 'Ownership of Bulk Cargos – The Gosforth', (1986) *L.M.C.L.Q*. 4.
[480] The Law Commission and the Scottish Law Commission. 1993. **Sale of Goods Forming Part of A Bulk** (Law Com. No. 215, Scot. Law Com. No.145.)

or all of the contract goods obtains an undivided share in the bulk and becomes a tenant in common of the whole. The tenancy in common is realisable upon apportionment of the identified quantity to the individual contracts of the tenants (i.e. the buyers). While ascertainment and appropriation are still required in order for the goods to be subject to individual proprietary rights, the amending provisions establish new proprietary rights for buyers while the goods remain in bulk - the tenancy in common. This does not amount to ownership of part of the bulk, but means that, together with the other tenants in common, the buyer has a shared property interest in the contents of the bulk.

6.23. Section 20A of the 1979 Act lays down three conditions that must be satisfied for a tenancy in common to apply:

1) the contract must be for the sale of goods from an identified bulk source;
2) the contract must be for a specified quantity of goods (as opposed to a share);
3) the buyer must have paid some or all of the price of the goods.

The section also stipulates how the quantum of each buyer's share is to be calculated. If the total of the amounts paid for by the buyers does not exceed the whole of the bulk, each buyer's share is proportionate to his share of the price of the bulk as a whole. If the total of the amounts paid for by the buyers exceeds the bulk, each buyer's share is reduced proportionately. Section 20B deals with the effects of creating a tenancy in common, and requires all owners to be joined in order to transfer any part of the bulk. It provides for a deemed consent on behalf of the buyers that a tenant in common agrees that the goods may be dealt with, e.g. appropriated and delivered etc, and that no cause of action may accrue in this instance as against the seller. Furthermore, there is no obligation on the other tenants to compensate for a shortfall in delivery. The 1995 Act also made consequential amendments to section 16 and Rule 5 of section 18 of the Sale of Goods Act. The changes to the latter rule confirmed the doctrine of ascertainment by exhaustion. As noted in Chapter 2, there were also consequential amendments to the definitions of 'goods' and 'specific goods'.

6.24. The reforms effected by the Sale of Goods (Amendment) Act 1995 were generally welcomed by commercial interests and academic commentators.[481] Criticism in academic commentary centred on specific aspects of the provisions - such as their restriction to pre-paying buyers and the absence of rules about the allocation of risk in the event of the deterioration of the goods before the buyer took delivery of his share of the bulk – as well as on broader questions such as the implications of the reforms for concepts of possession, constructive possession and co-ownership. While there was some criticism of the piecemeal nature of the changes, there was also a recognition that a limited, targeted response to the matters at issue stood a better chance of enactment.[482] To date, no case law arising from the reforms made by the 1995 Act has been reported in the UK.

6.25. The 1995 Act has proved influential in other common law jurisdictions. Similar reforms have been adopted in Singapore, New South Wales, Southern Australia, and Victoria and have been proposed in Hong Kong. The ownership in common approach is also the basis for the Uniform Commercial Code's rules on goods forming part of a bulk. Section 2-105(5) of the Code provides:

> 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.

This underlines the fact that, while the reforms enacted by the Sale of Goods (Amendment) Act 1995 are open to criticism, credible alternative approaches are lacking. The legislative changes made in the UK to address the issues raised by the sale of unascertained goods forming part of an identified bulk are balanced and workable and balanced and, in our opinion, should be adopted in future Irish legislation.

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[481] Bradgate, R. & White, F. 'Sale of Goods Forming Part of a Bulk: Proposals for Reform', (1994) *L.M.C.L.Q.* 315; Ulph, J. 'The Sale of Goods (Amendment) Act 1995: co-ownership and the rogue seller', (1996) *L.M.C.L.Q.* 93; Burns, T. 'Better Late than Never: the reform of the law on sale of goods forming part of a bulk', (1996) *MLR* (59) 260; Gullifer, L. 'Constructive Possession After the Sale of Goods (Amendment) Act 1995', (1999) *L.M.C.L.Q.* 93; Worthington, S. 'Sorting Out Ownership Interest in a Bulk: Gifts, sales and Trusts', (1999) *J.B.L.* 1; Crinion, J. ' "All that Glitters …" *Re Wait*, Section 16 and the Peril for the Pre-Paying Buyer: is it time for a fresh approach?', (2004) *UCD Law Review* 76.

[482] Ulph, J., ibid. at 106.

6.26. Recommendation

Provisions along the lines of those contained in the UK Sale of Goods (Amendment) Act 1995 should be introduced to deal with the issue of unascertained goods forming part of an identified bulk.

Consumer Buyers and Insolvent Sellers

6.27. Insolvencies are a not uncommon occurrence in the retail sector.[483] Though most of these insolvencies do not lead to losses for consumers, serious detriment can result for consumers in cases where they have paid for goods in advance of delivery.[484] When Jim Langan Furniture Value Ltd went into liquidation in 2009, for example, some 2,000 customers had paid deposits of €1m.[485] The liquidator, however, was able only to supply stock to the value of €65,000 to these customers. If the property in the goods has passed, the consumer will be able to claim ownership of the goods from the receiver or liquidator. The difficulty for buyers in such situations, however, is that, under the rules in sections 16 to 18 of the Sale of Goods Act, payment of the price is not linked to the passing of property. Goods ordered and paid for in advance – for example, electrical goods or furniture chosen on the basis of a sample on display in the store which have then to be dispatched from a warehouse or ordered from a manufacturer – will normally be unascertained. The pre-paying buyer will have no proprietary right over the goods as a result, and his payment will be used, together with the insolvent seller's other assets, to pay the creditors. Though the buyer is one of these creditors, he will rank as an unsecured creditor behind the preferred and secured creditors when it comes to the distribution of the assets. There will often be no, or very limited, funds available to meet claims for price recovery or actions for damages by unsecured creditors. In the Jim Langan Furniture Value Ltd liquidation,

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[483] According to www.insolvencyjournal.ie, there were 201 retail insolvencies in Ireland in 2009 and 177 in 2010. In its 2009 Annual Report, the National Consumer Agency noted increased concern among consumers on the issue, stating: 'Commencing at the very end of 2008 and continuing throughout 2009, a significant upsurge in calls was received in respect of consumers with fears about firms going out of business. Principal amongst the concerns of callers was consumer rights in respect of deposits paid for goods not yet received or services not yet rendered, the rights of gift voucher and credit note holders and concerns around recourse in the event of faulty goods once a retailer had ceased trading.' National Consumer Agency **Annual Report 2009**, p. 38.

[484] For a detailed discussion, see Bradgate, R. & White, F. 2007. 'Insolvent Sellers and Pre-Paying Buyers' in Howells, G. et al (eds). 2007. **The Yearbook of Consumer Law 2007** (Aldershot: Ashgate), pp. 31-85.

[485] Jim Langan Furniture Value Limited (in Liquidation): Statement of Affairs by Liquidator. http://www.liquidation.ie/Jim_Langan_Furniture_Value_Limited_in_Liquidation.764.html See also **Irish Times** 3 March 2009, 'Customers Lose as Furniture Firm Shuts'.

for example, none of the creditors received payment. Depending on the rules of their payment card scheme, buyers who have paid by credit card, or in a minority of cases debit card, may be able to recoup payments in such circumstances through chargeback mechanisms.

6.28. Though the changes recommended in the previous section to address the issue of unascertained goods forming part of an identified bulk discussed in the preceding section will apply to both consumer and commercial sales, their relevance to consumer sales is slight. The Report of the English and Scottish Law Commissions that formed the basis for the corresponding amendments to the UK Sale of Goods Act 1979 acknowledged that 'the reform is not designed primarily for consumers'.[486] The provisions have no application to the sale of wholly unascertained goods which are probably the norm in pre-paid consumer sales. The concepts of bulk and co-ownership which are central to the provisions were formulated with large-scale commodity transactions in mind and do not readily fit the characteristics of consumer sales.[487]

6.29. While limited changes have been made to insolvency rules in some countries to improve the position of unsecured creditors, reform of sale of goods legislation to strengthen the position of pre-paying consumer buyers of unascertained goods has been undertaken only in British Columbia. Following a report of the Law Reform Commission of British Columbia,[488] the Consumer Protection Statutes Amendment Act SBC 1993 added a new Part 9 to what is now the Sale of Goods Act 1996 in order to give consumer buyers a mandatory, non-possessory lien over the seller's goods. [489] The lien cannot be excluded and applies where the following conditions are met:

1) the seller makes an agreement to sell goods in the usual course of his business;
2) the buyer pays all or part of the price;
3) the goods are unascertained or future goods; and
4) the buyer is acquiring the goods in good faith for use primarily for personal, family or household purposes.

[486] The Law Commission and the Scottish Law Commission. **Sale of Goods Forming Part of a Bulk**, op. cit., para. 4.3.
[487] Bradgate & White, 'Insolvent Sellers and Pre-Paying Buyers', op. cit., pp. 69-70.
[488] Law Commission of British Columbia. 1987. **Report on the Buyer's Lien: A New Consumer Remedy** (LCR 93).
[489] Then the Sale of Goods Act 1979.

The lien is for the amount the buyer has paid towards the purchase price of the goods and applies against all goods in possession of the seller that correspond with the contract description, and the property in which has not passed to another buyer. The lien can also apply to any bank account in which the seller usually deposits the proceeds of his sales. The legislation contains further rules dealing with the termination of the lien (when property passes to the buyer, or where the purchase price has been refunded at the seller's option); the lien's priority over other security interests; proceedings to enforce the lien; and cases of conflict where two or more liens exist over the same property (any shortfall in such a case is attributed to the buyers' claims in the proportion that their respective claims bear to the sum of those claims). As against other buyers with liens, therefore, the lien operates akin to a tenancy in common; where there is a shortfall, each buyer shares proportionately in the deficit.

6.30. The proposals of the British Columbia Law Commission and the subsequent legislation were largely welcomed by academic commentators for providing a relatively straightforward scheme to protect consumer buyers in certain, though not all, circumstances.[490] Unlike the legislative provisions in the UK on unascertained goods forming part of a bulk, however, the reforms adopted in British Columbia have not been adopted either in other Canadian provinces or in other jurisdictions. Though the mandatory lien approach has some merits, it is not one that we can recommend. It is necessary to bear in mind in this context that, as the rules governing insolvency come within the remit of the federal authorities in Canada, British Columbia did not have the option of protecting pre-paying consumer buyers by means of changes to insolvency legislation. An outcome similar to that brought about by the consumer lien could be achieved more simply by giving consumer buyers preferential status, like employees as regards unpaid wages, in insolvencies. Dealing with the issue through reform of the rules on insolvency would also allow protection to be provided for pre-paying buyers of services. Consumer detriment is as, if not more, likely to arise in situations where consumers have paid in advance for services as it is for goods, and

[490] See further Wood, 'Law Reform Commission of British Columbia Report on the Buyer's Lien: A new consumer remedy', (1988) 14 *C.B.L.J.* 118; Bridge, 'The Prepaying Buyer and the Bankrupt Seller', (1989) 3 *B.F.L.R,* 171; Close, 'The British Columbia Buyer's Lien - a new consumer remedy', (1995) 25 *C.B.L.J.* 127.

tackling the problem through reform of the statutory rules on the passing of property in goods does nothing to improve the position of these buyers.[491] It is necessary also to acknowledge that giving consumer buyers preferential status raises issues of fairness vis-à-vis other categories of creditor. These issues are more appropriately considered in the context of the overall rules on insolvencies than in the narrower context of the rules governing the passing of property in contracts of sale. The question of the priority of the buyer's lien vis-à-vis other secured creditors has been left for the judiciary to determine in British Columbia. This gives rise to uncertainty as matters relating to the priority of security interests are likely *prima facie* to invite legal challenge, particularly perhaps where, as in the case of the buyer's lien, it takes the form of an unregistered security interest.

6.31. An alternative approach to the protection of pre-paying consumer buyers of unascertained goods has recently been proposed in a report on the reform of UK consumer law prepared by a group of academics for the Department for Business, Innovation and Skills.[492] The report proposes that the ownership of goods held in stock by the seller would pass to the consumer on the basis of the order in which they were purchased. As each item was purchased, one such item would be treated as belonging to that customer. If there were no items in stock when the purchase was made or if that stock was all committed to earlier customers, new incoming stock purchased by the seller would be treated as owned by customers according to when their purchase was made. Property in the goods would pass therefore at the time the contract was made if the goods in question were in stock or, where the goods were not in stock, as soon as the next item of these goods came into stock. According to its proponents, the advantage of this approach is that it would reduce the risk of consumer exposure to consumer insolvency while avoiding the uncertainties of an approach based on ascertainment and unconditional appropriation.

6.32. While this is an interesting proposal, we have a number of reservations about it. Most obviously, it would offer no protection to consumers 'at the end of the queue' in

[491] In March 2011, the Dublin gym chain Total Fitness went into liquidation owing an estimated €1.6m to 11,150 members who had paid annual subscription fees in advance. The liquidator informed these members that no dividend would be paid to unsecured creditors in their position. **Irish Times**, 25 April 2011. 'Buyers Beware – Company Closures Can Cost You.'

[492] Howells, G. & Twigg-Flesner, C. **Consolidation and Simplification of UK Consumer Law**, op. cit., paras. 8.79-8.82.

cases where more sales had been made than corresponding items bought in. The passing of ownership to the pre-paying buyer would only apply, moreover, to goods owned by the seller. Where the consumer's order remained to be met by a manufacturer or supplier, the proposed remedy would not be available. On a practical level, it is conceivable that difficulties could arise in matching orders with existing and incoming stock for the purpose of allocating ownership. The position of buyers who have only part-paid for goods in advance is also unclear. As its authors acknowledge, a further risk with the proposal is that the enhanced status it would give consumers in cases of insolvency could significantly reduce the value of floating charges as between banks and trader borrowers. They acknowledge that this might make banks less willing to lend to such borrowers and suggest that research should be carried out to establish if adoption of this approach would have an adverse effect on bank lending to retailers and other businesses. As is well known, it is difficult enough for businesses to secure lending from banks at present and anything that would add to these difficulties is not a realistic proposition on this ground alone.

6.33. Recommendation

No other changes are recommended to the provisions governing the passing of property in sections 16 to 18 of the 1893 Act.

Section 19: Reservation of Right of Disposal

(1) Where there is a contract for the sale of specific goods or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled. In such case, notwithstanding the delivery of the goods to the buyer, or to a carrier or other bailee or custodier for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled.

(2) Where goods are shipped, and by the bill of lading the goods are deliverable to the order of the seller or his agent, the seller is *prima facie* deemed to reserve the right of disposal.

(3) Where the seller of goods draws on the buyer for the price, and transmits the bill of exchange and bill of lading to the buyer together to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honour the bill of exchange, and if he wrongfully retains the bill of lading the property in the goods does not pass to him.

Section 19 has not been amended since its enactment, nor have the equivalent provisions at section 19 of the UK Sale of Goods Act 1979.

6.34. As discussed in Chapter 3, section 1(2) of the 1893 Act provides that a contract of sale may be absolute or conditional, and conditional sale arrangements have been judicially approved since the late nineteenth century.[493] Section 19 deals with important types of conditional contract in both general and specific terms. As Bridge notes, its purpose is to counter the presumptive rules on the passing of property in section 18 by stipulating that, in the cases of a contract for the sale of specific goods or the appropriation of goods to a contract for the sale of unascertained goods, the property will not pass where the seller reserves the right of disposal.[494] Reservation of the right of disposal is most common in the case of unascertained goods and its principal effect is to delay the passing of property after delivery as this is the usually the event that determines that passing. In the case of specific goods where, in accordance with Rule 1 of section 18, property would otherwise pass when the contract was made, the title reservation must take place by the terms of the contract and, as a consequence, before delivery.

6.35. Section 19(1) authorises the seller of the goods to insert a term in the contract of sale that property in the goods will not pass to the buyer until certain conditions are fulfilled. As discussed below, the most common such condition is payment of the price, but the seller is at liberty to seek the reservation of the right of disposal on whatever conditions he wishes to make.[495] Such reservation may be express or be implied from the circumstances of the agreement. If the contract is one for the sale of specific goods, the seller must by the terms of the contract, reserve the right of disposal. If the contract is one for the sale of unascertained goods, the parties may agree either by the terms of the appropriation or the contract that the right of disposal is reserved. However, a seller may also, when appropriating unascertained goods to the contract, unilaterally reserve the right of disposal and impose conditions to be fulfilled before the property in the goods will pass.[496] Where the seller reserves the right of disposal, he retains *prima facie* both the legal and equitable title to the goods.

[493] *McEntire v Crossley* [1895] AC 457.
[494] Bridge, **The Sale of Goods**, op. cit., para. 3.74.
[495] **Benjamins Sale of Goods**, op. cit. para. 5-131.
[496] *Glenbarron v Kreeft (1875) L.R. 10 Ex. 274*

However, it is open to the parties to agree that the seller is to retain the beneficial ownership of the goods only,[497] or that the seller, though retaining the legal ownership of goods, is to hold them on trust for the buyer.[498]

6.36. Historically, cases involving the reservation of the right of disposal arose mainly in connection with contacts for the sale of goods to be carried by sea where the seller sought security against default by, or the insolvency of, the buyer. Sections 19(2) and (3) deal with two such cases where the seller is taken by implication to have reserved a right of disposal:

2) Where a seller ships goods and, by the bill of lading, the goods are deliverable to the order of the seller or to the seller's agent, the seller is prima facie deemed to have reserved the right of disposal,[499] and
3) Where the seller sends a bill of exchange for the price of the goods to the buyer for acceptance or payment together with a bill of lading.

Under subsection (2), a seller who takes a bill of lading which makes the goods deliverable to his own order or to his agent (such as a bank) is held to reserve the right of disposal until he is paid or his other conditions are met. As other parties cannot take delivery of the goods without the bill of lading, the seller's possession of these bills allows him to treat the goods as security for payment. Under subsection (3), the seller can reserve the right of disposal even where the bill of lading is delivered to the buyer by transmitting this bill to the buyer together with a bill of exchange for the price. If the buyer does not honour the bill of exchange, he must return the bill of lading. If the buyer wrongfully retains the bill of lading, the subsection provides that the property in the goods does not pass to him.

6.37. While reservation of the right of disposal can afford the seller effective protection against the buyer's default or insolvency, it cannot provide a similar level of protection against the risk that the buyer may resell the goods to a third party before he has paid the seller for them. As discussed in Chapter 7, the buyer in this situation may be able to pass a good title to the goods under various provisions of sections 21-23 & 25-26 of the 1893 Act even where the property in the goods has not

[497] **Benjamin's Sale of Goods**, op. cit. para. 5-134 fn. 57, points out that a reservation of beneficial ownership might operate only by grant of legal and beneficial ownership followed by a re-grant of beneficial ownership as in *re Bond Worth Ltd* [1980] Ch.228.
[498] *Re London Wine Co. (Shippers) Ltd.* [1986] P.C.C. 121.
[499] This presumption may be rebutted by proof of a contrary intention or the circumstances of the case.

passed to him because of the seller's reservation of the right of disposal. Reservation of title clauses which seek to address this risk to the seller are discussed later in the Chapter.

Retention of Title Clauses

6.38. As discussed in Chapters 10 and 11, the 1893 Act offers unpaid sellers a range of remedies. Sections 49 and 50 provide respectively that, where the buyer wrongfully neglects or refuses to pay for the goods, the seller can sue for the price or for damages for non-acceptance. These remedies are of little use, however, where the buyer's inability to pay results from insolvency. The rights available to unpaid sellers under sections 38-48 of the Act in these circumstances – a lien over the goods, a right to stop the goods in transit, and a right to resell the goods and terminate the originate contact – are subject to a range of restrictions and, as discussed further in Chapter 11, the remedies they provide have proved to be of limited value in modern commercial circumstances. It has become common consequently for sellers to have recourse to retention of title clauses in order to protect themselves from non-payment by buyers. Under such clauses, the seller retains title to the goods supplied to the buyer until they have been paid for. If the clause is effective, the goods cannot then be subject to any security interest granted by the buyer to his creditors. Though retention of title clauses are mainly found in commercial contracts, they can occur also in consumer contracts.[500] As the main issues raised by section 19 relate to these clauses rather than to the statutory provision itself, it is necessary to consider them in more detail.

6.39. Retention of title clauses take a variety of forms.[501] The simplest form of such clause – sometimes referred to as an original goods claim - seeks to retain title to the goods supplied under the contract until the price has been paid. In *Bernard Somers v James Allen (Ireland) Ltd*,[502] the respondent company had supplied animal feed to a manufacturer subject to a simple retention of title clause. The manufacturer became insolvent before the goods were used for manufacturing purposes. The receiver contended that the retention of title clause was ineffective where it was known that the

[500] Hire-purchase agreements which are mainly used in consumer transactions can be seen in some respects as a functional equivalent of reservation of title clauses, but are unsuited to cases where goods are supplied for resale or for use in manufacturing.
[501] For a more detailed account, see White, **Commercial Law**, op. cit., pp. 336-345.
[502] [1985] I.R. 340; [1984] I.L.R.M. 437.

goods were supplied for use in a manufacturing process. The High Court held, however, that as long as the goods still existed in the state in which they had been supplied and had not been mixed with other goods or subject to conversion through the manufacturing process, a simple title retention clause was effective. Where goods supplied under a contract of sale subject to such a clause are used in a manufacturing process, the seller may retain title to them if they remain identifiable in their original form and can be detached from the manufactured goods in which they have been used. In *Hendy Lennox v Grahame Puttick Engines Ltd*,[503] diesel engines covered by such a clause were incorporated into generator sets. The court found that, as the engines were identifiable by their serial numbers and could be removed in a relatively short time without damage being done to either the engines or generators, the seller's retention of title clause remained effective.

6.40. Where the manufacturing process leads to the irreversible incorporation of the goods into a new product or to a degree of alteration that causes the loss of their identity, a simple retention of title clause will be ineffective. In *Clough Mill v Martin*,[504] Goff L.J. stated that 'where A's material is lawfully used by B to create new goods, whether or not B incorporates other material of his own, the property in the new goods will generally vest in B, at least where the goods are not reducible to the original materials.' In *Borden v Scottish Timber Products Ltd*,[505] the seller's title to resin supplied to a timber manufacturer was held by the Court of Appeal to be extinguished once the resin was used in the manufacture of chipboard and had ceased to exist independently. A similar view was taken in *Re Bond Worth Ltd*[506] which involved fibre incorporated first into yarn and then into carpet.

6.41. Attempts to preserve title claims in such circumstances by means of retention of title clauses with a 'manufactured products' claim over any new product made with the original goods have been largely unsuccessful.[507] In *Kruppstahl AG v Quitman Products Ltd*,[508] the plaintiff seller supplied steel to the respondent manufacturer for use in manufacturing. When the respondent went into liquidation, the seller claimed

[503] [184] 2 All ER 152.
[504] [1985] 1 W.L.R. 111 at 125.
[505] [1981] Ch. 25.
[506] *Re Bond Worth Ltd* [1980] Ch. 228.
[507] Webb, 'Title and Incorporation: Who Owns Manufactured Goods?' [2000] *J.B.L.* 513.
[508] [1982] I.L.R.M. 551.

ownership of both worked and unworked steel. The High Court held that, while the steel still in its original form remained the property of the seller, the seller's interest in the steel that has been used in the manufacturing process amounted to a charge on the goods and was unenforceable for lack of registration under the Companies Act 1963. In *Re Peachdart Ltd*,[509] leather supplied by the seller under a retention of title clause that had an express provision regarding subsequent goods was used by the buyer in the manufacture of handbags, some of which were wholly, and others partly, completed. Vinelott J. held that the parties must have intended that the leather would cease to be the exclusive property of the seller once it had been incorporated into the handbags. While the supplier of the leather would have a charge on the end products of the manufacturing process, that charge required registration under the Companies Act to be effective. In *Clough Mill Ltd v Martin*,[510] a reservation of title clause covered both yarn sold to the buyers and any goods into which the yarn was incorporated. The Court of Appeal saw no reason in principle why the property in the new goods should not be transferred to the seller of the yarn in such a case. It held nevertheless that the seller's interest was subject to a charge which was void for non-registration. The retention of title clause could not be read, moreover, as conferring a right to the full value of the new goods on the seller of materials incorporated in the goods as this value would also be made up of the labour and materials of the buyer as well perhaps of materials supplied by other sellers under similar terms. As Benjamin notes, it is likely consequently that, other than in the most exceptional circumstances, any 'manufactured products' provision in a retention of title clause will be held to create a registrable charge.[511] Attempts by insolvency practitioners, however, to argue that simple retention of title clauses should be construed as agreements under which the property in the goods passes to the buyer who then grants the seller a registrable charge over the goods to the value of the debt have been rejected by the courts in both Ireland and England.[512] Attempts to challenge such clauses on the basis that they have not been properly incorporated in the sales contract have also been unsuccessful in the main.[513]

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[509] [1984] Ch. 131.
[510] [1985] 1 W.L.R. 111.
[511] **Benjamin's Sale of Goods**, op. cit., para. 5-150.
[512] *Frigoscandia Ltd v Continental Irish Meat Ltd* [1982] I.L.R.M. 396; *Clough Mill Ltd v Martin* [1985] 1 W.L.R. 111.
[513] *Sugar Distributors Ltd v Monaghan Cash and Carry* [1982] I.L.R.M. 399. For an exception, see *Union Paper Co. v Sunday Tribune (In Liquidation)*, [1983] IEHC 98.

6.42. Where a buyer resells goods before paying for them, the seller's rights over the goods will normally be extinguished as the sub-buyer will acquire a good title to the goods under section 25 of the 1893 Act. In response, some reservation of title clauses claim an interest in the proceeds of any such resale. In *Aluminium Industrie Vaasen BV v Romalpa Aluminium Ltd*,[514] the plaintiffs sold large quantities of aluminium foil to the respondents subject to a retention of title clause which provided, among other things, that, until full payment was made, property in the goods would remain with the seller and that the buyer was 'fiduciary owner' of new goods made with the foil and was accountable to the seller for the proceeds of resales. The Court of Appeal held that the relationship between seller and buyer in respect of the resale proceeds was that of principal and fiduciary agent and not that of creditor and debtor. All of the moneys received by the respondents from the resale of the goods, including their profit, had therefore to be held on trust for the plaintiffs. The *Romalpa* ruling has attracted considerable criticism,[515] and a claim for the proceeds of resales has not been successful in any subsequent reported case in England.[516] As Bridge observes, later cases dealing with clauses extending to the proceeds of new goods have set down conditions to be satisfied if these clauses are not to be treated as registrable charges that 'in practical terms, are impossible to satisfy'.[517] While resale claims had some success in the Irish courts in the immediate aftermath of the *Romalpa* judgment,[518] later judgments have taken an approach more in line with English case law post *Romalpa*. In *Carroll Group Distributors v G & F Burke*,[519] the plaintiff supplied goods to the respondent subject to a retention of title of clause which provided, among other things, that the goods were to remain the property of the seller until all payments had been made and required the buyer to keep the proceeds of resales of the goods 'in trust' for the supplier in a separate bank account. The buyer went into liquidation and the seller sought to trace into the proceeds of the resales. The High Court dismissed the claim and, though no separate bank account had in fact been created, held that any such account would have contained sums in excess of the seller's claim because of the

[514] [1976] 1 W.L.R. 676.
[515] Atiyah, **The Sale of Goods**, op. cit, p. 471. Bridge, **The Sale of Goods**, op. cit., para. 3.90. **Goode on Commercial Law**, op cit., p. 765.
[516] *Re Andrabell Ltd* [1984] 3 All ER 407; *Tatung (UK) Ltd v Galex Telesure Ltd* [1989] 5 BCLC 325. *Compaq Computers Ltd v Abercorn Group* [1993] BCLC 602;
[517] Bridge, **The Sale of Goods**, op. cit., para. 3.94.
[518] *Re Sugar Distributors Ltd* [1982] I.L.R.M. 399; *SA Foundries Du Lion v International Factors Ltd* [1985] I.L.R.M. 66; *Re WJ Hickey Ltd* [1988] I.R. 126.
[519] [1990] I.L.R.M. 285.

buyer's price mark-up and other factors. Any such account would represent accordingly a source of funds to which the supplier could have recourse to discharge monies due to him and, as such, would have the characteristics of a mortgage or charge. As no charge of this kind had been registered under the Companies Act 1963, the seller's claim was void.

Issues Arising

6.43. The purpose and, if unchallenged or upheld, the effect of a retention of title clause is to reduce the pool of assets available for distribution to the creditors of an insolvent buyer. A clause of this kind enables an unpaid seller who would otherwise be an unsecured creditor to have preferential treatment in the event of insolvency. As the volume of case law on these clauses suggests, the operation of title reservation clauses is contentious and has been the subject of reforms of the law regulating security interests in personal property in some jurisdictions and, in others, including Ireland, and the UK, of calls and proposals for reform. Article 9 of the US Uniform Commercial Code provides for a general system of regulation of security interests, including retention of title clauses. If a seller wishes to make a retention of title clause effective against third parties, he must register it by filing a financial statement. Broadly similar provisions apply in Personal Property Security Acts in force in most of the Canadian Provinces.[520] Legislative regulation of retention of title clauses as security interests under a general regime dealing with security interests has also applied in New Zealand since 1999 and in Australia since 2009.[521]

6.44. The issue of retention of title clauses was considered by the Law Reform Commission in 1989 in the context of a review of debt collection.[522] The Commission proposed that such clauses should not be enforceable unless evidenced in writing and signed by the buyer. Title retention clauses would not be deemed, moreover, to create any form of charge over the goods unless expressly stipulated as doing so at the time of the conclusion of the contract. The Commission's report further proposed the establishment of a system of registration of retention of title clauses, and also left open the possibility of the subsequent establishment of a more

[520] See Annex I, p.480.
[521] Ibid., pp. 484 & 498.
[522] Law Reform Commission. 1989. **Report on Debt Collection (2): Retention of Title** (LRC 28).

comprehensive registration regime for other types of security interests in goods. Neither register, however, has been put in place in the period of over two decades since publication of the report, nor have any of the Commission's other recommendations been given legislative effect.

6.45. The issue of retention of title clauses and of the law on personal property security interests more generally has also been the subject of a succession of reviews and reform proposals in the UK.[523] The Crowther Committee on Consumer Credit (1971),[524], the Cork Committee on Insolvency Law (1981),[525] and the Diamond Review of Security Interests in Property (1989)[526] all identified a range of deficiencies in the existing legal framework and recommended a single statutory regime for security interests in personal property. None of these recommendations were implemented. Security interests over personal property returned to the agenda in the UK in the late 1990s when the Department of Trade and Industry launched a fundamental review of company law. In 2001, the Company Law Review Steering Group proposed the 'radical option' of changing the existing system of registration to one of 'notice-filing'.[527] As the Steering Group had not had sufficient time to consider fully its proposals and in particular whether, as Crowther and Diamond had recommended, any new scheme should cover 'quasi-security devices' such as retention of title clauses, it recommended that these issues be referred to the English and Scottish Law Commissions. The English Law Commission published a consultation paper in 2002 followed by a consultative report in 2004.[528] The latter report proposed a scheme for personal property security interests, modelled on the Saskatchewan Personal Property Security Act 1993, which would apply in the first instance to security interests created by companies and would later be extended to unincorporated businesses.[529] The report was more guarded on the subject of

[523] De Lacy, J. 'The evolution and regulation of security interests over personal property in English law' in De Lacy, J. (ed). 2010. **The Reform of UK Personal Property Security Law** (London: Routledge Cavendish), pp. 3-82.
[524] **Report of the Committee on Consumer Credit**. 1971 (Cmnd. 4596).
[525] **Report of the Committee on Insolvency Law and Practice**. 1981. (Cmnd. 8558).
[526] **A Review of Security Interests in Personal Property (Diamond Report)**. 1989. (London: Department of Trade and Industry).
[527] Final Report, **Modern Company Law for a Competitive Economy**, URN 01/942.
[528] Consultation Paper No. 164, **Registration of Security Interests: Company Charges over Property other than Land.** Consultation Paper No. 176, **Company Security Interests: a Consultative Report:**
[529] Law Commission. **Consultation Paper No. 176**, op. cit., para. 1.20.

retention of title clauses. While it recommended that such devices should be brought within the proposed general scheme for security interests, it recognised that this proposal was contentious and sought further views about its costs and benefits. Responses to this report were again mixed. In particular, there was little support for including retention of title devices in a companies-only scheme. The Law Commission published its final *Report on Company Security Interests* in 2005 which proposed electronic notice filing, and associated rules, for security interests created by companies.[530] It recommended that the issue of retention of title clauses should be deferred for further consideration pending a review of the whole question of transfer of title to goods by non-owners, and should be considered for all debtors and not just companies. The main substantive reforms proposed by the Law Commission have not been adopted to date and there appears to be little prospect that they will be enacted in the near future. As de Lacy has observed, 'it is remarkable that this area of law has generated such a mass of reform proposals and so little action.'[531]

6.46. The failure of reform initiatives in this area in both Ireland and the UK is testimony both to the complexity of the issues and to the divided opinions on them. It has been argued in the UK context that the attractions of personal property security legislation are questionable in the case of retention of titles clauses.[532] At common law, there is a significant degree of certainty surrounding the law on retention of title clauses. From the seller's perspective a scheme that would require registration would make it harder to pursue certain claims – for example to original goods. While such a scheme would allow sellers to create a security interest over 'new goods', a claim not effective at common law, it is not clear that this is a priority for sellers. The courts, as Atiyah notes, have insisted that parties 'are free to make whatever contracts they wish on whatever terms they choose and that there is nothing illegitimate about the result if they succeed in evading the requirement of registration.'[533] As outlined in Chapter 1, moreover, Directive 2000/35/EC[534] on late payments, furthermore, requires member

[530] Law Comm No. 296.
[531] De Lacy, J. 'The evolution and regulation of security interests over personal property in English law', op. cit., p. 81.
[532] Beale, H. 'The Exportability of North American Chattel Securities Regimes: the Fate of the English Law Commission's Proposals', (2006) C.B.L.J. 178.
[533] Atiyah, **The Sale of Goods**, op. cit., p. 475.
[534] Recently replaced by Directive 2011/7/EU on Combating Late Payment in Commercial Transactions which member states are required to transpose by March 2013 and whose provisions on retention of title clauses are similar to those of its precursor.

states to take appropriate measures to ensure that national legislation contains provisions enabling sellers to retain title to goods and, where necessary to recover goods, until payment is made. The Directive was given effect in Ireland by the European Communities (Late Payment in Commercial Transactions) Regulations 2002.[535]

6.47. The above considerations constitute a significant *prima facie* case for the retention of the existing statutory regime relating to reservation of title, and we are not disposed accordingly to recommend any substantive amendment of section 19 of the 1893 Act. This is not to say that the status quo is satisfactory or would not benefit from reform. A number of aspects of the law regarding retention of title clauses are unclear. The case law is based on the clauses in the specific contracts that have given rise to litigation and it is not always easy as a result to discern a consistent approach on the part of the courts. It is debatable as a matter of principle, furthermore, whether the freedom of contracting parties should not be subject to greater control when its purpose and effect is to impair the rights of third parties who have had no say in the contract. Though the Law Reform Commission recommended specific statutory reforms relating to retention of title clauses, experience in other jurisdictions suggests that it is preferable to address these issues in the broader context of personal property security reform. We are not unsympathetic to a broader programme of reform along these lines, but a recommendation to this effect is outside our terms of reference.

Section 20: Risk *prima facie* passes with the property

> Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer, the goods are at the buyer's risk whether delivery has been made or not.
>
> Provided that where delivery has been delayed through the fault of either buyer or seller the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault.
>
> Provided also that nothing in this section shall affect the duties or liabilities of either seller or buyer as a bailee or custodier of the goods of the other party.

[535] S.I. No. 388 of 2002. The Regulations do not directly transpose Article 4(1) on retention of title clauses, presumably on the ground that such clauses are already recognised under Irish law.

6.48. Section 20 has not been amended in Ireland since its enactment. In the UK, an important amendment was made to the equivalent provision in 2002 by means of the addition of the following subsection to Section 20 of the Sale of Goods Act 1979:

> (4) In a case where the buyer deals as consumer or, in Scotland, where there is a consumer contract in which the buyer is a consumer, subsections (1) to (3) above must be ignored and the goods remain at the seller's risk until they are delivered to the consumer.

This amendment was effected by the Sale and Supply of Goods to Consumers Regulations 2002[536] which implemented Directive 1999/44/EC on Consumer Sales and Guarantees. Though recital 17 of the Directive states that 'the references to the time of delivery do not imply that Member States have to change their rules on the passing of risk', the British Government took the view that an amendment to section 20 was desirable for the avoidance of doubt. The uncertainty on the issue arose in their view from the fact that, in requiring goods to be in conformity with the contract at the time of their delivery to the consumer, the Directive was potentially at odds with the Sale of Goods Act 1979 which required goods to conform to the contract at the time when risk passed from seller to buyer.[537] Unless otherwise agreed between the parties, risk under the Sale of Goods Act passed with the transfer of the property in the goods and could thus precede delivery.

6.49. Under the proposal for a Directive on Consumer Rights published in 2008, Chapter IV of which was to replace Directive 1999/44/EC, risk of loss of, or damage to, goods was to pass to the consumer when he or a third party, other than the carrier and indicated by the consumer, had acquired the physical possession of the goods.[538] Though the main provisions of Chapter IV of the Directive have been deleted from the text of the Directive agreed following discussions between the European Parliament and Council, the following provision on the passing of risk is included at Article 23:[539]

> In contracts where the trader dispatches the goods to the consumer, the risk of loss of or damage to the goods shall pass to the consumer when he or a third party

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[536] S.I. 2002/3045.
[537] Bradgate, R. & Twigg-Flesner, C. **Blackstone's Guide to Consumer Sales and Associated Guarantees**, op. cit., paras. 3.4.7.2. & 3.5.6.
[538] Commission of the European Communities. **Proposal for a Directive of the European Parliament and of the Council on Consumer Rights** (COM 2008 614), Article 23.
[539] Proposal for a Directive of the European Parliament and of the Council on Consumer Rights, Article 23. A provisional version of the final text of the Directive can be accessed at http://www.europarl.europa.eu/documents/activities/cont/201106/20110624ATT22578EN.pdf

indicated by the consumer and other than the carrier has acquired the physical possession of the goods. The risk shall pass to the consumer upon delivery to the carrier if the carrier was commissioned by the consumer to carry the goods and that choice was not offered by the trader, without prejudice to the rights of the consumer against the carrier.

6.50. The present rules on risk at section 20 of the 1893 Act serve to allocate responsibility as between seller and buyer for loss of, or damage to, goods which is not attributable to the act or fault of either party. If goods are damaged while at the seller's risk, he will be required to repair or replace them in order to perform his obligations under the contract. If goods are damaged while at the buyer's risk, the buyer must accept and pay for them and bear the cost of the loss or damage. Section 20 restates in default form the common law rule, *res peruit domino*, that, if goods are lost or damaged, the loss is to their owner.[540] Unless otherwise agreed between the parties, therefore, risk passes with property. In determining when exactly risk passes, therefore, the rules on the passing of property at sections 16 to 19 of the 1893 Act apply. In the case of specific goods where possession is retained by the seller under rule 1 of section 18, property passes at the time the contract is made and, as a result, risk also passes at this time regardless of when delivery is made. In the case of unascertained goods, no property can pass until the goods have been ascertained, and property and risk will pass in accordance with the intention of the parties under section 17 or with the unconditional appropriation of the goods to the contract under rule 5 of section 18. Where goods are supplied on approval or on sale or return, property and risk will not pass until the buyer 'adopts' the transaction in accordance with rule 4 of section 18.

6.51. The rule in section 20 may be displaced by express or implied agreement between the contracting parties. Where goods are sold subject to a retention of title clause, for example, the contract may state that, although property remains with the seller, risk passes to the buyer on possession of the goods. Though section 20 has not given rise to a large volume of case law, the cases have arisen that represent important exceptions to the general rule governing risk. In *Sterns Ltd v Vickers Ltd*,[541] the

[540] Per Blackburn J. in *Martineau v Kitching*, 'As a general rule, *res peruit domino*, the old civil law maxim, is a maxim of our law; and when you can show that the property passed, the risk of the loss *prima facie* is in the person in whom the property is.' (1872) L.R. 7 Q.B. 436 at 454.
[541] [1923] 1 K.B. 78.

respondents sold the plaintiffs 120,000 tons of white spirit which was part of a larger volume of 200,000 tons held in a storage tank owned by a third party. Though the plaintiff buyers obtained a delivery warrant from the sellers, and accepted by the third party, that enabled them to take possession of the spirit, they left it in the tank for a period of time. When they eventually collected it, it was discovered that the spirit had suffered a deterioration in quality during the storage period. Despite the fact that the goods remained unascertained and, in consequence, that the property in them had not passed to the buyer, the Court of Appeal held that the risk had passed to the buyer. The buyer's acceptance of the delivery warrant appears to have been regarded as the critical factor by reason of the fact that this gave the buyer a right of immediate possession. In *Comptoir d'Achat et de Vente SA v Luis de Ridder Limitada (The Julia)*,[542] Lord Normand observed:

> In those cases in which it has been held that the risk without the property has passed to the buyer it has been because the buyer rather than the seller was seen to have an immediate and practical interest in the goods, as for instance when he has an immediate right under the storekeeper's delivery warrant to the delivery of a portion of an undivided bulk in store, or an immediate right under several contracts with different persons to the whole of a bulk not yet appropriated to the several contracts.[543]

6.52. While the risk in *Sterns v Vickers* was held to have passed before the property, in *Head v Tatersall*,[544] a case decided two decades before the enactment of the 1893 Act, it was held to have passed after the property. The plaintiff in the case bought a horse from the respondent that was warranted to have been hunted with the Bicester hounds and he was given a week in which to return the horse if it did not match up to the contract description. The horse was accidentally injured during the week and the plaintiff sought to return it after learning that it had not hunted with the hounds concerned. The court held that, although the property in the horse had probably passed, the risk remained with the seller, and the plaintiff was entitled to return the horse and recover the price. Similar facts today would probably lead to the same result but on the basis of different reasoning. Under rule 4 of section 18 of the 1893 Act on sale on approval, the property, and hence the risk, would not pass until the expiry of the time fixed for the return of the goods – in this case, one week. Atiyah

[542] [1949] AC 293.
[543] Ibid. at 319.
[544] (1870) LR 7 Ex 7.

has suggested that the decision in *Head v Tatersall* is indicative of a broader principle to the effect that the risk always remains on the seller while the buyer has a right to reject the goods.[545] Although no such rule is expressly stated in the Act, it appears on this view to follow from the rules on acceptance, and in particular from the fact that there is nothing in these rules to preclude rejection merely because goods have been accidentally lost or damaged.

6.53. Section 20 also provides that, where delivery is delayed through the fault of either buyer or seller, the goods are at the risk of the party at fault for any loss or damage caused by the delay in delivery. In *Demby Hamilton & Co Ltd v Barden*,[546] the sellers agreed to sell 30 tons of apple juice ordered as 'per sample' for delivery by the buyers to third parties. The buyers took delivery of part of the order, but delayed taking delivery of the remainder. Because of the delay, the uncollected juice deteriorated and was no longer fit for consumption. The court held that, although the property in the goods had not passed to the buyer, he should bear the risk of the damage to the goods as it had resulted from his delay. Lastly, section 20 provides that nothing in the section shall affect the duties or liabilities of either seller or buyer in their capacity as bailee or custodier of the goods for the other party. Where, for example, under a retention of title clause, property and risk remain with the seller but the buyer has possession of the goods, the buyer will be a bailee of the goods. Where property and risk have passed to the buyer, however, but the seller retains possession of the goods, the latter will be the bailee. A bailee's duty is to take reasonable care of the goods in his custody and, as such, he will ordinarily be liable only for loss or damage caused by his negligence. The allocation of risk for goods in transit under sections 32 and 33 of the 1893 Act is discussed in Chapter 10 of the Report.

Issues Arising

6.54. Section 20 gives rise to one major issue – whether risk should continue to be linked to the passing of property – which needs to be considered separately for consumer and commercial sales. Where consumer sales are concerned, the case for linking risk with delivery is clear-cut in our opinion. A mandatory rule operating on this basis would be more in accordance with the expectations of the parties to

[545] Atiyah, **The Sale of Goods**, op. cit., p. 345.
[546] [1949] 1 All ER 435.

consumer transactions, in particular the consumer buyer. It would also accord more closely with the practicalities of the insurance of the goods. In retail sales, as Atiyah observes[547], a very strong case can be made for maintaining that 'the most appropriate person to insure would nearly always be the party with physical possession, if only because in practice this is what would normally happen'. As noted above, moreover, the recently agreed EU Directive on Consumer Rights will require a change along these lines in the case of contracts where the trader dispatches the goods to the consumer, and it would be anomalous and confusing to have a different rule for other consumer contracts of sale.

6.55. The matter is less clear-cut in the case of commercial contracts of sale. Subject to separate rules governing the shipping of goods by carriers and the holding of goods by bailees, section 2-509 of the UCC provides that the risk passes to the buyer on his receipt of the goods. No other common law jurisdiction whose sales law is based on the 1893 Act, however, has amended its sale of goods legislation to reverse the link between risk and property for commercial contracts of sale. This may reflect the fact that, as Bridge notes:[548]

> the rule in section 20(1) is only a presumptive one and the modern law on the passing of property ties it in with delivery, so any statutory reform associating risk with possession rather than property would yield modest results in practice.

Though there is force to this point, we think, on balance, that linking risk with delivery rather than with the passing of property would be a more appropriate rule for commercial as well as consumer sales. As this Chapter has shown, the rules on the passing of property are far from straightforward. As delivery is usually a visible occurrence that leaves little or no scope for doubt or dispute, a rule formulated on this basis would be simpler and clearer than the existing rule. The issue of who is required to insure the goods that form the subject-matter of the contract of sale is highly material to the passing of risk in commercial transactions and, in general, the party who is in possession of the goods will be in a better position to insure them. A provision revised on this basis, however, should remain a default rule for commercial transactions.

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[547] Atiyah, **The Sale of Goods**, op. cit., p. 347.
[548] Bridge, **The Sale of Goods**, op. cit., para. 4.08.

6.56. Recommendation

Section 20 of the 1893 Act should be amended to provide that risk will pass with delivery. This provision should be mandatory for consumer contracts of sale, but a default rule for commercial contracts of sale.

CHAPTER SEVEN SALE OF GOODS ACT 1893: TRANSFER OF TITLE, SECTIONS 12, 21-23 & 25-26

7.1. This chapter deals with the regulation of issues relating to title in the form, first, of the implied terms as to title at section 12 of the 1893 Act and, second, the *nemo dat* rule, and the exceptions to it, on transfers and conflicts of title at sections 21-23 and 7.1. This chapter deals with the regulation of issues relating to title in the form, first, of the implied terms as to title at section 12 of the 1893 Act and, second, the *nemo dat* rule, and the exceptions to it, on transfers and conflicts of title at sections 21-23 and 25-26 of the Act.[549] As previously outlined in Chapter 3 and discussed further in Chapter 6, the Act's definition of a contract for the sale of goods identifies the transfer of the property in goods from seller to buyer as the constitutive feature of the sales transaction. The proprietary provisions of the legislation use a number of related terms – property, title, owner/ownership[550] - without fully defining their respective meanings. Only 'property' is defined as meaning 'the general property in goods, and not merely a special property'.[551] The 'general property' means the absolute interest in the goods or, for all practical purposes, their ownership. A 'special property' is a possessory interest of a kind claimed by those to whom goods have been pledged or bailed.[552] While this lack of clarity has attracted academic commentary,[553] it appears to have caused few, if any, difficulties in practice.

7.2. We gave some consideration in this context to the alternative framework for the regulation of matters of title and ownership contained in the Draft Common Frame of Reference [DCFR].[554] Under the DCFR the seller 'must transfer the ownership of the goods', as well as deliver the goods, transfer such documents representing or relating to the goods as may be required by the contract, and ensure that the goods conform to

[549] Section 24 of the 1893 Act on the revesting of property in stolen goods on conviction of the offender was repealed by the Criminal Justice (Theft and Fraud Offences Act) 2001, s.3(1) and sch.1.
[550] 'Ownership' features only in section 34 of the Act on acceptance, but 'owner' occurs in sections 1, 12, 21, 24-25 and 47.
[551] 1893 Act, s.62.
[552] **Goode on Commercial Law**, op. cit. pp. 216-220. White, **Commercial Law**, op. cit., p. 365.
[553] For further discussion of these issues, see Kiralfy 'The problem of a Law of Property in Goods' (1949) *MLR* 424; Battersby, 'A Reconsideration of "Property" and "Title" in the Sale of Goods Act', (2001) *J B.L* 1; Battersby and Preston, 'The Concepts of "Property", "Title" and "Owner" used in the Sale of Goods Act 1893' (1972) *MLR.* 269, and Ho, 'Some Reflections on "Property" and "Title" in the Sale of Goods Act', (1997) *C.L.J.* 571. See also Goode, 'Ownership and Obligations in Commercial Transactions', (1987) *L.Q.R.* 433.
[554] Von Bar, C. et al. (eds). 2009. **Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference** (Munich: Sellier).

the contract.[555] 'Ownership' is defined as 'the most absolute right a person, the owner, can have over property, including the exclusive right, so far as consistent with applicable laws or rights granted by the owner, to use, enjoy, modify, destroy, dispose of and recover the property'.[556] The DCFR also addresses the issue of third party rights or claims. It provides that the goods must be free from any right or reasonably well founded claim of a third party.[557] Where such a right or claim is based on intellectual property rights, the rules provides that the goods must be free from any right or claim of a third party which is based on industrial property or other intellectual property and of which the seller knew or could reasonably be expected to have known at the time of the conclusion of the contract. This does not apply, however, where the right or claim results from the seller's compliance with technical drawings, designs, formulae or other such specifications furnished by the buyer.[558] While the DCFR provisions have merits in respect of simplicity and clarity, they do not address all of the issues encompassed by the Sale of Goods Acts and the accompanying case law. The uncertainty over the future development and status of the Common Frame of Reference, moreover, means that it cannot be regarded as a practical basis for reform in this area in the immediate future.[559]

SECTION 12 IMPLIED UNDERTAKING AS TO TITLE, ETC

(1) In every contract of sale, other than one to which subsection (2) applies, there is-

(a) an implied condition on the part of the seller that in the case of a sale he has a right to sell the goods and, in the case of an agreement to sell, he will have a right to sell the goods at the time when the property is to pass, and

(b) an implied warranty that the goods are free and will remain free until the time when the property is to pass, from any charge or encumbrance not disclosed to the buyer before the contract is made and that the buyer will enjoy quiet possession of the goods except so far as it may be disturbed by the owner or other person entitled to the benefit of any charge or encumbrance so disclosed.

(2) In a contract of sale, in the case of which there appears from the contract or is to be inferred from the circumstances of the contract an intention that the seller should transfer only such title as he or a third person may have there is-

(a) an implied warranty that all charges or encumbrances known to the seller have been disclosed to the buyer before the contract is made, and

(b) an implied warranty that neither-

[555] Ibid., IV. A – 2:101.
[556] Ibid., VIII. – 1:202.
[557] Ibid., IV. A – 2:305.
[558] Ibid., IV. A – 2:306.
[559] For an outline of the range of options for the future evolution of the DCFR, see European Commission. 2010. **Green Paper on Policy Options for Progress towards a European Contract Law for consumers and businesses**. COM (2010) 348. See also paragraphs 3.64-3.65 above.

(i) the seller, nor
(ii) in a case where the parties to the contract intend that the seller should transfer only such title as a third person may have, that person, nor
(iii) anyone claiming through or under the seller or that third person otherwise than under a charge or encumbrance disclosed to the buyer before the contract is made,

will disturb the buyer's quiet possession of the goods.

7.3. Section 12 was substituted for the original section in the 1893 Act by section 10 of the Sale of Goods and Supply of Services Act 1980. The original provision had provided that the implied condition and warranties as to title applied 'unless the circumstances of the contract are such as to show a different intention'. Per section 55 of the original Act, these implied undertakings could also be waived or varied. The effect of the 1980 Act's changes to section 12, together with those to section 55, was, first, that exclusion or variation of the implied undertakings as to title was prohibited, though per section 12(2) it remains open to the parties to agree that 'the seller should transfer only such title as he or a third party may have'.[560] Secondly, even where the seller made clear that he was selling only a limited title, he could not exclude in their entirety the warranties of quiet possession and of freedom from charges or encumbrances in favour of third parties. The seller must disclose to the buyer, before the contract is made, any encumbrances known to him and must further warrant that no one claiming through or under him or the third party will disturb the buyer's quiet possession of the goods. Save for the fact that the buyer's warranties as to quiet possession and freedom from charges or encumbrances are more absolute in the Irish statute,[561] the changes made to section 12 by the 1980 Act were identical to those made in the UK by the Supply of Goods (Implied Terms) Act 1973 and later incorporated in the UK Sale of Goods Act 1979. The amendments to the section in the UK followed recommendations of the Law Commission for England and Wales and the Scottish Law Commission.[562]

7.4. Section 12 can be distinguished from the other implied terms under the Act on a number of grounds. First, its application is wider in that it applies to all sales, whereas

[560] As Bridge observes, 'the line between a prohibited exclusion and a limited title sale is a peculiarly elusive one to draw.' Bridge, **The Sale of Goods**, op. cit., para. 5.20.
[561] The implied warranties under UK legislation cover charges or encumbrances *not disclosed or known* to the buyer before the contract is made, whereas those under Irish legislation cover charges or encumbrances *not disclosed* to the buyer.
[562] The Law Commission and the Scottish Law Commission. **Exemption Clauses in Contracts First Report: Amendments to the Sale of Goods Act 1893**, op. cit., paras. 11-19, 124 , and Appendix A, p.52.

section 13 applies only to sales by description, section 14 only to sales in the course of a business, and section 15 only to sales by sample. Secondly, liability for breach of section 12 can never be excluded, even where the buyer does not deal as a consumer.[563] Thirdly, a different remedial regime applies to section 12 than to the other implied terms; in particular, the rules on acceptance do not apply. Fourthly, in line with this separate remedial regime, case law seems to view section 12 as 'fundamental' in nature and hence it has been interpreted more strictly than other implied terms.[564] These features suggest that section 12 should be considered separately from the other implied terms and within its own specific statutory context.[565]

Issues Arising

7.5. The main issues raised by section 12 concern, first, the seller's liability in respect of the right to sell under subsection (1)(a) and, second, the remedies available for breach of this provision. The question of the classification of the Act's implied undertakings as conditions or warranties has been considered in Chapter 4.

The right to sell in section 12(1)(a)

7.6. Section 12(1)(a) requires that, in the case of a sale, the seller has a right to sell the goods and, in the case of an agreement to sell, that he will have the right to sell the goods at the time when property is to pass. The leading case on the meaning of 'the right to sell' is *Niblett v Confectioners' Materials Co Ltd.*[566] The defendants were an American company which had agreed to sell 3,000 cases of tinned milk to the plaintiffs. When the goods arrived in England, they were detained by customs officials on the ground that part of the consignment infringed the trade mark of another manufacturer. The plaintiffs had to remove the offending labels to secure the release of the goods, an action that substantially reduced their value. The court held that there had been a breach of section 12(1) by reason of the fact that, as the company whose trade mark had been infringed could have obtained an injunction to restrain the sale, the vendor did not have the right to sell the goods. The precise

[563] 1893 Act, s.55(3).
[564] Bridge speaks of 'title fundamentalism' in this regard. Bridge, **The Sale of Goods**, op. cit., para. 5.21.
[565] Bradgate, R. 2000. **Commercial Law** (3rd ed.) (London: Butterworths) p. 357.
[566] [1921] 3 KB 387; see also *O'Reilly v Fineman,* Ir Jur Rep 36 and The Irish Digest 1939-1948 Col 107.

implications of this judgment are open to interpretation. At its broadest, it is authority for the proposition that where an owner of goods can be stopped by process of the law from selling the goods, he does not have the right to sell and is in breach of section 12(1)(a).[567] Benjamin, however, takes a contrary view, maintaining that the words 'right to sell the goods' mean that the seller has the power to vest full rights in the goods to the buyer, but makes no promise about his own proprietary rights.[568] For instance, where a seller without title sells goods in circumstances where the buyer acquires good title to the goods,[569] there would be no breach of section 12(1)(a). While there is no direct judicial authority on the point, Atkin LJ stated *obiter* in *Niblett*:[570] 'It may be that the implied condition is not broken if the seller is able to pass to the purchaser a right to sell notwithstanding his own inability…'. Similarly, the *ratio* of the *Niblett* judgment, according to Benjamin, does not extend beyond the situation where the property rights which the seller purports to vest in the buyer are encumbered by a right vested in a third party, such as an intellectual property right, which affects the goods in the hands of the buyer. In our view, however, the contention that there is no breach of the right to sell condition under section 12 where a seller without title sells goods in circumstances where the buyer acquires good title to the goods under one or more of the exceptions to the *nemo dat* rule must be questioned. Goode argues that section 12 is breached in such a situation because, as against the true owner, the seller's disposition is unlawful, meaning that he has no right to sell.[571]

7.7. A related issue was raised *Rowland v Divall*,[572] a case involving the sale of a car by the defendant to the plaintiff, a car dealer. The latter exhibited the car in his showroom for two months and then sold it to a buyer who used it for two months before it was repossessed by the police on the ground that it had been stolen by the person who had sold it to the defendant. The dealer reimbursed the buyer and brought an action against the defendant for recovery of the full purchase price. The Court of

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[567] Ivamy, **Casebook on Sale of Goods.** 1980. (4th ed.) (London: Lloyd's of London Press), p.6.
[568] **Benjamin's Sale of Goods**, op. cit., para. 4-004.
[569] For example under any of the *nemo dat* exceptions in ss. 21-25 of the 1893 Act: see further below.
[570] [1921] 3 KB 387 at 401. **Chitty on Contracts, Volume 2**. 2009. (30th ed.) (London: Sweet & Maxwell), para. 43-061 also supports this viewpoint.
[571] See **Goode on Commercial Law**, op. cit., pp. 311-312; Atiyah, **The Sale of Goods**, op. cit., p. 109; Bradgate, **Commercial Law**, op. cit., p. 358.; see further *R v Wheeler* (1991) 92 Cr App R 279, and Brown, 'The Scope of Section 12 and the Sale of Goods Act' (1992) *L.Q.R.* 221.
[572] [1923] 2 KB 500.

Appeal found in his favour, holding that failure to pass a good title to goods in accordance with section 12(1) meant that 'the buyer has not received any part of that which he contracted to receive – namely the property and right to possession – and, that being so, there has been a total failure of consideration.'[573] The fact that the dealer and the second buyer had had the use of the car for a period of four months was held not to have conferred a benefit sufficient to preclude the claim of total failure of consideration.

7.8. This judgment has been questioned for being unduly favourable to the buyer who had use of the goods for a substantial period and yet was entitled to a full refund of the price.[574] It has been argued conversely, however, that the decision was fair as the car-dealer buyer had no use for the vehicle unless he had good title or property in the goods to enable him to resell it.[575] Such a buyer is always exposed to the risk of claims in conversion by the true owner, and, once the defect of title is discovered, the buyer's title may be unmarketable. Despite the criticisms of the judgment, and calls for statutory intervention to overturn it, it has been approved in recent decades by both the Supreme Court in Ireland[576] and the English Court of Appeal.[577]

7.9. A number of more minor issues have also arisen in relation to section 12. First, even where there is a breach of section 12(1)(a), there is authority that the breach may be repaired by title being fed through at a later stage provided this is done before the buyer elects to treat the contract as repudiated and rejects the goods.[578] Secondly, the implied warranty as to freedom from undisclosed charges or encumbrances, which may have derived from land law, has proved to have little practical application to sale of goods transactions (although a similar express term is standard in ship and aircraft sales). Its future relevance may therefore be questioned. Bridge notes that it is practically impossible to envisage a case that falls within the encumbrance warranty

[573] Ibid. at 507. See also *Mallett and Son (Antiques) Ltd v Rogers* [2005] IEHC 131; [2005] 2 ILRM 471 where it was held that an antique bookcase was sold in breach of s.12 of the 1893 Act and the plaintiff buyer was thus entitled to a full refund of the price paid (£80,000) and damages of £31,533 to cover the cost of restoration work done on the bookcase.
[574] Bradgate, **Commercial Law**, op. cit., p.360; see also Bridge, **The Sale of Goods**, op. cit., paras. 5.07-5.19.
[575] See Peel, **Treitel's Law of Contract**. 2007. (12th ed.) (London: Sweet & Maxwell), para. 22-007.
[576] *United Dominion Trust (Ireland) Ltd v Shannon Caravans Ltd* [1976] IR 225.
[577] *Barber v NSW Bank plc* [1996] 1 All ER 906.
[578] *Butterworth v Kingsway Motors Ltd* [1954] 2 All ER 694.

but not within section 12(1)(a) or the quiet possession warranty, and hence suggest that its repeal would yield no practical consequences.[579] Thirdly, the implied warranty as to quiet possession has given rise to case law which has clarified some matters of detail while raising others. For example, case law has clarified that breach of this provision encompasses both physical interference[580] and interference through the assertion of third party rights.[581] Moreover, case law has clarified that this undertaking is continuing in nature,[582] although the question remains for how long. There will be a breach if the buyer is disturbed in possession by the wrongful acts of the seller, or any person claiming under him; or by the lawful acts of any other person, including the true owner.[583] But, there is authority that there will be no breach where the buyer's possession is disturbed by the wrongful acts of third parties,[584] although this is not expressed in the wording of the provision. Fourthly, sales of limited title (regulated by section 12(2)) can be difficult to distinguish from exclusion clauses (which are prohibited in relation to section 12). There is little evidence, however, that this causes difficulty in practice.[585]

Conclusions

7.10. While the ambiguity concerning the *ratio* of *Niblett v Confectioners Materials Ltd*[586] has given rise to much academic commentary, it appears to have caused few practical problems and hence the case for legislative reform in this regard is weak. Given the criticisms of *Rowland v Divall*[587] outlined above, there is arguably a stronger case for legislative intervention to alter or overturn this decision. It has been suggested in the UK that, in claims under section 12, a buyer should be required to give credit to the seller for his use and enjoyment of the goods.[588] In a joint consultative document published in 1983, the Law Commission for England and

[579] Bridge, **The Sale of Goods**, op. cit., para 5.35.
[580] e.g. *Computer Systems Ltd v United Paints Ltd* (2000) 2 TCLR 453.
[581] e.g. *Niblett v Confectioners Materials Ltd* [1921] 3 KB 387 at 401.
[582] *Microbeads AC v Vinhurst Road Markings Ltd* [1975] 1 All ER 529, [1975] 1 WLR 218.
[583] *Mason v Burningham* [1949] 2 KB 545.
[584] *The Playa Larga* [1975] 1 WLR 218.
[585] Bridge, **The Sale of Goods**, op. cit., para 5.25.
[586] [1921] 3 KB 387 at 401.
[587] [1923] 2 KB 500.
[588] See, for example, the UK Law Reform Committee 12th Report. 1966. **Transfer of Title to Chattels** (Cmnd. 2958); Law Commission for England and Wales (1975) **Law of Contract: Pecuniary Restitution on Breach of Contract** (Working Paper No.65); Law Commission for England and Wales and Scottish Law Commission (1983) **Sale and Supply of Goods** (Working Paper No.85); and UK Department of Trade and Industry (1994) **Transfer of Title: Sections 21 to 26 of the Sale of Goods Act 1979.**

Wales and the Scottish Law Commission proposed that the buyer should be limited to an action for damages, or alternatively, an action for damages or the recovery of the monies paid under the contract subject to a deduction for the innocent party's use and possession of the goods – whichever would yield the greater sum. It has been argued conversely that there would be difficulties and hence uncertainty in assessing the value of such use. More fundamental perhaps is the argument questioning the right of a seller who has breached section 12 to be paid by a buyer for the use of another party's goods. In the event, the Law Commissions in the UK recommended that section 12 should not be amended to address the *Rowland v Divall* judgement.[589] On balance, and in the light of the lack of statutory reform elsewhere and the judicial approval of *Rowland v Divall* in Ireland and the UK, the case for maintaining the status quo appears stronger than the case for reform.[590] Similarly, in relation to the minor issues identified above, there have been no specific proposals made for reform, and the nature of the issues raised would appear more suited to resolution on a case-by-case basis.

Recommendation

7.11. While section 12 of the 1893 Act gives rise to a number of issues, a review of its provisions and the options for reform favours, on balance, the maintenance of the status quo. No recommendation is made consequently for the amendment of section 12.

SECTIONS 21-23 & 25-26 1893 ACT: THE *NEMO DAT* RULE AND ITS EXCEPTIONS

7.12. It is a fundamental rule of property law that no one can transfer a better title than he himself has - *nemo dat quod non habet* – thereby protecting security of ownership.[591] In relation to goods, the basic rule is restated as follows in section 21 of the 1893 Act:

> Subject to the provisions of this Act, where goods are sold by a person who is not

[589] The Law Commission and the Scottish Law Commission. **Sale and Supply of Goods**, op. cit., paras. 6.1-6.5.

[590] For a discussion of the lack of change to section 12 in other common law jurisdictions, see Annex IV, section 8.2.11.

[591] This, or a similar, basic rule applies to sales of goods, land, and to other forms of property, to gifts, and to bailments, such as contracts of hire and hire-purchase.

> the owner thereof, … the buyer acquires no better title to the goods than the seller had …

Over a long period of time, a number of common law and statutory exceptions to the basic rule have been developed in order to protect *bona fide* purchasers and thereby encourage commercial activity by reinforcing the security of sale transactions. As Denning LJ observed in *Bishopsgate Motor Finance Corp. Ltd v Transport Brakes Ltd*:[592]

> In the development of our law, two principles have striven for mastery. The first is for the protection of property: no one can give a better title than he possesses. The second is for the protection of commercial transactions: the person who takes in good faith and for value without notice should get a good title. The first principle has held sway for a long time, but it has been modified by the common law itself and by statute so as to meet the need of our own times.

As these remarks indicate, the *nemo dat* rule and the related exceptions seek to strike a balance between the rights of two 'innocent' parties (the original owner and the third party purchaser in good faith) where the conduct of a dishonest intermediary results in a conflict of title. The matter at issue is whether these rules, as they now operate, strike the correct balance in present-day economic and social conditions, and, whether the legal framework in this area is in need of reform.

7.13. Sections 21-23 & 25 of the 1893 Act contain seven separate exceptions to the *nemo dat* rule. Further exceptions can be found in the Factors Act 1889 and the Consumer Credit Act 1995, amongst others. It is important to note that there is a degree of overlap between these exceptions and that this overlapping is not always consistent. The tangled interrelations between the exceptions has led to a more general criticism that the exceptions are overly technical and, in some cases, devoid of a coherent rationale. Apart from the repeal of section 24 on the revesting of property in stolen goods on conviction of the offender by the Criminal Justice (Theft and Fraud Offences) Act 2001, these sections of the 1893 Act have gone unchanged in Ireland since the Act's enactment.

First Exception: Unauthorised Agency

7.14. Section 21(1) provides:

[592] [1949] 1 K.B. 322 at 336-37.

> … where goods are sold by a person who is not the owner thereof, *and who does not sell them under the authority or with the consent of the owner,* the buyer acquires no better title to the goods than the seller had … [our italics]

The effect of the subsection is that, if goods are not sold with the authority or consent of the owner, the buyer acquires no title to them. The provision must be read, however, in conjunction with section 61 of the Act which preserves the common law rules of agency. In accordance with those rules, an owner will be bound by any disposition of his goods by an agent acting with his authority or consent.

Second Exception: Apparent Authority and Apparent Ownership

7.15. Further to the above exception, section 21(1) goes on to state:

> … 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, *unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell.* [our italics].

This exception may apply in two different types of case:

1) where the owner represents that the seller is the owner's agent, as in cases of apparent authority; and
2) where the owner represents that the seller is the owner of the goods, sometimes referred to as 'apparent ownership'.

In each of these cases the owner will be prevented from recovering the goods, and the buyer will acquire title to them, provided that the seller's dealing in the goods is consistent with the appearance created by the owner's conduct. Although section 21 refers only to the owner's 'conduct' it is clear that in both such cases the owner's representation may be by words or conduct. Common to all estoppels, the representation must be one of fact; it must be unambiguous; and it must be acted upon. However, based on English case law, this estoppel exception has generally been narrowly interpreted.[593] For instance, it has been held that the owner's representation must be voluntary.[594] Mere parting with possession is insufficient.,[595] rather a positive representation that the seller has the right to sell is required.[596] In theory, estoppel may be based on an owner's negligence. But, under English law at

[593] For example, *Shaw* v *MPC* [1987] 1 WLR 1332.
[594] *Debs* v *Sibec Developments Ltd* [1990] RTR 91.
[595] *Farqharson Bros & Co* v *King & Co* [1902] AC 325. Note, this case is effectively reversed where the person in possession is a mercantile agent under s.2 of the Factors Act 1889; and where the person in possession has contracted to buy goods under s.9 of the 1889 Act and s.25(2) of the 1893 Act.
[596] *Central Newbury Car Auctions Ltd v Unity Finance Ltd* [1957] 1 QB 371. See also *Mercantile Bank of India v Central Bank of India* [1938] AC 287.

least, it seems that it will very rarely be possible for a buyer to establish a title to goods on the basis of estoppel by negligence.[597]

Third Exception: Market Overt

7.16. By a long established exception to the *nemo dat* rule, derived from the *lex mercatoria*,[598] section 22(1) of the 1893 Act 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.

Accordingly, the sale must take place in an open, public, and legally constituted market, established by Royal Charter, statute or custom. Though Irish case law on the point is scant, it has been held that the old Prussia Street cattle market in Dublin was a market overt.[599] A list of such markets overt does not exist for consultation; the question as to whether a particular market qualifies or not can be addressed accordingly only in the context of a dispute in relation to a sale in that market.

Fourth Exception: Voidable Title

7.17. Section 23 of the 1893 Act provides:

> When the seller of goods has a voidable title thereto, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of the seller's defect in title.

This section applies only where the seller's title is voidable, as opposed to void.[600] Moreover, the section only applies where the title has not been avoided at the time of the sale. An original owner should take immediate steps therefore to rescind the contract with the seller. He may do so without court proceedings merely by notifying the seller of his intention to avoid the contract between them or by retaking possession of the goods. Further, where the seller is untraceable, it was held in *Car and Universal Finance Co Ltd v Caldwell*[601] that the original owner may be able to rescind the contract by taking other steps to recover his property, such as notifying the police.

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[597] *Moorgate Mercantile Co Ltd* v *Twitchings* [1977] AC 890, [1976] 3 WLR 66.

[598] Scrutton J. in *Clayton v Le Roy* [1911] 2 QB 1031, at 1038-9. The *lex mercatoria* was the customary mercantile law that developed from medieval times on the basis of the trade practices and usages in operation in transactions between merchants.

[599] *Ganly v Ledwidge* (1876) IR 10 CL 33; and *Delaney v Wallis* (1883) 14 LR Ir 31.

[600] *Cundy v Lindsay* (1878) 3 App Cas 459; *Anderson v Ryan* [1967] IR 34 at 38.

[601] [1965] 1 QB 525.

In this case, the owner of a car had been induced to part with it by a fraudulent misrepresentation in circumstances such that the contract was voidable. The English Court of Appeal held that he had done all that was necessary to rescind the contract by bringing the fraud to the attention of the police and to that of the Automobile Association who notified their patrols. A buyer who subsequently purchased the vehicle in good faith acquired no title to it as a result. As with the other *nemo dat* exceptions, the buyer in such cases must act in good faith and without notice of the seller's title defect. However, the burden of proof under section 23 is different from th applying to the other exceptions. It has been held that, under section 23, it is for the original owner to prove that the purchaser did not act in good faith.[602]

Fifth Exception: Seller in Possession

7.18. Section 25 of the 1893 Act, which mirrors sections 8 and 9 of the Factors Act 1889, is designed to protect persons who deal with sellers or buyers in possession of goods who no longer, or do not yet, own the goods. Section 25(1) states:

> Where a person having sold goods continues or is in possession of the goods, or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge or other disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same.

This provision covers the situation where a seller who has contracted to sell goods retains possession of them after the contract of sale and thus appears to own the goods, even if property in them has in fact already passed to the buyer. Other people may therefore deal with the seller as if he were still the owner of the goods - for instance, by agreeing to buy the same goods, or to take security over them. Section 25(1) may protect such a subsequent purchaser who deals with a seller who remains in possession of goods after selling them. A related provision at section 48(2) of the 1893 Act which applies where an unpaid seller exercises a right of lien or of stoppage of transit is discussed in Chapter 10.

7.19. Four main requirements must be met in order for the provision at section 25(1) to operate. First, there must be a sale, within the Act's definition, from the seller to

[602] *Whitehorn Bros v Davison* [1911] 1 KB 463.

the first buyer – an agreement to sell is insufficient. Secondly, after the sale, the seller must 'continue or be in possession' of the goods. It now seems clear that the provision applies regardless of the capacity in which the seller remains in possession of the goods.[603] Moreover, section 25(1) applies where the seller continues or *is in possession* of them. However, there is authority that, where possession is lost by the seller and later regained by him, the provision will not apply.[604] Thirdly, the seller must deliver or transfer the goods to a second buyer under a sale, pledge or other disposition. Although there is conflicting case law, it appears that constructive delivery is sufficient in this regard.[605] A similar broader provision in the Factors Act 1889 protects such a second buyer even though he receives possession of the goods under an *agreement for* sale, pledge or other disposition.[606] Lastly, the second buyer in such a case must receive the goods in good faith and without notice.

Sixth Exception: Buyer in Possession

7.20. Section 25(2) of the 1893 Act states:

> Where a person having bought or agreed to buy goods obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title, under any sale pledge or other disposition thereof, to any person receiving the same in good faith and without notice of any lien, or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner.

This provision covers the situation where a person who has agreed to buy goods takes possession of them before title passes to him and, by being in possession of the goods, gives the appearance of being their owner. If he resells or otherwise disposes of the goods before property passes to him, a title or priority dispute may then arise between the person who sold the goods to this buyer and the person to whom this buyer subsequently transferred them.

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[603] *Worcester Works Finance Ltd v Cooden Engineering Ltd* [1972] 1 QB 210 approved in *Hanley v ICC Finance* [1996] ILRM 463.

[604] *Mitchell v Jones* (1905) NZLR 932; *Worcester Works Finance Ltd v Cooden Engineering Ltd*. [1972] 1 QB 210, approved in *Hanley v ICC Finance* [1996] ILRM 463.

[605] *Nicholson v Harper* [1895] 2 Ch 415; cf. *Gamer's Motor Centre (Newcastle) Pty Ltd v Natwest Wholesale Australia Pty Ltd* (1987) 163 CLR 236: approved in *The Saetta* [1994] 1 All ER 851.

[606] See also the Factors Act 1889, s.8.

7.21. There are four main requirements for section 25(2) to apply. First, the initial buyer must have bought or agreed to buy goods. It thus applies to sales subject to a reservation of title pending payment,[607] and to sales contracts which are voidable at the option of the seller even where the contract has been avoided.[608] But, it does not apply where the initial buyer acquired the goods under a hire purchase contract;[609] an agency agreement;[610] a sale or return agreement;[611] or a contract for work and materials.[612] Secondly, the initial buyer must be in possession (actual or constructive) of the goods, or of documents of title, with the consent of the seller. Thirdly, the initial buyer must deliver or transfer the goods under a sale, pledge or other disposition. As noted at paragraph 7.19, a related provision in the Factors Act 1889 protects the second buyer even though he receives possession of the goods under an *agreement for* sale, pledge or other disposition. Lastly, the second buyer must receive the goods in good faith and without notice.

7.22. Where the requirements of section 25(2) are satisfied, the disposition by the initial buyer to a subsequent buyer has the same effect as if that initial buyer 'were a mercantile agent in possession of the goods with the consent of the owner'. These words have been interpreted in England and Northern Ireland as requiring that the initial buyer must act in the way in which a mercantile agent acting in the ordinary course of business would act in disposing of the goods, although this is not expressly stated in the legislation.[613] It has also been held in England that, since a disposition by a mercantile agent is only binding on the owner of goods if the agent is in possession of them with the consent of the owner, section 25(2) only applies where the initial buyer is in possession with the consent of the owner.[614]

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[607] For an example of conditional sale see *Lee v Butler* [1893] 2 QB 318.
[608] *Newtons of Wembley Ltd* v *Williams* [1965] 1 QB 560.
[609] *Helby* v *Matthews* [1895] AC 471; *cf. Lee v Butler* [1893] 2 QB 318.
[610] *Shaw* v *MPC* [1987] 1 WLR 1332; see further Thornely, 'Thieves, Rogues, Innocent Purchasers, and Legislative Tangles', (1988) *C.L.J.* 15.
[611] *Weiner* v *Harris* [1910] 1 KB 285.
[612] *Dawber Williamason Roofing* v *Humberside CC* (1979) 14 BLR 70.
[613] *Newtons of Wembley Ltd* v *Williams* [1965] 1 QB 560, and *RF Martin Ltd v Duffy* [1985] NI 417.
[614] *National Employers Mutual General Insurance Association Ltd v Jones* [1990] 1 AC 24.

Seventh Exception: Special common law or statutory power of sale

7.23. Section 21(2)(b) of the 1893 Act provides that nothing in the Act shall affect the validity of any contract of sale under any special common law or statutory power of sale or under the order of a court of competent jurisdiction.

Other Miscellaneous Exceptions

7.24. Section 2(1) of the Factors Act 1889 Act provides:

> Where a mercantile agent is, with the consent of the owner, in possession of goods or of documents of title to goods, any sale, pledge, or disposition of the goods made by him when acting in the ordinary course of business of a mercantile agent, shall, subject to the provisions of this Act, be valid as if he were expressly authorised by the owner of goods to make the same; provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same.

Therefore, where a mercantile agent (as defined in the 1889 Act)[615] is in possession of goods (constructive possession will suffice) or a document of title (also defined in the legislation),[616] with the consent of the owner, and, as mercantile agent, sells the goods in the ordinary course of business, the buyer will receive good title, provided he buys in good faith and without notice of any defect in title.

7.25. Section 70 of the Consumer Credit Act provides a further exception in the case of goods let under a hire-purchase agreement to a dealer who deals in goods of that class or description. If the dealer sells the goods when ostensibly acting in the ordinary course of his business, the sale shall be valid as if the dealer were expressly authorised by the owner to make the sale, provided that the consumer buyer acts in good faith and without notice.

Issues Arising

7.26. While the *nemo dat* rule itself is clear and simple to apply, the same cannot be said of the exceptions to it. The problems that have arisen in relation to the exceptions to the rule can be classified as general or specific in character. As regards the specific problems, these derive both from the statutory provisions themselves and from the applicable case law.

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[615] Factors Act 1889, s.1(1).
[616] Ibid., s.1(4).

General Issues

7.27. As is apparent from the foregoing analysis, one of the main general criticisms levelled at these sections of the 1893 Act is that the exceptions to the *nemo dat* rule are over-complicated, lack an underlying and unifying rationale, and overlap in ways that are inconsistent and incoherent. Atiyah, for example, describes the statutory provisions in this area as 'complex and confused'.[617] This line of criticism has led to the suggestion that the *nemo dat* rule and the various exceptions to it should be repealed and replaced by a single more coherent principle.[618] A second general criticism relates to the 'all or nothing' nature of the rule and exceptions. Either the original owner will retain title under the *nemo dat* principle, or the innocent third party purchaser will get good title under one or more of the exceptions. There will always be one 'winner' and one 'loser' even though both parties are 'innocent'. It has been suggested that it might be possible to apportion the loss which occurs when an innocent owner and an equally innocent *bona fide* purchaser are left in a conflict of title. In *Ingram v Little*, Devlin L.J. observed that[619]:

> For the doing of justice the relevant question in this sort of case is not whether the contract was void or voidable, but which of the two innocent parties shall suffer for the fraud of a third. The plain answer is that the loss should be divided between them in such circumstances. If it be pure misfortune, the loss should be borne equally; if the fault or imprudence of either party has caused or contributed to the loss, it should be borne by that party in the whole or in the greater part.

Specific Issues Raised by the Statutory Framework

7.28. Bridge is critical of the fact that a series of provisions dealing with conflicts of title is located within a statutory framework that addresses the bilateral relationship of seller and buyer and suggests that a separate statute dealing with title matters would be more appropriate.[620] Looking at the specific exceptions, the *market overt* exception in section 22 is the oldest of the *nemo dat* exceptions and has been criticised as being archaic and anomalous in its application and as inappropriate in a modern commercial context.[621] It has been further suggested that it operates as a 'thieves' charter' in that

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[617] Atiyah, **The Sale of Goods**, op. cit., p. 401; see also Kelly, C. 'Losing Nemo? Reform of the *Nemo Dat* Rule in Ireland', in Shannon, G and O'Dell, E. (eds.). 2008. **Law and Practice: Essays on Reform** (Dublin: Clarus Press).

[618] For example, Diamond. 1989. **Review of Security Interests in Property**, (UK Department of Trade and Industry).

[619] *Ingram v Little* [1961] 1 QB 31 at 73-74.

[620] Bridge, 'Do we need a new Sale of Goods Act?', op. cit., para 2.27.

[621] Smith, 'Valediction to Market Overt', [1997] *Am. J. Legal Hist*. 225.

it is the only exception to the *nemo dat* rule which allows title in stolen goods to pass to an innocent third party purchaser. Two main approaches to its reform can be distinguished. First, by the extension of the rule to all retail sales as recommended in the 1960s by the UK's Law Reform Committee.[622] This proposal was not implemented in the UK, though the exception was extended in this way in Hong Kong.[623] Secondly, by repeal of the rule. This has been the dominant approach and has been followed in the UK, most of the Canadian provinces, New Zealand, a number of Australian states, and Singapore.[624] Repeal has also been recommended in Hong Kong.[625]

7.29. Another criticism of the statutory framework relates to the exact meaning of the 'good faith' and 'without notice' requirements for the buyer under the various exceptions to the *nemo dat* rule. Section 62(2) provides that a thing is deemed to be done in 'good faith' when it is in fact done honestly, whether it be done negligently or not.[626] Therefore, good faith simply requires the buyer to act honestly, a subjective test. It has been argued that the good faith requirement in this context has more to do with commercial convenience and expediency than with broader notions of justice, fairness, and reasonableness associated with the principle of good faith. The question at issue therefore is whether the scope of good faith in the exceptions should be broadened. Furthermore, 'notice' is not defined in the legislation. But it is generally accepted that 'constructive notice' has no role in commercial transactions[627], and that notice in this context means 'actual notice'.[628] However, the concept of actual notice is far from simple. Actual notice is not the same as actual knowledge. Actual notice is assessed objectively. In deciding what facts a buyer has notice of, a court may draw inferences from the facts. For instance, a buyer will be treated as having notice of facts to which it can be shown that he deliberately turned a blind eye.[629] Moreover, a buyer will be treated as having actual notice of facts if he knows of circumstances

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[622] UK Law Reform Committee 12th Report, op. cit., paras. 30-35.
[623] Annex IV, section 6.1.
[624] Ibid., sections 2.5, 3.2, 4.1, 5.1 and 7.1. The repeal was effected in England by the Sale and Supply of Goods Act 1994. The market overt rule never applied in Scotland or Wales.
[625] Annex IV, section 6.3.
[626] This definition is taken from section 90 of the Bills of Exchange Act 1882.
[627] See, in a different context, the statement by Lindley LJ in *Manchester Trust v Furness* [1895] 2 QB 539 at 545.
[628] See *Worcester Works Finance Ltd* v *Cooden* [1972] 1 QB 210 at 218; [1971] 3 All ER 708 at 712; *per* Lord Denning.
[629] See *London Joint Stock Bank v Simmons* [1892] AC 20 regarding negotiable instruments.

which 'must lead a reasonable man applying his mind to them, and judging from them, to the conclusion that the fact is so'.[630] Again, the question is whether the concept of notice, as an objective concept, should be clarified in legislative form.

7.30. A further criticism of the current statutory framework relates to the inclusion of section 26, which deals with the effects of a writ of execution. It has been argued that this provision does not belong in a statute dealing with the sale of goods and would be more appropriate to some form of courts legislation. A final criticism of the statutory framework concerns the fact that similar, though not identical, exceptions to the *nemo dat* rule at section 25 of the 1893 Act co-exist in a separate statute, namely sections 8 and 9 of the Factors Act 1889. This duplication has been rightly questioned in our view, and there is a strong case for the consolidation of these overlapping rules in sale of goods legislation.[631]

Specific Issues Raised by Case Law

7.31. A number of other issues have arisen from case law. One such issue is the narrow interpretation given to section 21(1) and the concept of agency based on estoppel, including estoppel by negligence. The matter at issue is whether this exception should be construed more broadly so as to favour innocent third party purchasers. A second issue relates to the burden of proof of good faith and lack of notice. The *nemo dat* exceptions require that the buyer must act in good faith and without notice of the seller's defect in title. However, the burden of proof under section 23 is different from the other exceptions. It has been held in *Whitehorn Bros v Davison* that, under section 23, it is for the original owner to prove that the purchaser did not act in good faith and without notice.[632] While this has led to academic and judicial criticism, the decision has not been overruled.[633] Requiring an owner to prove a third party's bad faith is clearly more difficult than requiring a third party to prove his own good faith: all the relevant evidence is in the hands of the third party. The UK Law Reform Committee recommended the reversal of this burden of proof, though its

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[630] *Per* Lord Tenderden in *Evans v Truman* (1830) 1 Mood & R 10 at 12.

[631] Their repeal was proposed in the Diamond Review of Security Interests in Property and has also been recommended by Bridge, 'Do we need a new Sale of Goods Act?', op. cit., para. 2.27. See also Thorneley, J. 'Thieves, Rogues, Innocent Purchasers and Legislative Tangles', [1988] *C.L.J.* 15.

[632] [1911] 1 KB 463.

[633] See, for example, **Benjamin's Sale of Goods**, op. cit., para 7-029.

recommendation has never been implemented.[634] A third problem arises in relation to section 23 and the difficulty that exists in determining whether a contract is void or voidable. The case law on this distinction has been and remains confused and overly technical.[635] Abolition of the distinction was first proposed by UK Law Reform Committee in its 12th Report,[636] though its recommendation has not been implemented. The position in the US under the Uniform Commercial Code achieves a similar effect.[637] Article 2-403 of the Code provides:

> A person with voidable title has power to transfer a good title to a good faith purchaser for value. When goods have been delivered under a transaction of purchase the purchaser has such power even though
>
> (a) the transferor was deceived as to the identity of the purchaser …

The policy which underlies this approach is based on a recognition that the original owner who deals with a rogue should bear the risk and that it is unfair accordingly that this risk can be transferred onto an innocent third party purchaser.[638]

7.32. A further problem has arisen regarding the operation of section 23 under which a buyer will succeed in a conflict of title with an original owner where the seller has a voidable title and his title has not been avoided at the time of the sale. Usually, the original owner can rescind the contract with the seller merely by notifying the seller of his intention to avoid the contract between them or by retaking possession of the goods. However, in the case of *Car and Universal Finance Co Ltd v Caldwell*[639]discussed at paragraph 7.17. above, it was held that where the seller is untraceable, the original owner may be able to rescind the contract by taking other steps to recover his property, such as notifying the police. This decision has been criticised for limiting the protection afforded to innocent third party purchasers in a way that seriously undermines the objective of the statutory provision.[640] The UK Law Reform Committee recommended that the matter be addressed by means of a statutory provision requiring that the rescission of a voidable contract would require

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[634] Twelfth Report of the Law Reform Committee, **Transfer of Title to Chattels**, Cmnd 2958 (1966), para 25.
[635] For more recent example of the difficulty in this regard see *Shogun Finance* v *Hudson* [2003] UKHL 62.
[636] *Ibid.*
[637] For a discussion see Thomas, 'Mistake of Identity: A Comparative Analysis' (2008) *L.M.C.L.Q.* 188.
[638] Similar sentiments were expressed by Lord Denning in *Lewis v Averay* [1972] 1 QB 198 at 207.
[639] [1965] 1 QB 525.
[640] Twelfth Report of the Law Reform Committee, op. cit., para. 16.

communication with the fraudulent party.[641] The Diamond Review on Security Interests in Property also called for the rule established in this case to be changed.[642] Clarification of this point in Irish law would be welcome. A final issue that has caused difficulty concerns the operation of section 25(2) regarding cases where the buyer is in possession of the goods. Where the requirements of section 25(2) are satisfied, the disposition by the first buyer to the sub-buyer has the same effect as if the first buyer 'were a mercantile agent in possession of the goods with the consent of the owner'. In *Newtons of Wembley Ltd v Williams*[643], these words were interpreted as requiring that the first buyer must act in the way in which a mercantile agent acting in the ordinary course of business would act in disposing of the goods. The case concerned the sale of a car by the plaintiff, a car dealer, to a buyer subject to an agreement that it would remain their property until his cheque had cleared. Though the cheque had not been honoured, the buyer was allowed to take the car away and went on to sell it in an established London street market which dealt in used cars. This second buyer then sold the car to the defendant. Though the Court of Appeal found that the plaintiff had taken the necessary steps to avoid the contract by informing the police in accordance with *Car and Universal Finance Co. Ltd.*, it held nevertheless that the defendant had acquired a good title to the vehicle as the rogue seller had to be regarded as having acted in the same way as a mercantile agent in view of the fact that the sale had taken place in a recognized market. However, this seems to read into the statute a meaning which is not there and it is not clear whether an Irish court would adopt such an interpretation.[644] Indeed, the Australian courts have rejected this line of reasoning.[645] The UK Law Reform Committee also recommended that the dicta in this case be reversed.[646]

Options for Reform

7.33. The above discussion illustrates the principal problems and sources of uncertainty in relation to sections 21-23 and 25-26 of the 1893 Act. The main

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[641] In line with Scots law: *McLeod v Kerr* [1965] SC 253.
[642] Diamond, **Review of Security Interests in Property**, op. cit., para 13.6.6.
[643] [1965] 1 QB 560. A similar interpretation was taken in a subsequent Northern Ireland case, *RF Martin Ltd v Duffy* [1985] NI 417.
[644] As Atiyah has commented: 'If a person is not a mercantile agent, how can he be said to act in the ordinary course of business of a mercantile agent?' Atiyah, **The Sale of Goods**, op. cit., p. 396.
[645] *Gamer's Motor Centre(Newcastle) Pty Ltd v Natwest Wholesale Australia Pty Ltd* (1987) 163 CLR 236.
[646] Twelfth Report of the Law Reform Committee, op. cit., paras. 21-23.

questions for consideration are whether the various matters at issue are best addressed through statutory reform or on a case-by-case basis and whether any statutory reform should be general and radical, or limited and specific, in character.

General Reform

7.34. The most radical reform option would be to repeal the existing rules and replace them with a single, clear-cut principle. While the current Irish (and UK) rules on conflict of title are characterised by striking a balance between original owners and innocent third party purchasers through the operation of the *nemo dat* rule and the various exceptions to it, other jurisdictions take what appears to be a more straightforward approach which favours the position of one party over the other. The original common law position, as reflected in the *nemo dat* rule, clearly favoured the first owner's position. Other jurisdictions, however, have opted to protect the innocent third party purchaser over the original owner. This is not an unreasonable approach to take in view, first, of the general policy objective of encouraging commercial transactions and, second, of the fact that the original owner will have dealt with the 'rogue' and so will have been in a better position than the innocent third party purchaser to make a judgment about his trustworthiness when handing over possession of his goods and hence should bear any subsequent loss. In German law, for example, Article 932 of the German Civil Code provides that a purchaser acting in good faith acquires title where he obtains possession from a seller who has no title.[647] The purchaser is not in good faith if he knew, or by reason of gross negligence did not know, that the goods did not belong to the seller. In France, similarly, Article 2279 of the French Civil Code provides that a buyer in good faith acquires an overriding title provided that he takes possession: 'possession is equivalent to title'. Article 2280 of the Code further provides that, where the goods are lost by, or stolen from, an original owner, their purchase at a fair or market, a public sale, or from a merchant selling similar goods, allows the purchaser to retain them until he is reimbursed for the price by the original owner. The Draft Common Frame of Reference also adopts an approach which favours the good faith acquisition of ownership. Accordingly, where the transferor has no right or authority to transfer ownership, the transferee acquires, and the former owner loses, ownership provided certain conditions are met, including

[647] As part of their Law of Property; see also Art 366 of Commercial Code.

the general conditions for the transfer of ownership (e.g. the goods exist; are transferable; etc) and that the transferee acquires the goods for value and in good faith.[648] Good faith acquisition cannot occur in relation to stolen goods unless the transferee acquired the goods from a transferor acting in the ordinary course of business, while good faith acquisition of stolen 'cultural objects' is impossible.

7.35. In the United States, Article 2-403(1) of the Uniform Commercial Code protects 'a good faith purchaser for value' if the transferor has a voidable title or even a void title by reason of mistake of identity.[649] Article 2-403(2) provides that any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in the ordinary course of business**.** **'**Entrusting' in this context includes delivery and any acquiescence in retention of possession, even if conditional.[650] A simplified scheme, inspired by the US system, within the context of the UK Sale of Goods Act 1979, was proposed by the Diamond Review of Security Interests in Property.[651] Its aim was to enhance the rights of innocent third party buyers and its main recommendation was that all security devices should be treated alike and that non-possessory securities should be registered under a single statutory framework. Linked to this proposal was a recognition that there should be a clear statement of the rights of innocent purchasers of goods subject to a security interest. Accordingly, it was proposed that there should be a general principle in the law which would apply whenever the owner of goods had entrusted goods to, or acquiesced in their possession by, another person (including where possession was given based on a mistake of identity), so that any disposition of the goods by the possessor would confer good title on an innocent purchaser to the extent that the owner could have conferred title.[652] This broad principle would cover many agency cases as well as section 23 on voidable title and section 25 on sellers and buyers in possession. However, these recommendations have not been implemented to date.[653]

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[648] Von Bar, C. et al. (eds), op. cit. VIII.- 3:101.
[649] Thomas, 'Mistake of Identity: A Comparative Analysis', op. cit.
[650] See also Article 9 on secured transactions.
[651] Diamond, **Review of Security Interests in Property**, op. cit. See also the tentative proposals from the Scottish Law Commission in Memorandum No. 27, *Corporeal Moveables* (1976).
[652] Diamond, ibid., para. 13.6.3.
[653] See also UK Department of Trade and Industry, **Consultation Document on Transfer of Title** (1994); Law Commission of England and Wales, (2005) **Report on Company Security Interests** (Law Com. 296); De Lacy, J. 'The evolution and regulation of security interests over property in

7.36. It is notable, despite numerous calls for reform of the *nemo dat* principle and the related exceptions to it, in particular in the UK, that relatively little reform has been achieved in practice.[654] While there are several reasons for the lack of action in this area of the legislation, there is no doubt that the practical demand for reform (barring the repeal of the *market overt* rule) has been modest, while identifying a better alterative has all too often proved problematical. Similar considerations would seem to apply in the Irish context. The replacement of the existing statutory provisions by a rule that favours one party, such as applies in France or Germany, would not offer an appropriate or balanced basis for reform in our view. While the reform agenda proposed by the Diamond Review of Security Interests in Property is more nuanced, its application raises a number of issues that require further consideration and consultation. Though we would not rule out an approach to reform along these lines, we are reluctant to recommend it in the absence of strong evidence that there is both a need and demand for changes along these lines.

7.37. An alternative radical option for reform focuses on the all-or-nothing nature of the current rules on conflict of title. As noted at paragraph 7.27 above, Devlin LJ suggested in *Ingram v Little*[655] that it might be possible to apportion loss between an innocent owner and an innocent purchaser where there is a conflict of title resulting from the conduct of a dishonest middle party who has disappeared. Following this suggestion, the topic of conflict of title was referred to the Law Reform Committee which reported in 1966. The Committee rejected Devlin LJ's suggestion of apportionment because they argued it was impractical and too complicated to implement, especially a string of transactions was involved.[656] This conclusion remains valid in our view and, while we are sympathetic to the aims behind this approach to reform, we cannot endorse it.

English law' in De Lacy, J (ed.), **The Reform of UK Personal Property Security Law: Comparative Perspectives,** op. cit., pp. 3-82; and Gullifer, L. 'Exceptions to the nemo dat rule in relation to goods and the Law Commission's proposals in the Consultative Report' in De Lacy, J. (ed), ibid., pp. 188-222.

[654] Annex IV, sections 2.7-2.8.

[655] [1961] 1 QB 31.

[656] Twelfth Report of the Law Reform Committee, op. cit., paras. 10-12. The principle of apportionment was accepted in the draft Canadian Uniform Sale of Goods Act, s.6(3), but like other provisions of that draft Act was never implemented.

7.38. Finally, a general reform of these sections of the 1893 Act could, as suggested by Bridge, take the form of their repeal and incorporation in a separate statute on title conflicts. While there is a certain logic to this proposal, the likelihood of such a statute securing Government approval and Parliamentary time seems remote at present. From the perspective of the parties to contracts of sale, there may also be practical advantages in having the rules on title transfers and conflicts in sale of goods legislation.

7.39. Though we do not recommend the replacement of the provisions of the Sales of Goods Act 1893 on title transfers and conflicts by an alternative general framework, a number of specific amendments to these provisions are both practical and desirable. While no change is needed to section 21, we recommend that the following changes should be made to the provisions at sections 22-23 and 25-26 of the Act.

7.40. Recommendations

Repeal the market overt exception at section 22. 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.

Harmonise the burden of proof for all of the exceptions to the *nemo dat* rule by stipulating that it rests with the seller under section 23. As noted above, the burden of proof under section 23 of the Act rests with the seller while, for all other exceptions to the *nemo dat* rule, it lies with the buyer. The burden of proof should apply on the same basis for all of the Act's exceptions to the rule.

Simplify section 23 by abolishing the distinction between void and voidable. As discussed above, the case law on this distinction is neither coherent nor consistent. The distinction can permit the risk of loss of title to be transferred unfairly to innocent third party purchasers and its abolition would ensure that the original owner who deals with a rogue would bear this risk.

Amend section 23 to address the ruling in *Car & Universal Finance Co Ltd v Caldwell*.[657] The effect of the judgement in this case has been substantially to curtail the protection afforded to third parties under section 23. Section 23 should be amended to provide that, unless the other contracting party is notified of the rescission of the contract, an innocent purchaser from this party should acquire a good title to the goods.

Amend section 25 to address the ruling in Newtons of Wembley Ltd v Williams[658] by providing that subsection (2) be brought into line with subsection (1) so as to enable a good title to be acquired by an innocent purchaser regardless of whether or not the person with whom he was dealing appeared to be acting in the course of a business.

Repeal section 26 (on effects of writ of execution) and transfer the provision to courts legislation. A similar reform was effected in the UK in the 1979 Sale of Goods Act and section 138 of the Supreme Court Act 1981.

Repeal sections 2, 8 and 9 of the Factors Act 1889, and consolidate these provisions in new sale of goods legislation.

[657] [1965] 1 QB 525.
[658] [1965] 1 QB 560; see also *RF Martin Ltd v Duffy* [1985] NI 417.

CHAPTER EIGHT SALE OF GOODS ACT 1893:PERFORMANCE OF THE CONTRACT I – DELIVERY OF THE GOODS, SECTIONS 10, 27-33 & 37.

8.1. This Chapter deals first with sections 27-28 of the 1893 Act on the general duties of the seller and the buyer in regard to delivery and payment and also with section 10 of the Act on stipulations as to time in view of its close link with delivery and payment. The Chapter then considers the detailed rules regarding various aspects of delivery in sections 29-33 of the Act. Chapter 9 is devoted to the remaining provisions of Part III of the Act - those at sections 33-37 on examination and acceptance - and to the related issues of the remedies for goods not in conformity with the contract, in particular the right to reject.

I SECTIONS 27-28 SALE OF GOODS ACT 1893

Section 27 Duties of Seller and Buyer
It is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them, in accordance with the terms of the contract of sale.

Section 28 Payment and Delivery Are Concurrent Conditions
Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer must be ready and willing to pay the price in exchange for possession of the goods.

These sections of the Act have remained unchanged since their enactment. The corresponding sections in the UK Sale of Goods Act 1979 are also identical to those enacted in 1893.

8.2. Section 27 sets out the core obligations of the parties under the contract of sale. The seller's duty is to deliver the goods, and the buyer's duty is to accept and pay for them. Where the contract is for the sale of specific goods, or if the property in the goods has passed to the buyer, the seller must deliver the specific goods that have been contracted for. If the contract is for the sale of unascertained goods, the seller can deliver any goods that meet the contract description unless the goods to be sold have been unconditionally appropriated to the contract. 'Delivery' is defined at section 61(1) of the Act as the 'voluntary transfer of possession from one person to another'. Its meaning under the Act differs therefore from its ordinary meaning where it connotes the dispatch or transport of goods from seller to buyer. A seller can, and

commonly will, fulfil his obligation to deliver goods simply by allowing the buyer to collect them.

8.3. Despite the emphasis on the transfer of possession in the definition of delivery in the Act, delivery can take a number of forms, some of which do not involve a handover of the physical custody of the goods. As Benjamin observes,[659] 'the meaning of delivery is best ascertained from the various acts which have been recognised by the law as constituting an effective delivery of the goods to the buyer in a given situation.' The main such forms are as follows:[660]

1) The physical transfer of the goods to the buyer or the buyer's agent;
2) The physical transfer of the goods to a third party, such as a warehouse-keeper;
3) The transfer of the means of access to, and/or control over, the goods, for example the handover of the keys to a warehouse in which the goods are stored;
4) The delivery of documents of title to the goods, such as a bill of lading for goods that are shipped;[661]
5) The holding of the goods by the seller as the buyer's bailee.

Where the seller or a third party acknowledges that they hold the goods on the buyer's, and not their own, behalf, the acknowledgement is referred to as attornment.

8.4. Section 28 comprises a default rule which provides that the delivery of the goods and the payment of the price are concurrent conditions. It elaborates on this rule by stating that the seller must be ready and willing to give possession of the goods in exchange for the price while the buyer must be ready and willing to pay the price in exchange for the possession of the goods. The seller is not required to effect actual delivery of the goods before being entitled to sue for the price.[662] Where it is clear that the buyer would have refused to pay the price or accept the goods, it is sufficient for

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[659] **Benjamin's Sale of Goods**, op. cit., para. 8-002.
[660] Ibid., paras. 8-007-114. Atiyah, **The Sale of Goods**, op. cit., pp. 124-25. **Goode on Commercial Law**, op. cit., pp. 289-93.
[661] Section 1(4) of the Factors Act 1889 defines a document of title as 'any bill of lading, dock warrant, warehousekeeper's certificate, and warrant or order for the delivery of goods, and any document used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by endorsement or by delivery, the possessor of the documents to transfer or receive goods thereby represented.' The most important type of document of title is the bill of lading, a document issued by the shipowner or his agent to the shipper of goods which constitutes a receipt for the goods, a contract for their carriage, and a document of title to them. Per Kennedy LJ in *Biddell Bros Ltd v E Clemens Horst & Co. Ltd* [1911] 1 KB 934 at 956-57, the bill of lading 'in law and in fact represents the goods.'
[662] *Levey & Co. Ltd v Goldberg* [1922] 1 KB 688.

the seller to show that he had 'not only the disposition but the capacity to perform the contract.'[663] Similarly, a buyer is not required to have paid the price for the goods in order to be entitled to sue for non-delivery provided that he was willing and able to pay. The rules regarding anticipatory repudiation have received consideration in a number of cases, most recently *Fercometal SARL v Mediterranean Shipping Co SA*.[664] In this case, the charterers of a vessel were told by its owners that it would not in arrive in time to allow the charterer's cargo to be loaded in accordance with the terms of the contract. Despite the absence of a cancellation clause in the contract, the charterer then sought to cancel the contract. The ship's owners refused to accept the cancellation and made a false claim that the vessel would now arrive in time. The charterers persisted in their repudiation of the contract and, when sued by the owners for breach of contract, responded that the latter had never been in a position to perform their obligations under the contract. The House of Lords accepted this defence. An anticipatory repudiation had either to be accepted or refused. If accepted, the contract was terminated and the accepting party was freed from his obligations under the contract. If the repudiation was rejected, however, the contract remained in force and the rejecting party must be in a position to discharge his duty to perform. Though the case did not involve a contract of sale, the reasoning in the judgement is of general application.

Section 10 1893 Act

Section 10 Stipulations as to Time

(1) Unless a different intention appears from the terms of the contract, stipulations as to time of payment are not deemed to be of the essence of a contract of sale. Whether any other stipulation as to time is of the essence of the contract or not depends on the terms of the contract.

(2) In a contract of sale "month" means prima facie calendar month.

8.5. Section 10 provides, first, that time of payment is presumptively not of the essence of the contract of sale and, second, that it is a matter for the construction of the contract whether any other stipulation as to time is of the essence. The section avoids the concepts of conditions and warranties that are central to other provisions of the Act, though terms that are of the essence of the contract can be equated with

[663] Per Lord Abinger in *De Medina v Norman* (1842) 9 M & W 820 at 827. *British & Bennington Ltd v NW Cachar Tea Co. Ltd* [1923] AC 48.

[664] [1989] AC 788. See also *Gill & Dufus SA v Berger & Co Inc* [1984] AC 382. *Braithwaite v Foreign Hardwood Co. Ltd* [1905] 2 KB 543. *Taylor v Oakes Roncoroni & Co* (1922) 38 TLR 349.

conditions, and terms that are not of the essence with warranties, for the purposes of the remedies available for breach. Where time is of the essence, late delivery constitutes a breach of condition and the buyer can reject the goods, terminate the contract and sue for damages. In accordance with section 11(2) of the Act, a buyer can elect to treat the breach of condition as a breach of warranty and pursue only a claim for damages. Where time is not of the essence of the contract, the buyer's only remedy is to sue for damages.

8.6. As noted in Chapter 4, the courts have consistently held that, as stated by McCardie J in *Hartley v Hymans*,[665] 'in ordinary commercial contracts for the sale of goods the rule clearly is that time prima facie is of the essence with respect to delivery.' This reflects the importance attached to certainty in commercial contracts, particularly in 'string transactions' involving a series of sales of the same goods, or transactions in which goods are bought for use as materials or components in the manufacture of other goods.[666] As a failure to deliver on time is presumed to be a breach of a condition, the buyer is entitled, unless this presumption is rebutted, to repudiate the contract regardless of whether the breach has resulted in loss or damage. In *Bowes v Shand*,[667] the seller agreed to ship a quantity of rice during the months of March and/or April. In the event, most of the rice was shipped at the end of February. Though the House of Lords acknowledged there was no material difference between the rice shipped in February and that which would have been shipped in March, it held that the buyers were entitled to reject the goods. Early delivery, accordingly, is no less a breach of contract than late delivery. The courts have taken a similar approach to the time of performance of other contractual obligations, such as the giving of notices, to that taken in respect of the time of delivery.[668]

8.7. Though time of delivery is *prima facie* of the essence of the commercial contract of sale, it can be expressly or impliedly waived by the buyer. In *Hartley v Hymans*[669], a contract for the sale of cotton stipulated that delivery was to be made in instalments by a specified date. The buyer accepted a number of deliveries after this date,

[665] [1920] 3 KB 475 at 484.
[666] White, **Commercial Law**, op. cit., p. 225.
[667] (1877) 2 App Cas 455.
[668] *Bunge Corp v Tradax SA* [1981] 1 WLR 711.
[669] [1920] 3 KB 475. See also *Westbrook Resources Ltd v Globe Metallurgical Inc* [2009] EWCA Civ 310.

however, and continued to press for performance for a subsequent period of four months, at which point he refused to accept any further deliveries. McCardie J held that, while time had originally been of the essence of the contract, the buyer's conduct amounted to a waiver of this stipulation. It was not open to the buyer consequently to terminate the contract abruptly, though he would have been entitled to do so had he given the seller notice of his intentions. In *Handelsgesellschaft Bremer v Vanden Avenne-Izegem*,[670] a case concerning the late submission of a notice extending the date of delivery, Lord Salmon confirmed that such a waiver did not need to be given expressly and that it was sufficient for the buyers to behave or write in such a way that reasonable sellers would be led to believe that the buyers were waiving any defect there might be in the notice.

8.8. A waiver of the condition as to time of delivery can be reversed, however, if the buyer sets a new delivery deadline. In *Rickards (Charles) Ltd v Oppenhaim*,[671] the plaintiff agreed to build and deliver a car for the defendant within six to seven months. The defendant waived his right to terminate the contract by continuing to press for delivery after the delivery date had passed. He then specified a new deadline for delivery and, when delivery was not made by that date, cancelled the contract. The court upheld the defendant's right to terminate the contract. The court also rejected the plaintiffs' claim that notices making time of delivery of the essence of a contract applied only to a contract of sale and not to a contract for work and materials such as that at issue. The court did not rule, however, on the question of whether a notice making time of delivery of the essence of the contract could subsequently be served in a contract where time had not originally been of the essence.[672]

8.9. The rule that time of delivery is of the essence applies to 'ordinary commercial contracts of sale' but not, in the absence of an express or implied intention to the contrary, to consumer sales contracts. The European Communities (Protection of Consumers in Respect of Contracts Made by Means of Distance Communications) Regulations 2001 which give effect to Directive 97/7/EC contain a default rule requiring the performance of distance contracts within a period of thirty days from the

[670] [1978] 2 Lloyd's Rep 109 at 126.
[671] [1950] 1 KB 616.
[672] Stannard, J.E. 'In the Contractual Last Chance Saloon: Notices Making Time of the Essence', (2004) *L.Q.R* 137 at 158.

day following the forwarding of the consumer's order to the supplier.[673] Where the supplier fails to perform his or her side of the distance contract on the grounds that the goods are unavailable, the consumer is entitled to a refund of any monies paid as soon as possible, and not later than thirty days, after being informed of the fact. The proposal for a Directive on Consumer Rights published in October 2008 included a similar default rule which was to apply to contracts of sale generally.[674] Though the text adopted by the Council subsequently restricted this rule to distance and off-premises contracts, the final text agreed following discussions between the European Parliament and Council includes a provision applicable to all contracts of sale requiring the trader to deliver the goods without undue delay, but not later than 30 days, from the conclusion of the contract.[675] As we stated in our report on the proposed Directive, the extension of the thirty day default delivery rule to all contracts of sale was questionable in view of the evidence that problems of late delivery were most pronounced in the distance selling sector.[676] Though we remain of the view that the modalities of delivery for non-distance contracts of sale are more appropriately regulated at national level, the Directive's delivery provisions will have to be implemented in Irish law for consumer contracts of sale.

8.10. Like stipulations as to time to delivery in consumer contracts, stipulations as to time of payment in commercial contracts are not deemed *prima facie* to be of the essence of a contract of sale. As with time of delivery in consumer contracts, however, time of payment in commercial contracts is subject to regulation by legislation of European Union origin. The European Communities (Late Payment in Commercial Transactions) Regulations 2002 (S.I. No. 388 of 2002) which give effect to Directive 2002/35/EC[677] imply a term into every commercial contract that, where the purchaser does not pay for the goods or services concerned by the relevant payment date, the supplier is entitled to late payment interest on the amount

[673] S.I. No. 207 of 2001, Regulation 9.
[674] Commission of the European Communities. 2008. **Proposal for a Directive on Consumer Rights**, Article 22.
[675] Proposal for a Directive of the European Parliament and of the Council on Consumer Rights, Article 22). A provisional version of the final text of the Directive can be accessed at http://www.europarl.europa.eu/documents/activities/cont/201106/20110624ATT22578EN.pdf
[676] Sales Law Review Group. 2009. **Position Paper on Proposed Directive on Consumer Rights**, para. 88.
[677] This Directive has recently been replaced by Directive 2011/7/EU on Combating Late Payment in Commercial Transactions which member states are required to bring into force by 16 March 2013. The substance of the provisions regulating late payment remains broadly similar.

outstanding at a rate of interest specified in the Regulations. 'Relevant payment date' is defined as the date or end of the period for payment specified in the contract or, where the contract does not specify this date or period, thirty days after the receipt of the invoice. Where the date of receipt of the invoice is uncertain, or the invoice is received before the goods or services, the relevant payment date is thirty days after the date of receipt of the goods or services.

Issues Arising

8.11. It has been argued that sections 10 and 28 of the 1893 Act are at odds in that, notwithstanding the stipulation in section 28 that delivery and payment are concurrent conditions, section 10 provides that stipulations as to time of payment are not of the essence of the contract, while stipulations as to time of delivery in commercial contracts have been held by the courts to be of the essence. Though the buyer is under an obligation to pay the agreed price at the designated time, the effect of section 10 is to create a presumption that this obligation is not a condition of the contract. These rules have been subject to criticism on the ground that they permit the buyer to repudiate the contact when the seller is unpunctual, but do not allow the seller to do likewise when the buyer is at fault.[678] The result, it is contended, is effectively to require the seller to extend compulsory credit to the buyer. These concerns are more apparent than real in our view, however, and do not warrant any amendments or additions to the existing statutory provisions. First, commercial contracts commonly allow payment periods of thirty days or more, a norm recognised in the statutory provisions on late payment and, in practice therefore, do not treat delivery and payment as concurrent conditions. Second, the seller is free to decline to deliver the goods until the buyer pays the price. Section 41(1) of the Act expressly permits the seller to retain possession of the goods until payment or tender of the price where, as is the case in transactions to which the default rule in section 28 applies, the goods

[678] Stoljar, S. 'Untimely Performance in the Law of Contract (1955) 71 *L.Q.R*. 527 at 539-40. Goode argues by contrast that, while the duties of delivery and payment are concurrent conditions, the two obligations are not necessarily of equal strength, and that the law recognises in various ways the distinction between the payment interest of the seller and the delivery interest of the buyer. 'The only consequence to the seller of non-payment of the price is that he is deprived of the use of money, a matter that can readily be compensated by an award of interest in addition to a contract sum. But non-delivery of goods in a commercial transaction may be disastrous. If the goods are of an income-producing kind bought for use in the buyer's business, he may suffer a substantial loss of profit, not to mention damage to his commercial reputation and the possible loss of repeat orders. If the goods are bought for resale and there is no available market, the seller's default may place the buyer in breach of his contractual obligations to his own purchaser.' **Goode on Commercial Law**, op. cit., p.441.

have been sold without any stipulation as to credit. Third, section 48(3) provides that the buyer may re-sell the goods where the goods are perishable, or where the seller gives notice of his intention to re-sell the goods and the buyer does not pay within a reasonable time.

8.12. Though no substantive changes are required to sections 10, 27 or 28, a minor change could beneficially be made to section 10. The default rule in section 10(1) applies 'unless a different intention appears from the terms of the contract'. This is unduly restrictive in our opinion and it would be preferable if the formulation of the default rule in sections 17 and 18 of the 1893 Act were followed. The default rule would apply consequently unless a different intention appears while, for the purpose of ascertaining the intention of the parties, regard would be had to the terms of the contract, the conduct of the parties, and the circumstances of the case.

8.13. Recommendation

The default rule at section 10(1) of the 1893 Act should be reformulated in line with that at sections 17(2) and 18 of the Act to provide that, for the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, and the circumstances of the case.

8.14. The next part of the Chapter deals with the delivery provisions at sections 28-33 of the 1893 Act. It looks first at the rules on various aspects of the modalities of delivery at sections 29, 32 and 33 and then considers the rules on delivery of the wrong quantity and instalment deliveries at sections 30-31.

II SECTIONS 28-33 SALE OF GOODS ACT 1893

Section 29 Rules as to Delivery

1) Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending in each case on the contract, express or implied, between the parties. Apart from any such contract, express or implied, the place of delivery is the seller's place of business, if he have one, and if not, his residence. Provided that, if the contract be for the sale of specific goods, which to the knowledge of the parties when the contract is made are in some other place, then that place is the place of delivery.
2) Where under the contract of sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time.

3) Where the goods at the time of sale are in the possession of a third person, there is no delivery by seller to buyer unless and until such person acknowledges to the buyer that he holds the goods on his behalf; provided that nothing in this section shall affect the operation of the issue or transfer of any document of title to goods.
4) Demand or tender of delivery may be treated as ineffectual unless made at a reasonable hour. What is a reasonable hour is a question of fact.
5) Unless otherwise agreed, the expenses and incidental to putting the goods into a deliverable state must be borne by the seller.

Section 32 Delivery to Carrier

1) Where, in pursuance of a contract of sale, the seller is authorised or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer is prima facie deemed to be a delivery of goods to the buyer.
2) Unless otherwise authorised by the buyer, the seller must make such contract with the carrier on behalf of the buyer as may be reasonable having regard to the nature of the goods and the other circumstances of the case. If the seller omit so to do, and the goods are lost or damaged in course of transit, the buyer may decline to treat the carrier as a delivery to himself, or may hold the seller responsible in damages.
3) Unless otherwise agreed, where goods are sent by the seller to the buyer by a route involving sea transit, under circumstances in which it is usual to insure, the seller must give such notice to the buyer as may enable him to insure them during their sea transit, and, if the seller fails to do so, the goods shall be held to be at his risk during such sea transit.

Section 33 Risk Where Goods Are Delivered at Distant Place

Where the seller of goods agrees to deliver them at his own risk at a place other than that where they are sold, the buyer must, nevertheless, unless otherwise agreed, take any risk of deterioration in the goods necessarily incident to the course of transit.

8.15. These sections of the Act have remained unchanged since their enactment. The corresponding provisions at sections 29 and 33 of the UK Sale of Goods Act 1979 also remain identical to those enacted in 1893. Section 32 of the UK Act remains the same as that enacted in 1893 in respect of commercial contracts but, following an amendment made in 2002,[679] now provides in subsection (4) that subsections (1) to (3) must be ignored where the buyer deals as consumer. The subsection further provides that, where the seller is authorised or required to send the goods to a consumer buyer, delivery of the goods to the carrier is not delivery of the goods to the buyer.

8.16. The rules regarding the time, place and other aspects of delivery in sections 29 and 32-33 are relatively straightforward and have given rise to little or no significant case law. Unless the parties have agreed otherwise, the place of delivery is the

[679] The amendment was effected by the Sale and Supply of Goods to Consumers Regulations 2002 (S.I. 2002/3045), reg. 4(3) in tandem with the amendment made to section 20 of the 1979 Act, discussed in Chapter 5 above, which provides that goods remain at the seller's risk until delivered to the consumer.

seller's place of business if he has one and, if not, his residence. In the absence of an agreement to the contrary, therefore, there is no obligation on the seller to transport the goods to the buyer. Many commercial contracts, however, contain express terms as to the place of delivery. In f.o.b. (free on board) contracts, for example, the place of delivery is the ship's rail at the port of shipment. Where the contract is for the sale of specific goods known by the parties to be located somewhere other than the seller's place of business or residence, that location is the presumptive place of delivery. In most contracts for the sale of specific goods, however, the goods are likely to be on the seller's premises. Where the contract of sale requires the seller to send the goods to the buyer, delivery to a carrier, whether named by the buyer or not, is deemed *prima facie* to be delivery of the goods to the buyer. If, however, the carrier is the seller's agent, delivery to the carrier does not constitute delivery to the buyer. Unless otherwise authorised by the buyer, the seller is required to make a reasonable contract with the carrier on behalf of the buyer. If the seller fails to do so and the goods are damaged in transit, the buyer may refuse to regard delivery to the carrier as delivery to himself and can take an action for damages against the seller.

8.17. The seller is required to tender delivery of the goods at the time stipulated in the contract. Where the contract of sale requires the seller to send the goods to the buyer but no time is fixed for their dispatch, the seller is required to send them within a reasonable time. What is a reasonable time will depend on the circumstances of the case. It will be influenced by the nature of the goods so that, for example, a shorter period will typically apply to perishable items. A demand for, or a tender of, delivery, is effective also only if made at a reasonable hour. What is a reasonable hour is a question of fact. The delivery of goods to a building site outside working hours which resulted in their being left in an unlocked garage was held not to be delivery at a reasonable hour.[680] Unless otherwise agreed, all expenses of, and incidental to, putting the goods in a deliverable state are borne by the seller.[681] The Act does not deal with the expenses incurred by the seller in making delivery or by the buyer in taking delivery. At common law, however, these expenses, unless otherwise agreed, fall on the seller and buyer respectively.

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[680] *Ron Mead TV & Appliances v Legendary Homes* 746 P 2d 1163 (1987) (Okl App). .

[681] Per section 62(4) of the 1893 Act, goods are in a 'deliverable state' when they are in such state that the buyer would under the contract be bound to take delivery of them.

8.18. Section 33 provides that where a seller agrees to deliver goods at a distant place at his own risk, the buyer shall, unless otherwise agreed, bear the risk of any deterioration in the goods necessarily incident to the course of transit. According to Bridge,[682] the section is based on a case, *Bull v Robison*,[683] where a quantity of iron sent by canal rusted in transit. The court held that this was necessarily incident to canal transit and that the risk of deterioration had to be borne by the buyer.[684] It is possible, however, that the courts would now take a narrower view of what was, and was not, a necessary consequence of the course of transit. In *Mash and Murrell Ltd v Joseph I. Emmanuel Ltd*,[685] Diplock J. held that, where goods are sold under a contract which involves transit before use, there is an implied term in the contract that the goods should be despatched in such a condition that they can survive a normal journey so that they remain suitable, on delivery, for the usual purpose for which the goods are intended, and are of merchantable quality. It followed that[686]:

> … an extraordinary deterioration of the goods due to abnormal conditions experienced during the transit [is one] … for which the buyer takes the risk. A necessary and inevitable deterioration during transit which will render them unmerchantable on arrival is normally one for which the seller is liable.

Though this rule was expressed in the context of a transaction where the seller's duty was to despatch the goods under a c.i.f. (cost, insurance and freight) contract rather than under the specific circumstances covered by section 33, it may nevertheless influence the interpretation of the latter provision.[687]

Issues Arising

8.19. As noted earlier in the Chapter, the recently agreed Directive on Consumer Rights will contain a default rule applicable to all consumer contracts of sale requiring the trader to deliver the goods to the consumer by transferring the physical possession or control of the goods to the consumer without undue delay, but not later than thirty days, from the conclusion of the contract. This will require the amendment, in the case of consumer contracts of sale, of the rule at section 29(2) of the 1893 Act

[682] Bridge, **The Sale of Goods**, op. cit., para. 4.20.
[683] (1854) 10 Ex. 342.
[684] The vendor 'must indeed stand the risk of any extraordinary or unusual deterioration; but the vendee is bound to accept the article if only deteriorated to the extent that it is necessarily subject to in the course of transit from one place to the other.' Ibid. at 346.
[685] [1961] 1 W.L.R. 862. See also *Beer v Walker* (1877) 46 L.J.Q.B. 677.

[686] [1961] 1 W.L.R. 862 at 871.
[687] **Benjamin's Sale of Goods**, op. cit. para. 6-022.

requiring delivery within a reasonable time where the contract requires the goods to be sent to the buyer. There will also be a need in this event to amend the rule at section 32(1) of the Act which provides that delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer is, *prima facie*, deemed to be a delivery of goods to the buyer. The effect of this provision is that the risk in principle passes to the buyer on delivery to the carrier.[688] An amendment to section 32(1) would be required in event case by our recommendation in Chapter 5 that risk should pass with delivery in consumer sales. If delivery, rather than the passing of property, is the determining event for the passing of risk, the delivery provisions must clearly be integrated with those on risk. The aim of our recommendation in Chapter 5 on the passing of risk in consumer sales is that risk would pass to the consumer only when he has actually received the goods, and this would not be consistent with a rule that delivery to a third party, whether named by the buyer or not, was deemed to be delivery to a consumer buyer. The recently agreed Consumer Rights Directive will also contain a provision applicable to all contracts of sale that the risk of loss of, or damage to, the goods will pass to the consumer when he, or a third party indicated by him and other than the carrier, has acquired the physical possession of the goods. It will further provide that the risk will pass to the consumer upon delivery to the carrier if the carrier was commissioned to carry the goods by the consumer and that choice was not offered by the trader. The required changes to section 32 should be effected, as has been done in the UK Sale of Goods Act 1979, by providing that subsections (1) to (3) of the 1893 Act are not applicable to consumer contracts of sale. The amended provision should further provide that delivery of the goods to the carrier is not delivery of goods to the buyer in consumer contracts of sale unless the carrier has been commissioned by the consumer.

8.20. The adoption of amendments to sections 29 and 32 along the lines set out above in the case of consumer contracts raises the question of whether similar changes should be recommended for commercial contracts of sale. Though, as stated elsewhere in this Report, our preference is for common rules to apply to consumer

[688] If the contract is one for the sale of unascertained goods, however, the property will not normally pass to the buyer by delivery to the carrier unless and until the goods have been ascertained and, in consequence, the risk will not in principle pass until that time.

and commercial contracts, we do not favour the application of a thirty-day default delivery rule to commercial contracts. A very specific provision of this kind, even one of a presumptive nature, is unsuited to the diversity of circumstances and requirements found among delivery arrangements in commercial contracts. The existing rule at section 30(2) requiring delivery within a reasonable time where no time for sending the goods has been fixed by the parties should, therefore, continue to apply to commercial contracts of sale.

8.21. We have recommended in Chapter 6 that section 20 of the 1893 Act should be replaced by a presumptive rule in commercial contracts that risk passes with delivery. The retention or replacement of the rule at section 32(1) of the Act that delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer is *prima facie* deemed to be a delivery of goods to the buyer requires consideration in this context. The matter is less clear-cut than in the case of consumer contracts because of the range and complexity of the arrangements relating to delivery and insurance in commercial contracts. A default rule that risk passes with delivery could apply in the case of commercial contracts alongside a *prima facie* rule that delivery to a carrier is deemed to be delivery to the buyer. Provisions along these lines are to be found in the UN Convention on the International Sale of Goods. Article 67 of the Convention provides, among other things, that risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer in accordance with the contract of sale. Article 69 provides among other things that, in cases not within Article 67, the risk passes to the buyer when he takes over the goods. We consider, on balance, that the existing prima facie rule at section 32(1) that delivery of the goods to a carrier for transmission to the buyer is deemed to be a delivery of goods to the buyer remains appropriate to commercial contracts of sale and should be retained.

8.22. The default provision at section 33 of the 1893 Act requiring the buyer to take any risk of deterioration in the goods necessarily incident to the course of transit is incompatible with the rule in the recently agreed Consumer Right Directive that the risk of loss or damage will pass to the consumer only where he, or a third party indicated by him, has acquired the physical possession of the goods. At a minimum, therefore, consumer contracts of sale will have to be exempt from this provision in the

future. While the provision could be retained as a default rule in commercial contracts of sale, we consider on balance there is no compelling requirement for a special statutory rule dealing with the specific circumstances where the seller agrees to deliver the goods at his own risk to a distant place. Risk in transit in commercial contracts of sale should be covered instead by the general presumptive rule, recommended in this Report, that risk passes with delivery.

8.23. Recommendations

The provision for a thirty-day default delivery rule in the recently agreed Consumer Rights Directive will, in the case of consumer contracts of sale, replace the rule at section 29(2) of the 1893 Act requiring delivery within a reasonable time where the seller is bound to send the goods to the buyer, but no time for sending the goods is fixed. The existing 'reasonable time' rule should be retained for commercial contracts of sale.

Section 32 of the 1893 Act on delivery to carrier should be amended to provide that subsections (1) to (3) are not applicable to consumer contracts of sale, and that delivery of the goods to the carrier is not delivery of goods to the buyer in consumer contracts of sale unless the carrier has been commissioned by the consumer.

In the case of commercial contracts of sale, the existing rule at section 32(1) of the 1893 Act that delivery of the goods to a carrier, for the purpose of transmission to the buyer is deemed *prima facie* to be a delivery of the goods to the buyer should be retained.

Section 33 of the 1893 Act on risk where goods are delivered at a distant place should be repealed.

Section 30 Delivery of the Wrong Quantity

1) Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts the goods so delivered he must pay for them at the contract rate.
2) Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or he

may reject the whole. If the buyer accepts the whole of the goods so delivered he must pay for them at the contract rate.

3) Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or he may reject the whole.
4) The provisions of this section are subject to any usage of trade, special agreement, or course of dealing between the parties.

Section 31 Instalment Deliveries

1) Unless otherwise agreed, the buyer of goods is not bound to accept delivery thereof by instalments.
2) Where there is a contract for the sale of goods to be delivered by stated instalments, which are to be separately paid for, and the seller makes defective deliveries in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or to pay for one more instalments, it is a question in each case depending on the terms of the contract and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract or whether it is a severable breach giving rise to a claim for compensation but not to a right to treat the whole contract as repudiated.

These sections have remained unchanged since their enactment in 1893. The equivalent provision at section 30 of the UK Sale of Goods Act 1979 has undergone significant amendment, the substance of which is discussed below. The equivalent provision at section 31 of the UK Act remains the same as that enacted in 1893.

8.24. Section 30 sets out the rules and remedies which apply when the seller delivers the wrong quantity of goods. Subsections (1) to (3) cover the following scenarios:

1) Where the seller delivers a lesser quantity than that contracted for, the buyer may either reject the delivery or accept and pay for it at the contract rate. The buyer is also entitled to sue for damages for breach of contract.

2) Where the seller delivers a greater quantity than that contracted for, the buyer may (i) accept the quantity contracted for and reject the rest, (ii) reject the whole delivery, or (iii) accept the whole delivery and pay for it at the contract rate. He may also sue for damages for breach of contract if he exercises the first two of these options, but may be precluded from doing so if he accepts the excess delivery.[689]

3) Where the seller delivers the goods contracted for mixed with goods of a different description, the buyer may either accept the goods which match the contract description and reject the rest, or reject the whole delivery.

[689] In *Gabriel Ward & English Ltd v Arcos Ltd* (1929) 34 LL LR 306, the court held that a buyer accepting an excess delivery had entered into a new contract and could not claim damages for breach of the original contract. Bridge argues that acceptance of a shortfall in delivery also amounts to entry into a new contract, but should not estop the buyer from claiming damages for non-delivery under the original contract. Bridge, **The Sale of Goods**, op. cit., para. 6.48.

Per subsection (4), the rules and remedies in subsections (1) to (3) are subject to any usage of trade, special agreement, or course of dealing between the parties. The most common form of special agreement involves stating the quantity of goods in approximate terms by use of qualifying terms such as 'about' or 'more or less', or by fixing specific limits within which deviation from the contract quantity is permissible, such as '1,000 tons of wheat, 5 per cent more or less'.

8.25. The effect of the provisions at sections 30(1) and (2) is that, where the seller fails to delivers the quantity of goods contracted for, the buyer can reject the goods. *Behrend & Co v Produce Brokers Co*[690] concerned two contracts for the sale of 176 and 400 tons of cotton seed to be delivered from the seller's ship to the buyers' ship in the port of London. As most of the cotton seed was stowed beneath other cargo that had to be delivered to Hull before the seed could be removed, the first delivery comprised only 15 tons and 22 tons of seed respectively. The ship returned to London two weeks later to discharge the remaining seed, but the buyers notified the sellers before its arrival that they would not accept the balance of the goods. The court held that the buyers were entitled to retain the first, and reject the second, delivery. Though the buyer can reject the goods where the seller delivers a wrong quantity, it appears to be accepted, though there is no court ruling to this effect, that the seller can subsequently deliver the correct quantity and that the buyer is bound to accept the delivery provided it was made within the time period stipulated in the contract.[691] There is no obligation on the buyer, however, to accept a subsequent correct delivery outside the contract period.

8.26. The sole, if slight, mitigation of the rigours of the rules in sections 30(1) and (2) derives from the *de minimis* maxim.[692] *In Shipton Anderson & Co v Weil Bros*,[693] a surplus of 55 lbs of wheat over the contractually stipulated upper limit of 4,950 tons - amounting to an excess of 0.0005 per cent – was held to be so slight as to override the buyer's right to reject the goods. As Atiyah observes,[694] if the *de minimis* maxim 'had

[690] [1920] 3 KB 530. See also *Gill & Duffus SA v Berger & Co Inc* [1983] 1 Lloyd's Rep 622.
[691] **Benjamin's Sale of Goods**, op. cit., para. 8-052. Bradgate, R. & White, F. 1995. 'Rejection and Termination in Contracts for the Sale of Goods' in Birds, J. et al (eds). **Termination of Contracts** (Chicester: Wiley), p. 66.
[692] De minimis non curat lex – the law does not concern itself with trifles.
[693] [1912] 1 KB 574.
[694] Atiyah, **The Sale of Goods**, op. cit., p. 136.

not been applied in this case the rule would have lost all commercial importance.' In *Harland and Wolff Ltd v J Burstall & Co*,[695] the court held that the buyer was entitled to reject a delivery of 470 instead of the stipulated 500 loads of timber. The *de minimis* maxim is narrowly construed by the courts who, as Bridge comments,[696] will tolerate 'microscopic' but not 'minor' deviations from the contractual amount.

8.27. Section 30(3) which permits the seller to reject goods that do not match the contract description when mixed with goods matching that description constitutes an exception to the 1893 Act's bar on partial rejection of defective goods. This bar derives from the provision at section 11(3) of the 1893 Act which precludes rejection of the goods in non-severable contracts where all or part of the goods have been accepted by the buyer.[697] Where only a part of the delivered goods are defective, therefore, the buyer must either accept or reject all of the goods. Section 30(3) allows a form of partial rejection in the specific case of deliveries that mix goods matching and not matching the contract description. This right is confined to breaches of description and does not extend to breaches of other terms, such as those relating to merchantable quality or fitness for purpose. In *Ebrahim Dawood Ltd v Heath Ltd,*[698] the sellers contracted to supply 50 tons of steel sheets in varying lengths, but delivered the entire quantity in six-foot lengths. The court held that the buyer could rely on section 30(3) to accept part of the goods and reject the rest.

8.28. Section 31(1) provides that, unless otherwise agreed, the buyer is not bound to accept delivery by instalments. Taken in conjunction with section 30(1), this means that, in the absence of such an agreement, the seller cannot seek to make good a shortfall in delivery by undertaking to deliver the balance of the goods at a later time. Section 31(2) sets out the rules which apply where the parties have agreed to instalment deliveries that are to be paid for separately and either the seller makes defective deliveries in respect of one or more instalments, or the buyer neglects or refuses to take delivery of, or to pay for, one more instalments. The sub-section

[695] [1901] 84 LT 324.
[696] Bridge, **The Sale of Goods**, op. cit., para. 6.47.
[697] 'Where a contract of sale is not severable, and the buyer has accepted the goods, or part thereof, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty, and not as a ground for rejecting the goods and treating the contract as repudiated, unless there be a term of the contract, express or implied, to that effect.'
[698] [1961] 2 Lloyd's Rep. 512

provides that it is a question in each case depending on the terms of the contract and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract or whether it is a severable breach giving rise to a claim for compensation but not to a right to treat the whole contract as repudiated. Where the breach in respect of one or more instalments is sufficiently serious, it may be held to amount to a repudiation of the entire contract and thus permit the buyer to terminate.[699] Per Lord Hewart CJ in *Maple Flock Co. Ltd v Universal Furniture Products (Wembley) Ltd*:[700]

> The main tests to be considered in applying the sub-section … are, first, the ratio quantitatively which the breach bears to the contract as a whole and secondly, the degree of probability or improbability that such a breach will be repeated.

In this case, seller contracted to deliver one hundred tons of rag flock in thrice-weekly instalments of 1.5 tons each. The deliveries in the first fifteen weeks were satisfactory and were accepted by the buyers, but a consignment delivered in the sixteenth week was sub-standard. A further four satisfactory deliveries were tendered but rejected by the buyer who terminated the contract for breach in respect of the defective delivery. The court held that the buyer was not entitled to repudiate the contract as the breach affected only one consignment out of a total of over sixty and was unlikely to recur. In *Regent OHG v Francesco of Jermyn Street*,[701] the parties agreed a contract for the sale of sixty two suits for delivery in instalments at the seller's discretion over a three-month period. The court held that a shortfall of one suit in the fourth of five instalment deliveries did not give the buyer the right to repudiate the whole contract.[702] In *Robt A Munroe & Co Ltd v Meyer*[703], however, Wright J held that the buyer was justified in terminating a contract for the delivery of 1,500 tons of bonemeal in weekly instalments of 125 tons after deliveries amounting to nearly half of the total quantity of goods were found to be contaminated, stating:

> Where the breach is substantial and so serious as the breach in this case and has continued so persistently, the buyer is entitled to say that he has the right to treat the whole contract as repudiated.

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[699] *Warinco AG v Samor SPA* [1979] 1 Lloyd's Rep 450. See also *Millar's Karri and Jarrah Co v Weddel, Turner & Co* [1908] LT 128 at 129 where the importance of the probability of a recurrence of the breach was emphasised.
[700] [1934] 1 KB 148 at 157.
[701] [1981] 3 All ER 327.
[702] If the contract had been for a single delivery regulated by section 30(1), rather than an instalment contract regulated by section 30(2), a shortfall of one suit in an order of sixty two would almost certainly have justified the buyer in rejecting all of the goods as a short delivery on this scale would not be within the *de minimis* rule.
[703] [1930] 2 KB 312 at 331.

8.29. The contracts covered by section 31(2) under which goods are to be delivered in separate instalments and paid for separately are an example of severable, as opposed to entire, contracts. A contract is severable if liability under it accrues from time to time as performance of a part or parts of the contract takes place, and is entire where the liability of one party to perform is dependent upon complete performance of his obligations by the other.[704] The essence of a severable contract is that it is a single contract whose obligations are performed in a number of stages.[705] Defective performance under one part or instalment of the contract can accordingly have legal consequences for the other parts or instalments and on the contract as a whole. Where a number of separate contracts exist, by contrast, defective performance under one contract will ordinarily have no legal consequences for the other contracts. As noted above, moreover, severable contracts form an exception to the bar on partial rejection that follows from section 11(3) of the Act.

8.30. The courts have shown flexibility in interpreting the requirements governing severability under section 31(2). In *Jackson v Rotax Motor and Cycle Co*,[706] a contract for the sale of six hundred car horns of slightly different descriptions stipulated 'delivery as required'. The goods were delivered in nineteen cases over a period of two months. The Court of Appeal held that the words 'delivery as required' indicated that the parties intended the goods to be delivered in instalments and not in a single consignment. Though no specific provision was made in the contract for separate payment for the instalments, this was also held to be the intention of the parties. The contract was severable consequently, with Farwell LJ stating that it was 'impossible to suppose that the parties intended this to be an entire contract of sale with all the consequences that would follow.'[707] In *Longbottom & Co Ltd v Bass*

[704] **Benjamin's Sale of Goods**, op. cit, para. 8-071. Bridge comments that, although instalment contracts are certainly severable contracts, the Sale of Goods Act 'does not translate instalment contracts into the language of entire and severable contracts.' There 'may be severable contracts that are not instalment transactions' and 'entire contracts under which the goods are deliverable in instalments'. Bridge, **The Sale of Goods**, op. cit, para. 10.84 & fn. 304.
[705] Per Lord Hewart CJ in *Maple Flock Co. Ltd v Universal Furniture Products (Wembley) Ltd*[1934] 1 KB 148 at 154: 'A contract for the sale of goods by instalments is a single contract, not a complex of as many contracts as there are instalments under it.'
[706] [1910] 2 KB 937.
[707] Ibid., at 947.

Walker & Co Ltd,[708] a contract for the sale of cloth was held to be severable where the cloth was to be delivered in instalments, though payment was not made separately for these instalments.

Issues Arising

8.31. The principal issues raised by sections 30-31 of the 1893 Act concern, first, the need for the retention of provisions relating to delivery of the wrong quantity; second, the strictness of the rules governing delivery of the wrong quantity; and, third, the limited scope for partial rejection permitted by these sections and section 11(3). We will look at each of these questions in turn.

The Need for Specific Provisions on Delivery of the Wrong Quantity

8.32. Some commentators suggest that cases in which the wrong quantity of goods are delivered could be treated as breaches of the duty of the seller under section 13 of the 1893 Act to supply goods that correspond to their description. Atiyah, for example, is of the view that 'the whole of s.30 is merely an application of the duty to deliver goods conforming to their description', adding that 'it is one of the peculiarities of the drafting of the Act that s.13 is dealt with under the heading 'Conditions and Warranties', while s.30 is dealt with under 'Performance of the Contract'.'[709] When this issue was examined as part of a recent consultation by the English and Scottish Law Commissions, however, most respondents disagreed that the two obligations could be equated in this way and considered instead that section 30 was 'a reasonable, sensible, and logical set of rules to deal with the wrong quantity of goods being delivered.'[710] Professor Roy Goode, for example, commented[711]:

> I do not agree that delivery of the wrong quantity goes to description since this is concerned with the identity of the subject matter of the description.

We are of a similar view and, subject to the changes recommended below, are in favour of the retention of a provision along the lines of section 30.

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[708] [1922] WN 245.
[709] Atiyah, **The Sale of Goods**, op. cit., p. 137.
[710] The Law Commission and the Scottish Law Commission. 2009. **Consumer Remedies for Faulty Goods** (Law Com. No. 317, Scot. Law Com. No. 216), para. 3.127.
[711] Ibid., para. 3.128.

Strictness of the Rule on Delivery of the Wrong Quantity

8.33. Where a wrong quantity is delivered to the buyer, section 30 gives him the right, in the absence of any usage of trade, special agreement or course of dealing to the contrary, to reject all of the goods regardless of how slight the shortfall or excess may be. It is arguable that this remedy is disproportionate and liable to be unfair to sellers. Recourse to the remedy is also likely to be influenced by market conditions.[712] Where the seller delivers a lesser quantity than that contracted for and the price of the goods has fallen since the contract is made, the buyer has a clear incentive to reject the whole delivery and to buy substitute goods at the lower price. Where the price has risen, however, the buyer is likely to accept the short delivery and pay for it at the contract rate. These considerations led the Law Commission for England and Wales and the Scottish Law Commission to recommend that the right to reject for delivery of a wrong quantity should not apply where the excess or shortfall was so slight that it would be unreasonable to reject the whole of the goods.[713] This recommendation was given effect by section 4(2) of the Sale and Supply of Goods Act 1994 which inserted new subsections 30(2)(a) and (b) as follows in the Sale of Goods Act 1979:

> (2A) A buyer who does not deal as 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, the excess is so slight that it would be unreasonable for him to do so.
> (2B) It is for the seller to show that a shortfall or excess fell within subsection (2a)

A similar amendment has been to the Sale of Goods Act 1893 in Singapore.

8.34. The changes made to section 30 in the UK Sale of Goods Act 1979 are sensible and balanced in our view. They represent a qualified relaxation of the stringency of the rules on delivery of the wrong quantity, but put the burden of establishing that an excess or shortfall is so slight that rejection would be unreasonable on the seller. The restriction of the provisions to commercial contracts of sale is also correct in our opinion as this is not an issue likely to give rise to problems or abuses of a significant kind in consumer sales. An amendment of this kind would also bring the right of rejection for breach of the quantity provisions of the Act into line with our

[712] White, **Commercial Law**, op. cit., p.227.
[713] The Law Commission and the Scottish Law Commission. **Sale and Supply of Goods**, op. cit., paras. 6.20-6.21.

recommendation in Chapter 4 for the introduction of a statutory 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.

8.35. Recommendation

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

Partial Rejection

8.36. The effect of section 11(3) of the 1893 Act is that, unless a contract of sale is severable, a buyer who accepts some of the contract goods will be treated as if he had accepted all of them. He will not be able to reject the defective goods and keep the rest but must decide either to reject, or accept, all of the goods. The sole exception to this rule under the Act is that at section 30(3) which permits partial rejection where the seller delivers goods that do not match the contract description mixed with goods that match it. In this case, the buyer may accept the goods which are in accordance with the contract and reject the rest, or he may reject all of the goods. This exception applies only, however, where goods are of a different description to that contracted for and not where they are defective in quality or some other respect.

8.37. We are not persuaded by the rationale for either the Act's broad prohibition of a right of partial rejection or its single exception to in respect of goods of mixed description. At present, a buyer who has one hundred tons of wheat delivered to him, ten of which are of substandard quality, must choose between either accepting or rejecting the entire hundred tons. It would be more advantageous to both sellers and buyers in our opinion if he could also choose to retain the ninety tons that were unsatisfactory and to reject the ten tons that were defective. It is not uncommon in fact for commercial contracts to include a term to this effect. Any such right of partial rejection would, it is important to make clear, apply only where the buyer was entitled to reject the whole of the goods in accordance with the provisions on acceptance under section 35 of the Act. Under all of the above scenarios, the buyer would also have the right to claim damages. The provision permitting partial rejection for goods

that do not conform to description is also open to question. It is not clear to us why breaches relating to description merit different treatment to those relating to quality, particularly given the significant degree of overlap that often exists between these two aspects of the contract terms.

8.38. The US Uniform Commercial Code has included from its outset a right of partial rejection.[714] This provision influenced the recommendation of the English and Scottish Law Commission for the incorporation of a similar right in the UK Sale of Goods Act 1979.[715] This recommendation led to the insertion by the Sale and Supply of Goods Act 1994 of a new right of partial rejection as follows at section 35A of the UK Sale of Goods Act 1979:

> 35A. (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 instalment of goods, subsection (1) above applies as if references to the goods were references to the goods comprised in the instalment.
>
> (3) For the purposes of subsection (1) above, goods 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 in, or is to be implied from, the contract.

There is an important exception to the right of partial rejection in the UK Act for what, following the Uniform Commercial Code, are termed commercial units, that is goods whose division would materially impair the value of goods or the character of the unit. This covers, for example, items that form part of an integrated whole such as a pair of shoes or a multi-volume set of encyclopaedias.[716] A buyer is not permitted accordingly to accept one shoe of a pair or a single volume of an encyclopaedia set and reject the other part or parts of the unit. Related amendments to the UK Sale of Goods Act 1979 also repealed the exception to the right of partial rejection for deliveries of mixed description and clarified that the provision at section 11 precluding rejection of the goods in non-severable contracts where all or part of the goods have been accepted by the buyer was subject to the new section 35A.

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[714] Uniform Commercial Code, section 2-601.
[715] The Law Commission and the Scottish Law Commission. **Sale and Supply of Goods**, op. cit., paras. 6.6-6.11.
[716] Ibid., paras. 6.12-6.13.

8.39. Recommendation

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. This general right of partial rejection should replace the limited right of partial rejection for goods of mixed description at section 30(3) of the 1893 Act. Future legislation should also state that section 11(3) of the 1893 Act is subject to the provision on partial rejection.

CHAPTER NINE SALE OF GOODS ACT 1893 PERFORMANCE OF THE CONTRACT II – EXAMINATION, ACCEPTANCE & REJECTION OF THE GOODS, SECTIONS 34-37.

9.1. This Chapter first considers section 34 of the 1893 Act on the buyer's right to examine goods prior to accepting them and section 35 on the rules governing acceptance by the buyer. As the buyer's acceptance of the goods annuls his right to reject them, these provisions are pivotal to the remedies available to the buyer for goods not in conformity with the contract. The Chapter also considers the separate remedies regime for consumer contracts of sale under the European Communities (Certain Aspects of the Sale of Consumer Goods and Associated Guarantees) Regulations 2003.[717] The co-existence for consumer sales of parallel remedies' regimes of domestic and EU origin is one of the main issues in need of review. Lastly, the Chapter examines section 36 of the 1893 Act on the rules governing the return of rejected goods, and section 37 on the liability of the buyer for neglecting or refusing delivery of goods.

I Sections 34 & 35 Sale of Goods Act 1893

Section 34 Buyer's Right of Examining the Goods

1) Where goods are delivered to the buyer, which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.
2) Unless otherwise agreed, when the seller tenders delivery of the goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract.

Section 35 Acceptance

The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or subject to section 34 of this Act, 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 or when, without good and sufficient reason, he retains the goods without intimating to the seller that he has rejected them.

[717] S.I. No. 11 of 2003. The Regulations give effect to Directive 199/44/EC of the European Parliament and of the Council on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees.

9.2. Section 34 has not been amended in Ireland since its enactment in 1893.[718] Section 35 has been subject to significant amendment, the substance of which is discussed later in the Chapter along with the changes to the corresponding provisions in UK legislation. As noted in Chapter 4, the provision at section 11(1)(c) of the 1893 Act which, in the absence of an express or implied contract term to the contrary, removed the right to reject specific goods where the property in the goods had passed to the buyer was repealed by the Sale of Goods and Supply of Services Act 1980.[719] The 1980 Act also inserted the following provision at section 53(2) & (3) of the 1893 Act which gives consumer buyers the right to request 'cure', that is repair or replacement, of goods not in conformity with the contract:

> (2) Where—
>
> (a) the buyer deals as consumer and there is a breach of a condition by the seller which, but for this subsection, the buyer would be compelled to treat as a breach of warranty, and
>
> (b) the buyer, promptly upon discovering the breach, makes a request to the seller that he either remedy the breach or replace any goods which are not in conformity with the condition, then, if the seller refuses to comply with the request or fails to do so within a reasonable time, the buyer is entitled:
>
> (i) to reject the goods and repudiate the contract, or
>
> (ii) to have the defect constituting the breach remedied elsewhere and to maintain an action against the seller for the cost thereby incurred by him.
>
> (3) The onus of proving that the buyer acted with promptness under subsection (2) shall lie on him.

The Remedies Regime under the Sale of Goods Acts 1893 and 1980

9.3. Per section 27 of the 1893 Act, the seller's primary duty under the contract of sale is to deliver the goods in accordance with the terms of the contract. Where the seller fails in this duty, he is in breach of the contract and the buyer is entitled to pursue the applicable remedies against him. Such breach can take a number of forms as follows:

- Goods sold by description which do not correspond with the description (s.13 1893 Act);

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[718] Though it made no changes whatever to the original section, section 20 of the Sale of Goods and Supply of Services Act 1980 substituted a 'new' section 34 for that in the 1893 Act presumably because of the amendments made by the 1980 Act to section 35, and the reference in that section to section 34.

[719] The Minister for State at the Department of Industry, Commerce and Energy stated in the second stage speech on the Bill that:

> … it has been held that injustice can arise for a buyer under section 11(1)(c) which provides that once the the buyer has accepted specific goods, a breach of any condition which the seller should have fulfilled can only be treated as a breach of warranty and not as a ground for rejecting the goods. This seems to mean that the buyer loses his right to reject defective goods at the moment of purchase… the Bill proposes to change the basis for such an obvious injustice.

Dail Debates, Vol. 309, 16 November 1978 Sale of Goods and Supply of Service Bill 1978 Second Stage: cols. 1107-08.

- Goods which are not of merchantable quality (ss.14(2) & (3) 1893 Act);
- Goods which are not fit for a particular purpose made known by the buyer to the seller (s.14(4) 1893 Act);
- Goods sold by sample which do not correspond with the sample (s.15 1893 Act);
- Goods not delivered within a reasonable time, or goods delivered at an unreasonable hour (s.28 1893 Act);
- Goods supplied in the wrong quantity (s.30 1893 Act);
- Goods not in conformity with the implied warranty as to the availability of spare parts and an adequate after sale service (s.12 1980 Act).
- Motor vehicles not in conformity with the implied condition of freedom from dangerous defects (s.13 1980 Act);
- Goods not in conformity with another express term of the contract.

9.4. The distinction made by the 1893 Act between 'conditions' and 'warranties' is critical for the purposes of the remedies for breach available to an injured party. As discussed in Chapter 4, section 62 of the 1893 Act provides that a breach of warranty gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated. Per section 11(2) of the Act, breach of a condition, on the other hand, may give rise to a right to reject the goods and treat the contract as repudiated; the buyer may also claim damages for losses caused by the breach. In accordance with section 11(1) of the Act, the buyer may waive the condition or elect to treat the breach of a condition as a breach of warranty. The focus of this Chapter is on the remedies of rejection and cure. Issues relating to the remedies of damages are considered in Chapter 11.

9.5. We did not give detailed consideration in this context to the introduction of statutory provisions that would make manufacturers directly liable for defects in the quality of goods. There is no doubt that a case can be made in principle for direct producer liability of this kind. Manufacturers are already liable in tort for safety defects in their products under the Liability for Defective Products Act 1991.[720] As the manufacturer undertakes or oversees the design and production of the goods, he clearly has a level of control over, and responsibility for, their quality that far exceeds that of the seller of the goods. These arguments notwithstanding, we think that a change of this kind would not be of significant benefit to consumers in practice and could well operate to their detriment. Under the contract of sale between seller and

[720] No. 28 of 1991. The Act gives effect to Directive 85/374/EEC on Liability for Defective Products.

buyer, the seller's liability for breaches of the express or implied terms of the contract is clear, is widely understood and accepted and, on the whole, affords a workable and effective form of redress to the buyer. We are not convinced that consumers would enjoy a similarly clear and effective source of redress if manufacturers were made liable for breaches of a contract to which they were not party. As manufacturers would have no or limited control over key aspects of the contract such as the price, some limitations would have to apply to their liability and the resultant need to apportion liability as between manufacturer and seller would present considerable practical difficulties. In a situation in which manufacturers and sellers were jointly liable for the conformity of goods with the contract, consumers could face uncertainty and difficulty in establishing where liability lay in specific instances. It is noteworthy in this context that direct producer liability only operates in a minority of EU Member States, albeit with differences in scope and substance.[721] While proposals for the introduction of such liability have been put forward in the past by both the European Commission and the UK Government, they were not subsequently implemented.[722]

Rejection and Termination

9.6. The wording of sections 11 and 62 of the 1893 Act has created some uncertainty about the relation between the rejection of the goods and the termination of the contract. Both sections refer to a right to reject the goods **and** treat the contract as repudiated. The matter at issue consequently is whether rejection and termination are one and the same right, or are separate rights. Though rejection will commonly entail termination, it has been convincingly argued that the two rights are separate.[723] A

[721] France, Belgium, Portugal, Latvia, Lithuania, Spain and Slovenia. Schulte-Nolke, H. et al (eds), **EC Consumer Law Compendium: Comparative Analysis**, op. cit., pp. 695-696.

[722] European Commission. **Green Paper on Guarantees for Consumer Goods and After-Sales Services**, op. cit., para. 3.2. European Commission. **Green Paper on the Review of the Consumer Acquis**, op. cit, para. 5.9. UK Department of Trade and Industry. 1992. **Consumer Guarantees: A Consultation Document**, paras. 15-16.

[723] Bradgate, R. & White, F. 1995. 'Rejection and Termination in Contracts for the Sale of Goods' in Birds, J. et al (eds), **Termination of Contracts** (Chichester: Wiley), pp. 57-58. See also Law Commission and Scottish Law Commission. 2008. **Consumer Remedies for Faulty Goods: A Joint Consultation Paper**, para. 2.10. In *Kwei Tek Chao v British Traders and Shippers Ltd* [1954] 2 Q.B. 459 at 469, however, Devlin J. treated rejection as equivalent to termination, stating that 'a right to reject is merely a particular form of the right to rescind.'

buyer, for example, may reject the goods but request cure by means of repair or replacement, thereby keeping the contract alive. Similarly, as we saw in Chapter 8, where the buyer rejects a wrong quantity of goods that has been delivered within the period stipulated for delivery, there appears to be a broad measure of agreement among commentators that the seller may tender a second delivery of the correct quantity within that period.[724] It is less clear, though possibly also the case, that the seller can make a subsequent conforming tender in cases where the initial tender is rejected for breach of other implied or express conditions of the contract and there remains time to perform.[725] For practical purposes, the key requirement is that the statutory rules governing the remedies available for breaches of contracts of sale make clear the circumstances in which rejection of the goods entails termination of the contract and those in which it does not. The next section of this Chapter examines a number of specific issues raised by the provisions on examination and acceptance at sections 34 and 35.

The Buyer's Right of Examining the Goods and Acceptance

9.7. The provisions on examination of the goods at section 34 and on acceptance of the goods at section 35 are closely inter-related and need to be considered in tandem. Per section 35, a buyer loses his reject to reject the goods where he is deemed to have accepted them. Per section 34(1), where goods are delivered to the buyer which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract. Section 34(2) provides that the buyer should be given a reasonable opportunity to examine the goods where, first, he has asked to do so and, second, there is no agreement to the contrary. If the seller refuses the buyer the opportunity to examine the goods, the buyer is *prima facie*

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[724] The obligation to deliver the correct quantity under section 30 of the 1893 Act is not, in the absence of an express or implied term to the contrary, a condition of the contract and differs in this respect from the implied undertakings under sections 12-15 of the Act.

[725] **Benjamin's Sale of Goods**, op. cit., para. 12-031 summarises the matter as follows: 'There is a certain amount of authority relating to commercial contracts containing specific time limits, and most of it concerned with tender of documents, that a seller who has made a false tender can withdraw it and substitute a conforming tender before the relevant date, subject to paying any special expenditure or loss incurred by the buyer in connection with examining and rejecting the first tender. On this basis, it can be said that the common law gives in a sense some measure of a right to cure defects.' See also Bridge, **The Sale of Goods**, op. cit., paras. 10.130-135. Ervine, W.C.H. 'Cure and Retender Revisited' [2006] *J.B.L.* 799. **Goode on Commercial Law**, op. cit., pp. 372-73.

not in breach if he refuses to take delivery of them.[726] The Act does not define, or elaborate on, what constitutes a reasonable opportunity to examine the goods. This will depend on the nature of the goods and the circumstances of the case. It may extend, however, to a right to test the goods and view them in operation.[727] Any such tests must be of a normal and reasonable kind, however, and be carried out within a reasonable time.[728]

9.8. Section 35 provides that acceptance is deemed to occur in the following three ways:

(1) When the buyer intimates to the seller that he has accepted the goods;
(2) When the buyer does any act in relation to the goods that is inconsistent with the ownership of the seller;
(3) When, without good and sufficient reason, the buyer retains the goods without intimating to the seller that he has rejected them.

The substance of the first two heads of acceptance has remained unchanged since the enactment of the 1893 Act. The third head of acceptance was amended by the 1980 Act by the substitution of 'without good and sufficient reason' for 'after the lapse of a reasonable time'. Before looking at each of these modes of acceptance, we will consider the relation between examination and acceptance.

The Relation Between Examination and Acceptance

9.9. The 1893 Act did not deal with the question of the relations between the provisions on examination in section 34 and those on acceptance in section 35. In particular, it was silent on the question of which section was to prevail in a situation in which the buyer had not had a reasonable opportunity to examine the goods in accordance with section 34, but was deemed to have accepted them in accordance with the rules governing acceptance in section 35. Where, for example, a buyer performed an act inconsistent with the ownership of the seller before having an opportunity to examine the goods, he was deemed not to have accepted the goods under section 34, but to have accepted them under section 35. These were the

[726] **Benjamin's Sale of Goods**, op. cit., para. 12-039.
[727] *Heilbutt v Hickson* (1872) LR 7 CP 438. *Walter Potts & Co Ltd v Brown Macfarlane & Co. Ltd* (1934) 30 Com. Cas 64. *Winnipeg Fish Co. v Whitman Fish Co.* (1909) 41 S.C.R. 453. *Burroughs Business Machines Ltd v Feed-Rite Mills* (1962) Ltd [1973] 42 D.L.R. (3rd) 303.
[728] *Heilbut v Hickson* (1872) LR 7 CP 438 at 451. *Truk (UK) Ltd v Takmakidis GmbH* [2000] 1 Lloyd's Rep 543.

circumstances at issue in *Hardy & Co. Ltd v Hillerns & Fowler*.[729] The buyer contracted to purchase wheat that was to be shipped from South America. Shortly after the wheat arrived in England, the buyer sold part of it and dispatched it to a sub-buyer. Following the sub-sale, the buyer had his first opportunity to examine the wheat and discovered that it did not conform to the contract. When he sought to reject the wheat, however, the Court of Appeal held that, as the sub-sale constituted an act inconsistent with the seller's ownership, the buyer had accepted the goods and forfeited the right to reject. The effect of the judgement was that section 35 was held to prevail over section 34 where the two were in conflict. In *E. & S. Ruben Ltd v Faire Bros. & Co. Ltd*,[730] rubber sheeting was purchased by the buyer to be delivered direct by the seller to a sub-buyer. The court held that the buyer had taken constructive delivery of the goods at the seller's premises and that the seller had acted as the buyer's agent in shipping the goods to the sub-buyer. The buyer could not reject the goods consequently as the act of dispatching them to the sub-buyer's premises was inconsistent with the seller's ownership. A different conclusion was reached on broadly similar facts, however, by a New Zealand court in *Hammer and Barrow v Coca-Cola*.[731] The plaintiff contracted to sell a quantity of yo-yos to the defendants under an agreement which provided that the goods would be delivered to the premises of a third party to whom the defendants had previously contracted to supply the items. The court held that, in dispatching the goods to the third party, the seller was acting as a seller making delivery in accordance with the contract of sale. The dispatch of the goods to the sub-buyer accordingly was not an act inconsistent with the seller's ownership, and the buyer was entitled to reject the goods.

9.10. As sub-sales by buyers are a routine occurrence in commercial life, section 35(1) of the 1893 Act was amended in the UK by the Misrepresentation Act 1967 in order to reverse the ruling in *Hardy*. The amendment took the form of the insertion of a reference in parenthesis to section 34 before the head of acceptance in section 35 that dealt with acts inconsistent with the ownership of the seller. The section as revised read:

1) The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or (except where section 34 above otherwise

[729] [1923] 2 K.B. 490.
[730] [1949] 1 K.B. 254.
[731] [1962] N.Z.L.R. 723.

> provides) 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, or when after the lapse of a reasonable time he retains the goods without intimating to the seller that he has rejected them.

The effect of the amendment was that the buyer could not be deemed to have accepted goods by virtue of doing an act inconsistent with the seller's ownership of the goods until he had had a reasonable opportunity of examining them for the purpose of ascertaining their conformity with the contract. Drafting changes apart, the corresponding amendment to section 35 made by the Sale of Goods and Supply of Goods Act 1980 was similar in substance. This states that:

> The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or, subject to section 34 of this Act, 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 or when, without good and sufficient reason, he retains the goods without intimating to the seller that he has rejected them.

9.11. Though the revised section 35 substituted by the 1980 Act sought to clarify the relation between sections 34 and 35, it left aspects of that relation unresolved.[732] It appears clear that the first head of acceptance (intimation of acceptance by buyer) is not subject to section 34 and that the second head (doing of any act inconsistent with the seller's ownership) is so subject. It is less clear, however, whether the third head of acceptance (retention of the goods without intimating rejection) is subject to the right of examination.[733] Though not conclusive on the point, the Seanad Committee Stage debate on the legislation suggests that the intention was to subject only the second head of acceptance to this right. The then Minister of State at the Department of Industry, Commerce and Tourism stated that[734]:

> The courts have held that section 35 prevails over section 34 and a buyer is deemed to have accepted the goods if he has carried out any act which is inconsistent with ownership of the seller notwithstanding that he has not exercised his right under section 34 to examine the goods before acceptance. One example of a case which illustrates the existing precedence of section 35 over section 34 is that of *Harding* (sic) *& Company Ltd versus Hillar* (sic) *and Fowler* where

[732] White, **Commercial Law**, op. cit., pp. 296-97.
[733] The amendment effected by the Misrepresentation Act 1967 applied only to acceptance by an act inconsistent with the seller's ownership. The text of the UK provision, unlike that of section 35 of the 1980 Act, however, included a comma at the end of the clause dealing with this head of acceptance.
[734] **Seanad Debates**, Vol. 93 - 27 March 1980, Sale of Goods and Supply of Services Bill 1978: Committee Stage Resumed, cols. 1588-89. See also. Grogan, V. et al. **Sale of Goods and Supply of Services: A Guide to the Legislation**, op. cit., para. 66

> notwithstanding that the buyer had not had the opportunity of examining the goods, a resale and delivery of the goods by the buyer, an act deemed to be inconsistent with the ownership of the seller, deprived him of the right of rejection. It is clearly unfair that the buyer should be robbed of his right to examine the goods by the provisions of section 35 of the 1893 Act. Accordingly the Bill rectifies this situation and qualifies the application of section 35 in a transaction involving the sale of goods with the provision of section 34.

9.12. A second source of uncertainty concerns the extent to which the second head of acceptance under section 35 is subject to section 34. The reference to section 34 does not distinguish between subsections (1) and (2) of the section, thus suggesting that it is intended to apply to both. It is clear that any heads of acceptance in section 35 not subject to section 34 should not be subject to section 34(1) as this deals with deemed acceptance. There seems no reason, however, why these forms of acceptance should also be excluded from the more general provision in section 34(2) obliging the seller, on request, to afford the buyer a reasonable opportunity of examining the goods.

9.13. These uncertainties around section 35 have been clarified in a further amendment of the corresponding provisions in the UK Sale of Goods Act 1979 effected by the Sale and Supply of Goods Act 1994.[735] Sections 35(1) and (2) of the 1979 Act now read:

> 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 ascertaining 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.

This way of framing the provisions makes clear, first, the specific heads of acceptance that are subject to the right of examination and, second, that it is only the provision on deemed non-acceptance in the absence of an opportunity to examine the goods, formerly at section 34(1) of the Act, that is applicable. The general obligation on the

[735] The amendment followed a recommendation from the English and Scottish Law Commissions for the reorganisation of the structure of sections 34 and 35 in order to make the relationship between them. The Law Commission and the Scottish Law Commission. **Sale and Supply of Goods**, op. cit., Appendix A, pp. 74-75.

seller to afford, on request, a reasonable opportunity of examining the goods to the buyer remains as a free-standing provision in section 34. A similar change involving the transfer of section 34(1) to section 35 should be made in future Irish sale of goods legislation.

9.14. Recommendation

Future legislation should integrate the examination provision at section 34(1) of the 1893 Act with the acceptance provisions at section 35 of the Act in order to clarify the interrelation between the provisions on the examination and acceptance of goods.

9.15. As discussed in Chapter 5, exemption clauses which sought to exclude or restrict the terms implied into contracts of sale by statute became a source of increasing concern from the third quarter of the last century. In response, amendments to section 55 of the 1893 Act made by the Sale of Goods and Supply of Services Act 1980 provide that clauses excluding or restricting the implied undertakings under the 1893 Act are void where the buyer deals as consumer and, in other cases, are - with the exception of the implied undertaking as to title which is void in all circumstances - enforceable only where shown to be fair and reasonable. The provisions at section 34 and 35 which safeguard against deemed acceptance where the buyer has not had a reasonable opportunity of examining the goods are not afforded similar protections against exemption clauses. We consider that consumer buyers should enjoy such protections and note that this has been afforded them by section 35(3) of the UK Sale of Goods Act 1979. This subsection states that, where the buyer deals as consumer, he cannot lose his right, by agreement, waiver or otherwise, to rely on section 35(2) – i.e. the provision precluding acceptance until the consumer has had a reasonable opportunity of examining the goods. In addition to exemption clauses, the sub-section covers loss of the right of examination by the application of common law rules such as waiver or estoppel. A provision along these lines should be included in future Irish sale of goods legislation. We consider, however, that contracting out of this right of examination should remain possible in commercial sales.

9.16. Recommendation

Where acceptance by the buyer is subject to his having a reasonable opportunity of examining the goods for the purpose of examining their conformity with the contract, future legislation should provide that consumer buyers cannot lose this right by agreement, waiver or otherwise.

9.17. As outlined at paragraph 9.13, section 35(2)(b) of the UK Sale of Goods Act 1979 deals with the opportunity to be given to the buyer to examine the goods for the purpose of ascertaining the bulk with the sample. As discussed in Chapter 4, this addition to section 35 of the UK Act followed from the new provision inserted at section 15A of that Act which removes the right to reject in commercial sales for slight breach of the implied terms under sections 13-15 of the Act.[736] Because the slight breach rule could not readily be applied to the implied condition of reasonable opportunity to compare the bulk with the sample under section 15(2)(b), this sub-section was deleted from section 15 and transferred in substance to section 35 of the 1979 Act. As we are proposing the introduction of a similar restriction on rejection for slight breach in commercial sales, we have recommended at paragraph 4.62 that a similar consequential amendment be made to section 35.

First Head of Acceptance: Intimation to Seller

9.18. This head of acceptance provides that the buyer loses the right to reject the goods when he intimates to the seller that he has accepted them. According to Bridge, its has its origin 'in the practice of buyers examining goods at the seller's premises, and acceding to the seller's delivery of them under the contract', a factor which accounts for 'the rather vague word "intimation"'.[737] Such intimation can be oral, written, or be implied by the buyer's conduct, but must be clear. In *Varley v Whipp*,[738] a letter of complaint by the buyer about an unsatisfactory reaping machine stating that it was of no use to him and requesting a meeting with the seller was, despite the absence of any express statement of rejection, held not to constitute acceptance. In *Clegg v Andersson*,[739] a case concerning a yacht with an overweight keel, the Court of

[736] The amendments to sections 15 and 34 of the 1979 Act were effected by the Sale and Supply of Goods Act (1994 Chapter 35), ss. 3(1), 4(1), & 8(2).
[737] Bridge, **The Sale of Goods**, op. cit., para. 10.60.
[738] [1900] 1 Q.B. 513.
[739] [2003] EWCA Civ 320.

Appeal rejected the reasoning of the trial judge that a number of statements made by the buyer – that he liked the yacht despite the problem with the keel, that it was his decision whether remedial work should be carried out on the vessel, and that he intended to move it to Portugal – amounted to an intimation of acceptance. These statements were conditional on the buyer's receiving a satisfactory response from the seller in respect of concerns expressed about defects affecting the vessel. The Court of Appeal also rejected the trial judge's finding that the storage of personal possessions on the yacht by the buyer was an intimation of acceptance.

Issues Arising

9.19. The joint 1987 report of the English and Scottish Law Commissions on the Sale and Supply of Goods drew attention to the issue of 'acceptance notes', that is, notes signed by the buyer on the delivery of goods which go beyond a mere acknowledgement of delivery.[740] Such notes might state, for example, that the goods were received in good condition or that the buyer 'accepts' the goods. As a note of this kind, or its verbal equivalent, could be held to amount to an intimation of acceptance for the purposes of section 35(1), a buyer who signed it, or made a similar verbal statement, could be denied the right to reject the goods even if the buyer had not had an opportunity to examine them. Like the equivalent provision in Irish legislation, section 35 of the UK Sale of Goods Act 1979 did not make this mode of acceptance subject to the buyer's right to examine the goods under section 34. The Law Commissions recommended accordingly that, as in the case of acceptance by means of an act inconsistent with the ownership of the seller, the buyer should not be deemed to have accepted goods by means of intimation of acceptance unless he had had a reasonable opportunity of examining the goods for the purpose of ascertaining their conformity with the contract. This recommendation was given effect by means of an amendment to section 35 of the UK Sale of Goods Act 1979 made by the Sale and Supply of Goods Act 1994.[741] Though there is no information available to us about the extent to which acceptance notes of this kind are used in practice, the risk of the loss of the right of rejection in such circumstances should be precluded by means of legislative provisions similar to those under the UK Act.

[740] The Law Commission and the Scottish Law Commission. **Sale and Supply of Goods**, op. cit., paras. 5.20-5.22.
[741] Sale and Supply of Goods Act 1994 (1994 Chapter 35), s. 2.

9.20. Though an amendment along these lines would enhance the position of both consumer and commercial buyers, we think that it can reasonably be asked whether this head of acceptance should apply at all to consumer sales. There may be circumstances in commercial sales where intimation of acceptance is part of the normal dealing between the parties. In the case of consumer sales, however, it is difficult to see a justification for a head of acceptance whose rationale is not readily apparent and which might frequently prove more restrictive than the main mode of acceptance under section 35 – retention of the goods, without good and sufficient reason, by the buyer without intimating rejection to the seller. As there may be grounds for the retention of intimation by acceptance of which we have taken insufficient account, our recommendation for its non-application to consumer sales is subject to review if convincing evidence can be produced that such a change would advantage consumers to an unreasonable degree.

9.21 Recommendations

The rules on acceptance in future legislation should be amended to provide 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.

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.

Second Head of Acceptance: Acts Inconsistent with the Ownership of the Seller

9.22. This head of acceptance provides that the buyer loses the right to reject the goods when he does any act in relation to them which is inconsistent with the ownership of the seller. It is widely seen as the most problematical element of section 35.[742] Conceptually, the provision raises the question of how a buyer to whom the property in the goods has already passed can perform an act that is inconsistent with

[742] Atiyah, **The Sale of Goods Act**, op. cit. p. 509. Bridge, **The Sale of Goods Act**, op. cit, para. 10.62.

the seller's ownership. As noted in Chapter 6, it is not uncommon for the property in the goods to pass before delivery. In the case of specific goods in a deliverable state, section 18 of the Act expressly provides that, unless otherwise agreed, the property passes when the contract is made regardless of the time of delivery and/or payment. In *Kwei Tek Chao v British Traders and Shippers Ltd*,[743] Devlin J. suggested that where the property in the goods has passed in circumstances in which the buyer retains the right to reject:

> [the buyer] gets only conditional property in the goods, the condition being a condition subsequent… It follows, therefore, that there can be no dealing which is inconsistent with the seller's ownership unless he deals with something more than the conditional property. If the property passes altogether, not being subject to any condition, there is no ownership left in the seller with which any inconsistent act under s.35 could be committed. If the property passes conditionally the only ownership left in the seller is the reversionary interest in the property in the event of the condition subsequent operating to restore it to him. It is that reversionary interest with which the buyer must not, save with the penalty of accepting the goods, commit an inconsistent act.

The buyer may still be entitled, therefore, to reject the goods in such circumstances and, if he does so, the property will revest in the seller, making him the owner of the goods once again.

9.23. Section 35 offers no guidance as to what constitutes an act inconsistent with the seller's ownership, and the case law has thrown up a range of situations that have been claimed or held to come under this heading.[744] The main questions raised by this head of acceptance relate to (i) delivery of the goods to a third party by means of sub-sales or other dealings; (ii) attempts at, or agreement to, repair of the goods, and (iii) the use of the goods in such a way that they cannot be restored to the seller in substantially the same condition as when they were delivered. We will look at each of these issues in turn.

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[743] [1954] 2 Q.B. 459 at 487.

[744] In *Armaghdown Motors Ltd v Gray Motors Ltd* [1963] NZLR 5, the registration of a motor car by the buyer in his own name was held to be an act inconsistent with the seller's ownership, a ruling that in Bridge's view was 'surely wrong'. Bridge, **The Sale of Goods**, op. cit, para. 10.62 fn. 234. See also **Goode on Commercial Law**, op. cit., p. 379-80. White, **Commercial Law**, op. cit., p. 298.

Sub-Sale of Goods and Acceptance

9.24. Sub-sale and delivery to a third party is generally regarded as the most common form of act inconsistent with the ownership of the seller and, as discussed in the previous section, the leading cases relating to this head of acceptance have involved this type of situation.[745] In response to these cases, section 35 was amended by the 1980 Act to provide that the buyer was not deemed to have accepted goods by virtue of doing an act inconsistent with the seller's ownership of the goods until he had had a reasonable opportunity of examining them for the purpose of ascertaining their conformity with the contract. Though this amendment addressed some of the deficiencies in the existing provision, it did not go far enough. The sub-sale, gift or other disposition of goods by the buyer should not, in our opinion, automatically preclude the remedy of rejection. Under the current provision on this head of acceptance, a retailer who sells goods to a consumer who then rejects them can be denied the right to reject the goods and return them to the manufacturer or wholesaler. Section 35(6)(b) of the UK Sale of Goods Act 1979, as amended in 1994, provides that the buyer is not deemed to have accepted the goods merely because the goods are delivered to another under a sub-sale or other disposition. A similar provision should be included in future Irish sale of goods legislation.

Repair of Goods and Acceptance

9.25. In their 1987 Report on Sale and Supply of Goods, the English and Scottish Law Commissions raised the possibility that a buyer who asked the seller to repair defective goods, or who agreed to the seller's offer to repair them, could be held to be doing an act inconsistent with the seller's ownership of the goods.[746] The buyer's consent to cure in such circumstances might also amount to acceptance by intimation. Though the Commissions thought that this outcome was unlikely,[747] they recommended that, for the avoidance of doubt, section 35 should be amended to clarify that attempts at cure should not of themselves deprive the buyer of his right to reject the goods. This recommendation was implemented by an amendment to section 35 of the UK Sale of Goods Act 1979 made by the Sale and Supply of Goods Act

[745] Atiyah, **The Sale of Goods**, op. cit., p. 513.
[746] The Law Commission and the Scottish Law Commission. **Sale and Supply of Goods**, op. cit., paras.5.27-5.29.
[747] Consent to cure by the buyer may be more likely perhaps to lead a loss of the right to reject on the ground that it results in the time limit for rejection being exceeded than on the ground that it amounts to an intimation of acceptance. See *Lee v York Coach and Marine* [1977] RTR 35.

1994. Section 35(6)(a) of the 1979 Act provides that the buyer is not deemed to have accepted the goods merely because he asks for, or agrees to, their repair, by or under an arrangement with the seller. A provision along the lines would be a useful clarifying measure in our opinion and should be included in future Irish sale of goods legislation. It should be noted that, though consent to cure of itself is not regarded as entailing acceptance under the UK provision, it could, in all the circumstances of a case, be one of a number of factors that might cumulatively be found to amount to acceptance.[748] As the subsection, moreover, only covers agreements with the seller for the repair of the goods, repair arrangements made by the buyer with a third party, such as the manufacturer, will not afford protection against a claim that consent to cure entails acceptance.

Use of Goods and Acceptance

9.26. Though there is little direct authority on the point, there is broad agreement among commentators that the use of goods more than is necessary to ascertain their conformity with the contract may constitute an act inconsistent with the seller's ownership if it prevents the return of the goods in substantially the same condition as when they were delivered.[749] The incorporation of goods in other goods or in a building might similarly be held to amount to an act inconsistent with the seller's ownership.[750] Though these types of scenario may appear relatively straightforward, there are considerable difficulties in establishing the scope and substance of this mode of acceptance. First, the loss of the right of rejection on this ground is difficult to separate from its loss under the third head of acceptance, namely retention of the goods without good and sufficient reason for not intimating rejection to the seller. Secondly, it is difficult in many cases to test goods to the extent needed to ascertain their conformity without rendering their condition substantially different from that obtaining at the time of delivery. Unless returned more or less immediately, perishable items of their nature cannot be restored to the seller in the condition in which they were delivered. A boiler has to be installed before it can be established that it is working satisfactorily. Wallpaper may have to be hung in order to ascertain

[748] The Law Commission and the Scottish Law Commission. **Consumer Remedies for Faulty Goods: A Joint Consultation Paper**, op. cit., para. 3.15.
[749] Atiyah, **The Sale of Goods**, op. cit., p.515. **Benjamin's Sale of Goods**, op. cit., para. 12-047. **Bridge**, **The Sale of Goods**, op. cit., para. 10.62. **Goode on Commercial Law**, op. cit., p. 382. White, **Commercial Law**, op. cit., p. 298.
[750] *Harnor v Groves* (1855) 15 C.B. 667.

its conformity with the contract. Food may have to be cooked to assess its quality. The limited case law shows an acknowledgement of these factors by the courts. In *Heilbut v Hickson*,[751] rejection was permitted after shoes intended for the army were tested by breaking open the soles of, first, a small sample and, then, a larger quantity in order to ascertain their conformity with the contract. In *Winnipeg Fish Co v Whitman Fish Co*,[752] the buyer was allowed to reject frozen fish that had to thaw before their conformity could be ascertained. Thirdly, other factors may over-ride the effect of the use of goods on acceptance. In *Clegg v Andersson*,[753] the beneficial use of a yacht for six months did not preclude rejection as the buyer was in regular contact with the seller about remedying the problems with the vessel. In *Fiat Auto Financial Services v Connelly*,[754] the use of a car as a taxi for ten months covering 40,000 miles was held not to be inconsistent with the seller's ownership as the buyer had made frequent complaints to the seller over the period about the vehicle's quality. Both cases were decided after the enactment of section 35(6)(a) of the UK Sale of Goods Act 1979 which provides that a buyer is not deemed to have accepted the goods merely because he asks for, or agrees to, their repair by or under arrangement with the seller.

9.27. Our examination of this head of acceptance included the question of whether there was a case for its repeal in full, particularly for consumer sales. We noted in this connection that the English and Scottish Law Commissions came close to recommending its abolition in 1987, but decided 'after long consideration and not without some regret' to recommend its reform instead.[755] Our recommendations that sub-sale and repair would no longer be regarded as acts inconsistent with the ownership of the seller would remove two of the main grounds of this head of acceptance. The main remaining act inconsistent with the seller's ownership for the purpose of this head of acceptance is, therefore, that of excessive use of the goods for the purpose of ascertaining their conformity with the contract such that they cannot be restored to the seller in substantially their original condition. Though abolition of this head of acceptance would have the merit of further simplifying the rules on

[751] (1872) LR 7 CP 438.
[752] (1909) 41 S.C.R. 453
[753] [2003] EWCA Civ 320.
[754] [2007] SLT (Sh Ct) 111.
[755] The Law Commission and the Scottish Law Commission. **Sale and Supply of Goods**, op. cit., para. 5.37 & paras. 5.32-5.36 & 5.38.

acceptance, it has the potential to lead to abuses by buyers and we are reluctant for this reason to recommend it.

9.28. Recommendations

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.**
b) **the buyer asks for, or agrees to, the repair of the goods.**

Third Head of Acceptance: Retention Without Intimating Rejection

9.29. Under the third head of acceptance in section 35, the buyer is deemed to have accepted the goods – and hence to have lost the right of rejection – 'when, without good and sufficient reason, he retains the goods without intimating to the seller that he has rejected them'. As noted earlier, the 1980 Act substituted the 'without good and sufficient reason' test for the original provision in the 1893 Act that the buyer was deemed to have accepted the goods 'when after the lapse of a reasonable time' he retained them without intimating rejection. The latter provision remains in force under section 35(4) of the UK Sale of Goods Act 1979. Before looking at the background to the change made by the 1980 Act, we will look at the operation of the 'lapse of reasonable time' rule prior to its repeal.

9.30. Though the right to reject is widely seen as a long-established, readily available remedy, it was substantially circumscribed at common law and as originally included in the Sale of Goods Act 1893. Under section 11(1)(c) of the 1893 Act prior to its amendment by the 1980 Act, the buyer did not have a right of rejection where the contract was for the sale of specific goods. Buyers were entitled to reject non-specific goods but, prior to the amendment of section 35 made by the 1980 Act, the time afforded them to do so was generally quite brief. While section 56 of the 1893 Act provides that the question of what is a reasonable time is a question of fact, the interpretation put on this head of acceptance by the courts reflected the traditional

conception of rejection as a short-term remedy. In *Perkins v Bell*,[756] the buyers took delivery of a quantity of barley at a railway station from where they dispatched it to a brewer who proceeded to reject it. The Court of Appeal held that the buyers should have inspected the goods at the station and that their failure to do so resulted in the loss of the right to reject. In the Irish case of *Gill v Thomas Heiton & Co. Ltd*,[757] the plaintiff wholesalers sold a barge-load of turf to the defendant retailers. Shortly after the unloading of the turf commenced, the buyers noted that it was defective in quality and unfit for resale, though they continued to unload it until the entire consignment had been removed from the barge. On the next day, the buyers informed the plaintiffs that they were rejecting the goods. The High Court held that the buyers had not exercised the right to reject with sufficient promptness and had acted in a manner inconsistent with the seller's ownership of the goods. Though these cases concerned goods bought for resale by commercial buyers, the courts showed little inclination in this period to allow a longer time for rejection where goods were bought for use. In *Flynn v Scott*,[758] the court held that the buyer could not reject a van three weeks after it had broken down, stating that this should have been done 'within a very few days'. In *Long v Lloyd*,[759] a misrepresentation case concerning the sale of a second-hand lorry, the court interpreted section 35 as providing that the right to rescind was lost after less than a week.

9.31. Though the fact-centred character of this head of acceptance makes it difficult to discern a consistent trend in judicial interpretation, there is evidence from the mid-twentieth century of a greater willingness on the part of the courts to countenance a longer period for the inspection and rejection of goods.[760] This may have been linked in part to the fact that cases involving complex manufactured products featured somewhat more prominently when compared with the preponderance of cases involving the sale of raw materials and rudimentary manufactured goods in the earlier case law. In a Canadian case, *Public Utilities Commission of City of Waterloo v*

[756] [1893] 1 Q.B. 193.
[757] [1943] Ir. Jur. Rep. 67.
[758] [1949] S.C. 442 at 446.
[759] [1958] All ER 402.
[760] The Law Commission and the Scottish Law Commission. **Consumer Remedies for Faulty Goods: A Joint Consultation Paper**, op. cit., para. 3.23.

Burroughs Business Machines,[761] for example, the court held that the buyers were entitled to reject a computer system fifteen months after its delivery as the goods were complex and novel and the buyers had striven throughout the period to make the system function properly. In *Manifatture Tessile Laniera Wooltex v JB Ashley Limited*,[762] the buyers purchased cloth from the seller in a number of batches and sold it on to sub-buyers without examining it. Seven weeks after the first delivery, the buyers received the first complaints from the sub-buyers about the quality of the cloth and, following meetings with the sellers which culminated in threats that rejection would be treated as a breach of contract, they sought to reject the goods three-and-a-half months after delivery. The Court of Appeal held that the 'reasonable time' allowed for rejection under the 1893 Act had not elapsed and that the buyers were entitled to reject the goods. In circumstances where the buyers were threatened that rejection would be treated as a breach of contract, it was legitimate for them to take particular care to examine the goods, including consultations with sub-buyers. The readiness of the courts to extend the time period permitted for rejection, however, should not be overstated. The consumer cases that came before the courts mainly involved contracts for the sale of motor vehicles. Atiyah has observed of the cases of this kind heard before the amendment of the rules on acceptance by the UK Sale and Supply of Goods Act 1994 that:[763]

> There is no doubt that, in general, the tendency under the former provisions was to hold that the right of rejection is lost speedily where goods were in daily use, and this normally meant days rather than weeks or months.

9.32. One such case which arose in 1977, *Lee v York Coach and Marine Ltd*,[764] had a decisive impact on the amendment to section 35 of the 1893 Act made by the Sale of Goods and Supply of Services Act 1980. The buyer of a defective motor car sought to reject it six months after delivery, during which time attempts had been made both to remedy the defects and to persuade the seller to acknowledge his obligations in this regard. The court held, however, that the reasonable time allowed for rejection had elapsed and that the buyer was not entitled to reject the vehicle. Though the Sale of Goods and Supply of Services Bill 1978 as initiated had retained the 'after a lapse of a

[761] (1974) 52 D.L.R. 481. Bridge suggests that, until recent years, Canadian courts were more likely than those in England to allow a longer time period for rejection. Bridge, **The Sale of Goods**, op. cit., para. 10.58, fn. 215.
[762] [1979] 2 Lloyd's Rep. 28.
[763] Atiyah, **The Sale of Goods**, op. cit., p. 516.
[764] [1977] R.T.R. 35.

reasonable time' wording from the 1893 Act,[765] it was decided in the light of the *Lee* judgement to amend the section at the Bill's Committee Stage in Dáil Éireann. The then Minister for State at the Department of Industry, Commerce and Tourism moved an amendment for the deletion of 'after the lapse of a reasonable time' and the substitution of 'without good and sufficient reason', stating:[766]

> This section amends section 35 of the 1893 Act by extending the time-limit before a buyer is deemed to have accepted the goods. A United Kingdom Appeal Court decision *Lee v York Coach and Marine* – ruled that a consumer who had not 'rejected' a defective motor car during the period of six months while attempts were being made to have it mended or to persuade the seller to acknowledge their legal obligations, meant that the consumer had 'accepted' the car. She was, therefore, unable to reject it and claim back her money. She was entitled only to damages for breach of warranty, the cost of making it roadworthy. It is felt that this operates against the interests of consumers and that it would improve the position if the text were amended to refer to retaining the goods 'without good and sufficient reason' rather than 'after the lapse of a reasonable time.'

9.33. The lack of any reported case law since 1980 on the amended wording of section 35 makes it difficult to attempt an authoritative assessment of its effect. As the provision differs from that in the UK and other countries whose sales law is based on the 1893 Act, no guidance is to be had from case law in other common law jurisdictions. Though the amendment effected by the 1980 Act was presented as a way of extending the time limit for the rejection of goods, its significance would seem to go further in providing that time *per se* is no longer the guiding criterion for the purposes of this head of acceptance.[767] The question that the Irish courts must consider is not whether the period for which the buyer retained the goods before intimating rejection was reasonable, but rather whether the buyer had good and sufficient reason for retaining the goods without intimating rejecting. It is arguable that the amended wording of section 35 marks a break with the traditional view of the right to reject as a short-term remedy and would permit buyers to reject goods for latent defects that take some time to emerge. It has been suggested in this context that the position under section 35 is analogous to the common law principle of affirmation

[765] Sale of Goods and Supply of Services Bill [No. 36 of 1978], s. 20.
[766] **Dáil Debates**, Vol.316, 14 November 1979 Sale of Goods and Supply of Services Bill 1978 Committee Stage (Resumed): col. 1646.
[767] Grogan, V. et al., **Sale of Goods and Supply of Services**, op. cit., para. 66.

under which an innocent party cannot, as a general rule, be held to have affirmed the contract unless he had knowledge of the breach.[768]

9.34. The corresponding criterion under this head of acceptance in UK legislation remains retention of the goods 'after the lapse of a reasonable time' without intimating rejection to the seller. Section 35(5) of the Sale of Goods Act 1979, which was inserted by the Sale and Supply of Goods Act 1994, further provides that 'the questions that are material in determining' whether a reasonable time has elapsed include whether the buyer has had a reasonable opportunity of examining the goods. The UK case law on this head of acceptance in the three decades since the 1980 amendment to the corresponding provision in Irish legislation displays the diversity to be expected from a fact-based test. Compared with earlier case law, there is evidence, though not of a uniform nature, of a greater readiness to countenance a longer time period for rejection. This was influenced in some cases by the amendments to sections 34 and 35 of the UK Sale of Goods made by the Sale and Supply of Goods 1994 regarding the effect of repair and sub-sale on acceptance.

9.35. The main cases concerning the time period permitted for rejection that have been decided by the UK courts in recent decades are as follows:

- *Bernstein v Pamson Motors Golders Green Limited*:[769] The court held that the buyer was not entitled to reject a new car which broke down on its first proper trip three weeks after purchase and after having been driven for just 140 miles. The reasonable time for acceptance had elapsed, even when allowance was made for the fact that the buyer had been ill for part of the period.[770]
- *Rogers v Parish (Scarborough) Limited*:[771] The Court of Appeal held that the purchaser of a car was entitled to reject it six months after delivery and after it had been driven for 5,500 miles during which time a number of inspections and failed repairs took place. The defendant seller attempted to argue on appeal that the period for rejection had passed but, as the matter had not been

[768] The Law Commission and the Scottish Law Commission. 2009. **Consumer Remedies for Faulty Goods: A Summary of Responses to the Consultation**, para. 2.27. For a discussion of affirmation as it applies to contracts for the supply of goods, see The Law Commission and the Scottish Law Commission. **Sale and Supply of Goods**, op. cit., paras. 2.50-2.52.

[769] [1987] 2 All ER 220. In *Clegg*, Morritt VC stated of *Bernstein*: 'In my view it does not represent the law now.' [2003] EWCA Civ 320 at 63. Goode has observed of the decision that it 'is generally considered to be harsh, reflecting an extremely stringent approach to the need for finality in sales transactions.' **Goode on Commercial Law**, op. cit., p. 384. Though an appeal was taken against the judgement, the case was settled before it was heard.

[770] Rougier J. stated that: 'I discount the period when the plaintiff was ill because 'reasonable' seems to me to be referable to the individual buyer's situation as well as to that of the seller.' Ibid. at 230-31.

[771] [1987] 2 All ER 232.

raised in the initial proceedings, the Court of Appeal refused to allow it to be raised.

- *Clegg v Andersson*:[772] The Court of Appeal held that the buyer was entitled to reject a yacht with an overweight keel seven months after delivery. In the light of the amendment made to section 35(6) of the 1979 Act by the Sale and Supply of Goods Act 1994, the time period for rejection could include both the time needed to carry out repairs, including the time needed to ascertain what repairs needed to be made.[773]
- *Truk (UK) Limited v Tokmakidis GmbH*:[774] The court held that the defendant buyer was entitled to reject a vehicle chassis, with a body specially fitted by the claimant seller, nine months after delivery. The judgment stated, among other things, that the fact that the vehicle was bought for resale rather than the buyer's own use justified an extended rejection period as defects could take longer to emerge in such cases. Where faults were likely to be latent, a longer time period during which faults might emerge might also be warranted.
- *Bowes v Richardson & Son Ltd*:[775] Rejection of a new car which suffered from a succession of faults that had not been remedied by attempted repairs was permitted seven months after purchase. The county court followed *Clegg*, holding among other things that, where goods were repaired, the buyer needed an adequate period of time in which to assess their effectiveness.
- *Jones v Gallagher*:[776] The Court of Appeal held that a buyer was not entitled to reject a fitted kitchen five months after its installation.[777] The buyer had made complaints about the kitchen, including its colour, and some remedial work was done in response. In holding that the buyer had accepted the kitchen, the Court placed considerable emphasis on the stipulation at section 59 of the UK Sale of Goods Act 1979 that the question of what is a reasonable time is one of fact. Buxton LJ also denied that *Clegg* had laid down a rule that the time for rejection was suspended during the time in which the buyer was seeking repairs or repairs were being undertaken.[778]
- *Fiat Auto Financial Services v Connelly*[779]: The use of a car as a taxi for ten months covering 40,000 miles was held not to amount to acceptance of the goods as the buyer had made frequent complaints to the seller over the period about the poor quality of the vehicle.

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[772] [2003] EWCA Civ 301.

[773] Hale LJ noted that it followed from this amendment that 'if a buyer is seeking information which the seller has agreed to supply which will enable the buyer to make a properly informed choice between acceptance, rejection or cure, and if cure in what way, he cannot have lost the right to reject.' Ibid at 75.

[774] [2000] 2 All ER (Comm) 594.

[775] 28 January 2004 (unreported). The Law Commission and the Scottish Law Commission. **Consumer Remedies for Faulty Goods: A Joint Consultation Paper**, op. cit., paras.3.42-43..

[776] [2004] EWCA Civ 10.

[777] The decision has been criticised on the ground that, as the contract was for work and materials, the rules on acceptance in section 35 of the Sale of Goods Act 1979 were not relevant and the case should instead have been decided on the basis of the common law rules on affirmation. Bradgate, R. 'Remedying the Unfit Fitted Kitchen' (2004) *L.Q.R.* (120) at 561-62.

[778] He stated, inter alia, that: 'There is no absolute rule that a situation in which information was sought cannot involve the loss of a right to reject: because that would be inconsistent with the guiding principle that assessment of loss of right to reject is a matter of fact to be considered in all the circumstances.' [2004] EWCA Civ at 36.

[779] [2007] SLT (Sh Ct) 111.

- *J.H. Ritchie Limited v Lloyd Limited*:[780] The plaintiff buyer purchased a seed drill that revealed defects on its first use following which it was returned to the sellers for repair. The sellers discovered that the harrow was missing two key bearings but were able to repair it to what they described as 'factory gate specification'. The buyer remained concerned that the absence of the bearings during the harrow's initial operation might affect its subsequent working and refused to have it returned until they had seen the engineer's report on the repairs. When the seller refused to provide such a report, the buyers rejected the goods. The House of Lords heard the case on appeal from the buyers against the decision of the Inner House of the Court of Session in Scotland, and held that the buyers had been entitled to reject the harrow. Though the goods were in conformity with the contract at the time of rejection, the seller was in breach of an implied term in the ancillary repair contract which required him to inform the buyer as to the nature of the repairs that had been carried out.

9.36. The English and Scottish Law Commissions have recently summarised as follows the state of the law in the UK regarding the time period allowed for acceptance and rejection under section 35:[781]

> It seems that the courts would allow longer than the three week interpretation of a 'reasonable time' in Bernstein. Beyond this more general observation, it is difficult to lay down clear rules. Furthermore, the status of periods of negotiation and repair is complicated by the tension between the decisions in *Clegg* and *Jones*… To conclude, it is not possible to say with a sufficient degree of certainty how long the reasonable period for examination is because it depends upon the facts of the case. In a standard case, a consumer may have sought a number of repairs, and these may have been unsuccessful. The interplay between the repairs and the period for rejection is difficult, and it means that a buyer attempting to exercise the right to reject will face difficult judgements.

The rules governing the time period for rejection are different in Irish law but, if anything, it is even more difficult to provide a clear statement of their application and effect because of the complete absence of case law.

Issues Arising

9.37. The chief issue that arises for review under this head of acceptance is clearly that of how the rule regarding the retention of goods without intimating rejection can

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[780] [2007] UKHL 9. For critical discussions of the judgement, see Carr, D. 'Repairs, Refusals and Rejections' (2007) *C.L.J.* 498. Loi, K. 'Sale of Goods in Scotland – Repairing Defects in the Law' (2007) *J.B.L.* 807. Low, K. 'Repair, Rejection and Rescission: An Uneasy Solution (2007) *L.Q.R.* (123) 536. Mak, V. 'The Seller's Right to Cure Defective Performance – A Reappraisal' [2007] *L.M.C.L.Q.* 409.

[781] The Law Commission and the Scottish Law Commission. **Consumer Remedies for Faulty Goods: A Joint Consultation Paper**, op. cit., paras. 3.56-3.58.

best be framed. Three possible options can be identified. First, retention of the existing provision at section 35 of the 1893 Act that the buyer is deemed to have accepted the goods when, without good and sufficient reason, he retains the goods without intimating rejection. Second, restoration of the rule formerly at section 35 of the Act, and which remains at section 35(4) of the UK Sale of Goods Act 1979, that the buyer is deemed to have accepted the goods when, after the lapse of a reasonable time, he retains them without intimating rejection. Third, stipulating a fixed time period such as thirty days, but with some element of flexibility, within which the right to reject goods can be exercised. We will look at each of these options in turn. In assessing these options, we have been guided by two principal considerations. First, the need for a rule that offers sellers and buyers, and in particular consumer buyers, as great a degree of clarity and certainty as possible about their rights and obligations. Second, the need for a rule that strikes a fair and workable balance between the interests of buyers and sellers, and consumers and businesses.

Retention Without Good and Sufficient Reason

9.38. The problem with the existing wording of section 35 is that it is formulated in such general terms that it offers little or no guidance to buyers and sellers as to when acceptance occurs and the right of rejection is lost. A provision that is critical to the availability or otherwise of the key remedy for buyers, particularly the buyers of consumer goods for whom going to court is seldom a feasible option, needs to be clearer and more definite as to the circumstances in which rejection can, and cannot, be exercised. Insofar as the existing provision can be interpreted as providing a long-term right to reject, moreover, we would have serious reservations about it on this ground. Though a longer-term right to reject is superficially attractive in principle, it would give rise to major issues and difficulties in practice.[782] First, it would be necessary in this event to formulate rules dealing with the buyer's obligation to give credit or compensation for the use of the goods during the months, or possibly even years, prior to rejection. Rules of this kind would not be easy to devise and would almost certainly prove a cause of dispute in many cases. More to the point perhaps, their application would take away much of the practical benefit to buyers of an extended right to reject. Secondly, a long-term right to reject would be open to abuse

[782] The Law Commission and the Scottish Law Commission. **Sale and Supply of Goods**, op. cit., paras. 5.6-5.13.

by buyers who could use the goods for a specific purpose or period before rejecting them and obtaining a full or substantial refund of the price. If such abuses occurred on an appreciable scale, the result would be an increase in costs and prices, an outcome that would not be in the interests of consumers generally.

Retention for a Reasonable Time

9.39. Like its counterpart in Irish legislation, the principal problem with the 'reasonable time' provision in UK legislation is the uncertainty to which it gives rise. Both retailers and consumers have reported this to be a source of serious difficulty.[783] As the summary of the case law at paragraph 9.35 shows, it is far from easy to identify a consistent thread amid the diversity of circumstances evident in the relatively small number of reported cases. The lack of clarity of the rule, and the complexity of the case law, makes it difficult in particular for consumers seeking to reject goods. As Bridge has observed:[784]

> A buyer, particularly one who is a consumer, requires a degree of nerve to exercise rejection rights. First of all, the uncertainty of the rejection period makes it difficult to give advice on the subject. Further, if the buyer has paid for the goods, they will have to be put out of commission if the rejection is to pass the test of unequivocality… If the buyer has inadvertently accepted the goods, a repudiation of the contract will turn out to be unlawful and the buyer will be open to an action by the seller.

The right to reject is meant to be a relatively straightforward and certain remedy. It is neither of these things, however, where the lapse of reasonable time test applies. For this reason, we are not in favour of the restoration of a provision along these lines.

Rejection Within a Standard Thirty Day Period

9.40. In our deliberations on the remedies available for breach of the conditions of contracts of sale, we have had the benefit of the detailed review of consumer remedies for faulty goods undertaken by the English and Scottish Law Commissions in 2008-09.[785] After considering a range of options for the duration of the right of the reject,

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[783] The Law Commission and the Scottish Law Commission. 2009. **Consumer Remedies for Faulty Goods** (Law Com No. 317, Scot Law Com No. 216), paras.3.36-3.46 & 3.55-3.60.
[784] Bridge, **The Sale of Goods**, op. cit., para. 10.71.
[785] The Law Commission and the Scottish Law Commission. **Consumer Remedies for Faulty Goods: A Joint Consultation Paper,** op. cit. The Law Commission and the Scottish Law Commission. **Consumer Remedies for Faulty Goods: A Summary of Responses to the Consultation,** op. cit. The Law Commission and the Scottish Law Commission. 2009. **Consumer Remedies for Faulty Goods**, op. cit.

the Commissions recommended that the normal period for the exercise of the right should be thirty days. A standard period of this duration would, in their view, afford sufficient time in most cases for the buyer to examine the goods and test them in use; would be in accord with the reasonable expectations of consumers and retailers; and, no less importantly, would be clearer and easier to publicise, understand and apply than the existing 'reasonable time' rule. As the Commissions observed:[786]

> We know that it is very rare for consumers to take disputes to court; it is also very rare for consumers to employ lawyers to advise them. It is therefore imperative that the law is capable of being understood, remembered and asserted by consumers. On balance, and in practical terms, we think that the introduction of a 30-day normal period for the right to reject will benefit the average consumer. It will also assist retailers by providing a simple standard for their staff.

9.41 While a thirty day period would be appropriate in most cases, the Commissions concluded that some element of flexibility was necessary in order to make allowance for situations where a shorter or longer rejection period was justified. In the case of perishable items, for instance, a thirty day period would be incompatible with the nature of the goods. In other cases, a period longer than thirty days would be required in order to afford the consumer a reasonable opportunity to examine and test the goods. A lawnmower purchased in November, for example, would typically remain unused for four to five months. Seasonal items, such as skis, bought in the summer would also go unused for months in many cases. In order to take account of these factors, the Commissions recommended that:

- It should be open to the seller to argue that the right to reject should be exercised in less than thirty days where the goods are of a kind that would be expected to perish within a shorter time.

- It should be open to the consumer to argue that the right to reject should be exercisable for a period longer than thirty days where it is reasonably foreseeable by, or reasonably within the contemplation of, both parties that a longer period will be necessary to inspect the goods. The normal thirty day period should not be extended, however, by reason of the personal circumstances of the consumer as this would undermine the relative simplicity and objectivity of the proposed rule.

9.42. In our view, the recommendations of the Law Commissions for a normal thirty day rejection period, with provision for a shorter or longer period in specified

[786] The Law Commission and the Scottish Law Commission. **Consumer Remedies for Faulty Goods**, op. cit., para. 3.53.

circumstances, have considerable merit. Provisions along these lines would bring a substantial degree of clarity and a greater element of certainty to the operation of the remedies regime. As evidenced by the broadly, though not universally, positive response to the proposals from business and consumer interests in the UK, the proposed rules also strike a reasonable balance between the interests of consumers and businesses.[787] Though the provisions governing the circumstances in which a shorter or longer rejection period would apply are likely to require further consideration and careful drafting, some element of flexibility along these lines is essential. The main argument against a fixed time period for rejection is the fact that no single time limit could ever deal adequately with the wide diversity of circumstances found among sales transactions.[788] Though the need for additional provisions of this kind takes away somewhat from the simplicity and certainty of the proposals, it is difficult to see how the provisions could function effectively without this element of flexibility.

9.43. Though the Law Commissions' recommendations were put forward in the context of a review of consumer remedies, we consider that, if applied as default rules, they could function no less advantageously in the context of commercial contracts of sale. This would also have the merit of maintaining broadly common rules for consumer and commercial sales. This recommendation should be reviewed, however, if evidence emerges that the proposed rule is unsuited to certain types of commercial contract.

9.44. Recommendations

The time period for the exercise of the right to reject goods not in conformity with the contract should normally be thirty days in the case of consumer contracts.

[787] The Law Commission and the Scottish Law Commission. **Consumer Remedies for Faulty Goods: A Summary of Responses to the Consultation**, op. cit., paras. 2.32-2.55. The Law Commission and the Scottish Law Commission. **Consumer Remedies for Faulty Goods**, op. cit., paras. 3.47-3.88.
[788] The English and Scottish Law Commissions recommended against a fixed period for rejection for this reason in a review of the issue undertaken in the 1980s. The Law Commission and the Scottish Law Commission. **Sale and Supply of Goods**, op. cit., paras. 5.14-5.19

Where the normal thirty-day period for rejection is incompatible with the nature of the goods, it should be open to the seller to argue for a rejection period shorter than thirty days.

Where it is reasonably foreseeable by both parties to the contract of sale that a longer period will be needed to examine the goods, the consumer should be able to argue for a rejection period longer than thirty days.

Except where the contract of sale provides otherwise, the time period in non-consumer sales for the buyer's right to reject goods not in conformity with the contract should normally be thirty days. As in the case of consumer sales, the seller or buyer would be entitled to argue for a shorter or longer period where the nature of the goods made a shorter period more appropriate or it was reasonably foreseeable that the buyer would need a longer period of time in which to examine the goods.

For the avoidance of doubt, any non-consumer contract of sale that stipulates a time limit within which the buyer must exercise a right to reject non-conforming goods should be subject to the statutory test of fairness and reasonableness.

II REMEDIES UNDER DOMESTIC AND EU LEGISLATION

9.45. Regulations 7 and 8 of the European Communities (Certain Aspects of the Sale of Consumer Goods and Associated Guarantees) Regulations 2003 (hereinafter the Consumer Sales and Guarantees Regulations) which give effect to the remedies' provision at Article 4 of Directive 1999/44/EC (hereinafter the Consumer Sales and Guarantees Directive) provide as follows:

> 7.(1) The seller shall be liable to the consumer for any lack of conformity referred to in Regulations which exists at the time the goods were delivered.
>
> (2) In the case of such a lack of conformity, the consumer shall, subject to, and in accordance with, this Regulation, be entitled to have –
>
> (a) the goods brought into conformity free of charge by repair or replacement, or
>
> (b) an appropriate reduction made in the price, or
>
> (c) the contract rescinded with regard to those goods.
>
> (3) In the first place, the consumer may require the seller to repair the goods or to replace them (in either case free of charge) unless this is impossible or disproportionate.
>
> (4) Either of these remedies shall be deemed to be disproportionate if it imposes costs on the seller which, in comparison with those of the other remedy or of any other remedy mentioned in this Regulation, are unreasonable, taking into account –

(a) the value the goods would have if there were no lack of conformity
(b) the significance of the lack of conformity, and
(c) whether the alternative remedy could be completed without significant inconvenience to the consumer.

(5) Where the remedy of repair or replacement is provided the repair or replacement shall be completed within a reasonable time and without any significant inconvenience to the consumer, taking account of the nature of the goods and the purpose for which the consumer required them.

(6) In paragraphs (2) and (3) 'free of charge' means free of the costs that must necessarily be incurred to bring the goods into conformity, including the cost of carriage, postage, labour and materials.

(7) The consumer may require an appropriate reduction of the price or have the contract rescinded if –

(a) the consumer is entitled to neither repair nor replacement, or
(b) the seller has not completed the repair or replacement within a reasonable time, or
(c) the seller has not completed the repair or replacement without significant inconvenience to the consumer.

(8) The consumer is not entitled to have the contract rescinded if the lack of conformity is minor.

8. (1) Subject to paragraph (2), any lack of conformity which becomes apparent within six months from the date of delivery of the goods shall, unless the contrary is provided, be presumed to have existed at the time of delivery of the goods.

(2) Paragraph (1) shall not apply if, by reason of –

(a) the nature of the goods concerned, or
(b) the nature of the lack of conformity concerned,

it would not be a reasonable inference that the lack of conformity existed at the time of delivery.

9.46. The main features of the remedial scheme under the Consumer Sales and Guarantees Regulations can be summarised as follows:

- Where the seller has delivered goods which do not conform with the contract, the consumer may, in the first instance, require the seller to repair or replace them.
- Where repair or replacement are impossible or disproportionate, or where either remedy has not been completed within a reasonable time or without significant inconvenience to the consumer, the consumer may require an appropriate reduction of price, or if the lack of conformity is not minor, have the contract rescinded.
- Unless proved otherwise, any lack of conformity which becomes apparent within six months of delivery is presumed to have existed at the time of delivery.

Minor drafting differences aside, Regulations 7 and 8, like the other provisions of the 2003 Regulations, adhere closely to the wording of the Consumer Sales and Guarantees Directive. The main substantive difference between the Directive and the transposing Regulations is that the latter omit the provision at Article 5(1) of the Directive restricting the liability of the seller for goods not in conformity with the contract to a period of two years from the date of delivery of the goods. As the

Consumer Sales and Guarantees Directive is a minimum harmonisation instrument, Member States are free to maintain or adopt national measures that exceed its protections. In this instance, Ireland opted to retain the existing general six-year time limit for contractual claims. Other provisions of the Directive with no counterpart in Irish sales law, such as the bar on rescission where the lack of conformity is minor, were given effect by the Regulations. No such restriction applies, however, to the remedial scheme under the Sale of Goods Acts, an illustration of the inconsistency between the two sets of legislative provisions.

9.47. The remedial framework for goods not in conformity with the contract under the Consumer Sales and Guarantees Directive involves a two-tier hierarchy of remedies. The first-tier remedies are repair or replacement of the goods. The second-tier remedies are reduction of the price or rescission of the contract, and can be invoked only where the consumer is not entitled to the first-tier remedies, or where the seller cannot perform these remedies within a reasonable time or without significance inconvenience to the consumer. By contrast, the remedial scheme under the Sale of Goods Acts 1893 and 1980 for breaches of the implied or express conditions of the contract gives primacy to the right to reject the goods and repudiate the contract. Where this right is lost through acceptance of the goods, the Acts afford a second-tier remedy of repair or replacement, with a restoration of the right of rejection and repudiation where the seller fails to provide the second-tier remedy within a reasonable time. Bradgate and Twigg-Flesner have observed as follows of the difference between the remedial scheme under the Consumer Sales and Guarantees Directive and that under UK sale of goods legislation[789]:

> [The] primacy … given … to the remedies of repair or replacement … is in sharp contrast to the position in English law where the buyer's principal remedies are rejection of the goods and termination of the contract and/or a claim for damages. The Directive here betrays its civil law roots. In effect the consumer's primary remedies under the Directive are to have the contract properly performed by having the goods repaired or replaced, with the right to escape the contract by rescinding it available only as a long-stop option. Rights of repair and replacement – rights of 'cure' – are effectively forms of specific performance and specific performance is the principal remedy for breach of contract in civilian systems, reflecting the

[789] Bradgate, R. & Twigg-Flesner, C. **Blackstone's Guide to Consumer Sales and Associated Guarantees**, op. cit., p. 83. Apart from the statutory right to cure for consumer contracts at section 53(2)of the Sale of Goods Act 1893, the remedies for breach of contract in contracts of sale are similar under Irish and UK legislation.

maxim *pacta sunt servanda*.[790] In contrast in English law, whilst lip service is paid to the notion of *pacta sunt servanda*, the principal remedy for a breach of contract is an award of damages.

9.48. Though the remedial framework in the proposed Directive on Consumer Rights published in October 2008, was broadly similar in substance to that in the Consumer Sales and Guarantees Directive, it differed in one fundamental respect in that, like the proposal's other provisions, it was intended to apply on a full harmonisation basis.[791] Agreement was not reached, however, on the full harmonisation status of this and certain other provisions of the proposed Directive on consumer sales contracts. As a result of the failure to reach agreement on these elements of the proposal, the provisions on consumer sales have, with the exception of the sections dealing with delivery and risk, been deleted from the final text of the Directive. The operative EU law for consumer contracts of sale, other than for rules on delivery and risk, will continue to be based on the existing minimum harmonisation Consumer Sales and Guarantees Directive.

9.49. We welcome the fact that the core provisions of EU legislation on consumer sales and remedies will not now apply on a full harmonisation basis. Had these provisions been adopted in fully harmonised form, Ireland, like other member states, would have had no little or no discretion about their implementation. Existing provisions under national legislation that went beyond the protections in the Consumer Rights Directive would have had to be repealed. As well as ensuring that important protections are maintained for consumers, this outcome will provide a fresh opportunity, without the constraints that full harmonisation would have imposed, to integrate the separate remedies regimes under the Sale of Goods Acts and the Consumer Sales and Guarantees Regulations. As we emphasised in Chapter 1, the current duplication of remedies under legislation of domestic and EU origin is a source of unnecessary and undesirable complexity and confusion. It flies in the face of all the tenets of good regulation to have two separate remedial schemes that serve the same purpose but are inconsistent, or in conflict, in important respects.

[790] Agreements must be kept.
[791] Article 26(2) of the proposed Directive provided, however, that the choice between the first-tier remedies of repair and replacement would lie with the trader, while Article 3(3) of Directive 199/44/EC provides that the consumer may require the seller to repair the goods or to replace them.

Integration of the Remedial Frameworks in Domestic and EU Legislation

9.50. The basic task of integrating the scheme of remedies under the Sale of Goods Acts and the Consumer Sales and Guarantees Regulations is relatively straightforward.[792] In accordance with our recommendation on the right of rejection outlined in the preceding section, the following three remedies of first resort would be exercisable at the choice of the consumer for goods not in conformity with the contract:

- termination of the contract and full refund of the price within a normal thirty-day period or, in specified circumstances, a longer or shorter period;
- replacement of the goods;
- repair of the goods.

Where the consumer opts in the first instance for the repair or replacement of the goods, he would be entitled to proceed to the remedies of termination and full refund or reduction of the price where:

- The seller has not completed the repair or replacement within a reasonable time or without significant inconvenience to the consumer; or
- The lack of conformity of the goods has not been remedied by the first repair or first replacement.

The remedial framework proposed here would apply only to consumer contracts of sale. In the case of commercial contracts of sale, the right to reject and the related rules on examination and acceptance would operate in tandem with the 'cure' provision for commercial contracts of sale outlined at paragraphs 11.31-11.33 below.

9.51. Several other issues require consideration in the context of the integration of the remedial schemes under domestic and EU legislation. As noted above, the Consumer Sales and Guarantees Directive provides at Article 3(6) that 'the consumer is not entitled to have the contract rescinded if the lack of conformity is minor'. Though this provision was included in the Consumer Sales and Guarantees Regulations which give effect to the Directive, there is no equivalent restriction on the right of rejection

[792] The English and Scottish Law Commissions whose recommendations have influenced our thinking on this issue as on the reformulation of the right to reject have proposed that the three first-order remedies of termination plus refund, repair, and replacement should come under 'the umbrella of the concept of rejection'. The Law Commission and the Scottish Law Commission. **Consumer Remedies for Faulty Goods,** op. cit., paras.3.111-3.113.). In accordance with the view that rejection of the goods and termination of the contract are different concepts, all three remedies would be characterised as entailing the rejection of the goods. While this offers a clever and coherent formula for the integration of the two remedial frameworks, it may cause confusion among buyers and sellers in view of the close connection historically between rejection and termination.

under the Sale of Goods Acts. As we have recommended in Chapter 4 that rejection should be prohibited in commercial contracts of sale where the breach of contract is so slight that rejection would be unreasonable, this issue relates only to consumer sales. In the case of these sales, we are not in favour of a restriction of the remedy of termination and refund proposed above to so-called non-minor defects. The appearance and finish of consumer goods is often integral to their overall quality and a provision that limits the remedies available to consumers for defects of this nature would be unjustifiably detrimental to consumer interests.[793] It would also create uncertainty and lead to disputes as to what was or was not a 'minor' defect. Our recommendation in Chapter 4 that the appearance and finish of goods and freedom from minor defects are in appropriate cases aspects of the quality of goods would permit the courts to distinguish between defects that are trivial or negligible and those that impair the standard of quality that a reasonable person would regard as satisfactory.[794]

9.52. Regulation 8 of the Consumer Sales and Guarantees Regulations provides that any lack of conformity which becomes apparent within six months of the delivery will, unless such an inference would be unreasonable by virtue of the nature of the goods or of the lack of conformity, be presumed to have existed at the time of delivery. No such reversal of the burden of the proof applies under the Sale of Goods Acts, nor would the Consumer Sales and Guarantees Directive require the application of this provision to the right of termination and refund as a remedy of first resort. The remedial scheme that we have proposed does not differentiate, however, between the three remedies that would be available where goods are not in conformity with the contract. The presumption regarding a lack of conformity arising within six months of delivery should apply, therefore, to the remedy of termination and refund in the same way as to the remedies of repair or replacement. Where the remedy of repair is exercised, moreover, the six-month period for the reversal of the burden of proof

[793] The Law Commission and the Scottish Law Commission. **Sale and Supply of Goods**, op. cit., paras. 3.38-3.43. The Law Commission and the Scottish Law Commission. **Consumer Remedies for Faulty Goods**, op. cit., paras. 3.98-3.110.

[794] In *Darren Egan v Motor Services (Bath) Ltd*, Smith LJ stated that: '… it seems to me unlikely that a buyer will be entitled to reject goods simply because he can point to a minor defect. He must also persuade the judge that a reasonable person would think that the minor defect was of sufficient consequence to make the goods unsatisfactory… The reasonable person may think that the minor defect is of no consequence.' [2008] 1 All ER 1156 at 1166.

should be suspended while repairs are being carried out and should resume on the re-delivery of the goods following their repair. Where the remedy of replacement is exercised, a further six-month period for the reversal of the burden of proof should commence on the delivery of the replacement goods.

9.53. Recommendations

The remedial frameworks for consumer contracts of sale under the Sale of Goods Acts and the Consumer Sales and Guarantees Regulations should be integrated by providing that the following would comprise remedies of first resort, exercisable at the choice of the consumer, for goods not in conformity with the contract:

- **termination of the contract and full refund of the price within a normal thirty-day period or, in specified circumstances, a longer or shorter period;**
- **replacement of the goods;**
- **repair of the goods.**

Where the repair or replacement of the goods are the remedies of first resort, the consumer should be entitled to proceed to the remedies of termination and full refund or reduction of the price where:

- **The seller has not completed the repair or replacement within a reasonable time or without significant inconvenience to the consumer; or**
- **The lack of conformity of the goods has not been remedied by the first repair or first replacement.**

The remedy of termination and refund should apply to 'minor' defects where such defects constitute a breach of the implied condition of satisfactory quality in consumer contracts of sale.

The thirty day period for rejection of the goods not in conformity with the contract should, where applicable, be suspended while repairs or discussions about repairs take place.

The presumption that a lack of conformity which becomes apparent within six months of the delivery of the goods existed at the time of delivery should apply

to the remedy of termination and refund in consumer contracts of sale in the same way as to the remedies of repair and replacement.

The presumption that a lack of conformity which becomes apparent within six months of the delivery of the goods existed at the time of delivery should apply in consumer contracts of sale for a further period of six months where replacement goods are supplied as a remedy for goods not in conformity with the contract.

In the case of commercial contracts of sale, the right to reject and the related rules on examination and acceptance should operate in tandem with the statutory 'cure' provision for commercial contracts of sale recommended at paragraph 11.36.

Section 36 Buyer Not Bound to Return Rejected Goods

Unless otherwise agreed, where goods are delivered to the buyer, and he refuses to accept them, having the right to do so, he is not bound to return them to the seller, but it is sufficient if he intimates to the seller that he refuses to accept them.

Section 37 Liability of Buyer for Neglecting or Refusing Delivery of Goods

When the seller is ready and willing to deliver the goods, and the buyer does not within a reasonable time after such request take delivery of the goods, he is liable to the seller for any loss occasioned by his neglect or refusal to take delivery, and also for a reasonable charge for the care and custody of the goods. Provided that nothing in this section shall affect the rights of the seller where the neglect or refusal of the buyer to take delivery amounts to a repudiation of the contract.

9.54. Section 36 comprises a default rule to the effect that, where the goods have been delivered to the buyer and he refuses to accept them, he is not bound to return them to the seller. It is sufficient that he intimate to the seller that he refuses to accept delivery. It must be made clear, however, in this event that the goods are being rejected as the buyer may otherwise be deemed to have accepted the goods. Though the buyer is not obliged to return the goods, there is a requirement on him to take reasonable care of them. Section 37 provides that, where the seller is ready and willing to deliver the goods and the buyer does not take delivery within a reasonable time of a request to do so by the seller, the latter is liable to the seller for any loss occasioned by his refusal or neglect to take delivery. These provisions have not given

rise to any significant issues or difficulties, and no changes of substance are required to either section 36 or 37.

CHAPTER TEN SALE OF GOODS ACT 1893: RIGHTS OF UNPAID SELLERS AGAINST THE GOODS SECTIONS 38-39 & 41-48

INTRODUCTION

10.1. Per section 27 of the 1893 Act, the duty of the buyer under the contract of sale is to accept and pay for the goods in accordance with the contract of sale. Where the buyer defaults on these obligations, the Act affords the seller real and personal remedies against the buyer's default. The personal remedies of an action for the price of the goods and of a claim for damages for non-acceptance are the subject of sections 49 and 50 of the Act respectively, and are discussed in Chapter 11. The focus of this Chapter is on the real remedies - a lien on the goods, a right to stop the goods in transit, and a right to re-sell the goods – exercisable under sections 38-39 and 41-48 of the 1893 Act.[795] As they apply against the goods, these remedies, unlike the personal remedies, are unaffected by the buyer's insolvency and, as such, would seem to offer a potent source of redress for non-payment.[796] Commercial and technological developments, however, have greatly reduced the utility of, and resort to, the remedies contained in this part of the Act.

10.2. The Chapter looks first at the general statement of the rights of the unpaid seller in sections 38-39 of the 1893. It then considers in turn the provisions specific to each of the remedies: sections 41-43 on the unpaid seller's lien; sections 44-46 on the right of stoppage in transit; and sections 47-48 on the unpaid seller's right of resale.

I THE UNPAID SELLER AND HIS RIGHTS

SECTION 38 UNPAID SELLER DEFINED

(1) The seller of goods is deemed to be an "unpaid seller" within the meaning of this Act-

(a) When the whole of the price has not been paid or tendered;

(b) When a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition on which it was received has not been fulfilled by reason of the dishonour of the instrument or otherwise.

(2) In this part of the Act the term "seller" includes any person who is in the position of

[795] Section 40 of the 1893 Act applies only to Scotland.

[796] As Benjamin observes: 'These remedies can be regarded as a type of self-help or extra-judicial remedy by which the seller gains better protection for his interests than he would by merely pursuing a claim for money: they reduce the risk of his being only an unsecured general creditor of the buyer, should the latter become bankrupt. By exercising these remedies, the unpaid seller in effect secures a form of preference over the general creditors of a bankrupt buyer.' **Benjamin's Sale of Goods**, op. cit., para. 15-001.

a seller, as, for instance, an agent of the seller to whom the bill of lading has been indorsed, or a consignor or agent who has himself paid, or is directly responsible for, the price.

SECTION 39 UNPAID SELLER'S RIGHTS

(1) Subject to the provisions of this Act, and of any statute in that behalf, notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods, as such, has by implication of law-

(a) a lien on the goods or right to retain them for the price while he is in possession of them;

(b) in case of the insolvency of the buyer, a right of stopping the goods in transitu after he has parted with the possession of them;

(c) a right of re-sale as limited by this Act.

(2) Where the property in goods has not passed to the buyer, the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to and co-extensive with his rights of lien and stoppage in transitu where the property has passed to the buyer".

These sections of the Act have not been amended since their enactment. Though the Sale of Goods Act 1979 modernised the wording of the corresponding sections in UK legislation, the substance of the provisions was left unchanged.

10.3. The definition of 'unpaid seller' in section 38 establishes the general scope of the remedies set out in the subsequent sections. Per subsection (1), the seller is deemed to be unpaid where the whole of the price has not been paid or tendered, or where a bill of exchange or other negotiable instrument has been dishonoured or the condition on which it was received has not been fulfilled. Put more simply, a seller is unpaid until he has received full and unconditional payment.[797] Subsection (2) defines 'seller' so as to include an agent occupying the position of seller and gives two examples by way of illustration. The first is that of an agent who endorses a bill of lading and is entitled accordingly to exercise the real rights of the seller as against the buyer. The second example is that of an agent who has himself paid, or is directly responsible for, the price. If the principal on whose behalf this agent has purchased the goods fails to pay him, therefore, the agent can exercise the rights of an unpaid seller.[798] The definition of 'unpaid seller', however, does not cover a buyer who has rejected the goods and is seeking to recover the payment made for them.[799]

10.4. Section 39(1) lists the three remedies which - subject to the provisions of the 1893 Act and of 'any statute in that behalf'- the unpaid seller has by 'implication of

[797] **Goode on Commercial Law**, op. cit., p. 443.
[798] *Ireland v Livingstone* (1872) LR 5 HL 395.
[799] *J.J. Lyons & Co v May and Baker Ltd* [1923] 1 KB 685.

law' notwithstanding that the property in the goods may have passed to the buyer. We will look at the characteristics of each of the remedies and the conditions governing their exercise in later sections of the Chapter. As these remedies arise by implication of law, they can, in accordance with section 55 of the Act, be negatived or varied by express agreement, by the course of dealing between the parties, or by a usage binding on both parties. The reference in the sub-section to 'any statute in that behalf' applies in particular to the Factors Act 1889, a number of whose provisions recur in substantially the same form in the 1893 Act.[800] The provisions of the Bills of Sale Act 1878 may also affect the exercise of the seller's remedies against the goods.

Issues Arising

10.5. While section 39(1) is relatively straightforward, section 39(2) is somewhat more problematical. The sub-section states that, where the property in the goods has not passed to the buyer, the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to and co-extensive with his rights of lien and stoppage in transit where the property has passed to the buyer. The rationale for the provision would appear to be that, as a lien refers to rights over another person's property, it is applicable only where the property has passed to the buyer as the seller cannot exercise a lien over his own goods.[801] Unlike section 39(1), however, section 39(2) makes no reference to the seller's right of resale. Atiyah has pointed out the problems created by this omission:[802]

> The draftsman seems to have thought it necessary to put in the right of withholding delivery, but not the power of resale, because the seller who is still owner does not need a power of resale. But this appears to be a confusion of the right and the power. If s.39(2) only means to lay down certain powers, then it is totally unnecessary because the owner of the goods has the power of withholding delivery no less than the power of passing a good title to a third person. On the other hand, if s.39(2) is meant to confer a right to exercise the power, as one would have thought, it follows that the right to resell the goods should have been included as well. The omission of this right might have the remarkable result that an unpaid seller could, as against the buyer, resell the goods in accordance with the Act where

[800] **Benjamin's Sale of Goods,** op. cit., para. 15-009. As noted in Chapter 6, sections 24-25 of the 1893 Act are broadly similar in substance and wording to sections 8-9 of the Factors Act 1889, and the repeal of the latter is recommended there for that reason. Section 47(2) of the 1893 Act is also largely similar to section 10 of the Factors Act.

[801] **Goode on Commercial Law**, op. cit., p. 443. Benjamin notes that, as a lien *strictu sensu* can arise only when the property held belongs to another, the right of withholding delivery exercised by the seller under s.39(2) over goods in which he still has the property, is 'a quasi-lien'. **Benjamin's Sale of Goods**, op. cit., para. 15-029.

[802] Atiyah, **The Sale of Goods**, op. cit, p. 449.

> the property had passed to the buyer, but could not do so where the property had not passed.

In *RV Ward Ltd v Bignall*,[803] however, Diplock L.J. stated *obiter* that the right of resale granted by section 48(3) applied whether or not the property in the goods had passed to the buyer, adding that:[804]

> The seller cannot have greater rights of resale if the property has already passed to the buyer than those which he would have if the property had remained in him.

10.6. Recommendation

For the avoidance of doubt, the provision at section 39(2) of the 1893 Act should be amended in future legislation to provide that the buyer has a right of resale.

10.7. The second issue raised by section 39(2) arises from the statement in the sub-section that the unpaid seller's right of withholding delivery where the property in the goods has not passed to the buyer is 'similar to and co-extensive with' the rights of lien and stoppage where the property has so passed. In the case of an agreement to sell future or unascertained goods that have not been identified to the contract, however, the seller is not under an obligation to deliver any particular goods to the buyer. In such a case, the seller's right to withhold delivery of goods that he may have planned to supply in performance of the contract is broader than under the right of lien. It is exercisable regardless of whether there has been any default by the buyer and gives rise to no breach of contract on the seller's part. As section 39(2) is intended to confer rights on the unpaid seller, it should not, in Benjamin's view, be interpreted so as to restrict rights arising under the common law – in this instance, those governing the seller's obligations in respect of the delivery of future or unascertained goods.[805] On this view, furthermore, the particular common law rights in question are 'not inconsistent' with section 39 within the meaning of section 61(2) of the Act.[806]

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[803] [1967] 1 Q.B. 534.
[804] Ibid. at 545.
[805] **Benjamin's Sale of Goods**, op. cit., para. 15-012. In Atiyah's view, 'it is inconceivable that this section (i.e. s. 39(2)) should, by a side wind as it were, alter these fundamentals of the law of sale.' Atiyah, **The Sale of Goods**, op. cit., p. 449.
[806] Section 61(2) 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, misrepresentation, duress or coercion, mistake or other invalidating cause, shall continue to apply to contracts for the sale of goods.'

II UNPAID SELLER'S LIEN

Section 41 Seller's Lien

(1) Subject to the provisions of this Act, the unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price in the following cases, namely:

(a) Where the goods have been sold without any stipulation as to credit;
(b) Where the goods have been sold on credit, but the term of credit has expired;
(c) Where the buyer becomes insolvent.

(2)The seller may exercise his right of lien notwithstanding that he is in possession of the goods as agent or bailee or custodier for the buyer.

Section 42 Part Delivery

Where an unpaid seller has made part delivery of the goods, he may exercise his right of lien or retention on the remainder, unless such part delivery has been made under such circumstances as to show an agreement to waive the lien or right of retention.

Section 43-Termination of Lien

(1) The unpaid seller of goods loses his lien or right of retention thereon-

(a) When he delivers the goods to a carrier or other bailee or custodier for the purpose of transmission to the buyer without reserving the right of disposal of the goods;
(b) When the buyer or his agent lawfully obtains possession of the goods;
(c) By waiver thereof.

(2) The unpaid seller of goods, having a lien or right of retention thereon, does not lose his lien or right of retention by reason only that he has obtained judgment or decree for the price of the goods.

These sections of the Act have not been amended since their enactment. Minor drafting changes apart, the equivalent provisions in the UK Sale of Goods Act 1979 remain similar to those enacted in 1893.

10.8. A lien is a right to retain possession of the goods until the price has been paid or tendered in full. In *Lord's Trustee v Great Eastern Rly*,[807] Fletcher-Moulton LJ stated that a lien does not 'strictly speaking give to the seller any property in the goods.' As possession of the goods is the *sine qua non* of the lien, a lien is lost where possession is lost and does not entitle the seller to regain possession where he has surrendered it.[808] The unpaid seller's lien is a special lien and not a general lien for all debts due from the buyer to the seller. Unless the contract of sale provides for a right of lien, the remedy applies only in accordance with the Act's provisions and the seller cannot rely on any separate equitable lien.[809] While at common law a seller had a right of lien

[807] [1908] 2 KB 54 at 63-64.
[808] *Valpy v Gibson* (1847) 4 CB 837. *Pennington v Motor Reliance Works Ltd* [1923] 1 KB 127. *Jeffcott v Andrew Motors Ltd* [1960] N.Z.L.R. 721 NZCA. An unpaid seller who exercises his right of stoppage in transit, however, is effectively restored to his former position and regains his lien. Atiyah, **The Sale of Goods**, op. cit., p. 456.
[809] *Transport & General Credit Corpn Ltd v Morgan* [1939] 2 All ER 17 at 25.

only where he had possession of the goods *qua* seller, section 41(2) of the 1893 Act extended the right to encompass the situation where the seller holds the goods as agent or bailee of the buyer. Where the seller acts as agent or bailee of the buyer, however, he may be held to have waived his lien. By virtue of section 39(1)(a), and because the lien is for the price of the goods, it does not entitle the seller, in the absence of an express term in the contract, to claim for storage or other expenses.[810] Finally, the contract of sale remains in existence during the exercise of the lien. As discussed later in the Chapter, section 48(1) of the Act provides that a contract of sale is not rescinded by the mere exercise by the unpaid seller of his right of lien or stoppage in transit.

When Lien Applies

10.9. The seller's lien arises where the following conditions apply:

1) The seller is in possession of the goods or part of the goods (ss.41(1) & 42); and
2) The seller is unpaid (ss.38(1) & 41(1)); and
3) (a) The goods have been sold without any stipulation as to credit, or
   (b) The goods have been sold on credit but the term of credit has expired, or
   (c) The buyer has become insolvent (s.41(1)(a)).

In accordance with section 62(3) of the Act, a person 'is deemed to be insolvent within the meaning of this Act who either has ceased to pay his debts in the ordinary course of business, or cannot pay his debts as they become due, whether he has committed an act or bankruptcy or not, and whether he has become a notour[811] bankrupt or not.' The seller's right to a lien in the event of the buyer's insolvency reflects the fact that insolvency or bankruptcy do not of themselves terminate the contract or entail its repudiation as the buyer's obligations may still be performed by his trustee in bankruptcy.[812] Where the buyer is insolvent, the unpaid seller's right of lien applies regardless of whether any stipulated period of credit has expired. The

[810] *Re Southern Livestock Producers Ltd* [1963] 2 All ER 801.
[811] 'Notour bankrupt' is a term in Scottish law that referred to a state of insolvency that had become 'notorious'. The clauses relating to bankruptcy in the definition of 'insolvent' in s.62(4) of the UK Sale of Goods Act 1979 were repealed respectively by the Insolvency Act 1985, ss. 235, 236(2), Sch. 9 para. 11, Sch. 10 Pt III, and the Bankruptcy (Scotland) Act 1985, s.75(2) Sch. 8. The latter Act also replaced the term 'notour bankrupt' in Scottish bankruptcy law generally by 'apparent insolvency', ibid. s.75(6).
[812] *Re Edwards* (1873) 8 Ch App 289. *Ex parte Chalmers* (1873) 8 Ch App 289. *Re Phoenix Bessemer Steel* (1876) 4 Ch.D. 108. *Mess v Dufus* (1901) 6 Com.Cas 165.

seller can retain the goods until the buyer or his trustee in bankruptcy pays the full price, thereby avoiding the need to claim for the price in the bankruptcy.[813]

10.10. Where an unpaid seller has made a part delivery of the goods, he may, per section 42, exercise his lien or right of retention on the remainder of the goods unless such part delivery has been made under circumstances indicative of an agreement to waive the lien or right of retention. The onus is on the buyer seeking to establish that the lien has been lost to show that it was the intention of the parties that delivery of part of the goods should constitute delivery in full.[814] Where the contract is for the sale of goods by instalments, there is a presumption that the contract is indivisible so that the seller may exercise his lien over goods awaiting delivery if any part of the price is outstanding.[815] If the contract is severable, however, insofar that it provides for separate delivery of, and payment for, individual instalments, each such delivery will be treated as if it were a separate contract for the purposes of the lien.[816] In such a case, the lien can only be exercised in respect of goods forming part of an instalment for which payment has not been made.

When Lien is Lost

10.11. Section 43(1) provides that the unpaid seller loses his lien or right of retention in the following circumstances:

(a) When he delivers the goods to a carrier or other bailee … for the purpose of transmission to the buyer without reserving the right of disposal of the goods;
(b) When the buyer or his agent lawfully obtains possession of the goods;
(c) By waiver of the lien or right.

If the price for the goods is paid or tendered in full, the lien will also obviously be terminated as the seller will no longer be an unpaid seller within the meaning of section 38(1). Although the seller loses his lien on delivery to the carrier, he may still, as discussed in the next section, have the right to stop the goods in transit. As possession is fundamental to the remedy of the lien, its loss necessarily follows when the buyer or his agent lawfully obtain possession of the goods. In Atiyah's view, 'lawfully' here means 'with the consent of the seller'.[817] Waiver of the lien can occur

[813] *Ex Parte Stapleton* (1879) 10 Ch.D. 586. *Gunn v Bolckow, Vaughan & Co* (1875) L.R. 10 Ch.App. 491.
[814] *Ex Parte Cooper* (1879) 11 Ch.D 68.
[815] *Ex Parte Chalmers* (1873) L.R. 8 Ch. App. 299.
[816] *Longbottom & Co. Ltd v Bass, Walker & Co.* [1922] W.N. 245.
[817] Atiyah, **The Sale of Goods**, op.cit., p. 455.

in a number of ways. If the seller deals with the goods, for example, in a manner inconsistent with the continuance of the lien, such as by their consumption or wrongful resale, the right will be lost.[818] By virtue of section 43(2) of the Act, the lien does not cease by reason of the fact that the seller has obtained a judgment for the price. The buyer's compliance with the judgment by making full payment of the price is required for termination of the lien.[819] Under section 47(1) of the Act, the seller's right of lien is not affected by a sub-sale or other disposition of the goods by the buyer unless the seller has given his assent to the transaction.

Issues Arising

10.12. The central issue regarding the unpaid seller's lien is whether it retains any relevance or value in present-day commercial conditions. As this question is equally, if not more, relevant to the right of stoppage in transit, we will return to it after we have considered the second real remedy afforded unpaid sellers by Part IV of the 1893 Act.

III RIGHT OF STOPPAGE IN TRANSIT

Section 44 Right of Stoppage in Transitu

> Subject to the provisions of this Act, when the buyer of goods becomes insolvent, the unpaid seller who has parted with the possession of the goods has the right of stopping them in transitu, that is to say, he may resume possession of the goods as long as they are in course of transit, and may retain them until payment or tender of the price.

Section 45 Duration of Transit

1) Goods are deemed to be in course of transit from the time when they are delivered to a carrier by land or water, or other bailee or custodier for the purpose of transmission to the buyer, until the buyer, or his agent in that behalf, takes delivery of them from such carrier or other bailee or custodier.
2) If the buyer or his agent in that behalf obtains delivery of the goods before their arrival at the appointed destination, the transit is at an end.
3) If, after the arrival of the goods at the appointed destination, the carrier or other bailee or custodier acknowledges to the buyer, or his agent, that he holds the goods on his behalf and continues in possession of them as bailee or custodier for the buyer, or his agent, the transit is at an end, and it is immaterial that a further destination for the goods may have been indicated by the buyer.
4) If the goods are rejected by the buyer, and the carrier or other bailee or custodier continues in possession of them, the transit is not deemed to be at an end, even if the seller has refused to receive them back.
5) When goods are delivered to a ship chartered by the buyer it is a question depending on the circumstances of the particular case, whether they are in the possession of the master as a carrier, or as agent to the buyer.

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[818] *Gurr v Cuthbert* (1843) 12 L.J.Ex 303.
[819] **Benjamin's Sale of Goods**, op. cit., para. 15-059.

6) Where the carrier or other bailee or custodier wrongfully refuses to deliver the goods to the buyer, or his agent in that behalf, the transit is deemed to be at an end.
7) Where part delivery of the goods has been made to the buyer, or his agent in that behalf, the remainder of the goods may be stopped in transitu, unless such part delivery has been made under such circumstances as to show an agreement to give up possession of the whole of the goods.

Section 46 How Stoppage in Transitu is Effected

1) The unpaid seller may exercise his right of stoppage in transitu either by taking actual possession of the goods, or by giving notice of his claim to the carrier or other bailee or custodier in whose possession the goods are. Such notice may be given either to the person in actual possession of the goods or to his principal. In the latter case the notice, to be effectual, must be given at such time and under such circumstances that the principal, by the exercise of reasonable diligence, may communicate it to his servant or agent in time to prevent a delivery to the buyer.
2) When notice of stoppage in transitu is given by the seller to the carrier, or other bailee or custodier in possession of the goods, he must re-deliver the goods to, or according to the directions of, the seller. The expenses of such re-delivery must be borne by the seller.

These sections have remained unchanged since the enactment of the 1893 Act. Apart from drafting changes to modernise the language of the sections (including the substitution of 'transit' for the Latin 'transitu'), the sole substantive change to the equivalent sections in the UK Sale of Goods Act 1979 has been the deletion of the reference to delivery to a carrier 'by land or water' in section 45(1) in order to extend the provisions to transit by air.

10.13. Section 44 sets out the right of the unpaid seller who has parted with the possession of goods to stop them in transit, that is to resume and retain possession of them until payment or tender of the price. The right is not a revival of the lien and is not dependent on the seller having previously exercised a lien.[820] Three conditions must be met before the right of stoppage can be exercised. First, the seller must be unpaid; second, the buyer must be insolvent; and, third, the goods must be in transit. The right is more restricted therefore than the seller's lien which, in addition to the buyer's insolvency, can also be exercised where the goods have been sold without any stipulation as to credit and, if sold on credit, where the term of credit has expired.

10.14. Section 45 comprises seven sub-sections which deal in some detail with the operation of the right of stoppage, and in particular with when the transit ends. In

[820] **Benjamin's Sale of Goods**, op. cit., para. 15-065.

Schotsmans v Lancs & Yorks Ry,[821] the 'essential feature' of the right was expressed as follows:

> … the goods should be at the time in the possession of a middleman, or of some person intervening between the vendor who has parted with and the purchaser who has not yet received them.

The right of stoppage requires, therefore, that the carrier middleman cannot be the agent of either seller or buyer. If he acts for the seller, the goods remain in the possession of the latter and the right of stoppage does not arise. If he acts for the buyer, the transit is at an end under the rules in section 45. Notwithstanding section 32(1) of the Act which states that delivery to the carrier is deemed *prima facie* to be delivery to the buyer, the right of stoppage is only terminated by an actual delivery to the buyer or his agent.[822] Delivery to a carrier who is not the agent of the buyer is not delivery to the buyer for the purposes of the right. Once the goods have come into the possession of the buyer or his agent, the transit does not recommence if the goods are sent to another destination by the buyer.[823] In accordance with section 46, the right of stoppage is exercised by means of repossession of the goods by the seller or by notice from the seller to the carrier. The seller's notice must make plain his intention to retake possession of the goods. It must also clearly identify the goods to which the notice applies.[824] As with the lien, the exercise of the right of stoppage does not of itself rescind the contract of sale.

Issues Arising

10.15. The retention of the remedy aside, the principal other issue to which the Act's provisions on the right of stoppage give rise relates to the detailed rules on the termination of the right in section 45. In Bridge's view, it is open to question whether there is any need for this section 'to run on for seven subsections' when 'all that is being said is that the transit is at an end when the buyer acquires possession of the goods, actual or constructive, or the right to immediate possession.'[825] Atiyah, takes a more positive view of the section, however, stating that it 'makes a determined and,

[821] (1867) L.R. 2 Ch.App. 332 at 338.
[822] *Ex Parte Rosevear China Clay Co. Ltd* (1879) 11 Ch D 560. The fact that the carrier was appointed by one of the parties, however, does not of itself mean that he is acting as their agent and that the transit is at an end on delivery of the goods to him. *Bethell v Clark* (1888) 20 Q.B.D. 615.
[823] *Kendal v Marshal Stevens & Co* (1883) 11 Q.B.D. 356.
[824] *Clementson v Grand Trunk Railway Co* (1877) 42 UCQB 263.
[825] Bridge, 'Do We Need a New Sale of Goods Act?', op. cit., para. 2.26.

on the whole, successful attempt' to reduce the 'chaos' of the pre-1893 common law 'to a number of definite rules.'[826]

Retention or Repeal of the Unpaid Seller's Lien and the Right of Stoppage

10.16. There is no doubt that recourse to the unpaid seller's lien has declined greatly since the inclusion of the remedy in the 1893 Act. Changes in trading practices have made the right of lien both more impracticable and less necessary. As there is no entitlement to the remedy where goods are sold with a stipulation as to credit, the prevalence of credit terms in present-day contracts of sale means, on the one hand, that the lien is no longer an option for the unpaid seller in a great many cases. On the other hand, the seller's need for protection from the risk of non-payment has been met in other ways, most notably through the widespread recourse to retention of title clauses.

10.17. Though the relevance of the lien has declined, it has not entirely disappeared from commercial practice. Infrequent though such a situation may be, the lien remains a potentially useful remedy for the unpaid seller where goods to be paid for on open account are still in the seller's possession when the buyer becomes insolvent.[827] It may also serve a purpose in the case of a contract with provision for instalment deliveries in permitting the seller to withhold delivery of an instalment until earlier instalments have been paid for.[828]

10.18. The case for the retention of the right of stoppage in transit is weaker in our view than that for the unpaid seller's lien. As Bridge has noted, reported cases on the right of stoppage have been 'exceedingly rare' in this and the last century, reflecting the fact that the remedy was predicated upon the lengthy transit of goods shipped on credit terms.[829] Rapid transit has made the right of stoppage both less usable and less useful. No less importantly, the development of the system of payments against documents and, more particularly, of payment by bankers' commercial credits have greatly reduced the need for a right to stop goods in transit.[830] According to Bridge,

[826] Atiyah, **The Sale of Goods**, op. cit., pp.457-458.
[827] **Goode on Commercial Law**, op. cit., p. 443.
[828] White, **Commercial Law**, op. cit., p. 330.
[829] Bridge, **The Sale of Goods**, op. cit., para. 11.26.
[830] For an account of the operation of bankers' commercial credits, see Atiyah, **The Sale of Goods**, op. cit., pp. 426-432.

the effect of these developments has been that 'the right of stoppage is unlikely ever to be exercised.'[831] Atiyah, however, while noting that there are virtually no modern cases on the subject, considers that 'the possibility of the right being needed must sometimes arise in the case of sales to buyers in other European Union countries where sales on open account are quite usual'.[832]

10.19. The Group favours the repeal of the right of stoppage in transit. If there is evidence, however, that the right is actually used in twenty-first century commerce, we would hesitate to interfere with business practice. Observations and submissions are invited accordingly on the issue from interested parties. The Group believes that the right of stoppage in its present form is unwieldy and, if it is to continue to be available to unpaid sellers, it should be revised and simplified as suggested by Bridge.

Extension of the Unpaid Seller's Lien

10.20. The options regarding the remedy of a statutory lien are not confined to the repeal or retention of the lien in its present form under the 1893 Act. The remedies in Part IV of the Act seek to stop the goods from going to the buyer where the buyer becomes insolvent or, additionally in the case of the lien, until payment or tender of the price where the goods are sold without a stipulation as to credit or the term allowed for credit has expired. The in-built limitations of the current remedies raise the question of whether there is a case for a more general statutory lien that would also offer a remedy to the unpaid seller where the goods had been delivered into the possession of the buyer. In addition to a right to retain possession of goods and to stop them in transit, a lien of this kind would permit the unpaid seller to reclaim goods identifiable under the contract of sale which were in the buyer's possession. As with the existing real remedies, a broader lien of this kind could be waived or varied by agreement between the parties. While closer in some respects to a retention of title clause than to the existing possessory lien, a general lien along these lines would differ from such a clause in significant respects. Whereas a retention of title clause withholds the property in the goods from the buyer until payment, a general lien would operate where the property had passed to the buyer. Furthermore, whereas a retention of title clause gives the seller a right to reclaim the goods as against a

[831] Bridge, 'Do We Need a New Sale of Goods Act?', op. cit., para. 2.26.
[832] Atiyah, **The Sale of Goods**, op. cit., p. 457.

subsequent buyer, the general lien would not do so by virtue of the fact that the first buyer's property in the goods would enable him to pass good title to a subsequent purchaser.

10.21. Though a general lien with this extended scope is an interesting concept and one that merits closer study, we were not in a position to give it the kind of detailed consideration that the idea requires. As we stated in Chapter 6, moreover, in our conclusions on the proposal for a mandatory lien for pre-paying consumer buyers, it is necessary to recognise that giving some buyers or sellers preferential status by means of this type of legal device raises issues of fairness vis-à-vis other categories of creditor. The matters at issue, and the conflicting interests involved, are more appropriately considered therefore in the context of the overall framework of personal property security law than in the narrower context of the rules governing the transfer of possession or property in contracts of sale.

10.22 Recommendations

The unpaid seller's lien at sections 41-43 of the 1893 Act should be retained in future legislation.

The right of stoppage in transit at sections 44-46 of the 1893 Act should be repealed. If evidence is forthcoming from future consultations that the right retains some utility in present-day commercial practice, this recommendation should be reviewed. If the right is retained following such a review, the conditions governing its operation should be simplified.

IV RE-SALE BY BUYER OR SELLER

Section 47 Effect of Sub-Sale or Pledge by Buyer

Subject to the provisions of this Act, the unpaid seller's right of lien or retention or stoppage in transitu is not affected by any sale, or other disposition of the goods which the buyer may have made, unless the seller has assented thereto.

Provided that where a document of title to goods has been lawfully transferred to any person as buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, then, if such last-mentioned transfer was by way of sale the unpaid seller's right of lien or retention or stoppage in transitu is defeated, and if such last-mentioned transfer was by way of pledge or other disposition for value, the unpaid seller's right of lien or retention or stoppage in transitu can only be exercised subject to the rights of the transferee.

Section 48 Sale Not Generally Rescinded by Lien or Stoppage in Transitu

1) Subject to the provisions of this section, a contract of sale is not rescinded by the mere exercise by an unpaid seller of his right of lien or retention or stoppage in transitu.
2) Where an unpaid seller who has exercised his right of lien or retention or stoppage in transitu re-sells the goods, the buyer acquires a good title thereto as against the original buyer.
3) Where the goods are of a perishable nature, or where the unpaid seller gives notice to the buyer of his intention to resell, and the buyer does not within a reasonable time pay or tender the price, the unpaid seller may re-sell the goods and recover from the original buyer damages for any loss occasioned by his breach of contract.
4) Where the seller expressly reserves a right of re-sale in case the buyer should make default, and on the buyer making default, re-sells the goods, the original contract of sale is thereby rescinded, but without prejudice to any claim the seller may have for damages.

10.23. The statutory remedies of the lien and the right of stoppage in transit are a means to an end and not an end in themselves. As Benjamin observes, the unpaid seller who avails of these remedies is seeking in the first instance to enforce the contract by obtaining a form of security for the buyer's performance of his duty to pay the price.[833] The unpaid seller who does not expect the price to be paid, however, 'is preparing the ground for the more radical remedies of termination of contract and resale.' In practice, the right of lien is often exercised as a preliminary to resale.[834] The circumstances in which the seller can resell the goods and the effect of resale on both the passing of title to a second buyer and the contract of sale with the first buyer are the subject of section 48 of the Act. As the section's provisions are complex, and in parts confusing, we will look separately at subsections (1) and (2) before considering subsections (3) and (4) in tandem. The first two subsections relate to the exercise of the right of lien or stoppage in transit, while the final two subsections have no necessary connection with these rights.

Section 48(1)

10.24. Section 48 (1) deals with the effect of the exercise of the rights of lien and stoppage on the contract of sale and provides that it is not rescinded by the mere exercise of these rights. This reflects the fact that these remedies are exercisable where the property in the goods, though not the possession, has passed to the buyer. Where the property has passed to the buyer, the effect of section 48(1) is that the exercise of either the lien or the right of stoppage is not sufficient of itself to revest

[833] **Benjamin's Sale of Goods**, op. cit., para. 15-101.
[834] Atiyah, **The Sale of Goods**, op. cit., p. 451.

the property in the seller.[835] As stated by Diplock J. in *RV Ward Ltd v Bignall*[836], the purpose of the sub-section is to ensure that, where the contract stipulates a fixed date for delivery, the seller's failure to deliver by reason of his exercise of the rights of lien or stoppage does not relieve him of his obligation to deliver upon payment or tender of the price, or discharge the seller of his obligation to accept the goods and pay the price.

Section 48(2)

10.25. In circumstances where an unpaid seller resells goods the property in which remains with the first buyer, there is a need to afford protection to the second buyer. Section 48(2) provides accordingly that such a buyer acquires a good title as against the original buyer where the resale occurs after the seller exercises his right of lien or stoppage in transit.[837] Resale by the seller in such circumstances is one of a number of situations in which the seller has the power to transfer a good title to a second buyer without thereby implying that he has the right as against the first buyer to resell the goods. It is necessary to distinguish in this context between the seller's power to sell and right to sell.[838] Unless the seller has a right to resell at common law or, as discussed below, under sections 48(3) or (4) of the Act, resale involves a breach of his obligation to deliver the contract goods by reason of the fact that the exercise of the lien or the right of stoppage does not rescind the original contract. The seller may be liable to the original buyer accordingly for damages for breach of contract or the tort of conversion.

10.26. Section 48(2) constitutes a further exception to the *nemo dat* rule discussed in Chapter 5 of this Report. It can be compared in particular with section 25(1) of the 1893 Act which provides that a seller who has transferred the property in the goods, but who remains in possession of them or the documents of title to them, can pass a good title to a third party. The seller's ability to pass a good title under section 25(1)

[835] **Benjamin's Sale of Goods**, op. cit., para. 15-101.
[836] [1967] 1 Q.B. 534 at 549.
[837] As Benjamin notes, the subsection assumes that the seller who has exercised either right remains in possession of the goods up to the time of resale. He adds that, if between the valid exercise of the right of lien or stoppage, an event occurs which divests the seller of his right to retain possession (such as payment or tender of the price), it could not have been intended by the draftsman that section 48(2) should apply. **Benjamin's Sale of Goods**, op. cit., para. 15.102.
[838] **Goode on Commercial Law**, op. cit., p.446. Atiyah, **The Sale of Goods**, op. cit., pp. 447-48.

is subject to the following conditions, none of which are expressly required for the application of section 48(2):

- The seller must continue or be in possession of the goods or the documents of title to the goods;
- The transaction must involve the delivery or transfer of the goods or title documents to the second buyer;
- The second buyer must receive the goods or title documents in good faith and without notice of the previous sale.

Under section 48(2), by contrast, a seller who has exercised the right of stoppage may be able to pass a good title where he is not in actual possession of the goods but is entitled to immediate possession of them by virtue of the exercise of this right.[839] The sub-section similarly does not make delivery or transfer to the buyer of the goods or title documents a pre-condition of a valid sale. Most importantly perhaps, the seller's power to confer good title on a second buyer under section 48(2) is not dependent on the second buyer's receipt of the goods or title documents in good faith and without notice of the original sale. In Goode's opinion, the freedom of the second buyer under section 48(2) from the good faith and notice requirements is questionable.[840] While the conditions that govern the passing of title under section 25(1) are absent from section 48(2), the latter provision, but not the former, is of course subject to the requirement that the seller be unpaid. Despite the differences between the two sets of provisions in respect of the conditions governing the passing of title, both are likely to overlap in many situations.[841]

Sections 48(3) and 48(4)

10.27. Section 48(3) confers a statutory right of resale on the unpaid seller in two instances. First, where the goods are of a perishable nature and the buyer does not pay or tender the price within a reasonable time. Secondly, where the unpaid seller gives notice of his intention to resell and the buyer does not pay or tender the price within a reasonable time. In both these cases, the seller may also recover damages from the buyer for any loss occasioned by his breach of contract. Section 48(4) provides that the seller has a right of resale if he has expressly reserved this right in the original contract in the event of default by the buyer. Where he resells the goods,

[839] **Benjamin's Sale of Goods**, op. cit., para. 15-103 & 15-124.
[840] **Goode on Commercial Law**, op. cit., p.447.
[841] **Benjamin's Sale of Goods**, op. cit., para. 15-103.

the contract is rescinded without prejudice to any claim the seller may have for damages. These statutory provisions aside, the buyer will also have a right of resale if the buyer repudiates the contract or if the goods in question have not been appropriated to the contract.[842]

Issues Arising

10.28. Section 48, especially subsections (3) and (4), has been the subject of considerable critical comment. Goode has called the section 'confusing and badly drafted' because of its indiscriminate mixing of powers and rights of resale and its unsatisfactory treatment of the impact of resale upon the original contract.[843] For Bridge, the section represents 'the clearest example of a provision in the Act that does not correspond to modern legal understanding'[844], and one that is a 'mystery' to 'anyone approaching it with the values and principles of contract law in the late twentieth century'.[845]

10.29. There is no doubt that the provisions on the right of resale in particular give rise to a number of issues. While section 48(4) states that, where the seller resells in accordance with an express term of the contract, the original contract of sale is rescinded, section 48(3) makes no reference to rescission in the cases of the resale of perishable goods or resale after notice. In *Gallagher v Shilcock*,[846] it was held that the absence of such a reference in section 48(3) meant that a resale under the subsection did not rescind the original contract. As the property in the goods had already passed to the buyer, the seller was therefore reselling the buyer's goods in the capacity of pledgee rather than that of owner. The buyer remained liable for the price as a consequence, subject to a credit for the resale price, and would also be entitled to any profit accruing if the seller resold the goods for a price higher than that in the original contract. The decision in *Gallagher* was overturned by the Court of Appeal in *RV Ward Ltd v Bignall*.[847] This case concerned the sale by the plaintiffs of two used cars which the defendant refused to take delivery of, or pay for. The sellers informed the buyer that, as the property in the cars had passed to him, he was liable for the price,

[842] Ibid., para. 15.105. Atiyah, **The Sale of Goods**, op. cit., pp. 463-64.
[843] **Goode on Commercial Law**, op. cit., p. 445.
[844] Bridge. 'Do We Need a New Sale of Goods Act?', op. cit., para. 2.7.
[845] Bridge, **The Sale of Goods**, op. cit., para. 11.44.
[846] [1949] 2 KB 765.
[847] [1967] 1 QB 534.

and further served notice that, if payment was not made within five days, they would resell the vehicles. The defendant declined to pay and the buyers managed to sell only one of the cars, whereupon they sued for the price of the unsold car and for the loss incurred on the resale of the other vehicle. The Court of Appeal held that the sellers were not entitled to the price of the unsold car as the resale of the first car had rescinded the original contract. The buyer accordingly was liable only for damages for non-acceptance, assessed in accordance with the normal rule as the difference between the contract price and the market value of the unsold car. The Court reached this verdict despite the absence of any reference to rescission in section 48(3) which governs resale after notice. It held that, while the buyer's failure to pay the price was not in itself a breach that justified repudiation of the contract, the seller's subsequent notice for payment within five days made time of the essence of the contact. Failure to pay within the stipulated time amounted consequently to repudiation which the seller accepted by reselling the goods. The resale thus constituted a rescission of the contract following which the property revested in the seller and the buyer was no longer liable for the price.[848]

10.30. Bridge has observed that the decision in *RV Ward Ltd V Bignall* imposes the modern view of contractual termination upon statutory provisions that were actuated by a different philosophy.[849] That modern view, as approved by the House of Lords in *Johnson v Agnew*[850], draws a clear distinction between termination of the contract for breach and rescission of the contract *ab initio*. Lord Wilberforce stated that, although it was sometimes said, that breach of contract entitled the innocent party to rescind:

> … this so-called rescission is quite different from rescission *ab initio*, such as may arise, for example, in cases of mistake, fraud or lack of consent. In those cases, the contract is treated in law as never having come into existence. In the case of an accepted repudiatory breach the contract has come into existence but has been put

[848] The Court of Appeal explained the inclusion of a reference to rescission of the contract in section 48(4) and its absence in section 48(3) on what Atiyah has termed 'somewhat ingenious grounds' (Atiyah, **The Sale of Goods**, op. cit., p. 465.) An express provision in section 48(4) was necessary as, where the contract contains an express provision for resale, any such resale would not necessarily amount to rescission were it not for the subsection. Resale in such a case would be an exercise of a contractual right rather than an acceptance of repudiation. It was necessary consequently to make express provision for a right of rescission in section 48(4). In the case of section 48(3), by contrast, the giving of notice made time of the essence and failure to pay on time a repudiation of the contact, thus obviating the need for any express provision regarding rescission. Ibid. at 550-51.
[849] Bridge, **The Sale of Goods**, op. cit., para. 11.53.
[850] [1980] AC 367.

to an end or discharged. [851]

Rescission is a remedy for breaches of obligations that fall outside the contract, generally matters to do with the circumstances surrounding its formation, and its effect is to restore the parties to their pre-contract position. Termination for breach, in contrast, applies prospectively.[852] The parties are released from obligations that have yet to be performed, but remain liable for obligations that have already accrued. On this view, a failure to pay the price and a subsequent resale by the seller under section 48(3) or (4) involves termination and not rescission.[853]

10.31. We agree with the view expressed by Bridge and others that section 48 needs to be redrawn in order to make it reflect modern contract theory, particularly in respect of termination for breach.

10.32 Recommendations

Sections 48(3) and (4) should be amended in future legislation to clarify that:

(1) The seller's right of resale applies where:

a) **the goods have not been delivered to the buyer;**
b) **the buyer's breach of contract is a terminating breach; and**
c) **the contract has been terminated.**

(2) Where the seller lawfully exercises a right of resale, any property in the goods which has passed to the buyer revests in the seller.

[851] Ibid. at 393.
[852] Atiyah points out, however, that termination must have some retrospective effect in a contract of sale in that it normally involves the restoration of the property in the goods from buyer to seller where the property had already passed. Where the property has not yet passed when the contract is terminated, the seller's duty to pass the property no longer applies despite having existed prior to the termination. Atiyah, **The Sale of Goods**, op. cit., p.466.
[853] Ibid., p.466.

CHAPTER ELEVEN SALE OF GOODS ACT 1893: ACTIONS FOR BREACH OF CONTRACT, SECTIONS 49-54

11.1. Part VI of the 1893 Act which deals with actions for breach of contract contains provisions on sellers' remedies at sections 49-50 and on buyer's remedies at sections 51-53. Section 54 deals with the right of buyers or sellers to recover interest or special damages. With the exception of a provision inserted by the 1980 Act in section 53 which gives consumers a right to request cure of faulty goods, these sections of the Act have remained unchanged since its enactment. The equivalent provisions in UK legislation have also gone untouched, as have those in other jurisdictions.[854] While these sections of the Act have avoided amendment, they have not have escaped criticism. Bridge, for example, has commented that the provisions of sections 50 and 51 on damages for non-acceptance and non-delivery respectively are 'ill-suited to most sale of goods transactions and, as a whole, lack a coherent philosophy of purpose as the courts try to bend them towards principles of damages in the general law of contract'.[855]

SECTION 49 ACTION FOR PRICE

1) Where, under a contract of sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may maintain an action against him for the price of the goods.
2) Where, under a contract of sale, the price is payable on a day certain irrespective of delivery, and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed, and the goods have not been appropriated to the contract.

11.2. The section provides the seller with an action for the price of the goods in two instances where the buyer wrongfully neglects or refuses to pay for the goods. These are:

- where the property in the goods has passed to the buyer and payment is not made in accordance with the contract (s. 49(1));
- where the price is payable 'on a day certain' irrespective of delivery although property has not passed and the goods have not been appropriated to the contract (s. 49(2)).

[854] Annex IV, sections 8.2.19-8.2.20.
[855] Bridge, 'Do We Need A New Sale of Goods Act?', op. cit., para. 2.18.

The seller's right to the price is based upon the action in debt. As the buyer's obligation is to pay the price, once property has passed or the time for payment under the contract has arrived, the debt falls due and the seller may maintain an action upon that debt. An action in debt has significant advantages for the seller over and above an action in damages for non-acceptance. The seller can recover the price and is not bound by any duty to mitigate any loss, nor is the action on the price subject to any rules of remoteness of damage.

Issues Arising

11.3. Notwithstanding the absence of amendments since 1893, there are a number of areas of doubt and uncertainty around section 49, some of which show the law to be irrational and inconsistent. The main such areas are as follows:

- Does section 49 represent two default rules which can be amended by the contract?

- Section 49(1) depends upon property in the goods having passed. It may be that the buyer has refused to accept the goods and, even if delivery has taken place, the action in debt is not available unless property has passed. Whether property in the goods has passed may be a more difficult issue to determine than acceptance or delivery of goods.

- The action for the price is lost if the seller accepts the breach and terminates the contract. It can reasonably be asked if this is a rational position for the statute to maintain in the twenty first century.

- Save in respect of section 49(2) cases, section 49(1) must be satisfied *vis-à-vis* the passing of property. If property is to pass on a stated event, the buyer may withhold participation in that event and prevent the passing of property from occurring. There is no method by which property may be deemed to have passed, although a buyer may be estopped from denying that property has passed.

- While section 49(2) allows an action for the price to be maintained irrespective of delivery, the price, in order to be recoverable must be due on 'a day certain'. There are conflicting views on what this term means.

- Section 49(2), according to an analysis of one important English case,[856] seems to envisage the possibility that an action on the price may be maintained even if goods are never delivered, the seller exercising a right of cancellation for failure by the buyer to pay the price, or an instalment thereof, before the date of delivery.

[856] *Hyundai Heavy Industries Co. v. Papadopoulos* [1980] 1 WLR 1129.

- It is not clear whether the seller or the buyer is under a duty to dispose of unwanted goods and whether the law should require the seller to be under that duty, being concomitant with the action upon the price, as a matter of policy.

- It is also unclear whether there is judicial discretion to deny the seller a right to the price upon equitable grounds (if, for example, the buyer shows that the seller has suffered no loss).

11.4. These issues suggest that actions for the price under section 49 do not rest upon entirely coherent or consistent grounds.[857] From the vantage point of a seller, however, the action for the price is a reasonable claim for the seller to be able to make. The rationale behind section 49, which requires the buyer to pay the agreed price in full, turns upon the fact that the goods are the property of the buyer and the onus should be upon the buyer to dispose of the goods. It would not be appropriate to relegate the seller to a claim in damages based upon the difference between the contract price and market value at breach, for example. The goods may have deteriorated and it would, accordingly, not be fair upon the seller to deny the seller a right to the agreed price. The difficulty with this theory is that the critical event is the passing of property rather than, for example, acceptance by the buyer. The Group considers that section 49, rooted as it is in the old causes of action, needs to be restated in a more contemporary fashion and that reforms should seek to eliminate the anachronisms and accretions that disfigure the section 49 action. There is a strong argument to be made for providing a simpler test under which it is to be made clear that the duty of disposing of goods will rest upon the shoulders of the buyer. The Uniform Commercial Code opts for acceptance by the buyer rather than the passing of property as the most important factor in triggering the seller's right to an action for the price, and the Ontario Law Reform Commission supported such a shift in emphasis. However, the Canadian Uniform Sale of Goods Committee[858] criticised the acceptance test, preferring delivery instead as the factor that should trigger the seller's right to the price. While conceding that, in practice, a close examination of the law reveals that the transfer of property 'is generally associated with the transfer of possession', the Canadian Institute of Law Research and Reform opted to provide 'functional solutions to particular problems'. Its Report continues by arguing that

[857] Atiyah, **The Sale of Goods**, op. cit., pp. 479-83. **Benjamin's Sale of Goods**, op. cit., paras. 16-021-16-027. Bridge, **The Sale of Goods**, op. cit., paras. 11.60-11.70.
[858] Report No. 38, **The Uniform Sale of Goods Act** (1982).

particular difficulties are raised by using the passing of property rules in problems raised by bankruptcy:

> If the existing rules on passing of property were certain and predictable, they would have some practical merit. But they are not; indeed, the only certain thing about them is that in some cases courts will strive to break out of the statutory strait jacket. Because the present law provides neither functional relevance nor certainty, the transfer of the invisible abstraction we call property is not a satisfactory test for determining the rights and duties of the parties to a contract of sale….. We believe that the concept of property is being made to do too much and that, while it can from time to time be bent to suit individual cases, this is not done on a consistent basis.[859]

11.5. The deliberations of the Group have been strongly influenced by the reviews undertaken in the United States and in Canada, especially in relation to section 49 to 54. Though there are other possible models such as section III-3: 301 of the Draft Common Frame of Reference (DCFR) or Article 62 of the Vienna Convention on the International Sale of Goods (CISG), there are clear advantages to reform proposals that more accurately reflect the common law origins of section 49. There have been no statutory adjustments to section 49 in the common law world, save for the provisions in the US Uniform Commercial Code (UCC). Though its provisions were never implemented, the Uniform Sale of Goods Act drafted in Canada in 1981 and adopted in 1982 is also a source of possible guidance on the desirability or otherwise of continuing to measure the right to maintain an action for the price under section 49(1) by reference to the passing of property. However, the Group is conscious of the fact that, at paragraphs 6.17 and 6.18 above, we concluded that amending the general provisions in sections 16-20 of the 1893 Act to reflect the UCC would not be a proportionate response to problems caused thereby, nor would it solve all the problems that occur in this complex area of law. In the context of reform of section 49, other knock-on consequences would follow such as a possible adjustment to some provisions in Part IV of the 1893 Act. Though we examine section 49 in the context of both the UCC and the Canadian reform proposals at this point in our Report, further consideration should be given to, and views sought on, the desirability and possible unintended consequences of a stand alone reform of the section.

[859] Ibid p. 89.

Reform Option 1: Section 2-709 UCC.

11.6. The seller's right to the price under section 49(1) arises where property in the goods has passed to the buyer and the buyer wrongfully fails to pay for the goods in accordance with the contract. Under section 49(2) the right is similarly available when the price is payable on 'a day certain', even though the property in the goods has not passed and the goods have not been appropriated to the contract. Both rights to the price, as we have seen, are based upon the action in debt at common law. These features have been built upon in the Uniform Commercial Code, section 2-709(1) of which provides that:

> When the buyer fails to pay the price as it becomes due the seller may recover, together with any incidental damages under the next section the price
> a) of goods accepted or of conforming goods lost or damaged within a commercially reasonable time after risk of their loss has passed to the buyer; and
> b) of goods identified to the contract if the seller is unable after reasonable effort to resell them at a reasonable price or the circumstances reasonably indicate that such effort will be unavailing.

11.7. It can be seen that the triggering events under subsection (a) do not include the passing of property, although risk may in practice coincide with the passing of property. Rather, acceptance, which is normally constituted by delivery to the buyer, will determine the seller's right to the price.[860] However, US case law suggests that delivery may take place if the buyer fails to reject the goods following delivery or tender by the seller.[861] Although this conclusion seems out of line with the rationale behind the action in debt itself insofar as deemed acceptance is concerned, White and Summers argue that it can be defended on pragmatic grounds.[862]

11.8. The second part of Section 2-709(1)(a), where conforming goods have been lost or damaged after risk has passed to the buyer, is explained by White and Summers as turning upon the fact that post-sale events have undermined the economic efficiency argument, namely that the seller is best able to effect a resale. In this situation:

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[860] Section 2-606(1) of the UCC states that acceptance of the goods occurs when the buyer:
(a) after a reasonable opportunity to inspect the goods signifies to the seller that the goods are conforming or that the buyer will take or retain them in spite of their nonconformity;
(b) fails to make an effective rejection under section 2-602(1), but such acceptance does not occur until the buyer has had a reasonable opportunity to inspect them; or
(c) except as otherwise provided under section 2-608(4), does any act inconsistent with the seller's ownership if the act is ratified by the seller.

[861] *Unlaub Co. v. Sexton* 568 F. 2d 72 (1977). *Plateq Corp v. Machlett Labs Inc* 189 Conn 433 (1983).

[862] White, J.J. & Summers, R.S. 2010. **Uniform Commercial Code** (6th ed). Section 9.2 contains a full examination of the acceptance cases.

> since the goods are at least damaged, often missing or destroyed, the seller's presumptively superior resale opportunity is diminished and may be nonexistent.[863]

The case-law in the United States on this part of section 2-709(1)(a) tends to arise in cases where goods are shipped to a buyer, being then lost or damaged.[864] Like section 49(1) these cases required the US Courts to consider complex rules on the passing of property, but unlike section 49(1) the passing of property rules did not provide the only route under which a seller is entitled to the price.

11.9. Where goods are not readily re-saleable then an action for the price may be available under section 2-709(1)(b) of the UCC. Such actions will typically involve specifically ordered goods that are delivered late. The seller will have to show that reasonable efforts would not produce a resale or that the case is one of *res ipsa loquitur* – for example, the late delivery of merchandise relating to the 2010 Football World Cup might raise issues in respect of products pertinent to Spain, the winners, but not so in the case of Italy.[865] It is possible to discern why the UCC should give the seller the right to claim the price in cases where the goods have been appropriated to the contract but the goods have no reasonable commercial value. Section 2-709(1)(b) represents, however, the expansion of a right to the price, a right that is somewhat anomalous in a number of ways. For this reason the Group has hesitated in regard to section 2-709(1)(b). As the seller retains the goods, we consider that the seller's generally superior sales skills and business acumen (vis-à-vis those of the buyer) should come into play. The case for extending the seller's right to the price, as distinct from damages, is by no means clear-cut. Furthermore, the cases in the United States indicate that there are difficulties and inconsistent lines of authority on factors such as whether goods have been 'identified to the contract' and how unsuitability is to be proved. Even the drafting of Section 2-709(1)(b) has attracted criticism. White and Summers remark:

> Elsewhere we have despaired of interpreting sentences which contain only one 'reasonable'. Who can interpret a sentence with three 'reasonables'?[866]

On balance, the Group does not recommend that Article 2-709(1)(b) be adopted. An action on the price should be maintainable because the goods have been identified to

[863] Ibid., p. 344
[864] For example, *Ninth Street East Ltd. v. Harrison* 259 A. 2d772 (1968); *Forest Nursery Co. v. IWS Inc.* 534 NYS 2d 86 (1988)
[865] The 2006 holders who failed to get out of the Group Stage.
[866] White and Summers, **Uniform Commercial Code**, op. cit., p. 351

the contract and the seller has been unable to sell them. We note in this context that the Uniform Sale of Goods Act in Canada, section 9.11 provides a legislative template that better accords with the 1893 Act.

11.10. In conclusion, section 2-709 and the statutory context within which it operates – the complexity of the other parts of the Code that make section 2-709 work could not be readily transplanted into Irish law – make it an inappropriate basis for recommending an extension to section 49 in its present form. The UCC provision can provide a basis, however, for overcoming some of the problems that section 49 currently creates. We think this can be best achieved by considering the Canadian work on Section 49.

Reform Option 2: The Canadian Draft Uniform of Sale of Goods Act

11.11. As we have seen, the Sale of Goods Committee which drafted the Canadian Uniform Sales of Goods Act suggested that neither the passing of property rules under the 1893 Act, nor the acceptance provisions that formed the core of the UCC provisions, offered a satisfactory solution to the problem of identifying the key event that best crystallises the seller's action for the price. In their view, 'delivery' constituted a clearer trigger for the seller's right to sue for the price, and the Act's provisions on the seller's action were framed accordingly.[867] While the Group considers that acceptance will include delivery in virtually every instance, it may be the case that the complex process of drafting a stand alone section on this point renders section 9.11 of the draft Canadian Act a more practicable proposition. Bridge is of the view that, if the Sale of Goods Act were amended on this basis, the same result as to price entitlement would be reached in the majority of cases as under the passing of property rules and that 'the actual legal position would change very little'.[868] While a change from property to delivery as the controlling factor for the seller's action for the price would offer a more coherent basis for the law, we agree that it might well not result in any very significant differences in the outcome of

[867] Uniform Law Conference of Canada. Draft Uniform Sale of Goods Act, section 106. Whether this is the case, in the light of Article 2.606(1), definition of acceptance (see footnote 7 above) is by no means clear. White and Summers, commenting on the action for the price when a seller retains goods write '[S]ince the seller possesses the goods the principal ground for recovering the price – for goods "accepted" – will not apply since a buyer who does not have possession will almost never have "accepted': **Uniform Commercial Code**, op. cit., p.345

[868] Bridge, **The Sale of Goods**, op. cit., para. 11.70

commercial litigation. On the related question of responsibility for disposing of unwanted goods, the UCC[869] takes the position, as did the Ontario Law Reform Commission,[870] that, in an action for the price, the burden of disposing of goods wanted by neither seller or buyer should be placed on the seller on the basis that the seller is best placed to market such goods. Where the goods are unsaleable, the seller would be able to recover the price, and, in the case of defective goods, damages would be available. This position was rejected, however, on the following grounds in the Uniform Sale of Goods Act:[871]

> These arguments did not take full account of the real procedural advantages which a debt action gave the seller over an action for unliquidated damages. The seller, after all, was not to blame for the contractual breakdown and had surely earned his entitlement to the price in many cases before the buyer's acceptance. It was also felt that the seller should not have the burden of disposing of goods at a distant place and that the tendency of our courts to prolong the right of rejection by adopting a restrictive interpretation of acceptance would make it difficult for a seller to know when he could sue for the price.

The Group agrees with this analysis and recommends no abridgement of the rights of the seller in respect of the disposal of the goods and resale.

11.12. Recommendation on Section 49

The Group favours the adoption of a provision linking an action for the price to delivery modelled on Section 9.11 of the Canadian Uniform Sale of Goods Act, as adopted in 1982. This should replace Section 49 of the 1893 Act. The relevant parts of Section 9.11 provide:

> **Seller's Action for the price**
>
> **(1) Where the buyer fails to pay the price as it becomes due, the seller may recover the price due,**
>
> **(a) of goods that he has delivered [or buyer has accepted] unless the buyer has rightfully rejected the goods;**
>
> **(b) of conforming goods lost or damages while the risk of their loss is upon the buyer;**
>
> **(c) of goods identified to the contract if the seller, being entitled to do so, is unable after reasonable effort to resell them at a reasonable price or the circumstances indicate that such effort will be unavailing.**
>
> **Seller's obligation to hold goods**

[869] Uniform Commercial Code, section 2-709
[870] Ontario Law Reform Commission, op. cit., pp. 416-17.
[871] Uniform Sale of Goods Act Report No. 38 page 108.

(3) Where the seller sues for the price he must hold for the buyer any goods which have been identified to the contract and are still in his control, except that if resale becomes possible he may resell them at any time prior to the collection of the judgment, in which case the net proceeds of any such resale must be credited to the buyer and payment of the judgment entitles him to any goods not resold.

SECTION 50: DAMAGES FOR NON-ACCEPTANCE

1) Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance.
2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract.
3) Where there is an available market for the goods in question the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept.

11.13. Section 50 of the 1893 Act provides the seller with a right to damages in cases where the buyer wrongfully refuses to accept and pay for the goods. Subsection (1) provides for an action for non-acceptance as distinct from an action for non-conformity which is dealt with elsewhere in the statute. If property in the goods has passed, or the date for payment of the price or an instalment of the price has been fixed for 'a day certain' that has arrived, an action on the price is an alternative. But in most cases of non-acceptance the sole remedy in damages is under section 50. Subsection (2) restates what is regarded as the 'first limb' in *Hadley v. Baxendale*[872], namely that the measure of damages is the loss that directly and naturally results in the ordinary course of events from the buyer's breach of contract. 'Second limb' damages are recoverable under section 54. Subsection (3) sets out what the measure of damages is to be in cases where there is an available market. This is a *prima facie* rule and can be displaced in certain instances by the courts, even where there is an available market. Where there is no available market, the court must select some other measure of loss. In some circumstances the court may conclude that the seller has failed to show that non-acceptance resulted in any loss, in which case nominal damages are awarded. This will most typically occur where the buyer fails to take delivery of goods on a rising market.

[872] (1854) 9 Ex. 341.

Issues Arising

11.14. English and Irish case law reveal a number of difficulties in relation to section 50 (and, relatedly, section 51). These include[873]:

- Uncertainty regarding what is meant by an 'available market'.
- Difficulties in applying section 50(3) to lost volume sales. While section 50(3) has been side-stepped as being only a *prima facie* rule, the circumstances in which a seller may recover for lost volume sales require clarification.
- There is no provision in section 50 that addresses late acceptance as distinct from non-acceptance.
- The possibility that damages may be awarded by reference to the resale price actually effected by the seller.
- The possibility that the value of the goods at the date of breach may not be used in favour of some other date such as the date of issuing proceedings or of the court judgment.

11.15. The market value measure has much to commend it. As the common law rule, it was relatively easy to estimate, especially in a localised environment where the seller, left with goods on his hands, would be expected to effect a prompt resale. In most such cases, consequently, the resale price and the market value would be one and the same. Sellers might have good reason, however, not to go into the market immediately in order to effect a prompt resale – for example, where they had a stock of identical goods and putting the unwanted consignment onto the market could have an adverse effect on the value of the entire stock. As an alternative to the market value measure, some jurisdictions favour the resale price test as the first measure of loss that a court should apply.

Reform Options

11.16. While general provisions relating to the award and assessment of damages can be found in the Draft Common Frame of Reference and the Principles of European Contract Law, they are framed at a level of generality that makes it difficult to tailor them to the specific circumstances addressed by section 50. The same is true of the CISG provisions. In view of the absence of compelling arguments for reform of

[873] Atiyah, **The Sale of Goods**, op. cit., pp. 484-94. **Benjamin's Sale of Goods**, op. cit., paras. 16-060-16-079. Bridge, M. **The Sale of Goods**, op. cit., paras. 12.55-12.74.

section 50 from any of the common law jurisdictions in which it remains in force,[874] it can be argued that the case for change is weak. The Group is of the opinion, however, that a number of adjustments should be made to the existing rules.

11.17. A first such change relates to the Act's failure to define an 'available market'. We favour the adoption of a definition based upon Upjohn J's *obiter dicta* in *WL Thompson Ltd. v. Robinson Gunmakers Ltd*.[875] The case concerned the non-acceptance of a new car, an item that did not readily fit within the established notion of an available market as a specific setting along the lines of a corn or cotton exchange where buyers and sellers meet on a regular basis.[876] Upjohn J. suggested instead that:[877]

> an available market merely means that the situation in the particular trade in the particular area was such that the particular goods could be freely sold.

11.18. The common law measure of damages, as reflected in section 50(3), has been criticised, secondly, for being inaccurate as a means of calculating the loss incurred by the seller. This formula has a tendency to lead to damages that over-or-under-compensate the seller, depending on how the market price shifts, upward or downwards, in relation to any resale price that the seller may in fact achieve. Because of the difficulties experienced in estimating the market price in specific situations, other mechanisms for assessing damages have been explored in the United States. While section 60(1) of the Uniform Sales Act had given sellers limited rights of resale (for example, where goods were perishable or the right was expressly reserved), section 2-706 of the UCC which replaced it went further in providing that, as a general rule, the measure of damages is to be assessed by reference to the difference between the contract price and the resale price of the goods. This is an appropriate test in relation to manufactured goods where there is a ready market for those goods. Under section 2-706(1) of the Code, the seller is given the right to resell goods ordered by a defaulting buyer. Where the resale is effected in good faith and in a commercially reasonable manner, the seller may recoup any difference between the

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[874] White and Summers describe the UCC counterpart, section 2-708(1) as 'among the least novel and least remarkable of the Code's damages sections': **Uniform Commercial Code**, op. cit., p. 359.
[875] [1955] Ch 177. See also *Charter v. Sullivan* [1957] 2 QBI17 at 128, and Griffith C.J. in *Francis v. Lyon* [1907] 4 CLR 1023 (defaulting seller)
[876] *Dunkirk Colliery Co. Ltd v Lever* (1878) 9 Ch. D 20 at 25.
[877] *WL Thompson Ltd. v. Robinson Gunmakers Ltd* [1955] Ch 177 at 187.

contract price and the realised resale price, plus incidental expenses. Resales can be public, for example an auction, or private. In the case of a private sale, section 2-706(3) requires the seller to give the buyer reasonable notice of his intention to sell. Any failure to give the requisite notice (in the absence of other relevant factors such as a discussion between the parties intimating that a resale was agreed and involving a consideration of methods of effecting the resale[878]) will result in this method of assessment being unavailable to the seller. The resale must take place promptly; this requirement has the advantage of allowing the court to presume that the resale has taken place at the market price, an important probative factor if difficulties arise. Promptness of a resale may depend upon the fungibility or otherwise of the goods and the volatility of the market.[879] When used correctly by a seller, section 2-706 of the Code provides a very direct means of recovering the seller's actual loss, avoiding in the process the difficulties raised by the common law formula enshrined in section 50(3) of the 1893 Act. Where the seller does not satisfy the requirements of article 2-706, however, he must be prepared to satisfy the courts as to market value by reference to the common law test as set out at section 2-708(1) of the UCC. Similarly, Section 9.10 of the 1982 Canadian Uniform Sale of Goods Act could be called into play as a legislative template on the seller's right to resell.

11.19. It should be possible in our view to produce a version of section 2-706 that could be inserted into section 50 and which would allow the seller to select the resale measure of recovery as an alternative to the measure found in section 50(3). Alternatively, the court could be given discretion to consider whether it is appropriate to award damages under either head, depending upon the facts of the individual case. We favour giving the seller the right to select the appropriate method of calculating the seller's loss. If the seller selects the resale measure, however, but fails to satisfy the requirements as to notice,[880] the timeliness of the resale, or other qualifying factors, the court may utilise the market formula in s. 50(3). Any award made under the latter measure should not exceed that initially sought by the seller under the resale measure. Section 2-706(1) of the UCC may also prevent the seller from being able to

[878] *Gray v. West* 608 SW2d 711 (1980).
[879] For example, oil. See *Apex Oil v. Belcher Co.* 855 F 2d 977 (1988)
[880] Notice requirements in the UCC are imposed in order to give the party in breach the possibility to minimise damages and protect against Stale Claims. See, for example, *Adams v. Munster Oil Co.* 98 SW 3d 832 (2003) (a section 2-607 case).

select the market formula in section 50(3) in cases where the seller has effected a favourable resale. This deals with cases where the actual resale price is ignored on the general principle that re-sales and sub-sales are not relevant under the market value formula. In *Tesoro Petroleum Corp v. Holborn Oil Co*.,[881] the buyer repudiated a contract to buy oil for which the contract price had been set at $1.30 per gallon. At the time of breach the market price had fallen to $0.80 per gallon. The seller nevertheless managed to effect a resale at $1.20 per gallon. Faced with a seller who claimed that he had a right to chose between a remedy under section 2-706 (resale) and section 2-708 (market value at breach), it was held that no such choice exists where the result would be to overcompensate the plaintiff (in this case to the tune of $3 million). It has been commented that this case decides that 'a seller who has resold prior to trial must use section 2-706 since the contract/resale measure will most closely approximate to its actual loss.'[882]

11.20. Thirdly, 'lost volume' sellers under the UCC also find that their claims are somewhat artificially regarded as being market value claims, even in cases where it is clear that non-acceptance has occurred and the seller has passed on the goods to a willing buyer at the same price as that agreed with the defendant buyer. The problem here is that the seller has more buyers than the seller can satisfy, whether the seller has a supply of goods already in stock, or goods can be ordered and orders filled as stock comes in. Section 2-708(1) is qualified by section 2-708(2) which roughly paraphrased allows the court, in cases of under-compensation under section 2-708(1), to award lost volume sellers *inter alia*:[883]

> The profit (including reasonable overhead) which the seller would have made from full performance by the buyer together with incidental damages making allowance for costs incurred and resale proceeds.
>
> It is accepted that this provision will be satisfied if the seller can show that:
>
> (a) the buyer at the resale would have been solicited for (an additional) sales contract if there had been no breach;
> (b) the solicitation would have been successful; and
> (c) the seller could have performed the (additional) sale.[884]

[881] 547 NYS 2d 1012 (1989). See Henning, etc.
[882] Law of Sales under UCC, para 8.8
[883] Section 2-708(2) is also directed at manufacturers producing finished goods from component parts and manufactures from raw materials who discontinue production after breach.
[884] *USX Corp. v. Union Pacific Resources Co.* 753 SW 2d 845 (1988). *Ragen v. Kearney & Trecker Corp* 912 F 2d 619 (1990).

A statutory provision codifying these factors might be worthwhile. However, Article 2–708(2) in particular has been heavily criticised[885] and, on balance, the Group does not want to import what is seen as a deeply flawed text into Irish law.

11.21 Recommendations

We recommend the retention of Section 50 in slightly amended form.

1) **'Available market' should be defined in line with case law dicta as meaning that the situation in the particular trade in the particular area is such that the goods in question can be freely sold.**
2) **Section 50 should incorporate provisions on the lines of those at section 9.10 of the 1982 Canadian Uniform Sales law or section 2-706 of the Uniform Commercial Code on sellers' right of resale.**
3) **We do not recommend specific legislative provisions to deal with the problem of lost volume sellers.**

SECTION 51 DAMAGES FOR NON-DELIVERY

1) Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may maintain an action against the seller for damages for non-delivery.
2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract.
3) Where there is an available market for the goods in question the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver.

11.22. Where the seller is in breach by wrongfully negotiating or by refusing to deliver the goods to the buyer, section 51(1) gives the buyer an action in damages for non-delivery. Section 51(2) measures damages by reference to the 'first limb' in *Hadley v. Baxendale*. 'Second limb' damages are available under section 54. The 'available market' value at the date of breach or refusal to deliver is selected as the *prima facie* measure of damages in section 51(3). The buyer who finds that, in breach of contract, the seller has not delivered the goods, is under no obligation to enter the market and purchase replacement goods. In the case of a buyer who actually enters the market to buy goods at a higher or lower price than the market price at the relevant time, the rule requiring the disregard of sales that have been concluded, or are in contemplation, is applied very strictly.[886] Other difficult decisions on section 51(3)

[885] White and Summers, **Uniform Commercial Code**, op. cit., fn. at section 8.8 (pp. 366-67).
[886] *Williams v. Agius* [1914] AC 510.

often turn upon the specific nature of commercial transactions,[887] and it is not entirely clear that the market value rule will prevail in cases where principles of remoteness of damage, or the special loss provisions in section 54, persuade a court that a beneficial sub-sale was in contemplation.

Issues Arising

11.23. English case-law on Section 51(3) is notoriously opaque, and general principles suggest that the subsection creates less of a difficulty in non-delivery cases than does the corresponding provision at section 50(3) in non-acceptance. The Group sees no compelling case for the adoption of either the CISG or DCFR provisions on buyer's remedies. While the Group proposes that the resale measure of damages in respect of a seller's remedies in the UCC should be specifically added to section 50, a similar provision is not necessary in the case of section 51, nor indeed does the UCC contain such a provision. Article 2-713 of the UCC selects a different measure of damages for non-delivery, namely the difference between the market price at the time when the buyer learned of the breach and the contract price, plus incidental and consequential damages.

11.24. Recommendation

As section 51(3) comprises a *prima facie* rule, we recommend that no change be made to the sub-section, or indeed to the remainder of section 51.

SECTION 52 SPECIFIC PERFORMANCE

> In any action for breach of contract to deliver specific or ascertained goods the court may, if it thinks fit, on the application of the plaintiff, by its judgment or decree direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages. The judgment or decree may be unconditional, or upon such terms and conditions as to damages, payment of the price, and otherwise, as to the court may seem just, and the application by the plaintiff may be made at any time before judgment or decree.

Issues Arising

11.25. While section 52 affords a court the discretion to award specific performance following upon breach of a contract for specific or ascertained goods, it is extremely

[887] See, for example, *R and H Hall Ltd and WH Pim (Jnr.) and Co's Arbitration*, (1928) 139 LT 50.

difficult to persuade a court that the discretion ought to be exercised in favour of a disappointed buyer. White suggests that there is only one Irish reported case in which such an order has been made.[888] Only in the most compelling circumstances will a court hold that manufactured goods or raw materials are unique or incapable of being replaced by a buyer who, it is assumed, will be able to enter the market to purchase a substitute. The increasing awareness by courts of the need to recognise and vindicate the buyer's 'performance interest' should, if anything, lead the judiciary to recognise that specific performance of a contract affords an alternative to engaging in a difficult or arbitrary process of assessing damages. US law has tended towards a more liberal view of uniqueness, the leading case of *Heidner v. Hewitt Chevrolet Co*.[889] holding that, in the light of shortages of motor vehicles after World War II, a motor dealer who defaulted on the delivery of a new car could be required to deliver a vehicle to the buyer. Section 2-716 of the UCC enjoins courts to award specific performance, not only where goods are unique, but also in 'other proper circumstances'. Such 'other circumstances' arise where the goods have tended to be commercially unique and the buyer has no realistic alternative remedy. A 'requirements' contract for the supply of propane over a long period of time where the buyer had no realistic prospect of finding another supplier, has been held to justify a decree of specific performance.[890] A buyer who has ordered goods that he has already sold on has also been held to be entitled to specific performance because of the poor prospect of obtaining substitute goods elsewhere, and the uncertain nature of the buyer's exposure to his own sub-buyer.[891]

Reform Options

11.26. We consider that a number of adjustments should be made section 52 in order to 'liberalise' the provisions on specific performance. The template in section 2-716 of the UCC could be adapted for this purpose, specifically by the addition of a new second sentence as follows based on the UCC provision:

> In particular, the court shall consider, in the case of goods that are physically or commercially unique for that buyer, whether the circumstances make specific performance an appropriate judgment or decree for the court.

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[888] *Clark v. Reilly* (1962) 96 ILTR 96. White, **Commercial Law**, op. cit., p. 317, fn. 133. See also Farrell, J. 1995. **Irish Law of Specific Performance** (Dublin: Butterworths), para. 1.25.
[889] 116 Kan 11 (1948).
[890] *Laclede Gas Co. v. Amoco Oil Co* 522 F 2d 33 (1975)
[891] *Ace Equipment Co. v. Agna Chem Inc.* 73 Pa. D&C 2d 300 (1975)

We also favour the deletion of the words 'specific or ascertained goods' from the first sentence of section 52.

11.27. Other more far-reaching reform options can be identified in respect of specific performance. The Draft Common Frame of Reference includes a right to specific performance at Book III, Article 3:302, though its formulation is rather terse in providing that a creator 'is entitled to enforce specific performance of an obligation other than one to pay money' and that specific performance includes remedying free of charge a contractual performance which is not in conformity with the contract terms regulating the obligation. Exceptions along the lines of the factors that generally persuade a common law court not to exercise the discretion are also set out.[892] On balance, the Group favours the retention of specific performance as a discretionary remedy rather than converting it into a remedy of first resort, or one based on entitlement. We return to this issue in relation to section 53.

11.28. Recommendations

The reference to 'specific or ascertained goods' should be deleted from the first sentence of section 52.

A new second sentence as follows should be added to the section:

> **In particular, the court shall consider, in the case of goods that are physically or commercially unique for that buyer, whether the circumstances make specific performance an appropriate judgment or decree for the court.**

SECTION 53 REMEDY FOR BREACH OF WARRANTY

(1) Subject to subsection (2), where there is a breach of warranty by the seller, or where the buyer elects, or is compelled, to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject the goods, but he may—

(a) set up against the seller the breach of warranty in diminution or extinction of the price, or

(b) maintain an action against the seller for damages for the breach of warranty.

(2) Where—

(a) the buyer deals as consumer and there is a breach of a condition by the seller which, but for this subsection, the buyer would be compelled to treat as a breach of warranty, and

(b) the buyer, promptly upon discovering the breach, makes a request to the seller that he either remedy the breach or replace any goods which are not in conformity with the condition,

[892] Where, for example, performance is burdensome, expensive or is of a personal character.

then, if the seller refuses to comply with the request or fails to do so within a reasonable time, the buyer is entitled:

(i) to reject the goods and repudiate the contract, or

(ii) to have the defect constituting the breach remedied elsewhere and to maintain an action against the seller for the cost thereby incurred by him.

(3) The onus of proving that the buyer acted with promptness under subsection (2) shall lie on him.

(4) The measure of damages for breach of warranty is the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty.

(5) In the case of breach of warranty of quality such loss is *prima facie* the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty.

(6) The fact that the buyer has set up the breach of warranty in diminution or extinction of the price or that the seller has replaced goods or remedied a breach does not of itself prevent the buyer from maintaining an action for the same breach of warranty if he has suffered further damage.

11.29. Section 53 sets out the measure of damages available in respect of a breach of warranty, or of a breach of condition which the buyer has elected, or is obliged, to treat as a breach of warranty. Section 53(1)(a) provides that the buyer may set up the breach of warranty against the seller in diminution or extinction of the seller's action on the price, while section 53(1)(b) gives the buyer a right of action in damages against the seller for breach of warranty. Section 53(2), as introduced by the 1980 Act, gives a consumer buyer the right to request the seller either to remedy a breach or to replace goods not in conformity with the contract. Section 53(3) is an ancillary provision which places the onus of proving promptness *vis-à-vis* a compliance request under section 53(2) upon the buyer. Section 53(4) provides that the measure of damages in respect of a breach of warranty are *Hadley v. Baxendale* 'first limb' damages. In relation to claims in respect of breach of warranty of quality, section 53(5) provides that the *prima facie* measure of damages is the difference between their value at the time of delivery and the value of the goods had they answered to the warranty. Section 53(6) provides that, in relation to the 'set off' remedy in section 53(1)(a), any additional losses may be recovered in damages.

Issues Arising

11.30. Neither the DCFR nor the CISG use the language of 'condition' and 'warranty'. Most of the provisions relating to damages in both texts are concerned with general principles which have not been codified in Ireland or the United Kingdom. Article III –3:702 of the DCFR contains a statement of the general measure

of damages which appears to be based on *Robinson v. Harmon*[893]. There are two specific aspects of section 53 that the Group considers appropriate for adjustment:

(1) the introduction of a cure remedy for commercial contracts;

(2) an amendment to section 53(5) regarding the estimation of loss in the case of breach of warranty.

A Broader Cure Remedy

11.31. Section 53, as amended by section 21 of the 1980 Act, introduced a right to request cure for consumer buyers. This entitles the buyer, promptly on discovering a breach, to request the seller either to remedy it or to replace the goods. If the buyer fails to do either within a reasonable time, the buyer can then either reject the goods or have them repaired elsewhere and claim the cost of the repair from the seller. The application of this remedy in consumer cases in the context of the remedial scheme under Directive 1999/44/EEC has been considered in Chapter 9. The issue to be considered here, therefore, is whether a right of cure should be extended in appropriate circumstances to commercial contracts. It is our view that that there should be afforded to buyers a general statutory right to repair or replacement and not one that applies only to consumer transactions. This right should sit alongside the specific performance provisions in section 52. The courts would thus retain the discretion to award specific performance, while a buyer could seek repair or replacement as a right where the conditions stipulated in the statutory provision were met.

11.32. Article 46 of the CISG contains an appropriate legislative model for a cure regime applicable post-delivery to non-conforming goods in commercial contracts. This provides that:

1) The buyer may require performance by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with this requirement.

2) If the goods do not conform with the contract, the buyer may require delivery of substitute goods only if the lack of conformity constitutes a fundamental breach of contract and a request for substitute goods is made [when notifying the seller that the goods are non-conforming] or within a reasonable time thereafter.

3) If the goods do not conform with the contract, the buyer may require the seller to remedy the lack of conformity by repair, unless this is unreasonable having regard to the circumstances. A request for repair must be made either in conjunction with notice

[893] (1848) 1 Exch. 850.

given under Article 39 (i.e. when notifying the seller that the goods are non-conforming) or within a reasonable time thereafter.

11.33. Some commentators are sceptical of the value of a cure provision in the commercial context. Bridge, for example, argues that cure 'is inherently uncertain and produces a host of questions that cannot be answered in advance of litigation to test the limits of the relevant provisions'.[894] This may be so, but the Group considers that Article 46 gives the buyer a substantial degree of control over the process. There is scope for difficulties under the CISG cure regime, however, in cases where the seller seeks to remedy non-conforming goods. Article 48 gives the seller the possibility of remedying any failure to perform his obligations 'if he can do so without unreasonable delay and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer'. It sets out a 'request' mechanism and stipulates that the remedial option for the seller is without prejudice to the buyer's right to claim damages and the buyer's rights of avoidance under Article 49. We consider that the level of uncertainty surrounding Article 48 militates against giving a right to call for goods to be repaired or replaced to the seller as well as the buyer. Article 48 does not deal adequately in our opinion with situations where the buyer's experience with a particular seller is such as to leave him with no confidence in the seller. The seller in turn might use or abuse an Article 48 type provision vis-à-vis an uncertain or prevaricating buyer. On a practical level, Article 48 appears capable of being severed from Article 46. We note that the Law Reform Commission also appear to have had reservations about Article 48.[895] Article 28 of the CISG allows the remedy of specific performance to sit alongside the Article 46 provisions. The Law Reform Commission, in its admirable summary of Article 46, saw no real objection to its provisions, although it is

[894] Bridge, M. 2007. **The International Sale of Goods** (Oxford: Oxford University Press), para. 12.37. The seller's right to cure is found in CISG, articles 34, 37 and 48. Summers and White, in discussing Article 2-508 of the UCC appear to support the seller's right to cure provisions despite the fact that it:

> offers many significant but unanswered questions. Although it was a novel legal doctrine, it was not new to business practice; it does no more than give legal recognition to a practical right that many sellers have exercised over the years ….. it seems likely that 2-508 simply recognises a general pattern or business behaviour and adds a legal sanction to those economic and non-legal sanctions which the parties had and have.

Uniform Commercial Code, op. cit., p. 436. Buyers have no cure rights under the U.C.C.

[895] Law Reform Commission. 1992. **Report on United Nations (Vienna) Convention on Contracts for the International Sale of Goods** (LRC 42-1992), p.63. This states, among other things, that 'Article 48(1) sets out a fairly broad licence to remedy a failure to perform. However, the power to remedy is subject to some limitations'.

unfortunate in our view that the Commission characterised the Article as specific performance.[896]

Amendment of Section 53(5)

11.34. Section 53(5) has produced one important recent English decision, *Bence Graphics International Ltd v Fasson UK Ltd*,[897] in which the majority of the Court of Appeal looked to the actual events that followed the breach of warranty of quality. The sellers sold the buyers a large quantity of vinyl film for use in the manufacture of decals for shipping containers. The film proved defective and unfit for the purpose for which it was to be intended, this purpose being known to the seller. The poor quality of the decals attracted a large number of complaints from shipping companies who had attached them to their containers. Though the buyers were not actually sued by any of the sub-buyers, they remained exposed to such claims and were at risk of reputational damage. Despite earlier authority that suggested the purchasers were entitled to the return of the purchase price,[898] the majority of the Court of Appeal started from the general position in relation to the award of damages that it is for the plaintiff to prove a loss, the benefits of provisions like Section 53 being ignored. Section 53 saves the seller the difficulties of proving economic and reputational loss and favours shorter and speedy trails via the market value measure of loss and favours the performance interest in receiving goods that are, in damages terms, valued by reference to the value placed upon them by the parties as conforming goods.

11.35. Bridge has expressed the view that, following the judgement in *Bence Graphics*, 'the law of damages in the sale of Goods Act as a whole is now in an incoherent and unpredictable state'.[899] We agree with this assessment. Clearly *Bence Graphics* does not represent Irish law, but rather than leave this important point for a judicial decision one way or another, we would prefer to provide greater clarity in the way in which Irish statute law estimates damages in respect of non-conforming goods. *Bence Graphics* is not a case in which the majority of the Court of Appeal looked at resale measure; the sellers were able to benefit from the purchasers' resale under their duty to mitigate loss. The judgement in the case suggests to us that section 53(5)

[896] Ibid., p.62.
[897] [1997] 1 ALL ER 979.
[898] *Slater v Hoyle Smith Ltd [1920] 2KBII*. See also **Treitel's Law of Contract**, op. cit., para. 20-048.
[899] Bridge, 'Do we need a New Sale of Goods Act?' op. cit. para. 2.23.

needs to be amended in order to meet the market value standard where commercial practice and the expectations of the parties, viewed as at the date of breach, so require. This could be done by deleting the reference to 'prima facie' in the subsection. An alternative formation could also be selected from the CISG or DCFR. In particular, article 74 of the CISG would more closely reflect the expectations of the parties viewed at the date of breach. On balance, however, we do not favour a change of this kind.

11.36. Recommendations

A statutory cure provision along the lines of that at Article 46 of the United Nations Convention on the International Sale of Goods should be introduced for commercial contracts of sale.

The words 'prima facie' should be deleted from section 53(5) on the estimation of loss in the case of breach of warranty of quality.

SECTION 54: INTEREST AND SPECIAL DAMAGES

> Nothing in this Act shall affect the right of the buyer or the seller to recover interest or special damages in any case where by law interest or special damages may be recoverable, or to recover money paid where the consideration for the payment of it has failed.

11.37. Section 54 allows for recovery and interest or special damages (Hadley v Baxendale 'second limb'), or for the recovery of money for a total failure of consideration. It has not been amended in the United Kingdom or Ireland and no changes are necessary to the section in our view.

11.38. Recommendation

The Group makes no recommendations for change to Section 54.

CHAPTER TWELVE SALE OF GOODS AND SUPPLY OF SERVICES ACT 1980: MISREPRESENTATION, SECTIONS 43-46

I MISREPRESENTATION: FORMS AND REMEDIES

12.1. Parties engaged in pre-contractual discussions commonly make a range of statements intended to influence the outcome of those discussions. The law identifies three broad categories of such statements: mere puffs, representations, and terms of the contract.[900] Mere puffs are statements, typically sales hype of an exaggerated kind, that are not intended to have legal effect. A representation is a pre-contractual statement of fact that induces the other party to enter the contract, but is not a term of the contract. A term of the contract is a statement that is intended to have contractual effect and is thus binding on the parties to the contract. The classification of a statement as a puff, a representation, or a contract term depends on the intention of the parties as assessed by a court in the light of the facts of the case. If a pre-contractual statement that is factually untrue is held to be part of the contract, the injured party can sue for breach of contract. If such a statement is held not to be a term of the contract, it may amount to a misrepresentation which entitles the injured party to repudiate the contract or recover damages. Misrepresentation is the subject of Part V of the Sale of Goods and Supply of Services Act 1980 and the focus of this Chapter of the Report. Before we examine the statutory provisions, we will look in more detail at misrepresentation, the main forms that it takes (fraudulent, negligent and innocent), and the applicable legal remedies.[901]

What is Misrepresentation?

12.2. In general terms, a misrepresentation is an untrue statement of fact or law made by one party to another which induces the misrepresentee to enter the contract and thereby causes him loss. A misrepresentation of which a party to a contract has notice, but which was not made by him or by his agent, can also give rise to a claim. A mere statement of opinion, rather than of fact or law, which proves to be unfounded, will not be treated as a misrepresentation unless the opinion amounts to a statement of fact and it can be proved that the person who made it, did not hold it, or could not reasonably have held it, to be true. An action may also lie in tort for negligent

[900] White, **Commercial Law**, op. cit., pp. 37-39.
[901] For an account, see Carey, G. 'Misrepresentation and the Avoidance of Liability', (2001) *CLP* 131 at 132-134.

misstatement in relation to negligent advice. A mere statement of intention that was not subsequently acted upon is not a misrepresentation. A misrepresentation can be implied or can be a representation by conduct if it involves a representation that there exists some state of facts different from the truth.[902]

12.3. For a misrepresentation to be actionable, it must have induced the representee to enter into the contract. If the representee knew the statement was a misrepresentation but did not rely on it, he cannot claim that he was induced by it to enter into the contract. Reliance is a question of fact. The burden of proof lies on the defendant to the misrepresentation action. If the representee has the opportunity to discover the truth prior to the formation of the contract, this does not prevent the statement from being a misrepresentation.[903] The applicable test is whether there is actual and reasonable reliance on the misrepresentation. By reference to principles of contributory negligence, damages for misrepresentation may be reduced if it is considered that the loss is partly the fault of the representee. The misrepresentation need not be the only matter which induces the other party to enter into the contract but, other than in cases of fraudulent misrepresentation, that party must be materially influenced by the misrepresentation. This means that the misrepresentation must either be such that it would affect the judgement of a reasonable person in deciding whether to enter into the contract and on what terms, or that it would induce the representee to enter into the contract without making inquiries that he would otherwise make.[904] This requirement of material influence does not have to be met in cases of fraud, or where the contract warrants the truth of the pre-contractual statement.

12.4. Silence does not of itself usually amount to a misrepresentation as there is no duty to disclose facts which, if known, would affect the other party's decision to enter the contract. This rule is subject to the following exceptions:

1) Misrepresentation by conduct.

[902] *Spice Girls Limited v Aprilia World Service Bv* [2002] EWCA Civ 15.
[903] *Redgrave v Hurd* (1881) 20 Ch. D. 1.
[904] The English Court of Appeal has characterised 'material' as meaning relevant to the decision of the representee to enter into the contract (*Morris v Jones* [2002] EWCA Civ 1790).

2) Where a party makes a statement that is a half-truth - that is, a statement which may be true as to what is said, but which becomes a misrepresentation by virtue of what is left unsaid. This exception commonly arises in practice.

3) Where a party makes a statement that is true when made, but circumstances change before the contract is concluded with the result that the statement is no longer true. The party who made the statement has a duty to tell the other party about the change. Failure to do so will amount to a misrepresentation.

4) Where the contract is a contract of the utmost good faith (*uberrimae fidei*) or deals with certain other fiduciary or quasi-fiduciary relationships, for example, an integral family member contract.

Fraudulent Misrepresentation

12.5 An action for fraudulent misrepresentation is founded in the tort of deceit. It occurs where a false representation has been made knowingly, or without belief in its truth, or recklessly as to its truth.[905] A claimant must establish:

1) a misrepresentation of fact or law;

2) that the defendant had no belief in the truth of the representation, or was reckless as to its truth;

3) that the defendant intended the claimant to act on the representation; and;

4) that the misrepresentation induced the claimant to enter into the contract.

Damages for fraudulent misrepresentation are not limited by the rules of remoteness applicable in contract and tort. All losses that flow from the claimant's reliance on the misrepresentation are recoverable, whether foreseeable or not. It is well established law that no contract cap is effective to limit liability for fraudulent misrepresentation.

Negligent Misrepresentation

12.6. A negligent misrepresentation occurs where a statement is made carelessly or without reasonable grounds for believing it to be true. This principle has its basis in the decision in *Hedley Byrne v Heller*[906] which reversed the prior classification of all non-fraudulent misrepresentations as innocent misrepresentations. Before this judgment, a misrepresentation that was negligently made could not, in the absence of a contract, avail the injured party unless there was a fiduciary relationship. Following *Hedley Byrne*, a person making a statement without having reasonable grounds for

[905] *Derry v Peek* [1889] App Case 337.
[906] [1964] A.C. 465.

believing in its truth was liable for negligent misstatement if a special relationship existed between the parties which gave rise to a duty of care. *Hedley Byrne* may be invoked by persons who are not even representees as long as reliance upon the representation could be reasonably expected. [907]

Innocent Misrepresentation

12.7 Innocent misrepresentation denotes a misrepresentation made entirely without fault - that is, where the person making it can show that he had reasonable grounds for believing his statement to be true.

Remedies

12.8 The remedies for misrepresentation are rescission and/or damages. In certain instances of over-valuation, the price payable by the representee may be reduced or abated. It is necessary to ascertain whether the misrepresentation is fraudulent, negligent, or innocent in order to determine the remedies available.

Rescission

12.9 A misrepresentation makes a contract voidable by the innocent party. As the equitable remedy of rescission is available for all types of misrepresentation, the claimant has a choice to rescind or affirm the contract. Where the representee elects to rescind, he must notify the representor, although where this is not possible some act consistent with rescission will suffice. A consequence of rescission is that contract damages cannot be claimed because, as the contract is deemed to have been set aside for all purposes, there is no basis for any such claim.[908] In contrast, where breach of a condition of a contract leads to termination, the parties are not released from obligations already accrued at the time of termination.

12.10 The right to rescind may be lost as a result of any of the following equitable bars:

1) Affirmation. As soon as the misrepresentation is discovered, the party to whom it is made can elect either to rescind or affirm the contract. Affirmation may be implied by an act inconsistent with the decision to rescind. However,

[907] *Wildgust v. Bank of Ireland [2006] ILRM, 28, applying Esso Petroleum v Mardon* [1976] Q.B. 801.
[908] Although claims for tortious damages may be relevant.

acts done in ignorance of the true facts will not amount to affirmation and will not bar the right to rescind.

2) Lapse of time. The doctrine of *laches* will prevent a claimant from obtaining the equitable remedy of rescission where there has been undue delay in bringing the claim.[909] In the case of fraudulent misrepresentation, delay will not of itself bar rescission provided that the claimant, without fault, remains in ignorance of the fraud. However, once the claimant becomes aware of the fraud, time begins to run from the discovery of the truth. Where the misrepresentation is innocent or negligent, time begins to run from conclusion of the contract and not from the date of discovery of the misrepresentation.

3) Where it is no longer possible for the parties to be restored to their pre-contractual position. No precise rule has been formulated as to the point at which equity will regard restoration as no longer possible. In historical terms, equitable jurisdiction was more flexible and imaginative than the common law. The degree of alteration in the subject matter of the contract will be relevant, as will the fault of the parties. Rescission is possible on the basis of substantial restoration.

4) Where a bona fide third party has acquired rights under the contract.

12.11 Rescission is only available against another contracting party. In the case of fraudulent misrepresentation, there is no requirement that the misrepresentation is material. Case law suggests that, where the right to rescind has been lost as set out above, damages for innocent misrepresentation will not be available, absent liability in fraud, contract or via a fiduciary relationship.[910]

Damages

12.12. Damages are available for all types of misrepresentation, and the type of misrepresentation determines the availability of damages and the basis on which they are awarded. In most cases, damages are awarded on a tortious basis - that is, the restoration of the claimant to the position he would have been in had he not entered into the contract. The damages sought may cover losses arising from the contract, provided they are not too remote and even the expenses of entering into the contract. Misrepresentation can also give rise to a claim for breach of contract where, for

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[909] In *Leaf v International Galleries* [1950] 2 KB 86, the plaintiff purchased a picture stated by the defendants to be by Constable. Five years later, the plaintiff sought rescission of the contract on the ground of innocent misrepresentation, but the Court of Appeal held that, even if the remedy were available in the case, five years was too long a period for it to apply.

[910] *Lecky v. Walter [1914]* I.R. 378; *Anderson v. Ryan* [1967] I.R. 34.

example, the misrepresentation has been incorporated into the contract in the form of a warranty. In this case, damages are assessed on the contractual basis of putting the claimant into the position he would have been in had the representation been true.

Damages for Fraudulent Misrepresentation

12.13. For fraudulent misrepresentation, the claimant has the right to rescind the contract, or to claim damages in the tort of deceit, or both, though he cannot claim under Section 45(2) of the 1980 Act. The object of the award of such damages is to put the claimant into the position he was in before the misrepresentation was made. However, the test of foreseeability does not apply in the context of the tort of deceit; all that is required is that the damages 'flowed' from the fraud.[911] Damages may be awarded for all losses directly caused by the misrepresentation, even if those losses are unforeseen. This is a potentially significant distinction between the fraudulent measure of damages and the usual, less generous, tortious test of remoteness. The rationale for the distinction is that it is justifiable to impose greater liability in this way in order to deter fraud.[912] Liability for unforeseen losses in the tort of deceit means that the defendant may bear the risk of the claimant's losses being increased by events subsequent to the fraud (such as a decline in the market value of the subject matter of the contract) and the consequential losses directly flowing from the fraudulent misrepresentation (such as wasted expenses).[913] Mitigation of loss is also relevant.

Damages for Negligent Misrepresentation

12.14. Damages for negligent misstatement are considered on a standard tortious basis. Recovery is in respect of all losses which are reasonably foreseeable consequences of the misrepresentation.[914] The 1980 Act introduced the possibility of recovery of damages for negligent misrepresentation. Where the maker of the misrepresentation is unable to show that he had reasonable grounds for believing, and did believe, that the statement at issue was true, the claimant is entitled to rescind the

[911] *Doyle v. Olby (Ironmonger) Limited [1969] 2 QB 158.*

[912] Carey, 'Misrepresentation and the Avoidance of Liability', op. cit., at 136.

[913] *Smith New Court Securities Limited v Scrimgeour Vickers (Asset Management) Limited and Others* [1996] 4 All ER 769.

[914] *The Wagon Mound (No.1)* [1961] A.C. 388.

contract (subject to the court's discretion) and to claim damages under Section 45(1) of the 1980 Act. The claimant may also seek damages under Section 45(1) if the contract has been affirmed, that is, if the claimant does not seek rescission. The statutory route offers a number of advantages to the claimant. The test is an objective one. There is no requirement to establish fraud. Once the claimant proves that the statement at issue was false, it is for the defendant to prove that he reasonably believed in the truth of the statement. Further, there is no requirement for the claimant to establish the existence of a special relationship involving a duty of care. The 1980 Act does not apply, however, where the representor is not the other party to the contract or his agent. Damages are awarded on a tortious basis, and the rule of remoteness used in this context is all direct, and not all foreseeable, losses. However, absent fraud, damages may be reduced to reflect the claimant's contributory negligence.[915]

Damages for Innocent Misrepresentation

12.15. Damages for innocent misrepresentation can be awarded in lieu of rescission under Section 45(2) of the 1980 Act, where the right to rescind exists.[916] Arguably, there may also be a possibility of statutory damages under Section 45(1) of the 1980 Act. The burden of persuading the court to exercise its discretion to award damages is on the party seeking that it be exercised. The court will consider the 'nature of the misrepresentation' and 'the loss that would be caused by it if the contract was upheld, as well as the loss that rescission would cause to the other party'. Where there has been a breach of warranty and also misrepresentation, the Court would not have to take into account reduction of damages for contributory negligence and thus this would be a factor in considering whether rescission should or should not be granted.

> A Court should hear evidence as to the proper measure of damages for breach of warranty and misrepresentation and as to the loss which will be suffered by the respondent if rescission were ordered. Both those issues require to be addressed by the Court under Section 2(2) [equivalent to section 45(2) of the 1980 Act], when it is exercising its discretion whether to award or refuse rescission. [917]

[915] *Gran Gelato Ltd v Richcliff Group Ltd* [1992] Ch 560.
[916] The latter point has been the subject of conflicting case law. *Thomas Witter Ltd v TBP Industries Ltd* [1996] 2 All ER 573. *Floods of Queensferry Ltd v Shand Construction Ltd (No 3)* [2000] BLR 81.
[917] *Odyssey Cinemas Limited v. Village Theatres Three Limited (Sheridan Millenium Limited*, third party [2010] NICA 25.

The Court has a wide discretion; it is 'a broad one, to do what is equitable'. [918]

II STATUTORY PROVISIONS

12.16 The provisions at Sections 43 - 46 of the 1980 Act have their origin in the Misrepresentation Acts enacted in 1967 for England and Wales and for Northern Ireland respectively.[919] Those provisions were based on recommendations made by the Law Reform Committee.[920] The Committee considered that the law as it then stood provided inadequate remedies for misrepresentation and that damages should not be restricted to fraudulent misrepresentation, stating[921]:

> ...where one of the parties was at fault in making the representation, the other ought to be entitled to damages as of right. We also think that the onus should be on the representor to satisfy the court that he was not at fault… The fact that a person has entered into a contract on the strength of a statement which is untrue ought by itself to entitle him to compensation unless the representor can establish his innocence.

The Report preceded the 1964 judgment in *Hedley Byrne* which went some way towards addressing the gap in liability identified by the Law Reform Committee.

12.17 The English Misrepresentation Act of 1967 was based in large part on the recommendations of the Law Reform Committee. The principal aims of the legislation were three-fold. First, to do away with the bars originating in earlier case law which precluded rescission for innocent misrepresentation where a contract had already been performed or the misrepresentation had become a term of the contract. Secondly, to extend the scope and strengthen the efficacy of the remedies for misrepresentation by providing that damages were payable for non-fraudulent misrepresentation and that the burden of proof was on the defendant to show that he had not been negligent. Prior to the Acts, damages were only available for misrepresentation where the false statement was made fraudulently or, following *Hedley Byrne*, negligently where a special relationship existed between the parties which gave rise to a duty of care. This extension of the remedies regime for misrepresentation was balanced, however, by the discretion that the Act gave the courts to award damages in lieu of the remedy of rescission previously available at

[918] *William Sindall plc v Cambridgeshire County Council* [1994] 1 W.L.R. 1016 at 1036.
[919] Misrepresentation Act 1967 (1967 Ch.7.). Misrepresentation Act (Northern Ireland) 1967. (1967 Ch. 14.)
[920] Law Reform Committee. 1962. **Innocent Misrepresentation** (Tenth Report, Cmnd. 1782).
[921] Ibid., paras. 17 & 22.

common law for all forms of misrepresentation. Thirdly, to render void contract terms excluding or restricting liability or remedies for misrepresentation unless reliance on such terms was 'fair and reasonable in the circumstances of the case'. The last provision was of broader significance in that it represented the first general attempt at statutory control of exemption clauses.

12.18 A number of drafting changes aside, the misrepresentation provisions in the 1980 Act are very similar to those in the 1967 Act. In introducing the provisions in the Bill which became the 1980 Act, the then Minister for State at the Department of Industry, Commerce and Energy laid emphasis, first, on the right of action given for innocent and negligent misrepresentation; second, on the control of clauses excluding or restricting liability for misrepresentation; and third, on the discretion afforded the courts, in 'the interests of equity', to award damages for misrepresentation rather than to rescind the contract.[922] Before considering the misrepresentation provisions of the 1980 Act in more detail, reference should be made to the provisions of the Consumer Protection Act 2007 on misleading commercial practices. Section 42 of the Act states that traders shall not engage in misleading commercial practices and sections 43 to 46 specify the various circumstances in which a commercial practice is misleading, including the provision of false or misleading information in relation to a wide range of attributes of goods and services. While the Act provides for criminal sanctions for misleading commercial practices, section 74 also gives consumers aggrieved by a misleading commercial practice a right of action for relief by way of damages. We will now examine each of the sections in Part V of the 1980 Act.

Section 43 "Contract"

In this Part "contract" means a contract of sale of goods, a hire-purchase agreement, an agreement for the letting of goods to which section 38 applies or a contract for the supply of a service.

Issues Arising

12.19 The Misrepresentation Acts enacted in England, Wales and Northern Ireland apply to contracts generally. There is no legislation of general application on misrepresentation in Ireland, however, and the restriction of the scope of the

[922] **Dáil Debates**, Vol. 309, 16 November 1978. Sale of Goods and Supply of Service Bill 1978 Second Stage: cols. 1105 & 1112. .

misrepresentation provisions of the 1980 Act to contracts for the sale or supply of goods and the supply of services is the main difference between the legislative regimes in Ireland and the UK. When the matter was raised in the course of the Committee Stage debate on the Sale of Goods and Supply of Services Bill 1978, the then Minister for State at the Department of Industry, Commerce and Tourism indicated that this restriction was attributable to practical, rather than policy, considerations, stating[923]:

> While it might be desirable to revise all the legal aspects of misrepresentation, it would be far outside the ambit of this Bill and, in particular, of my Department.

12.20 Though the matter is similarly outside our terms of reference, we would strongly advise that the scope of the existing legislative provisions on misrepresentation be broadened. The main effect of the restricted scope of the current statutory provisions is the exclusion of contracts involving land and things in action (shares, securities etc). This exclusion is all the more difficult to justify as the development of an equitable remedy for misrepresentation arose mainly in cases involving these types of transaction.[924] Cases concerning misrepresentation in contracts for real property and other transactions outside the scope of Part V of the 1980, moreover, continue to come before the courts on a regular basis.[925]

12.21 A further minor issue that needs to be addressed concerns the reference in Section 43 to 'an agreement for the letting of goods to which section 38 applies'. Section 38 and the other sections of Part III of the 1980 Act were subsequently repealed by the Consumer Credit Act 1995, Parts VI and VII of which now regulate consumer hire-purchase and hire agreements. The 1995 Act, however, did not specifically address the consequences of the deletion of section 38 of the 1980 Act for the provisions on misrepresentation in sections 43-46 of the Act. This omission should be rectified in future legislation. On a more substantive note, the opportunity should also be taken to apply the misrepresentation provisions to hire agreements

[923] **Seanad Debates**, Vol. 94, 16 April 1980. Sale of Goods and Supply of Services Bill Committee Stage: cols. 23-24.
[924] **Benjamin's Sale of Goods**, op. cit., para. 10-008. Until a number of sale of goods cases in the mid-twentieth century clarified the point, there was in fact a doubt as to whether the equitable remedy for misrepresentation applied to contracts for the sale of goods.
[925] Clark, **Contract Law in Ireland**, op. cit., pp. 325-40. It should be noted that even where there is no statutory exclusion as in the case of the English Act of 1967, there may be a judicial aversion to use of the 1967 rules for policy reasons, as in reinsurance contracts: See Steyn J. in *Highlands Insurance Co. v. Continental Insurance Co.*, [1967] 1 Lloyds Rep. 109 at 117-118.

generally and not just to consumer hire agreements. The corresponding provisions on hire-purchase agreements are not restricted to consumer agreements.

12.22 The provisions of the 1980 Act on misrepresentation are not, and were not intended to be, a comprehensive statement of the rules that apply in this area of the law.[926] Their aim, as noted earlier, was to clarify some of the common law rules that had developed over time and to reverse others. An action by a claimant may, therefore, be taken on a number of grounds: fraudulent misrepresentation; negligent misrepresentation; negligent misstatement; general negligence; innocent misrepresentation; the statutory right to damages conferred by the 1980 Act; and the statutory right to damages for misleading commercial practices affecting consumers granted by the Consumer Protection Act 2007. We think that it would be helpful consequently for future legislation to clarify that the statutory provisions on misrepresentation have the effect of supplementing the rules of the common law and equity and not of replacing them.

12.23 Recommendations

Serious consideration should be given to the introduction of statutory provisions on misrepresentation that would apply to contracts generally.

The application of the statutory provisions on misrepresentation to consumer hire agreements should be clarified. The provisions should also be extended to commercial hire agreements.

A new definition of 'contract' as follows should be included for the purposes of the misrepresentation provisions in future legislation:

> **'contract' means a contract for a sale or supply of goods, a hire purchase agreement, an agreement for the licensing or letting of goods or a contract for the supply of services or any combination in whole or in part of any of the aforesaid.**

Future legislation should provide that the statutory provisions on misrepresentation are a supplement to, and not a replacement for, the rules of the common law and equity.

[926] Bridge, **The Sale of Goods**, op. cit., para. 2.34.

Section 44 Removal of Certain Bars to Rescission for Innocent Misrepresentation

Where a party has entered into a contract after a misrepresentation has been made to him, and
(a) the misrepresentation has become a term of the contract, or,
(b) the contract has been performed;
or both, then if otherwise he would be entitled to rescind the contract, he shall be so entitled subject to the provisions of this Part, notwithstanding the matters mentioned in paragraphs (a) and (b).

Issues Arising

12.24 As noted above, section 44 was enacted in order to remove certain bars to rescission for innocent misrepresentation. The section remains necessary and justified in our view and should be retained in its existing form. Future statutory provisions, however, should lay down clearer and more balanced rules on the circumstances in which rescission should be available for misrepresentation. There is considerable merit in our view in the rules at sections 7(4)(b) and (5) of the New Zealand Contractual Remedies Act 1979, and we would favour the incorporation of provisions along similar lines into Irish law.

12.25 Recommendation

In order to complement the existing provisions of section 44 of the 1980 Act, and to indicate where rescission can or cannot arise and to reflect current case law, the following new section is proposed:

Rescinding Contract

(1) Without prejudice to the generality of Section 44, a party to a contract may rescind a contract if he has been induced into it by a misrepresentation made to him by a party to that contract and if the effect of the misrepresentation is:

(a) to substantially reduce the benefit of the contract to the rescinding party; or,
(b) to substantially increase the burden on the rescinding party under the contract;
(c) in relation to the rescinding party to make the benefit or burden of the contract substantially different from that represented or contracted for;

(2) A party to a contract shall not be entitled to rescind the contract if with full knowledge of the misrepresentation he has affirmed the contract.

Section 45 Damages for Misrepresentation

1) Where a person has entered into a contract after a misrepresentation has been made to him by another party thereto and as a result thereof he has suffered loss, then, if the person making the misrepresentation would be liable to damages in respect thereof had the misrepresentation been made fraudulently, that person shall be so liable notwithstanding that the misrepresentation was

not made fraudulently, unless he proves that he had reasonable ground to believe and did believe up to the time the contract was made that the facts represented were true.

2) Where a person has entered into a contract after a misrepresentation has been made to him otherwise than fraudulently, and he would be entitled, by reason of the misrepresentation, to rescind the contract, then, if it is claimed in any proceedings arising out of the contract that the contract ought to be or has been rescinded, the court may declare the contract subsisting and award damages in lieu of rescission, if of opinion that it would be equitable to do so, having regard to the nature of the misrepresentation and the loss that would be caused by it if the contract were upheld, as well as to the loss that rescission would cause to the other party.

Issues Arising

12.26 Section 45(1) reversed the historical pre *Hedley Byrne* common law rule that, as innocent misrepresentation was not actionable in tort, damages were unavailable as a remedy. The primary remedy for an innocent misrepresentation in equity was rescission of a contract. The provision allows the representor, however, to avoid liability if he can show that he believed in the truth of the facts that he represented and had reasonable grounds for doing so. The New Zealand Contractual Remedies Act 1979 provides by contrast that a party to a contract is entitled to damages if he has been induced to enter into the contract by a misrepresentation, whether innocent or fraudulent, made to him by or on behalf of another party to the contract. This Act equates a misrepresentation as if the representation were a term of the contract that has been broken and removes the common law and equitable remedies for misrepresentation.[927] We think that the existing provision at section 45(1) should be retained in modified form to deal with interpretation problems, and should also include definitions of fraudulent, negligent and innocent misrepresentation.

12.27 The principal other issue raised by section 45 relates to the measure of damages available for the cause of action under subsection (1). The current state of the law on the issue is far from clear. Bridge has observed of the corresponding provision in the Misrepresentation Act 1967 that, insofar as it sanctions damages awards, it 'sits very badly within the scheme of rules governing damages awards in tort and contract.'[928] As has been observed, the language of section 45(1) seems to point to the measure in the tort of deceit – 'if the person making the misrepresentation would be liable to damages in respect thereof had the misrepresentation been made

[927] Contractual Remedies Act 1979, Public Act No. 11 of 1979, s. 6(1).
[928] Bridge, **The Sale of Goods**, op. cit., para. 8.38.

fraudulently, that person *shall be so liable* notwithstanding that the misrepresentation was not made fraudulently' (our emphasis).[929] This was certainly the view of commentators at the time of the introduction of the 1967 Act.[930]

12.28 There is no conclusive Irish case law on the issue. English case law has generally held that damages should be calculated according to the rules for damages in tort.[931] A claimant may thus recover the damages he sustained by entering into the contract, but not the profit he hoped to make from the bargain, or the value of the good or service as represented. The main uncertainty has been over whether the measure of damages for actions under the statutory cause of action includes compensation for loss of bargain. While *Watt v Spence*[932] indicated that such damages could be available, a different view was taken in *Sharneyford Supplies Ltd v Edge*.[933] The matter appears to have been resolved for the present at least by the decision of the Court of Appeal in *Royscott Trust v Rogerson* that:[934]

> In view of the wording of the subsection it is difficult to see how the measure of damages under it could be other than the tortious measure and that is now generally accepted.

Balcombe LJ then dealt as follows with the question of which tortious measure was appropriate to the statutory cause of action:[935]

> The first main issue before us was: accepting that the tortious measure is the right measure, is it the measure where the tort is that of fraudulent misrepresentation, or is it the measure where the tort is negligence at common law? The difference is that in cases of fraud a plaintiff is entitled to any loss which flowed from the defendant's fraud, even if the loss could not have been foreseen. In my judgement the wording of the subsection[936] is clear: the person making the innocent misrepresentation shall be 'so

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[929] Clark, **Contract Law in Ireland**, op. cit., p. 334.
[930] Atiyah and Treietel stated, for example, that the 'measure of damages in the statutory action will apparently be that in an action of deceit.' Atiyah, P.S. & Treitel, G.H. 'The Misrepresentation Act 1967' (1967) *MLR* 369 at 373.
[931] *F&H Entertainments v Leisure Enterprises* [1976] 120 S.J. 331. *Sharneyford Supplies Ltd v Edge* [1986] 1 All E.R. 588. In the latter case, however, Mervyn Davies J. kept open the question of whether damages for loss of bargain were available, stating: 'I do not decide whether or not such damages for innocent misrepresentation embrace any element for loss of bargain.' Clark, ibid., p. 334.
[932] [1976] Ch. 165. Dicta by Lord Denning in two cases in the Court of Appeal - *Gosling v Anderson* [1972] E.G.D. 709 and *Jarvis v Swan Tours* [1973] Q.B. 233 – also appeared to suggest that the contractual measure was the appropriate one.
[933] [1986] 1 All E.R. 588.
[934] [1991] 2 QB 297 552 at 556. See also *William Sindall Plc v Cambridgeshire County Council* [1994] 1 WLR 1016.
[935] *Royscott Trust v Rogerson*, ibid., at 557.
[936] That is, section 2(1) of the Misrepresentation Act 1967 whose wording is identical to section 45(1) of the 1980 Act.

liable' i.e. liable to damages as if the representation had been made fraudulently.

12.29 Goode has noted that the *Royscott* decision remains controversial.[937] In *Smith New Court Securities v Scrimgeour Vickers (Asset Management) Ltd,* [938] the House of Lords expressed reservations about it, though it did not over-rule it. In Bridge's view, the rule permitting recovery of all losses flowing directly from the misrepresentation is 'a stringent, even a punitive one'.[939] We think that these criticisms have validity in the case of innocent and negligent misrepresentation. It would be preferable, in our view, to apply the contract measure of damages to these forms of misrepresentation. For fraudulent misrepresentation, the applicable measure should remain damages in the tort of deceit, including for unforeseen loss and damage. We note in this context that section 6 of the New Zealand Contract Remedies Act 1979 provides that damages may be awarded for misrepresentation 'as if the representation were a term of the contract that had been broken.' While this approach is appropriate to innocent and negligent misrepresentation, fraudulent misrepresentation should be treated on the same basis as other forms of fraud for the purpose of the assessment of damages.

12.30 Recommendations

Section 45 of the Sale of Goods and Supply of Services Act 1980 should be replaced by a statutory provision along the following lines:

Damages for misrepresentation

(1) If a party to a contract has been induced to enter into it by a misrepresentation made to him by another party to that contract and as a result thereof that party has suffered loss and :

(a) if the misrepresentation is an innocent misrepresentation, he shall be entitled to damages from that other party as if the representation were a term of the contract that has been broken, unless the other party proves that he had reasonable ground to believe and did believe up to the time the contract was made that the facts represented were true;

(b) if the misrepresentation is a negligent misrepresentation, he shall be entitled to damages from that other party as if the representation were a term of the contract that has been broken;

(c) if the representation is a fraudulent misrepresentation, he shall be entitled to damages in the tort of deceit and awarded for all loss and damage that flowed from the fraud, even if the loss and damage are unforeseen.

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[937] **Goode on Commercial Law**, op. cit., p. 120 fn. 326.
[938] [1996] 4 All E.R. 769.
[939] Bridge, **The Sale of Goods**, op. cit., para. 8.39.

2. If a party to a contract has been induced to enter into it by an innocent misrepresentation or a negligent misrepresentation and which would entitle that party, by reason of the innocent misrepresentation or, as the case may be, negligent misrepresentations to rescind the contract, then if it is so claimed in any proceedings that the contract ought to be or has been rescinded, the Court may declare the contract subsisting and award damages in lieu of rescission, if the Court is of the opinion that it would be equitable to do so, having regard to the nature of the innocent misrepresentation or, as the case may be, negligent misrepresentation and the loss that would be caused by it, if the contract were upheld, as well as to the loss that rescission would cause to the other party.

As this provision, unlike its counterpart in the 1980 Act, distinguishes between innocent, negligent and fraudulent representation, it would be advisable to include definitions of these terms in the legislation. We recommend that definitions along the following lines should be included in future legislation:

'misrepresentation' means a fraudulent misrepresentation or a negligent misrepresentation or an innocent misrepresentation.

'fraudulent misrepresentation' means a representation of fact or law which a party to a contract makes without belief in the knowledge or truth of the representation or was reckless as to its truth and the party intended the other party to act on the representation and the misrepresentation induced the other party to enter into the contract;

'negligent misrepresentation' means a representation of fact or law which a party to a contract makes carelessly or without reasonable grounds for believing it is true and which induces the other party to the contract to enter into the contract.

'innocent misrepresentation' means a representation of fact or law which a party to the contract makes and has reasonable grounds to believe the representation was true but which induced the other party to enter into the contract;

Section 46 Avoidance of Certain Legal Provisions Excluding Liability for Misrepresentation

1) If any agreement (whether made before or after the commencement of this Act) contains a provision which would exclude or restrict -
   (a) any liability to which a party to a contract may be subject by reason of any misrepresentation made by him before the contract was made, or
   (b) any remedy available to another party to the contract by reason of such a misrepresentation

   that provision shall not be enforceable unless it is shown that it is fair and reasonable.

2) Sub-section (1) shall not affect any right to refer a difference to arbitration.

The Schedule to the 1980 Act on 'fair and reasonable terms' set out at paragraph 5.1 above is applicable to the test of whether a term is 'fair and reasonable' for the purposes of Section 46.

12.31 As noted earlier, statutory control of contract terms excluding or restricting liability for misrepresentation was first effected in England, Wales and Northern Ireland by the Misrepresentation Acts 1967. As originally enacted, section 3 of the Act in force in England and Wales provided that such terms 'shall be of no effect except to the extent (if any) that, in any proceedings arising out of the contract, the court or arbitrator may allow reliance on it as being fair and reasonable in the circumstances of the case.' Section 3 was later substituted by section 8(1) of the UK Unfair Contract Terms Act 1977 and now provides that a term excluding or restricting liability for misrepresentation:

> shall be of no effect except insofar as it satisfies the requirement of reasonableness as stated in section 11(1) of the Unfair Contract Terms Act 1977; and it is for those claiming that the term satisfies that requirement to show that it does.

It is relevant to note that, unlike other provisions of the UK Unfair Contract Terms Act which apply only where one of the parties 'deals as consumer' or on the other party's written standard terms of business, section 3 subjects all contract terms, even those negotiated in full by the parties, to the 'reasonableness test' of the Unfair Contract Terms Act. In Ireland, by contrast, section 46, like the other provisions of Part V of the 1980 Act, applies only to contracts for the sale of goods, hire-purchase agreements, consumer hire agreements, and contracts for the supply of a service.

Issues Arising

12.32 Section 46 is of most relevance to non-fraudulent misrepresentation by virtue of the fact that the common law is generally held to prevent parties from excluding liability for their own fraud.[940] As Lord Hobhouse commented in *HIH v Chase Manhattan*:[941]

> Fraud and negligence are different from each other in kind. Commercial men recognize the risk of want of care or skill; they do not contemplate

[940] *Pearson v Dublin Corporation* [1907] A.C. 351.
[941] *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2003] UK HL 6, [2003] Lloyd's Rep 61 at 122. Bridge states that it is 'at least very likely' that liability for fraud may not be excluded at common law, noting that Lord Hobhouse endorsed the proposition with 'some degree of caution' in *HIH v Chase Manhattan*. See also *Zanzibar v British Aerospace* [2000] 3 W.L.R 2333. Bridge, **The Sale of Goods**, op. cit., para. 9.16.

fraud in the making of the contract.

In Thomas Witter Limited v TBP Industries Ltd,[942] the court held that an exemption clause which sought to exempt liability for all forms of misrepresentation for all purposes was unreasonable and void, by virtue of its exclusion of fraud.

12.33 The first English case to test the exemption clause provision at section 3 of the Misrepresentation Act 1967 was *Cremdean Properties Ltd v Nash*.[943] The plaintiff contracted to buy property from the defendant and relied on representations from the latter's agent about the square footage that had been approved for planning permission. On discovering the true figure, the plaintiff sought rescission or damages for misrepresentation. The defendant sought to rely on a clause in the tender document which stated that, while the particulars given about the property were believed to be correct, they did not constitute part of the contract, their accuracy was not guaranteed and any errors they contained would not annul the sale. It added that intending buyers must satisfy themselves by inspection or otherwise as to the correctness of the statements made in the particulars. The plaintiff argued that the exclusion came within section 3 of the 1967 Act and was unreasonable. The Court of Appeal rejected the argument that the effect of the clause was to bring about a situation as if no representation had been made, with Bridge L.J. stating[944]:

> I should not have thought that the courts would have been ready to allow such ingenuity in forms of language to defeat the plain purpose at which section 3 is aimed.

12.34 While it is clear that standard exemption clauses must be assessed by reference to section 46 or the corresponding provision in English legislation, there is more uncertainty regarding the effect of entire agreement clauses. Though such clauses take a variety of forms, their relevant features in the context of liability for misrepresentation are, first, the clause itself to the effect that the terms of the contract represent the entire agreement between the parties and, second, a non-reliance clause to the effect that neither party has placed any reliance on any pre-contractual statements not expressly incorporated in the contract. The courts have shown a readiness to accept that, insofar as an entire agreement clause seeks to exclude

[942] [1996] 2 All ER 573.
[943] [1977] 2 E.G. 547.
[944] Ibid. at 551.

representations rather than remedies, its effect is to define the scope of the contract rather than to exclude liability. In *McGrath v Shah*, Chadwick J. suggested that section 3 of the Misrepresentation Act 'was not apt to cover a contractual provision which seeks to define where the contractual terms are actually to be found.'[945] Where, however, a claim concerning misrepresentation is brought in tort, rather than contract, an entire agreement clause will not affect the application of section 3. As Cartwright has observed[946]:

> The effect of an entire agreement clause in relation to pre-contractual misrepresentations will normally be to limit the contractual force of such misrepresentations to those which are provided in the contract. But such a clause has no impact on claims where the cause of action is based on a pre-contractual misrepresentation, such as rescission, or damages under the Misrepresentation Act 1967…Words such as 'this contract comprises the entire agreement between the parties' do not themselves exclude misrepresentations.

12.35 Non-reliance clauses have been considered by the English courts in a number of cases. In *EA Grimstead & Son Ltd v McGarrigan*, Chadwick LJ stated *obiter* that:[947]

> An acknowledgement of non-reliance is capable of operating as an evidential estoppel. It is apt to prevent the party who has given the acknowledgement from asserting in subsequent litigation against the party to whom it has been given that it is not true.

He proceeded to indicate the conditions that had to be met in order for the estoppel to be operative:[948]

> It is, of course, not sufficient that the acknowledgement should be capable of operating as an evidential estoppel. In order to establish an estoppel it was for Mr McGarrigan to plead and prove that the three requirements identified by this court in Lowe v Lombank Ltd[949] were satisfied – that is to say, (i) that the statements in those clauses were clear and unequivocal, (ii) that the purchaser had intended that Mr McGarrigan should act upon those statements and (iii) that Mr McGarrigan had believed the statements to be true and had acted upon them.

In *Watford Electronics Ltd v Sanderson CFL Ltd*[950], the same judge stated that the third of these requirements:

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[945] [1989] 57 P&C.R. 452. *Inntrepreneur Pub Co. v East Crown Ltd* [2000] 2 Lloyd's Rep 611.
[946] Cartwright, J. 'Excluding Liability for Misrepresentation' in Burrows, A. & Peel, E. (eds). 2007. **Contract Terms** (Oxford: Oxford University Press), p. 222.
[947] [1999] EWCA Civ 3029 at 20.
[948] Ibid. at 20-21.
[949] [1960] 1 WLR 196.
[950] [2001] EWCA Civ 317; [2001] All ER (Comm.) 696.

> … may present insuperable difficulties, not least because it may be impossible for a party who has made representations which he intended should be relied upon to satisfy the court that he entered into the contract in the belief that a statement by the other party that he had not relied upon those representations.

The willingness of the courts to treat a non-reliance clause as an estoppel will not of itself limit the protection afforded by section 46 in that a statutory protection which cannot be avoided by contract cannot be avoided by estoppel.[951] More generally, the courts have shown a reluctance to permit the statutory provisions regulating exemption for misrepresentation to be bypassed. As Jack J. stated in Government of *Zanzibar v British Aerospace(Lancaster House) Ltd*:[952]

> A term which negates a reliance which in fact existed is a term which excludes a liability which the representor would otherwise be subject to by reason of the representation. If that were wrong, it would mean that section 3 could always be defeated by including an appropriate non-reliance clause in the contract, however unreasonable that might be.

In conclusion, therefore, while entire agreement clauses may have an effect in excluding liability for pre-contractual misrepresentations, their efficacy in relation to misrepresentation claims is, as Goode has noted, 'much more doubtful.'[953]

12.36 Recommendations

Future legislation should incorporate the common law prohibition on the exclusion of liability for fraudulent misrepresentation.

Contract terms that exclude or limit liability for other forms of misrepresentation should be permissible where shown to be 'fair and reasonable'.

A provision along the lines of section 13(1) of the UK Unfair Contract Terms Act which elaborates on the ways in which exemption clauses may seek to exclude or restrict liability should be added to the statutory provisions on the exemption of liability for misrepresentation. This would help to clarify the nature and type of clauses seeking to exclude or restrict liability for misrepresentation which come within the scope of the statutory provisions. A similar recommendation has been

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[951] *Keen v Holland* [1984] 1 All ER 75. Cartwright, op. cit., p. 225.
[952] [2000] 1 WLR 2333 at 2347-48.
[953] **Goode on Commercial Law**, op. cit., p.103 fn. 195.

made at paragraph 5.29 above in respect of clauses seeking to exempt liability for the implied undertakings under the 1893 Act.

CHAPTER THIRTEEN SALE OF GOODS AND SUPPLY OF SERVICES ACT 1980: GUARANTEES AND MISCELLANEOUS (UNSOLICITED GOODS, DIRECTORY ENTRIES, AND REGULATIONS) SECTIONS 15-19, 47-49 & 51-54

I PRODUCT GUARANTEES

13.1. Product guarantees typically involve the following elements:[954]

(1) the guarantee pledge relating to defects in materials or manufacture which become apparent within a specified period after the purchase of the product;
(2) the remedies available if that pledge is not fulfilled;
(3) the terms and conditions on which the guarantee is provided.

Though these elements are more or less common to all guarantees, there can be significant differences in the form and content of guarantees. Manufacturers' guarantees, the most common form of product guarantee, are generally provided free of charge with the product. Their duration is typically one to two years, though longer guarantee periods apply in some cases, most notably motor vehicles. Other guarantees, often known as extended warranties, have to be paid for and are usually purchased separately from the product. These guarantees are commonly supplied by retailers and may be underwritten by an insurance company. Guarantees of this kind typically apply for a longer period than manufacturers' guarantees and/or cover defects caused by factors such as accidental damage or normal wear and tear that would not ordinarily be covered by standard manufacturers' guarantees or by buyers' legal rights. Though their operation is not without its issues, guarantees can offer consumers an informal means of redress without the uncertainty and difficulty that recourse to statutory remedies may entail. As with other aspects of consumer sales law, guarantees are currently subject to dual regulation under the following enactments:

(1) the Sale of Goods and Supply of Services Act 1980; and
(2) the European Communities (Certain Aspects of the Sale of Consumer Goods and Associated Guarantees) Regulations (S.I. No. 11/2003) which gives effect to Directive 1999/44/EC.

We will look at each of these in turn.

[954] Twigg-Flesner, C. 2003. **Consumer Product Guarantees** (Aldershot: Ashgate), p. 29.

The Sale of Goods and Supply of Services Act 1980

13.2. Statutory regulation of guarantees in Ireland was first effected by sections 15-19 of the Sale of Goods and Supply of Services Act 1980. Unlike many of the Act's other provisions, the sections dealing with guarantees were not modelled on United Kingdom legislation,[955] but appear to have been influenced in part by American legislative provisions and proposals.[956] The National Consumer Advisory Council's 1974 report which influenced many of the provisions of the 1980 Act included a recommendation on the introduction of legislative provisions on the enforceability and transferability of guarantees.[957] Sections 15-19 of the Act do not impose a requirement on manufacturers or others to provide guarantees; their aim rather is to ensure that, where guarantees are supplied, they will be subject to rules designed to ensure that they are 'meaningful, legally binding and easily understood by the buyer as to their promises and effects'.[958] Their enactment reflected concerns over the legal status and enforceability of guarantees and the use of guarantees to exclude or restrict consumers' legal rights.[959]

13.3. The main features of the guarantee provisions in the 1980 Act are as follows:

- **Section 15** defines 'guarantee' as 'any document, notice, or other written statement, howsoever described, supplied by a manufacturer or other supplier, other than a retailer, in connection with the supply of any goods and indicating that the manufacturer or other supplier will service, repair or otherwise deal with the goods following purchase'.

- **Section 16** sets out the information requirements to be contained in a guarantee (name and address of guarantor, duration of guarantee, procedure

[955] Prior to the implementation of Directive 1999/44/EC, UK legislation had very limited rules regulating guarantees. Section 5 of the Unfair Contracts Terms Act 1977 prohibits provisions in guarantees that exclude or restrict liability for loss or damage to consumer goods caused by negligence during the manufacturing or distribution process. The Consumer Transactions (Restrictions on Statements) Order 1976 requires guarantees for consumer goods to carry a clear and conspicuous statement that the guarantee does not affect consumers' statutory rights. The Supply of Extended Warranties on Domestic Electrical Goods Order 2005 provides for information and withdrawal rights for consumers who enter into warranty contracts for domestic electrical goods for monetary consideration.

[956] 15 USC 2301. The Whincup report on consumer protection law in other jurisdictions prepared for the National Prices Commission in 1972-73 drew attention to a 1971 Federal Bill which was a precursor of the provisions on guarantees in the Magnusson-Moss Warranty Act 1975, and to legislation on guarantees in a number of US states. National Prices Commission. 1973. Occasional Paper No. 9. **Consumer Protection Law in America, Canada and Europe**, pp. 108-116.

[957] National Consumer Advisory Council. 1974. **Submission to the Minister for Industry and Commerce on Proposals for Legislation to Assure the Consumers' Interest**, p. 17.

[958] Department of Industry and Commerce. CP 627. 'Sale of Goods and Services Bill, 1977: Second Stage Brief': 14

[959] Ibid: 14

for presenting a claim under the guarantee, undertakings in respect of goods covered by guarantee, and any charges to the buyer in respect of these undertakings); provides that the procedure for making a claim under the guarantee shall not be more difficult than ordinary or normal commercial procedure; and makes it an offence to supply a guarantee which does not comply with these requirements.

- **Section 17** provides that a seller of goods who delivers a guarantee to the buyer shall be liable for its terms unless he expressly indicates the contrary to the buyer at the time of delivery or, if he is a retail seller, gives the buyer a written undertaking that he will service, repair or otherwise deal with the goods after purchase.

- **Section 18** stipulates that rights under a guarantee shall not exclude or limit the buyer's statutory or common law rights and any provision in a guarantee which imposes on the buyer obligations beyond those in the contract, or gives the seller or his agent sole power to decide whether or not goods are defective, is void.

- **Section 19** provides that a buyer may take proceedings for breach of guarantee as for breach of warranty, and that the Court may order fulfilment of the terms of the guarantee or damages and may allow the guarantor to fulfil his obligations on such terms as it deems just. 'Buyer' means any person who acquires title to the goods within the guarantee period.

Unlike a number of other sections of the 1980 Act, the Act's guarantee provisions are not limited to situations where the buyer 'deals as consumer' and thus cover commercial buyers of goods covered by a guarantee. The provisions are not restricted either to 'free' guarantees and apply equally to guarantees for which a charge is payable. Finally, the provisions depart from the doctrine of privity of contract in permitting subsequent purchasers of goods to invoke a guarantee within the guarantee period.

Directive 99/44/EC on Certain Aspects of the Sale of Goods and Associated Guarantees

13.4. The provisions on guarantees in Directive 1999/44/EC have their origins in the European Commission's 1993 Green Paper on Guarantees for Consumer Goods and After-Sales Services.[960] The Green Paper proposed a range of options including

[960] Commission of the European Communities. 1993. **Green Paper on Guarantees for Consumer Goods and After-Sales Services**. Com (93) 509. The Green Paper referred to guarantees as 'commercial guarantees' to distinguish them from 'legal guarantees', the consumer's rights under the law governing the sale of goods. This terminology was not retained in Directive 1999/44/EC, though the 2008 proposal for a Directive on Consumer Rights reinstated the term 'commercial guarantee'. The

requirements for commercial guarantees to confer benefits additional to those provided by the consumer's legal rights, and for all members of a distribution network set up by the same manufacturer to honour guarantees, as well as a proposal for an optional European Guarantee that would apply across the European Union. In the event, the provisions adopted in Directive 1999/44/EC were more modest and focused principally on the legal status of guarantees and the information requirements applicable to them.[961] While the Directive recognises that guarantees are 'legitimate marketing tools' which can stimulate competition, it provides that, in order to ensure that consumers are not misled, guarantees should contain certain information, including a statement that the guarantee does not affect the consumer's legal rights.[962]

13.5. Article 1(2)(e) of the Directive defines 'guarantee' as:

> any undertaking by a seller or producer to the consumer, given without extra charge, to reimburse the price paid or to replace, repair or handle consumer goods in any way if they do not meet the specifications set out in the guarantee statement or in the relevant advertising.

Unlike the corresponding provisions of the Sale of Goods and Supply of Services Act 1980, therefore, the Directive's provisions do not cover either guarantees on goods sold to non-consumer buyers, or extended warranties or other guarantees for which a charge is payable. The definition of 'guarantee' in the Directive is not limited to commitments made in a guarantee document that comes with the goods but can cover guarantees given in advertising.[963] 'Producer' is defined by the Directive as 'the manufacturer of consumer goods, the importer of consumer goods into the territory of the Community or any person purporting to be a producer by placing his name, trade mark or other distinctive sign on the consumer goods' (Article 1(2)(d)). The Directive applies therefore to guarantees given by retailers or others who place their own name or brand on goods manufactured for them by others. As noted above, the definition in the 1980 Act covers guarantees provided by a manufacturer or supplier other than a

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Green Paper also cited the Irish provisions on guarantees as among the 'most forward-looking national texts in this domain'.

[961] The Directive was given effect by the European Communities (Certain Aspects of the Sale of Consumer Goods and Associated Guarantees) Regulations 2003 (S.I. No. 11 of 2003). The provisions on guarantees are at Regulation 9 of the Regulations.

[962] Recital 21, Directive 1999/44/EC of the European Parliament and of the Council on Certain Aspects of the Sale of Consumer Goods and Associated guarantees.

[963] The definition in the 1980 Act does not contain an express provision about advertisements and it is unclear whether advertising in written form is covered by the stipulation that guarantee means 'any document, notice or other written statement, howsoever described, supplied by a manufacturer or other supplier … in connection with the supply of any goods …'.

retailer, though retailers are liable for manufacturers' guarantees if they have not expressly disclaimed responsibility for them, or given their own written undertaking to service or repair goods after purchase.

13.6. Article 6(1) of the Directive provides that a guarantee 'shall be legally binding on the offerer under the conditions laid down the guarantee statement and the associated advertising'. It would appear that the 'conditions' referred to here include the actions the consumer (or in some cases the retailer) must take in order for the guarantee to take effect (such as a registration requirement) as well as the terms and conditions governing the application of the guarantee (the duration, claim procedure etc).[964] The fact that the guarantee binds the offerer only on the conditions set out in the guarantee document and any associated advertising underlines the essentially modest aims of the Directive. Article 6(1) is silent on the question of whether guarantees are transferable to subsequent purchasers of goods. Though it does not confine the benefit of the guarantee to the first buyer, it does not expressly state either that the guarantee is transferable. Article 6(2) provides that the guarantee shall:

- state that the consumer has legal rights under applicable national legislation and make clear that those rights are not affected by the guarantee;

- set out in plain intelligible language the contents of the guarantee and the essential particulars for making claims under the guarantee, notably the duration and territorial scope of the guarantee as well as the name and address of the guarantor.

Article 6(3) states that the consumer may request that the guarantee be made available in writing or another durable medium. Article 6(4) empowers Member States to provide that guarantees for goods marketed within their territory be drafted in one or more of the official languages of the European Community, in practice the language of the Member State implementing this provision. This option was not exercised by eleven member states including Ireland.[965] Finally, Article 6(5) provides that a failure to comply with the requirements of Article 6 does not affect the validity of the guarantee, and that consumers can still rely on it and require that it be honoured. The

[964] Bradgate, R & Twigg Flesner, C. 2003. **Blackstone's Guide to Consumer Sales and Associated Guarantees,** op. cit., pp.175-176.
[965] Schulte-Nolke, H. (ed). 2008. **EC Consumer Law Compendium: Comparative Analysis**, p. 689. http://ec.europa.eu/consumers/rights/docs/consumer_law_compendium_comparative_analysis_en_final.pdf

Directive does not include any specific sanctions for breaches of its guarantee provisions. As the Directive comes within the scope of Directive 98/27/EC on injunctions for the protection of consumers' interests, however, national enforcement authorities can apply for an injunction where an infringement of the guarantee provisions is harmful to the collective interests of consumers.

13.7. In summary, the 1980 Act and Directive 1999/44/EC are broadly similar in their focus on the enforceability of guarantees and the provision of information about them. Neither seeks to make guarantees mandatory or to regulate their substantive provisions to any significant extent. The provisions of the 1980 Act are broader in scope, however, in that they cover commercial as well as consumer buyers, extend the benefit of the guarantee to subsequent purchasers of goods, and may bind retailers as well as manufacturers and distributors in some circumstances.

Proposal for a Directive on Consumer Rights

13.8. As previously stated, Chapter IV of the proposed Directive on Consumer Rights was intended to replace Directive 1999/44/EC on the Sale of Consumer Goods and Associated Guarantees.[966] In the event, the Directive that is to be adopted later in 2011 will exclude the main provisions of the proposed Chapter, including those on guarantees, and the existing Consumer Sales and Guarantees Directive will remain in force. The aim and approach of the provisions on commercial guarantees at Article 29 of the proposed Directive were broadly in line with the corresponding provisions in the present Directive. Though otherwise similar to the definition in that Directive, the definition of 'commercial guarantee' at Article 2(18) of the proposal was not restricted, however, to guarantees 'given without extra charge' and would thus have applied to extended warranties and other guarantees for which a charge is payable. Article 29(1) of the proposed Directive sought to clarify the relation between guarantee statements and associated advertising by stipulating that the guarantee would be binding on the conditions laid down in the statement. In the absence of the guarantee statement, however, the guarantee would be binding under the conditions laid down in the advertising on the commercial guarantee. Article 29(2)(c) sought, in tandem with the proposal's provisions on unfair contract terms, to deal with the issue

[966] Commission of the European Communities. 2008. **Proposal for a Directive of the European Parliament and of the Council on Consumer Rights**. COM (2008) 614.

of the transferability of guarantees. While guarantee statements were required to state, where applicable, that the guarantee could not be transferred to a subsequent buyer, Annex III.1(j) of the Directive provided that a contract term which restricted the consumer's right to re-sell goods by limiting the transferability of a commercial guarantee was presumed to be unfair. Unlike the minimum harmonisation basis of Directive 1999/44/EC, the full harmonisation basis of the proposed Directive would have precluded member states from maintaining or introducing provisions on guarantees that exceeded those in the EU instrument. This would have prevented, for example, retention of the provision at section 16(3) of the 1980 Act which provides that the procedure for presenting a claim under a guarantee must not be more difficult than ordinary or normal commercial procedure. The reversion to the minimum harmonisation Directive 1999/44/EC means, however, that Ireland will remain free to maintain or introduce statutory provisions on guarantees that go beyond the protections conferred by the Directive.

Issues Arising

13.9. The Group is broadly in agreement with the approach to the regulation of guarantees in the Sale of Goods and Supply of Services Act 1980 and Directive 1999/44/EC. It is correct in our view that the regulation of guarantees acknowledges their discretionary character and focuses on ensuring that consumers are given adequate information about guarantees, in particular that these do not affect the legal rights of purchasers, and that commitments made by guarantors are enforceable. As we have stressed in other sections of this report, it is essential that an end be brought to the present dual regulation of consumer sales law by legislative provisions of domestic and EU origin. There should accordingly be a single set of rules governing product guarantees in sale of goods legislation. As the rules in the 1980 Act are clearer and more detailed in our opinion than those in Directive 1999/44/EC, they should provide the basis for the future statutory provisions. Where the Directive contains provisions not directly covered by sections 15-19 of the 1980 Act, however, the proposed legislation must obviously incorporate those provisions. This would apply to the express recognition in the Directive that undertakings made in relevant advertising can form part of a guarantee, to the requirement to state the territorial scope of the guarantee, and to the stipulation that the guarantee be made available in writing or on another durable medium on request by the consumer. Though not

exercised in the transposition of Directive 1999/44/EC, the regulatory option permitting member states to require that guarantees be drafted in an official language of the European Community, in our case English, should be availed of in future legislation.

13.10 Recommendation

There should be a single set of statutory rules on product guarantees in future legislation. Those rules should be based on the provisions of sections 15-19 of the Sale of Goods and Supply of Services Act 1980 along with the addition of those elements of the guarantee provisions of Directive 1999/44/EC not found in the Act, including the requirement that guarantees be expressed in English.

Application of Guarantees' Provisions to Non-Consumer Buyers

13.11. As noted above, the guarantee provisions at sections 15-19 of the Sale of Goods and Supply of Services Act 1980 apply both to consumer and commercial buyers of goods covered by guarantees. As Directive 1999/44/EC applies only to guarantees relating to a sales contract between a trader and a consumer, the provision of guarantees to commercial buyers falls outside its scope and is left to the legislative discretion of member states. Whether Ireland should continue to continue to apply its statutory provisions on product guarantees to consumer and non-consumer buyers, however, is an issue that requires consideration in its own right. The rationale for applying the protections of sections 15-19 of the 1980 Act to commercial purchasers of goods covered by guarantee was not set out in great detail in the Oireachtas debates on the proposed legislation. It appears to have been based on a view that, as the guarantee went with the goods, the proposed statutory protections for the purchasers of goods under guarantee should not differentiate between different types of purchaser. The fact that guarantees mainly apply to non-producer goods intended for everyday use may also have been a consideration. The then Minister for State at the Department of Industry, Commerce and Tourism stated in Seanad Éireann that[967]:

> it is not really necessary to specify or imply target groups for whom a guarantee is intended. Anyone buying the goods and using them should have a claim under the

[967] **Seanad Debates.** Vol. 93., 27 March 1980 Sale of Goods and Supply of Services Bill 1978 Committee Stage (Resumed): col. 1572. An opposition speaker suggested that the guarantee provisions should not apply to commercial purchasers or, failing that, that their exclusion should be permissible in commercial contracts where this was 'fair and reasonable', ibid: col. 1575.

guarantee if something goes wrong and this would be a normal and reasonable interpretation.

13.12. The matter at issue, however, is not whether a non-consumer purchaser of goods covered by a guarantee should have a claim under the guarantee, but rather whether such a purchaser should be able to avail of additional statutory protections in respect of guarantees. It would arguably have been more consistent with the overall approach of the 1980 Act to have applied the guarantee provisions to transactions where the buyer 'deals as consumer' or to have permitted their exclusion from business-to-business contracts where this was 'fair and reasonable'. The restriction of statutory protections for product guarantees to consumer goods or sales would also accord more closely with the approach adopted in legislation outside Ireland. European Union legislation on commercial guarantees applies only to consumer sales as do the guarantees provisions in the Draft Common Frame of Reference.[968] The provision on guarantees in the UK Unfair Contract Terms Act 1977 are limited to goods 'in consumer use', that is 'use other than exclusively for the purposes of a business', while the Supply of Extended Warranties on Domestic Electrical Goods Order 2005 applies only to contracts entered into by consumers. In Australia and New Zealand, the right of action in respect of the statutory provisions on guarantees is limited to the consumer and 'a person who acquires the goods from, or derives title to the goods through or under the consumer' (Australia), or 'any person who acquires the goods from or through the consumer' for purposes other than resupply in trade, use in production or manufacture, or use to repair or treat other goods or fixtures on land (New Zealand).[969] In the United States, the Magnusson-Moss Warranty Act 1975 does not apply to guarantees on products sold for resale or commercial purposes and covers only guarantees on a 'consumer product', that is products normally used for personal, family or household purposes; the term 'consumer', however, includes any person to whom a consumer product is transferred during the duration of the guarantee.[970]

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[968] Von Bar, C. et al (eds). 2008. **Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference, Interim Outline Edition** (Munich: Sellier), Book IV.A., Chapter 6, pp. 204-207.

[969] Australia, Trade Practices Act 1974, Part VDivision 2A, section 74(G). New Zealand, Consumer Guarantees Act 1973, sections 27 & 2(b).

[970] 15 USC 2301. See also Federal Trade Commission, **A Businessperson's Guide to Federal Warranty Law**: http://www.ftc.gov/bcp/edu/pubs/adv/bus01/shtm.

13.13. Though a case can be made for limiting the application of the statutory provisions on guarantees to consumer sales, we are not convinced that a restriction of this kind is necessary or desirable. As the guarantee is given by the manufacturer or distributor in respect of the goods, it would not be practical, for example, to apply the information provisions at section 16 of the 1980 Act only to cases where the goods were purchased by a consumer. The protections and remedies afforded by sections 17-19 of the Act, furthermore, are not such as to make their application to business buyers inherently inappropriate or unreasonable, particularly as product guarantees are largely restricted to consumer goods.

13.14. Recommendation

The provisions regarding guarantees in future legislation should, like the existing statutory provisions, apply to all purchasers of goods covered by a guarantee.

The Regulation of Extended Warranties

13.15. As noted above, the UK enacted the Supply of Extended Warranties on Domestic Electrical Goods Order 2005 to regulate consumer contracts involving these products. Its enactment followed an Office of Fair Trading (OFT) investigation which found evidence of grounds for concern in the provision of such warranties, and a subsequent Competition Commission report.[971] The main concerns revealed by the OFT investigation centred on pressure selling of extended warranties, inadequate information to consumers to allow them to assess alternatives to such warranties, an approach to the pricing of warranties that did not reflect the cost of the cover provided, and a lack of competition in the extended warranty market. The 2005 Order sought to address these concerns by imposing more extensive information requirements on the providers of extended warranties for domestic electrical goods,[972] and by giving consumers purchasing an extended warranty with an initial duration of more than one year a right to cancel it within a period of forty five days from the day

[971] Office of Fair Trading. 2002. **Extended Warranties on Domestic Electrical Goods: A Report on an OFT Investigation**, http://www.oft.gov.uk/OFTwork/markets-work/completed/warranties . Competition Commission. 2003. **Report on the Supply of Extended Warranties on Domestic Electric Goods Within the UK**, http://www.competition-commission.org.uk/rep_pub/reports/2003/485xwars.htm.

[972] The information provisions include a requirement to state that extended warranties may be available from other providers, that household insurance may be relevant to the purchase of domestic electrical goods, and to indicate the nature of the financial protection available in the event of the provider going out of business.

of purchase. A review of the Order undertaken for the Office of Fair Trading in 2008 found that it had had a positive impact in a number of areas.[973] The proportion of consumers purchasing extended warranties at the point of sale had declined from 82 per cent to 68 per cent, and the number of consumers shopping around for warranties had shown a modest increase. An estimated 5 per cent of consumer purchasers of extended warranties had also availed of the cooling-off right provided for in the Order.

13.16. No investigation has been undertaken in Ireland of the market for extended warranties for electrical goods. In its Annual Report for 2008, however, the National Consumer Agency expressed concerns about 'what could be regarded as pressure selling' by furniture retailers to get consumer to take out extended warranties.[974] It is unclear from the report whether the warranties in question applied to furniture, electrical goods, or both. Given the overall similarities in the retail environment in both countries and the fact that a number of UK-based retailers in the electrical goods sector also operate here, there is a case for a more detailed investigation of extended warranties in Irish retailing to establish if there is evidence of consumer detriment of the kind found to exist in the UK. As an interim initiative, a consumer protection measure modelled on the UK 2005 Extended Warranties Order should be introduced for the electrical goods sector. Extended warranties are a materially different product from traditional manufacturers' guarantees and may require more extensive regulation than the relatively 'light-touch' provisions deemed appropriate for free-of-charge guarantees.

13.17. Recommendation

An extensive review of Irish extended warranty documents and practices should be undertaken across all sectors in which extended warranties are commonly available. As an interim measure, regulations based on the Supply of Extended Warranties on Domestic Electrical Goods Order 2005 should be introduced to regulate extended warranties in electrical retailing.

[973] Office of Fair Trading. 2008. **Evaluating the Impact of the Supply of Extended Warranties on Domestic Electrical Goods Order 2005**. http://www.oft.gov.uk/shared_oft/reports/Evaluating-OFTs-work/oft1024.pdf

[974] National Consumer Agency, **Annual Report 2008**, pp. 15-16.

II PART VI SALE OF GOODS AND SUPPLY OF SERVICES ACT 1980

13.18. Part VI of the Sale of Goods and Supply of Services Act 1980 is headed 'Miscellaneous' and this accurately describes its contents. Its main provisions deal with (i) unsolicited goods, (ii) directory entries, and (iii) Ministerial powers to make orders regulating the form and content of contracts for the supply of goods and services. We will consider each of these in turn.

Unsolicited Goods and Services

Section 47 Sale of Goods and Supply of Services Act 1980:

13.19. Section 47 sets out the circumstances in which a recipient of unsolicited goods may treat such goods as an unconditional gift, and makes it an offence to seek payment for them or to threaten legal proceedings or a collection procedure. The section is modelled on the provisions of the UK Unsolicited Goods and Services Act 1971. Its inclusion in the 1980 Act followed a recommendation from the National Consumer Advisory Council that the recipients of unsolicited goods should have the right to keep the goods under conditions similar to those laid down in the UK legislation.[975] Though the Department of Industry and Commerce considered that the problem of unsolicited goods was not widespread at the time, it noted occasional reports of UK rogue traders dispatching unsolicited goods from Ireland in order to circumvent the legislation in force in their own jurisdiction.[976] There were also claims of 'high-handed and offensive' demands for payment for goods sent without request to innocent parties.

13.20. Section 47(1) first specifies that it applies to unsolicited goods sent to a person:

(i) with a view to his acquiring them, and
(ii) received by him, and
(iii) which he has agreed neither to acquire nor to return.

Its application is not restricted to consumers and covers unsolicited goods sent to businesses. The subsection further provides that the recipient may treat unsolicited goods as an unconditional gift and that any right of the sender to the goods shall be extinguished in either of two circumstances as follows:

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[975] National Consumer Advisory Council. 1974. **Submission to the Minister for Industry and Commerce on Proposals for Legislation to Assure the Consumers' Interest**, p. 18.
[976] Department of Industry and Commerce. CP 27. Sale of Goods and Services Bill, 1977: Second Stage Brief, p. 27.

(1) during the period of six months from the date of receipt of the goods, the sender did not take possession of them and the recipient did not unreasonably refuse to permit him to do so; or

(2) not less than 30 days before the end of that six month period, the recipient of the goods gave notice to the sender and, during the following 30 days, the sender did not take possession of them or and the recipient did not unreasonably refuse to permit him to do so.

13.21. Section 47(2) of the Act specifies that the notice from the recipient of unsolicited goods to their sender must be in writing, give the recipient's name and the address at which the sender can take possession of the goods, and state that the goods are unsolicited. Section 47(3) provides that a person in the course of any business who, without reasonable cause to believe that there is a right to payment, makes a demand for, or asserts a present or prospective right to, payment for what he knows are unsolicited goods shall be guilty of an offence. Any invoice or similar document indicating a sum of money as if it were due is, in accordance with section 49(1) of the Act, regarded as asserting a right to payment. Section 47(4) provides that a person shall be guilty of an offence who, without reasonable cause to believe that there is a right to payment in the course of any business, and with a view to obtaining payment for what he knows or ought to know are unsolicited goods –

(a) threatens to bring any legal proceedings,
(b) places or causes to be placed the name of any person on a list of defaulters or debtors or threatens to do so, or
(c) invokes or causes to be invoked any other collection procedure or threatens to do so.

By virtue of the application of these provisions to both consumer and business recipients, the National Consumer Agency which is now responsible for the enforcement of the 1980 Act is under an obligation to investigate and, where appropriate take enforcement action against, breaches of section 47 affecting businesses.

European Union Legislation on Unsolicited Goods and Services

13.22. The supply of unsolicited goods and services was first regulated under EU legislation by Article 9 (Inertia selling) of Directive 97/7/EC on the protection of consumers in respect of distance contracts. This required Member States to take the measures necessary to:

- prohibit the supply of goods or services to a consumer without their being ordered by the consumer beforehand, where such supply involves a demand for payment;

- exempt the consumer from the provision of any consideration in cases of unsolicited supply, the absence of a response not constituting consent.

Despite its inclusion in a Directive on distance contracts, the prohibition of inertia selling was not restricted to inertia selling involving this type of contract. Article 7(3) of the Directive clarified that the provision of a substitute product or service in accordance with Article 7(3) of the Directive did not come within the prohibition of inertia selling.[977]

13.23. Directive 97/7/EC was implemented in Ireland by the European Communities (Protection of Consumers in Respect of Contracts Made by Means of Distance Communication) Regulations 2001 (S.I. No. 207 of 2001). As section 47 of the 1980 Act was considered to give adequate effect to the Directive's provisions in respect of unsolicited goods, the Regulations deal only with the supply of unsolicited services. Regulation 11 of the Regulations applies provisions identical to those at Sections 47(3) and (4) of the 1980 Act to demands for payment and threats of legal proceedings or other action in respect of the supply of an unsolicited service. Though the other provisions of the Regulations apply only to contracts between a supplier and a consumer, Regulation 11 is, like the corresponding provision on unsolicited goods in the Sale of Goods and Supply of Service Act 1980, of general application. As with section 47 of the 1980 Act, this means that the National Consumer Agency may be obliged to investigate, and where appropriate, prosecute breaches of the Regulation affecting business recipients of unsolicited services.

[977] Article 7 of Directive 97/7 states that, unless the parties have agreed otherwise, the supplier must execute the order for a distance contract within a maximum of thirty days from the day following the dispatch of the order by the consumer. Where the supplier fails to perform his side of the contract because of the unavailability of goods or services, the consumer must be informed of the situation and be able to obtain a refund within thirty days of any sums he has paid. Article 7(3) permits member states to provide that the supplier may provide the consumer with goods or services of equivalent quality and price provided that this possibility was provided for prior to the conclusion of the contract or in the contract and the consumer was informed of it in a clear and comprehensible manner. Eighteen member states, including Ireland, gave effect to this regulatory option. The supply of goods and services in such circumstances is not to be deemed 'inertia selling' within the meaning of Article 9 of the Directive.

13.24. Article 15 of Directive 2005/29/EC on Unfair Commercial Practices (UCPD) substituted a new Article 9 of the Distance Selling Directive as follows:

> Given the prohibition of inertia selling practices laid down in Directive 2005/29/EC of 11 May 2005 of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market, Member States shall take the measures necessary to exempt the consumer from the provision of any consideration in cases of unsolicited supply, the absence of a response not constituting consent.

The prohibition of inertia selling in the UCPD referred to here is that in the 'blacklist' of aggressive commercial practices considered unfair in all circumstances at Annex I: of the Directive:

> Demanding immediate or deferred payment for or the return or safekeeping of products supplied by the trader, but not solicited by the consumer except where the product is a substitute supplied in conformity with Article 7(3) of Directive 97/7/EC (inertia selling).

The Directive defines 'product' as 'any goods or service, including immovable property, rights and obligations' (Article 2(c)). The prohibition of inertia selling in the UCPD blacklist was given effect in Ireland by section 53(3)(f) of the Consumer Protection Act 2007 which provides that a trader shall not engage in the following practice:

> In relation to any product that a consumer does not solicit, demanding that the consumer –
> (i) make immediate or deferred payment for the product, or
> (ii) return or keep the product safe.

13.25. The effect of the UCPD provision and the consequential amendment to the Distance Selling Directive has been to split the original provision on inertia selling into two distinct parts. The proscription of payment demands for unsolicited goods and services has become a prohibited aggressive commercial practice under the UCPD, breaches of which are punishable by criminal or administrative sanctions or can be the subject of an injunction. The requirement on Member States to take measures to exempt consumers from the provision of consideration for unsolicited goods or services remains part of the Distance Selling Directive. This is aimed at giving consumers a contractual remedy in respect of unsolicited goods and services. As the recently agreed Directive on Consumer Rights is set to incorporate the Distance Selling Directive, this provision will form part of the new Directive in the

future. Article 45 of the Directive essentially re-enacts Article 9 of the Distance Selling Directive and provides that:[978]

> The consumer shall be exempted from the provision of any consideration in cases of unsolicited supply of goods, water, gas, electricity, district heating or digital content or unsolicited provision of a service, prohibited by Article 5(5) and point 29 of Annex I of Directive 2005/29/EC. In such cases, the absence of a response from the consumer following such an unsolicited supply shall not constitute consent.

The rationale for the inclusion of this provision, according to recital 61 of the original proposal, is that, while the Unfair Commercial Practices Directive prohibits inertia selling, it provides no contractual remedy for consumers affected by the practice.[979] It was considered necessary, therefore, 'to introduce in this Directive the contractual remedy of exempting the consumer from the provision of any consideration for such unsolicited supplies.'

Issues Arising

13.26. The provisions on unsolicited goods and services do not give rise to major policy issues. The main matters for consideration concern the conditions governing the retention of unsolicited goods and the application of the provisions regarding unsolicited goods to businesses in receipt of such goods.

Conditions Governing Retention of Unsolicited Goods

13.27. As noted above, section 47(1) of the Sale of Goods and Supply of Services Act 1980 provides that the recipient of unsolicited goods can treat them as an unconditional gift where (i) the sender did not take possession of them within six months of their receipt by the recipient and the recipient did not unreasonably refuse to permit the sender to do so, or (ii) not less than thirty days before the expiry of that six month period, the recipient gave written notice to the sender and the sender did not take possession of them during the following 30 days or the recipient unreasonably refuse to permit the sender to do so. The question arises as to whether, in the case of unsolicited goods sent to a consumer, these conditions are in accordance with the provision on inertia selling at Article 9 of Directive 97/7EC on Distance Selling (and

[978] Proposal for a Directive of the Parliament and of the Council on Consumer Rights. A provisional version of the text of the Directive can be accessed at http://www.europarl.europa.eu/documents/activities/cont/201106/20110624ATT22578EN.pdf

[979] European Commission. 2008. **Proposal for a Directive on Consumer Rights**. COM (2008) 614, recital 61.

with the similar provision in the recently agreed Consumer Rights Directive which is set to replace it). The provision in the existing Directive obliges member states to 'take the measures necessary to exempt the consumer from the provision of **any consideration** in cases of unsolicited supply, the absence of a reply not constituting consent' (our emphasis). It is arguable, however, that the conditions governing the retention of unsolicited goods at section 47(1) of the Sale of Goods and Supply of Services Act 1980 may constitute a form of consideration.[980] A claim to this effect has been made in fact by academic commentators on EU consumer legislation.[981] It is relevant to note in this context that the UK legislation which gave effect to the inertia selling provision of the Distance Selling Directive did away with the conditions governing the receipt of unsolicited goods under the UK Unsolicited Goods and Services Act 1971, conditions identical to those under section 47(1) of the Sale of Goods and Supply of Services Act 1980.[982] The applicable statutory provisions in the UK now provide that:[983]

> The recipient (of unsolicited goods) may, as between himself and the sender, use, deal with or dispose of the goods as if they were an unconditional gift to him. The rights of the sender to the goods are extinguished.

Issues of compatibility with EU law aside, we see no good reason why restrictive conditions should attach to the retention of goods sent to persons without their consent. On purely practical grounds, moreover, the time limits specified in the Act may be unsuited to certain types of goods, such as perishable items.

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[980] 'Consideration' is a term to which a broad interpretation has traditionally been applied. In the well-known words of Lush J. in *Currie v. Misa* (1875) LR 10 Ex 353, (1875-76) LR 1 App Cas 564, ' a valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility, given, suffered or undertaken by the other.'

[981] Schulte-Nolke, H. (ed). 2008. **EC Consumer Law Compendium: Comparative Analysis**, p. 572. http://ec.europa.eu/consumers/rights/docs/consumer_law_compendium_comparative_analysis_en_final.pdf

[982] The Consumer Protection (Distance Selling) Regulations 2000, Regulation 22(2).

[983] Ibid., Regulation 24(2)-(3). The British Columbia Business Practices and Consumer Protection Act 2004 (section 12) imposes no legal obligation on consumers in respect of unsolicited goods or services (unless they have expressly acknowledged in writing their intention to accept them) and gives no cause of action to the supplier of unsolicited goods or services. It further provides that goods or services previously supplied with the consumer's consent are deemed to be unsolicited goods or services if there is a material change in the goods or services and the supplier is unable to establish that the consumer consented to this change. A provision of this kind, however, would not be compatible with the maximum harmonisation status of the inertia selling provisions of the Unfair Commercial Practices Directive and the proposed Consumer Rights Directive. The Australian Trade Practices Act 1974 (Part V, Division 1, section 65) retains provisions broadly similar to those at section 47(1) of the 1980 Act, though unsolicited goods become the property of the recipient three months after the receipt of the goods, and not six months as in the 1980 Act.

13.28. Recommendation

We recommend that the conditions governing the receipt of unsolicited goods under section 47(1) of the Sale of Goods and Supply of Services Act 1980 should be repealed. Persons receiving unsolicited goods should be entitled to treat them as an unconditional gift, and the rights of the sender to such goods should be extinguished without regard to such conditions. The provisions on unsolicited goods and services which are currently contained in separate pieces of legislation should also be brought together in future legislation.

Scope of Provisions on Unsolicited Goods and Services

13.29. The provisions at section 47(1) of the Sale of Goods Act 1980 and Regulation 11 of S.I. No. 207 of 2001 apply to business and consumer recipients of unsolicited goods and services alike. The contractual consequences of supplying unsolicited goods should, in our view, be the same regardless of whether the recipients are businesses or consumers – that is, the rights of the sender should be extinguished and the recipient should be entitled to treat the goods as an unconditional gift. The supply of unsolicited goods or services falls outside the type of legitimate business dealings in respect of which freedom from legislative intervention is appropriate. This practice warrants consequently the application of statutory provisions and protections to business-to-business transactions.

13.30. Recommendation

The supply of unsolicited goods or services to businesses should be regulated by provisions similar to those governing the supply of such goods and services to consumers under Directives 97/7/EC and 2005/29/EC.

SECTIONS 48 AND 49 SALE OF GOODS AND SUPPLY OF SERVICES ACT 1980 – DIRECTORY ENTRIES

13.31. As with the provisions on unsolicited goods that directly precede them, sections 48 and 49 of the 1980 Act were introduced to address a business practice that was a cause of current concern, and were modelled on provisions in the UK Unsolicited Goods and Services Act 1971. The business practice at issue was the making of demands for payment for entries in business directories where the business

had not knowingly consented to such an entry or, in some cases, where the directory did not exist.[984] The key provisions of sections 48 and 49 are as follows:

- A person shall not be liable for any payment for the inclusion in a directory of an entry relating to him or his business, and shall be entitled to recover any such payment, unless the order for the entry has been made in accordance with the requirements of the Act ('directory' for this purpose excludes the alphabetical telephone directory issued by Telecom Eireann);

- The main such requirement is that the order for the directory entry must be made by means of an order form or other stationery belonging to the person to whom, or to whose trade or business, the entry is to relate, and the note of a person's agreement to a charge for such an entry must state the amount of the charge above the place of signature and provide other specified information about the directory, its price (if any), the number of copies to be available for sale or distribution, and also give reasonable particulars of the entry in respect of which the charge would be payable;

- A person shall be guilty of an offence if he demands payment, asserts a present or prospective right to payment, or takes any action in furtherance of a demand for payment in respect of a charge for a directory entry without knowing, or having reasonable cause to believe, that the entry was ordered in accordance with the Act or that a proper note of agreement has been signed.

13.32. The effect of these provisions is to impose two procedural requirements designed to protect businesses from payment demands for entries in business directories obtained by means of sharp or deceptive practices. An order for the directory entry must first be made on the order form or stationery of the business that is to be the subject of the entry, and the business's agreement to a charge for the entry must be signed on a note which provides information about the directory and the cost of the entry. The provisions are targeted at abusive business-to-business practices and, though consumers have been approached for inclusion in these directories on occasion, have no significant consumer dimension. Responsibility for the enforcement of the provisions rests with the National Consumer Agency and thus requires the Agency to investigate, and where necessary take enforcement action on, complaints affecting businesses.

[984] In the second stage speech on the Bill, the then Minister of State at the Department of Industry, Commerce and Tourism stated the Department had received 'a good many complaints over the last year or two about firms soliciting payment for entries in a directory which does not seem to exist'. **Dáil Debates**, Vol. 309, 16 November 1978 Sale of Goods and Supply of Service Bill 1978 Second Stage: col. 1109.

13.33. The principal other legislative provisions of relevance to business practices of this kind[985] are those of Directive 2006/114/EC concerning misleading and comparative advertising.[986] This has been given effect in Ireland by the European Communities (Misleading and Comparative Marketing Communications) Regulations 2007 (S.I No. 774/2007). The Regulations, among other things, prohibit traders from engaging in a misleading marketing communication and provide that a marketing communication is misleading if:

(a) in any way including its presentation) it deceives, or is likely to deceive, in relation to a range of specified matters regarding goods or services the trader to whom it is addressed or whom it reaches, and
(b) by reason of its deceptive nature, is likely to affect the trader's economic behaviour, or
(c) for any reason specified in (a) or (b), injures or is likely to injure a competitor.

The Regulations provide for no public enforcement mechanism. Traders affected by a misleading marketing communication may apply to the Circuit or High Court for an order prohibiting such a communication.

13.34. Though the original complaints about business directories date from the nineteen seventies, similar concerns have arisen in more recent years, though this time on a cross-border basis within the European Union. The main, though not the sole focus, of such complaints has been a Spanish-based directory called the European City Guide.[987] According to a report on misleading directory companies prepared for the European Parliament, the modus operandi of these enterprises involves approaches to small businesses and non-profit making organisations inviting them to submit a directory listing apparently free of charge.[988] Businesses which agree to a listing later discover that they have unwittingly signed up to a contract binding them for three or more years at a typical yearly charge of €1,000. Payment demands have

[985] Some business practices regarding directories may involve fraud and be dealt with under the criminal law.
[986] Directive 206/114/EC is a consolidated version of the former Directive 84/450/EEC on misleading advertising. With the enactment of Directive 2005/29/EC on unfair business-to-consumer practices, the scope of Directive 84/450/EEC was limited to misleading advertising affecting business and, in accordance with Community rules on legislative consolidation, it was repealed and its provisions and all the amendments to in codified in Directive 2006/114/EC.
[987] The European City Guide was originally based in Barcelona but, after the Catalan authorities fined it €300,000 in 2003 and ordered its closure for one year, it moved its operations to Valencia. **European Parliament 8 September 2006: Answer to a Written Question – European City Guide and Misleading Advertising Scam**. A number of UK businesses set up a website, www:stopecg.org, to draw attention to the malpractices in which it was claimed that the company engaged.
[988] Committee on Petitions of the European Parliament. **Report on the Misleading Directories Companies report**. A6-0446/2008, 13.11.2008.

been aggressively pursued by the directory companies and, in some cases, by debt-collection agencies acting on their behalf. According to the European Parliament report, 'thousands of businesses' across the EU have been affected by these practices, though it is not known how many of these businesses actually made payments to the to the directory companies. Payment demands, coupled with threats of legal action, are reported to have been made to a sizeable number of Irish companies and organisations, including at least twenty schools.[989] More recently, two linked companies with offices in England and the Netherlands, Yellow Page Marketing BV and Yellow Publishing Limited, were fined a total of $2.7m. by the Federal Court of Australian for misleading and deceptive practices involving online business directories.[990] The companies had invoiced thousands of Australian businesses for subscriptions to their online directories after seeking to mislead them into thinking that they were dealing with the operators of the established Yellow Pages Directory.

13.35. Although section 47 of the 1980 Act affords businesses reasonable protection against rogue directory companies operating in Ireland, it cannot give the same degree of protection from the activities of directory companies based outside Ireland. Under the rules of jurisdiction in force under the Brussels I Regulation, matters relating to the provision of services under a contract will, as a general rule, be dealt with by the courts in the Member State where, under the contract, the services were or should have been provided.[991] As most EU Member States do not have provisions regulating directory entries along the lines of those in force in Ireland and the UK, a directory company in one of those Member States could obtain a judgement against an Irish company for non-payment for a directory entry in their national courts and then seek to have that judgement enforced in the Irish courts. In accordance with the Brussels I rules, an application for the enforcement of a judgement given in another member state that is made to the Master of the High Court must be declared immediately enforceable on completion of the necessary formalities and without review with

[989] **Sunday Business Post**, 30 January 2005: 'European City Guide Scam Threatens Barber'. **Irish Independent**, 13 April 2006: 'Schools hoodwinked in Euro guide debt scam.'
[990] *Australian Competition and Consumer Commission v Yellow Page Marketing BV* (No 2) [2011] FFCA 352.
[991] Council Regulation (EC) No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial Matters. The European Communities (Civil and Commercial Judgements) Regulations 2002 (S.I. No. 52 of 2002) set out the procedures applicable to the implementation of the Regulation.

respect to the provisions governing the unenforceability of judgements on the ground of conflict with public policy. Though such an outcome is certainly possible, it is not necessarily likely. As the European Parliament's report on Misleading Directories Companies noted, businesses which refuse to pay the directory companies have seldom been pursued in the courts.[992] If the activities of rogue directory companies operating on a cross-border basis within the European Union continue to be a problem, however, Ireland should actively support the adoption of appropriate measures at Community level to tackle the matter.

Issues Arising

13.36. The evidence of continued abuses involving business directories over the past decade shows the need for the retention of provisions along the lines of those at sections 48-49 of the Sale of Goods and Supply of Services Act 1980. Much of this activity appears to have been aimed at micro-businesses, sole traders, charities and other bodies particularly vulnerable to this form of malfeasance. Though the rationale for the statutory provisions on directory entries remains valid, these require to be updated and amended in a number of respects. Sections 48 and 49 have gone unamended since their adoption, while the provisions of the UK Unsolicited Goods and Services Act 1971 on which they were based have undergone three separate revisions.[993]

Electronic Communications and Directory Entries

13.37. The provisions on directory entries in the Sale of Goods and Supply of Services Act 1980 were adopted before the changes in communications technologies that have transformed commercial life. There is a clear case accordingly for updating them to take account of modern commercial and communications practices. In the UK, the amendments made by the UK Unsolicited Goods and Services Act 1971 (Electronic Communications) Order 2001 still require an order for a first directory entry to be made by means of an order form or other stationery belonging to the business which is to be the subject of the entry but, subject to specified conditions,

[992] Committee on Petitions of the European Parliament, op. cit., p. 5.
[993] The Unsolicited Goods and Services (Amendment) Act 1975 (1975 c.13). The Unsolicited Goods and Services Act 1971 (Electronic Communications) Order 2001, (S.I. No. 2778 of 2001). The Regulatory Reform (Unsolicited Goods and Services Act 1971) (Directory Entries and Demands for Payment) Order 2005 (S.I. No. 55 of 2005).

permit agreement to the charge for the entry to be made by electronic communication. These conditions are, first, that information about the directory, its producer, sale and distribution, and the charge for an entry must be communicated to the business beforehand and, second, that the electronic communication must be capable of being readily produced and retained in a visible and legible form. The latter requirement is broadly similar to the 'durable medium' provision in several EU Directives.[994] The UK provision on charges for directory entries strikes an appropriate balance in our view between ensuring that there are both effective safeguards and a reasonable level of flexibility, and should be adopted in future Irish legislation.

13.38. The rules applying to orders for initial directory entries raise more complex issues. It is now ten years since the relevant provision in the UK legislation was revised, and in this period electronic communications have become an even more central feature of commercial life. While the requirement that an order for a first-time directory entry must be submitted on an order form or other stationery belonging to the business to be covered by the entry is a potent safeguard, it is valid to ask if some means of protecting businesses from unscrupulous directory companies can be found that does not require orders to be submitted on paper. A requirement of this kind, moreover, is difficult *prima facie* to reconcile with the rationale behind the provisions on electronic contracts at section 19 of the Electronic Commerce Act 2000.[995] The focus of the provisions on directory entries in the 1980 Act is rightly on the malpractices committed by a small number of rogue traders, but it is necessary also to keep in mind that there are well-established bona fide directories in which large numbers of businesses wish to be listed. While it is necessary to have regulations that protect vulnerable businesses from abuses, this should not be done in a manner that

[994] Directive 2002/65/EC on the distance marketing of consumer financial services defines durable medium as 'any instrument which enables the consumer to store information addressed personally to him in a way accessible for future reference for a period of time adequate for the purposes of the information and which allows the unchanged reproduction of the information stored'. The term is defined similarly in Directive 2008/48/EC on consumer credit agreements and Directive 2008/122/EC on timeshare contracts and features also in the proposed Directive on Consumer Rights.

[995] 19(1). An electronic contract shall not be denied legal effect, validity or enforceability solely on the grounds that it is wholly or partly in electronic form, or has been concluded wholly or partly by way of electronic communication.

(2). In the formation of a contract, an offer, acceptance of an offer or any related communication (including any subsequent amendment, cancellation or revocation of the offer or acceptance of the offer) may, unless otherwise agreed by the parties, be communicated by means of an electronic communication.

Electronic Commerce Act 2000 (No. 27 of 2000).

imposes unnecessarily burdensome obligations on legitimate directory companies or on the businesses that wish to advertise in them. The existing rules almost certainly add to the operating costs of bona fide directory companies and may strike businesses wishing to subscribe to these directories as inconvenient and burdensome.

13.39. Though we are of the view that the existing requirement that orders for a first-time directory entry must be submitted on an order form or other business stationery should be replaced by a provision that would permit such orders to be made by electronic means, we do not propose to make a recommendation as to the detail of such a provision. The form and content of such a provision is outside our competence and should be the subject of consultation with directory companies and business interests, particularly organisations representing small and medium businesses. Any such provision should ensure, however, that there are effective safeguards against the activities of rogue directory companies and take appropriate account of relevant e-commerce legislation.

Renewal and Extension of Directory Entries

13.40. Though the reform of the provisions regarding first-time directory entries requires further consultation and consideration, the rules regulating the renewal or extension of such entries do not give rise to the same issues and should be simplified and streamlined. With appropriate safeguards, the risk of abuse is sufficiently lower in the case of contracts for renewed or extended entries to justify less onerous regulation. We have examined the corresponding provisions in UK legislation and think that these strike an appropriate balance between the need to ensure adequate protection and to avoid excessive regulation. The Regulatory Reform (Unsolicited Goods and Services Act 1971) (Directory Entries and Demands for Payment) Order 2005 provides that contracts for renewed or extended directory entries automatically satisfy the requirements governing payment for directory entries if certain stipulated conditions are met. The most important of these conditions are as follows:

- the form, content and distribution of the new issue or version of the directory, and of the new entry, are materially the same as the entry relating to the same business in the earlier issue or version of the directory;

- if it was a term of the contract for the entry in the earlier directory that the business renew or extend the contract, the publisher of the directory must notify the business of the renewal before the start of the new contract and

inform it that it has a period of twenty one days within which to withdraw its consent from the renewal or extension of the contract;

- if the parties to the earlier and new contract are different, that they have either entered into a novation agreement in respect of the earlier contract or the publisher has informed the business which is the subject of the directory entry of the new party to the contract.

If these and the other specified conditions are met, the requirements regarding order forms and notes of agreement to charges do not apply.

Invoices and Demand for Payment

13.41. Section 49(1) of the 1980 Act provides that, for the purposes of the provisions regulating unsolicited goods and directory entries, any invoice or similar document, indicating a sum of money as if it were due, shall be regarded as asserting a right to payment. Section 49(2) provides that the Minister for Enterprise, Trade and Innovation may by order require that any invoice or similar document shall bear a prescribed statement that no claim is made to the payment. Section 49(3) provides that a person who issues an invoice or similar document which does not comply with the requirements of an order made under section 49(2) shall be guilty of an offence. No orders have been made under section 49(2), however, since the enactment of the provision. While the corresponding UK legislation originally contained a similar provision empowering the relevant Minister to make orders regulating the content and form of invoices and similar documents, it has been replaced by a provision that sets out the conditions which invoices must satisfy if they are not be regarded as asserting a right to payment. These conditions require the invoice or other document:

(a) to be clear, legible and comprehensible; and
(b) to contain a statement in a prescribed form that the invoice is not a demand for payment, that there is no obligation to pay it, and that it is not a bill.

We think that a provision of this kind would afford useful guidance in the case of both directories and unsolicited goods and should apply to the statutory provisions in both these areas.

13.42 Recommendations

Section 48 of the Sale of Goods and Supply of Services Act 1980 should be amended to permit agreement to a charge for a first-time directory entry to be

made on a durable medium where there has been prior provision of prescribed information about the directory and the charge.

The rules at Section 48 regulating orders for first-time directory entries should also be revised to permit such orders to be made by electronic means. The content of the future rules should be the subject of consultation with directory companies and business groups in order to ensure that effective safeguards are maintained against the activities of rogue directory companies.

Section 48 of the Sale of Goods and Supply of Services Act 1980 should be further amended to provide that the requirements relating to orders and payment for renewed or extended directory entries should be simplified along the lines set out in the UK Regulatory Reform (Unsolicited Goods and Services Act 1971) (Directory Entries and Demands for Payment) Order 2005.

Section 49(2) of the Sale of Goods and Supply of Services Act 1980 should be repealed and replaced by a provision indicating the conditions which an invoice or similar document must satisfy if it is not to be regarded as asserting a right to payment.

Future legislative provisions on directory entries should take full account of e-commerce legislation currently in force.

SECTIONS 51-54 SALE OF GOODS AND SUPPLY OF SERVICES ACT 1980

13.43. Sections 51-54 of the Sale of Goods Act deal with the powers of the Minister for Jobs, Enterprise and Innovation to make orders in respect of the following matters relating to contracts:[996]

- Section 51 provides that the Minister may, by order, following such consultation as he considers necessary, require that a seller of a specified class

[996] Section 50 which gave the Minister the power, by order, to apply a right of withdrawal from contracts entered into at a place other than the place of business of the business party to the contract (or 'in other specified circumstances') was repealed by the Consumer Credit Act 1995 (section 19 and schedule 2). No regulations had been made under the section, and a broadly similar purpose had subsequently been met by the right of withdrawal from consumer off-premises contracts conferred by Directive 85/577/EEC on contracts negotiated away from business premises as given effect by the European Communities (Cancellation of Contracts Negotiated Away from Business Premises) Regulations 1989 (S.I. No.. 224/1989).

of goods or a supplier of a specified class of service shall include such particulars as are specified in the order in any specified class of contract or in any guarantee, notice or other writing in relation to such contract.

- Section 52 provides that the Minister may by order require, in relation to any person acting in the course of a business who makes use of a standard form contract for the sale or letting of goods, the supply of a service, or a hire-purchase agreement, that the person shall give such notice to the public as the order may specify as to his use of such standard form contract and as to whether he is or is not willing to contract on any other terms.

- Section 53 provides that the Minister may by order prohibit, in relation to goods or services generally on in relation to any specified class of goods or services, any seller of such goods or supplier of such services in the course of a business from making use of any printed contract, guarantee or other specified class of document unless it is printed in type of at least such size as the order prescribes.

- Section 54 provides that the Minister may by order provide, in relation to goods or services of a class described in the order, that a contract for the sale of goods, the supply of a service, or an agreement for a letting of goods (other than a hire-purchase agreement or a consumer hire agreement) shall, where the buyer, hirer or recipient deals as a consumer be in writing, and any such contract not in writing shall not be enforceable against the buyer, hirer or recipient.

A person contravening an order made under any of these sections is guilty of an offence.

Issues Arising

13.44. The most salient fact about sections 51-54 of the 1980 Act is that, in the thirty years in which they have been in force, not a single order has been made under any of the sections. This fact notwithstanding, it is clearly necessary and desirable that the legislation to replace the 1980 Act should contain a provision empowering the Minister for Jobs, Enterprise and Innovation to make regulations relating to the form and/or substance of contracts for the supply of goods and services. Two specific issues that might be the subject of such regulations have been brought to our attention: (i) the use of small print in consumer contracts and (ii) the mandatory issuing of receipts for consumer transactions. We will look at each of these in turn.

Small Print in Consumer Contracts

13.45. There is no general statutory regulation of the form or presentation of consumer contracts in Ireland, in particular the size of the print used in such contracts. The provision at section 53 of the 1980 Act empowering the Minister for Jobs, Enterprise and Innovation to make either general or sector-specific regulations governing the size print in contracts and other documents has, as we have seen, not been utilised in the three decades since its enactment. Some sectoral rules, however, contain provisions of this kind, notably the Consumer Protection Code issued by the Financial Regulator.[997] In the case of distance contracts, the European Communities (Protection of Consumers in Respect of Contracts Made by Means of Distance Communications) Regulations 2001 provide that the information prescribed by the Regulations must be provided in a 'clear and comprehensible manner which is appropriate to the means of distance communication used'. If this requirement is not met, the contract is not enforceable by the supplier. Regulation 5(1) of the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 which give effect to the Directive 93/13/EEEC on Unfair Terms in Consumer Contracts provides that:

> In the case of contracts where all or certain terms offered to the consumer are in writing, the seller or supplier shall ensure that terms are drafted in plain, intelligible language.

Recital 20 of the Directive states that 'consumers should actually be given an opportunity to examine all the terms'. Though the Directive makes no reference to legibility, some interpretations of its provisions take the view that a legibility requirement follows from the stipulation that written terms be intelligible.[998]

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[997] Regulated financial services entities must ensure that all printed information they provide to consumers is of a print size that is clearly legible. They must also ensure that warnings required by the Code are prominent - that is, they must be in a box, in bold type and of a font size larger than the normal font size used in the document or advertisement. Where small print or footnotes are used in advertisements for regulated entities, they should be of sufficient size and prominence to be clearly legible. Financial Regulator, August 2006, **Consumer Protection Code**, pp. 2 , 13 & 35. Some US states regulate the legibility of insurance contracts in detail by stipulating minimum print sizes, while some Australian States and Territories do likewise for consumer credit and/or hire purchase contracts. Australian Law Reform Commission. 1982. **Insurance Contracts** (ALRC 20), paras. 36-37

[998] The Office of Fair Trading guidance on the UK Regulations which gives effect to the Directive states as follows: 'Intelligibility also depends on how contracts are presented and used. Obviously, print must be legible. This depends not only on the size of the print used but also its colour, that of the background and the quality of the paper used.' Office of Fair Trading. 2008. **Unfair Contract Terms Guidance: Guidance for the Unfair Terms in Consumer Contracts Regulations**, para. 19.8 In *The Office of Fair Trading and Foxtons Ltd* [2009] EWHC 1681 (Ch), Mann. J. took note of the very small type face used in some of the contract terms between the defendants, an estate and letting agent, and the landlords who used their services. It is not clear, however, to what extent the smallness of the print

13.46. Though courts have sometimes criticised the use of excessively small print in contract documents,[999] it is likely that that they would be slow to absolve a contracting party from liability solely on the ground that the size of type rendered the contract terms illegible. In *D & J Koskas v Standard Marine Insurance Co. Ltd*[1000], Sankey J. expressed the view that a clause presented in a very small print size should be ignored. The Court of Appeal disagreed, however, with the judge's assessment of the legibility of the document,[1001] and Scrutton LJ. commented more broadly as follows on the relation between the legibility and validity of contract terms:[1002]

> I am rather afraid of the doctrine that you can get out of clauses by saying they are difficult to read. There may be extreme cases. I have in mind the bill of a well-known shipping company printed on red paper which was calculated to produce blindness in anyone reading. I am not saying that in no case can you get out of it on the point of illegibility, but this case does not appear to me to be a case in which that doctrine should be applied.

13.47. The issue of small print in consumer contracts has been highlighted by a campaign on the issue undertaken by the Dublin radio station, Q102.[1003] The *Make Small Print Big Print* campaign was launched in response to concerns expressed by listeners to the station, its principal demand being that Irish law should require consumer contracts to use a standardised ten-point font size in plain typeface against a contrasting background. The campaign was backed by consumer and business groups and received the support of the Oireachtas Joint Committee on Enterprise, Trade and Employment. When we first considered this question, it appeared that the introduction of regulations of this kind would be precluded by the full harmonisation character of the proposed Directive on Consumer Rights. Article 31(1) of the original text of the proposed Directive provided that written contract terms must be legible, and recital 47 stated that, subject to this legibility requirement, traders 'should be free to choose the font type or size in which the contract terms are drafted'. As discussed previously,

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of itself was a factor in the Court's judgment that the contract terms relating to renewal and sales commission were in breach of the Unfair Terms in Consumer Contracts Regulations 1999.

[999] *Goldsbrough v Ford Credit (Aust) Ltd* [1989] ASC 55-946 at 58-584. *George T. Collings (Aust) Pty Ltd v H.F. Stevenson* [1991] ASC 56-051.

[1000] (1926) 25 Ll L Rep 363 at 368.

[1001] (1927) 27 Ll L Rep 59.

[1002] Ibid. at 62. In a more recent South African case, *Fourie v Hansen* [2000] JOL 5993 (W), however, the court held that the small font size in a contract document was one of the factors that rendered an exemption clause unenforceable.

[1003] Joint Committee on Enterprise, Trade and Employment: Small Print Campaign – Discussion with Q102. Parliamentary Debates 28 May 2008,

however, Chapter V of the proposal in which these provisions were located has been deleted from the final text of the Directive with the result that unfair terms in consumer contracts will continue to be regulated by Directive 93/13/EEC. As this Directive is a minimum harmonisation instrument, it does not prevent EU member states from maintaining or introducing national legislative provisions that exceed its protections. Though we agree that the use of small print in consumer contracts should be subject to regulation, we do not consider ourselves qualified to make a detailed recommendation on the content of such regulations. The proposal that such contracts should be in ten-point font size or above and in plain typeface against a contrasting background appears reasonable in our opinion, but this and possible other elements of future Regulations on the issue should be the subject of further consultation with consumer and business interests and with professional bodies and others with a technical expertise in matters relating to legibility.[1004]

Mandatory Receipts for Consumer Contracts

13.48. The National Consumer Agency supports the introduction of a mandatory legal requirement on traders to issue receipts for consumer transactions. In the Agency's view, consumers require a record of the fact and date of a transaction in order to ensure the effective application of their legal rights. There is no general requirement on businesses to provide a receipt at present, though sectoral rules to this effect apply in some cases. The Taxi Regulation Act 2003 (Small Public Service Vehicles) (Amendment and Licensing) Regulations 2007 (S.I. No. 710 of 2007) require taxi services to provide printed receipts, and hackney and limousines to provide written receipts, and also prescribe the information to be provided on receipts. The Consumer Protection Code for financial services provides, among other things, that regulated entities must provide a consumer with a receipt for each negotiable or non-negotiable instrument presented by the consumer as payment for a financial product or service provided by that entity.[1005] The obligations on businesses engaged in off-premises transactions of €50.79 or more to provide a written cancellation notice, and on those engaged in distance contracts to provide specified information in writing on a durable

[1004] For a brief discussion of the factors influencing the legibility of type, see Reynolds, L. 'The Legibility of Type', http://designweb.cc.uic.edu/zhan/class/research/Legibility/html . See also Australian Law Reform Commission, **Insurance Contracts**, op. cit. para. 35.
[1005] Financial Regulator, op. cit., p. 13

medium, effectively meet some of the same needs as a requirement for mandatory receipts in that they constitute a record of the transaction for the consumer.[1006]

13.49. There is little or no dispute over the principle of requiring businesses to provide consumers with a receipt. This is something that the great majority of businesses do as a matter of course. If the receipt is to be effective as a transaction record, it must of course be retained by the consumer. We do not support, however, the introduction of a general requirement in primary legislation for the issue of receipts. This would be an inflexible mechanism in our opinion, and one that would be difficult to alter and update. We favour instead a legislative provision empowering the Minister for Enterprise, Jobs and Innovation to make regulations requiring the provision of receipts and to determine the scope and manner of application of such a requirement. A number of practical issues require further consideration and consultation in this context. Is it feasible or desirable to require receipts for low-value transactions given the practical difficulties of enforcing such a requirement? While a mandatory receipt requirement would present no difficulties for large and medium-sized retailers with electronic point of sale systems, it would be more problematical for some small retailers and service providers. If a receipt requirement is to apply to such businesses, what form should it take? These and other matters require further consideration and consultation of a kind that we were not in a position to undertake.

13.50. Recommendations

Regulations governing print size and related presentational issues in consumer contracts should be introduced. The content of such Regulations should be determined after consultation with business and consumer interests.

The Minister for Jobs, Enterprise and Innovation should be empowered to make regulations requiring the issue of a receipt in consumer transactions. The scope and manner of application of such a requirement should be the subject of consultation with business and consumer interests.

[1006] European Communities (Cancellation of Contracts Negotiated Away from Business Premises) Regulations 1989 (S.I. No. 224/1989), Regulation 4. European Communities (Protection of Consumers in Respect of Contracts Made by Means of Distance Communications) 2001 (S.I. No. 207/2001), Regulations 4 & 5.

CHAPTER FOURTEEN I NON-SALE CONTRACTS FOR THE SUPPLY OF GOODS AND II SALE OF GOODS AND SUPPLY OF SERVICES ACT 1980: SUPPLY OF SERVICES, SECTIONS 39-42

14.1. The focus of previous Chapters of this Report has been on the contract of sale, defined by section 2(1) of the 1893 Act as a contract whereby the seller transfers or agrees to transfer the property in the goods to a buyer for a money consideration, called the price. There are a range of related transactions, however, which fall outside the definition of a contract of sale, whether because there is no transfer of property or only an option for such a transfer (contracts of hire, hire-purchase agreements), no consideration (gift) or no money consideration (barter or exchange), or no goods (contracts for services, or work and materials contracts in which the goods element is incidental). This Chapter will consider these different forms of transaction and the legislative provisions that currently regulate them. Part I will look at a variety of contracts involving the transfer of goods, and will focus in particular on the application or otherwise to such contracts of the implied statutory terms regarding title, sale by description, quality and fitness for purpose, and sale by sample. Part II of the Chapter will consider services contracts with no, or a secondary, goods element.

I Hire-Purchase, Hire, Gift and Barter

Hire-Purchase and Hire Contracts

14.2. A hire-purchase contract involves a hire or bailment of goods in return for a schedule of instalment payments over a prescribed period and with an option to purchase the goods at the end of that period.[1007] Though the hirer is not legally obliged to purchase the goods, this is the usual outcome. The owner of the goods remains the owner until the final payment is made and, subject to specified conditions, can repossess the goods if the hirer defaults on his payments. The efficacy of hire-purchase agreements was upheld in two rulings made by the House of Lords in 1895, shortly after the enactment of the Sale of Goods Act 1893. In *McEntire v Crossley Bros*,[1008] it was held that a hire-purchase contract did not come within the Bills of Sales Acts and was thus not subject to the formalities and registration

[1007] The main part of the definition of 'hire-purchase agreement' at section 2(1) of the Consumer Credit Act 1995 states that it 'means an agreement for the bailment of goods under which the hirer may buy the goods or under which the property in the goods will, if the terms of the agreement are complied with, pass to the hirer in return for periodical payments.'

[1008] [1895] AC 457.

procedure prescribed by these Acts for documents recording the transfer of ownership in goods. In *Helby v Matthews*,[1009] it was held that a person in possession of goods under a hire-purchase agreement had not bought or agreed to buy them within the meaning of section 25 of the 1893 Act. As a result, the hirer could not pass title to the goods to a third party, thereby ensuring that the owner's property interest in the goods was fully protected. While these judgements were satisfactory from the point of view of the owners of goods and facilitated the growth of hire purchase arrangements in the first half of the twentieth century, their effect was to deprive hirers of the protections of the 1893 Act, a position confirmed by the Irish courts in *B.P. v Smyth*.[1010] As we noted in Chapter 1, this gap was addressed by the Oireachtas in the Hire Purchase Act 1946 which, inter alia, implied conditions and warranties into hire-purchase agreements regarding the hirer's entitlement to quiet possession of the goods, the owner's right to sell the goods, the merchantable quality of the goods, and their fitness for any particular purpose made known by the hirer. A provision in the hire-purchase agreement excluding or modifying these conditions and warranties could not be relied upon unless the owner could prove that, before the agreement was made, the relevant provision had been brought to the notice of the hirer and its effect made clear to him.[1011] As section 55 of the 1893 Act then permitted exclusion clauses to operate without restriction in contracts of sale, hirers of goods under hire-purchase agreements thus enjoyed greater protections than buyers in this respect.

14.3. Part III of the Sale of Goods and Supply of Services Act 1980 updated and revised the provisions of the Hire-Purchase Act 1946 on implied statutory undertakings relating to goods and the exclusion of these implied undertakings. Other aspects of hire-purchase agreements continued to be regulated by the Hire Purchase Acts 1946 and 1960. The effect of the amendments made by the 1980 Act was to put the implied undertakings applicable to hire-purchase agreements on the same basis as

[1009] [1895] AC 471.
[1010] (1931) 65 I.L.T.R. 182.
[1011] In the second stage speech on the Bill, the then Minister for Industry and Commerce, Seán Lemass T.D., stated that: 'Another source of abuse in regard to hire-purchase agreements is that the anxiety of persons in poorer circumstances to avail themselves of hire-purchase facilities provides an opportunity for owners to dispose of inferior quality goods to such persons who, when they find the goods are unsatisfactory, may also discover that the hire-purchase agreements into which they entered, precludes them from suing the owner of the goods for breach of warranty.' He added that the effect of the Bill would be to provide 'that the same conditions as to quality, warranty, and the like, will apply to hire-purchase transactions as to ordinary commercial transactions.' **Dáil Debates**, Vol. 100, 01 May 1946, Hire-Purchase Bill 1946 Second Stage: col. 2252.

those applicable to contracts of sale under the 1893 and 1980 Acts in respect of freedom from undisclosed charges or encumbrances and the right to quiet possession, correspondence with description and sample, quality and fitness for purpose, spare parts and after-sale service, the safety of motor vehicles, and statements purporting to restrict the rights of the hirer. The provisions regulating exclusion clauses in consumer and commercial hire-purchase agreements were also put on the same footing as those applying to contracts of sale following the 1980 Act's amendment of section 55 of the 1893 Act, namely that such clauses were void in consumer sales contracts but, the implied undertakings as to title aside, enforceable in commercial sales contracts where shown to be fair and reasonable.

14.4. Part III of the 1980 Act also extended conditions and warranties similar to those implied into hire-purchase agreements to goods let otherwise than under a hire purchase contract, thereby applying statutory protections of this kind to hire contracts for the first time. A contract of hire is one in which the owner bails or agrees to bail goods to the hirer by way of hire without any intention for the property in the goods to pass. Unlike the corresponding sections of the 1980 Act on hire-purchase agreements, however, the provisions on contracts of hire applied only where the hirer dealt as consumer, thereby leaving commercial hire contracts outside the scope of the Act.

14.5. The provisions of Part III of the 1980 Act on hire-purchase and consumer hire agreements were repealed and re-enacted in substantially unchanged form in the Consumer Credit Act 1995. The main purpose of the 1995 Act was to give effect to Directive 87/102/EEC on consumer credit and a subsequent amending instrument, Directive 90/88/EEC.[1012] Though the provisions on implied conditions and warranties were left broadly unchanged, the opportunity was taken to amend other parts of the legislation relating to hire-purchase and hire agreements and to repeal the Hire Purchase Acts 1946 and 1960. Unlike the 1980 Act and the Hire Purchase Acts 1946 & 1960, however, the scope of the provisions on hire-purchase agreements in the 1995 Act is restricted to transactions where the hirer is a consumer.[1013] The 1995 Act

[1012] These Directives have since been repealed and replaced by Directive 2008/122/EC on consumer credit agreements. The latter Directive was given effect by the European Communities (Consumer Credit Agreements) Regulations 2010 (S.I.No. 281 of 2010).
[1013] Section 3(1) provides that the Act applies to credit, hire-purchase and consumer-hire agreements 'to which a consumer is a party', this last clause having been inserted at Committee stage in Seanad

requires hire-purchase agreements and consumer hire agreements to contain a statement that the hirer has a right to withdraw from the agreement without penalty on submission of a written notice to this effect within ten days of receipt of a copy of the agreement.[1014] Part VII of the Act also introduced new provisions on the content and enforceability of consumer hire agreements, defined as agreements of more than three months' duration for the bailment of goods to a hirer under which the property in the goods remains with the owner. It further places an obligation on the hirer to take reasonable care of the goods let to him under a consumer hire agreement. It left unchanged, however, the exclusion of commercial hire agreements from the scope of the statutory provisions. This issue arose for consideration in *Flynn v Dermot Kelly Ltd and New Holland Finance (Ireland) Ltd*[1015] in which the plaintiff, a farmer, took out a four-year lease on a tractor with the second-named defendant, a finance and leasing company which had bought it from the first-named defendant, a seller of farm equipment, following an approach to the latter by the plaintiff. After the tractor was destroyed by fire, the plaintiff claimed damages on the ground that the vehicle was not of merchantable quality and was unfit for its intended purpose. O'Neill J. held that, as the leasing agreement was not a consumer hire contract, it did not come within the implied undertakings as to quality and fitness under the Consumer Credit Act 1995. As the agreement was not a contract of sale, the implied conditions under the Sale of Goods Acts did not apply either. The court found, however, that the commercial reality of the transaction dictated the existence of a collateral contract between the plaintiff and the first-named defendant under which this defendant had agreed to sell the tractor to the leasing company in return for the plaintiff entering a leasing agreement. The conditions as to quality implied by the Acts were applicable to this contract, and their breach rendered the first-named defendant liable to the plaintiff in damages.

Eireann in order, according to the Minister for State at the Department of Enterprise, Trade and Employment, to make it 'clear beyond all doubt that the Bill applies only to agreements entered into by consumers and not to anybody else.' (**Seanad Debates**, Vol. 144: Consumer Credit Bill 1994, Committee and Final Stages, col. 486). The definition of 'hirer' at section 2(1) of the 1995 states that it 'means a consumer who takes, intends to take or has taken goods from an owner under a hire-purchase agreement or a consumer-hire agreement in return for periodical payments.'

[1014] Section 50 of the Sale of Goods and Supply of Services Act 1980 had contained a provision empowering the Minister for Industry, Commerce and Tourism to provide by order for a cooling-off period for contracts of sale, hire purchase agreements and letting agreements. No such order was made, however, and the section was repealed by the Consumer Credit Act 1995.

[1015] [2007] IEHC 103.

Gift and Barter

14.6. A gift is not a contract at common law by virtue of the absence of consideration. A person making a gift, therefore, owes no obligations to the beneficiary either at common law or under statute in respect of title, correspondence with description and sample, quality, and fitness for purpose. There is uncertainty, however, regarding goods supplied as 'free' offers or gifts under promotional schemes. The provision of such 'free' gifts is a common feature of modern retail and business practice, whether in return for the purchase of a particular item ('buy one, get one free'), or a purchase above a specified threshold ('free gift with purchases over €50'), or as part of loyalty schemes or similar arrangements. In *Esso Petroleum Ltd v Customs and Excise Commissioners*,[1016] garages selling petrol advertised a 'free' gift of a coin bearing the likeness of a football player to be given to customers purchasing four or more gallons of petrol. The matter at issue was whether the coins were the subject of a contract of sale, in which case they would be liable for purchase tax. A majority of the House of Lords held that there was no sale, but divided on the question of whether the coins were the subject of a gift or of a collateral contract separate from the contract of sale. In a number of recent cases, however, the courts have been more prepared to take the view that goods ostensibly given for nothing under promotional campaigns have in fact been paid for under the contract for the sale of goods or the supply of services. In *Kuwait Petroleum v Customs & Excise Commissioners*,[1017] Laddie J. observed of 'buy one get one free' offers that:

> There is a limit to the gullibility of ordinary members of the public. A promotion of that kind would not persuade most customers that they were really getting half of their acquisitions free. They would think that they were receiving each of the products at half price and that they were paying for both.

This analysis has been followed in subsequent cases.[1018] As these cases have concerned the tax liability of businesses in respect of goods supplied in the course of promotional campaigns, however, it cannot necessarily be assumed that the same reasoning would be followed in cases concerning the application of implied quality and other conditions to the gratuitous supply of goods in such circumstances.

[1016] [1976] 1 W.L.R. 1.
[1017] [2001] STC 62 at 74.
[1018] *Tesco plc v Customs and Excise Commissioners* [2003] EWCA Civ. 1367. *British Dental Association v Revenue Customs Commissioners* [2010] SFTD 757.

14.7. The definition of contract of sale in the 1893 Act stipulates that the consideration tendered in return for the transfer of the property in the goods must be in money. This differentiates sales contracts from contracts of barter and exchange where goods are exchanged for other goods, for services rendered, or for other forms of non-monetary consideration. Where a monetary value is put on the goods to be exchanged, particularly where there is also part-payment in cash, the transaction is likely to be regarded as a contract of sale. In *Aldridge v Johnson*,[1019] an agreement to exchange 52 bullocks valued at £192 plus £23 for 100 quarters of barley valued at £215 was treated by the court as a contract of sale. In *Flynn v Mackin & Mahon*,[1020] a car was traded for another car plus £250. The court held that the transaction was a barter as no monetary value had been put on the cars.[1021] As Atiyah notes,[1022] there are differences of opinion about the approach to be taken to such transactions:

> One view is that the answer depends upon whether the money or the goods is the substantial consideration… However, the proper characterisation of a contract depends, in the last resort, on the intention of the parties so long only as they do not include provisions manifestly inconsistent with the intended nature of the transaction. So, it may well be that, if the parties envisage the transaction as a sale and use terminology more appropriate to a sale, the contract would be held to be such even if substantial consideration is supplied in goods rather than money. In the motor trade it is, of course, a common occurrence for a person to 'trade in' an old car in part-exchange for a new one and, if the transaction relating to the new car is treated by the parties as a sale, it is improbable that the courts would treat it as anything else, even if the dealer's allowance for the traded-in car does not fall far short of the price of the new one.

14.8. There is little or no statutory regulation of these types of non-sale transaction in Ireland. Section 8 of the Trading Stamps Act 1980 states that the provisions of the 1893 and 1980 Acts shall apply in every case where the promoter of a trading stamp scheme offers goods or services in exchange for trading stamps. It further provides that, where a person other than a promoter of a trading stamp scheme offers goods or services in exchange for trading stamps, the provisions of the Acts shall apply in the same way as if that exchange were for a monetary consideration. The Act was framed with reference to the trading stamps schemes in operation in the 1960s and 1970s,

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[1019] [1857] 7 E & B 855.
[1020] [1974] I.R. 101. For a critical analysis of this judgement, see Canton, 'Sale of Goods and Barter', (1976) *MLR* (38) 589.
[1021] In *Chappell & Co. Ltd v Nestlé Co. Ltd* [1960] A.C. 87, a gramophone record was offered in return for a sum of money and a number of chocolate wrappers. Lord Reid expressed doubts *obiter* whether the transaction could be considered a sale.
[1022] Atiyah, **The Sale of Goods**, op. cit., p. 10.

however, and is of limited relevance to the loyalty schemes that are their nearest present-day equivalent.[1023] The fact that the Act made special provision for the implication in such transactions of the statutory undertakings applicable to contracts of sale suggests, however, that the exchange of trading stamps, vouchers or other coupons for goods was regarded as a barter and not a sale.

Issues Arising

14.9. The first issue raised by the various non-sale transactions discussed in the preceding paragraph concern the gaps in the statutory regulation of these transactions. The main such gaps are as follows:

- While the terms implied into consumer hire-purchase and hire agreements and are similar to those implied into contracts of sale, commercial hire-purchase and hire agreements are not subject to any statutory regulation in respect of implied conditions and warranties. The definition of consumer hire contract is also restrictive in that it covers only contracts of more than three months' duration.
- Contracts of 'pure' barter or exchange are outside the scope of the implied statutory undertakings. While exchange contracts in which a monetary value is ascribed to the goods being exchanged may be covered by the implied undertakings, the matter remains to be settled conclusively.
- There is some uncertainty in regard to free 'gifts' supplied by retailers or other businesses as part of promotional campaigns. The position of goods supplied for no direct monetary consideration under loyalty schemes is also uncertain and would not appear to be covered by the Trading Stamps Act 1980.

The second issue relates to the fact that the implied undertakings regarding goods are set out in separate statutes for different types of transaction – the Sale of Goods Acts 1893 for contracts of sale, the Sale of Good and Supply of Services Act 1980 for work and materials contracts,[1024] the Consumer Credit Act 1995 for consumer hire-purchase and hire agreements, and the Trading Stamps Act 1980 for goods supplied in exchange for trading stamps. As these provisions are similar in their purpose and substance, regulatory simplification would be furthered by their consolidation. This would make the law clearer and more accessible for both businesses and consumers.

[1023] The Act's definition of 'trading stamp' excludes stamps, coupons, or similar devices redeemable only from the seller of the goods, or his supplier, or the person who provides the services. Present-day loyalty schemes, however, are redeemable in many cases only from the seller of the goods or the supplier of the services.

[1024] Though as discussed at paragraph 14.39, the terms as to goods implied into contracts for work and materials under section 39 of the 1980 Act are more limited than the equivalent implied terms for goods supplied under contracts of sale and hire-purchase and consumer hire agreements.

14.10. The policy objectives in this area of sales law are clear-cut and straightforward in our view. Other than where adjustments are required by virtue of the nature of the contract, such as the inapplicability to contracts of hire of the implied condition that the seller has the right to sell the goods, the implied conditions and warranties governing goods supplied under different kinds of transaction should be identical in substance and form. As well as making the law less complex, this would minimise the practical effects of differences in the classification of contracts. Though the courts have shown themselves willing to apply rules analogous to those applying to contracts of sale to related non-sale contracts,[1025] it would be preferable in our view to address gaps in the current coverage of the statutory provisions through appropriate legislative changes. As in other areas, a limited reform agenda and a more wide-ranging one can be identified. The limited reform agenda would tackle the most obvious gap in the existing statutory framework – the absence of regulation of commercial hire-purchase and hire contracts and the restriction of consumer hire agreements to contracts of more than three months' duration – and leave other questions (contracts for barter, the provision of 'free' gifts under promotional and loyalty schemes) to be determined by the courts on a case-by-case basis. Though this would be an improvement on the status quo, it would not represent a sufficient measure of reform in our opinion.

14.11. Two possible models for a more comprehensive scheme of reform can be identified. First, Part I of the UK Supply of Goods and Services Act 1982 applies implied terms as to title, correspondence with description and sample, quality and fitness for purpose modelled on the statutory obligations of the sellers of goods to contracts for the hire of goods and to contracts for the transfer of goods.[1026] A contract for the transfer of goods is defined as a contract under which one person transfers or agrees to transfer to another the property in goods, other than an excepted contract. An 'excepted' contract is a contract of sale; a hire-purchase agreement; a contract in which the property in goods is transferred in exchange for trading stamps; a transfer or agreement to transfer made by deed; and a contract intended to operate by way of mortgage, pledge, charge or other security. Part I of the Act further provides that a

[1025] In *Young and Marten Ltd v McManus Childs Ltd* [1969] 1 AC 454, the House of Lords referred to the undesirability of drawing unnecessary distinctions between different types of contract and treated a contact for work and materials like a contract of sale in respect of the implied undertakings as to goods.
[1026] The Act's provisions were based on the recommendations of the 1979 report of the Law Commission on **Implied Terms in Contracts for the Supply of Goods** (Law Com. No. 95).

contract is a contract for the transfer of goods whether or not services are also provided and, subject to exemptions of excepted contracts, whatever the nature of the consideration for the transfer. Its provisions apply, therefore, to contracts of hire, contracts of barter, and to the supply of goods under contracts for work and materials. Legislative provisions along these lines would, particularly if consolidated with the implied conditions and warranties applicable to contracts of sale, address the main issues raised by the current fragmented statutory framework. As a result of the requirement to adopt the definition of 'sales contract' in the proposed Consumer Rights Directive discussed at paragraphs 3.4 to 3.7, goods supplied under a consumer contract for work and materials would be treated on the same basis as goods supplied under a consumer contract of sale.

14.12. The approach taken by the New Zealand Consumer Guarantees Act 1993 offers a not dissimilar reform option. Part I of the Act contains a unified framework for goods transactions which, in a single set of provisions, applies a range of guarantees, including in respect of title, quality, compliance with description and sample, to contracts for the supply of goods by a person in trade to a consumer by way of gift, sale, exchange, lease, hire or hire purchase. Part 2 of the Act then sets out the right of redress against suppliers in respect of these various forms of supply of goods. The Act covers only the supply of goods and services to consumers; commercial contracts of sale in New Zealand remain subject to the Sale of Goods 1908, an enactment that retains the structure and the main rules of the Sale of Goods Act 1893. We would not favour a restriction of this kind, however, and consider that a unified comprehensive framework should apply to the implied statutory undertakings governing both commercial and consumer transactions involving the supply of goods.

14.13. The approach followed in New Zealand raises the interesting question as to whether there is merit in having a separate statute for the core provisions applicable to consumer contracts. The New Zealand Consumer Guarantees Act 1993 deals essentially with the implied quality and other terms applicable to contracts for the supply of goods and services and with the remedies available to consumers for breaches of these implied terms. Provisions relating to other aspects of consumer sales – transfer of property, transfer of title, the rights of unpaid sellers against the goods etc – continue to be dealt with, together with all of the provisions applicable to

commercial contracts of sale, in the Sale of Goods Act 1908. The advantage of this approach is that it brings together in a readily accessible form the statutory provisions that are of most practical significance for consumer contracts. Though, as we have made clear throughout this Report, we favour the retention of a common legal basis for consumer and commercial contracts of sale, this would not preclude, nor be inconsistent with, the introduction of a separate statute governing the main aspects of consumer contract rights. In addition to the implied terms governing consumer contracts for the sale and supply of goods and the supply of services and the remedies for breaches of those terms, such a statute could incorporate the provisions of the recently agreed Consumer Rights Directive which deal mainly with distance and off-premises contracts as well as the provisions which give effect to Directive 93/13/EEC on Unfair Contract Terms. We think that there would be considerable benefit to both consumers and businesses in bringing together in this way the main statutory provisions applicable to consumer contract rights. The gains from doing so would, in our view, outweigh the disadvantages resulting from the fact that two Acts would be required rather than a single, larger Act dealing with all aspects of both commercial and consumer contracts for the sale and supply of goods and the supply of services.

14.14. Recommendations

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 (commercial hire-purchase and hire agreements, barter/exchange) should be consolidated in future legislation. The concept of 'contract for the transfer of goods' in the UK Supply of Goods and Services Act 1982 offers a suitable framework for such consolidation.

A separate Consumer Contract Rights Act should be enacted that would incorporate the main statutory provisions applicable to consumer contracts, including the provisions of the recently agreed Consumer Rights Directive and of Directive 93/13/EC on Unfair Contract Terms. 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 and Supply of Goods and Supply of Services Act.

The implied statutory undertakings as to goods applicable to consumer hire-purchase and hire agreements under Parts VI and VII of the Consumer Credit Act 1995 should apply also to commercial hire-purchase and hire agreements in future legislation.

The restriction of the definition of hire agreement in the Consumer Credit Act 1995 to contracts of more than three months' duration should not be retained in future legislation. There is no equivalent restriction in the corresponding legislation in other common law jurisdictions. A hire of goods by a consumer or business for two weeks or two months should benefit from the same implied undertakings on quality, fitness for purpose and other matters as a hire of goods for four months.

Future legislation should clarify that goods supplied 'free' or at a reduced price when bought in conjunction with other goods under promotional campaigns are subject to the same implied quality and other terms as goods purchased for a price.

Future legislation should also clarify that goods supplied under loyalty schemes are subject to the same implied quality and other terms as goods supplied under a contract of sale.

II PART IV SALE OF GOODS AND SUPPLY OF SERVICES ACT 1980 ACT: SUPPLY OF SERVICES

14.15. Part IV of the 1980 Act, comprising sections 39-42, constituted the main innovation of the Act in that, almost a century after legislation of general application was first enacted to regulate the quality of goods, it introduced statutory standards governing the quality of services. Prior to the enactment of these provisions, there was an implied term at common law in contracts for work and materials that the work was performed competently and that any materials used were reasonably fit for their intended purpose.[1027] Unlike much of Irish law on the sale of goods and supply of services, moreover, Part IV of the 1980 Act was not modelled on prior UK

[1027] *Myers v Brent Cross Service Co* [1934] 1 KB 46.

legislation.[1028] The Whincup report on consumer protection law prepared for the National Prices Commission in 1973 had recommended that legislation should provide for an implied warranty of reasonable fitness of services for normal or specified purposes, though it also noted the very limited statutory regulation of consumer service contracts in other jurisdictions.[1029] In introducing the provisions of this Part of the 1980 Act, the then Minister of State at the Department of Industry, Commerce and Energy stated that their aim was to bring the law regulating the quality of services into line with that regulating the quality of goods:[1030]

> There is no reasonable basis on which suppliers of services should be exempt from the implied conditions and warranties as to the quality of the service as are obligatory on a seller of goods. Indeed, one could argue that the need for adequate protection for a consumer is all the greater in the case of a service because in a sale of goods the consumer can at least see and examine a given product. However, this is not generally the case with a service. When the latter is involved, the buyer may well be purchasing an expertise about which he may know very little unless he happens to have a degree of technical or specialised knowledge that the average person does not have.

14.16. The main provisions of Part IV of the 1980 Act are as follows:

- Section 39 provides that, in every contract for the supply of a service, where the supplier is acting in the course of a business, the following terms are implied –

  (a) that the supplier has the necessary skill to render the service,
  (b) that he will supply the service with due skill, care and diligence,
  (c) that, where materials are used, they will be sound and reasonably fit for the purpose for which they are required, and
  (d) that, where goods are supplied under the contract, they will be of merchantable quality within the meaning of section 14(3) of the Sale of Goods Act 1893.

- Section 40 deals with the exclusion of the implied terms under section 39. It provides that any contract term implied by virtue of that section may be negatived or varied by:

  - an express term of the contract,
  - the course of dealing between the parties, or
  - by usage if the usage be such as to bind both parties to the contract.

[1028] Equivalent provisions were not introduced in UK legislation until the Supply of Goods and Services Act 1982

[1029] National Prices Commission. 1973. Occasional Paper No. 9. Consumer Protection Law in America, Canada and Europe, pp. 117-128.

[1030] **Dáil Debates**, Vol. 316, 14 November 1979 Sale of Goods and Supply of Services Bill Second State: cols. 1660-61.

Where the recipient of the contract deals as consumer, however, it must be shown that the exclusion clause is (i) fair and reasonable by reference to the criteria in the Schedule to the Act and (ii) has been specifically brought to the attention of the consumer.

- Section 41 deals with statements purporting to restrict the rights of recipients of services and is a counterpart to the corresponding provision on goods at section 11 of the 1980 Act. It makes it an offence for a person in the course of a business to make statements in various forms which are likely to be taken as indicating that a right or the exercise of a right conferred by, or a liability arising by virtue of section 39, is restricted or excluded other than as provided for in section 40.

- Section 42 is a conflict of laws provision similar to that governing conflict of laws in sales contracts inserted in section 55A. of the 1893 Act by section 23 of the 1980 Act.

14.17. Section 39 has given rise to litigation in cases involving the supply of services to both consumers and businesses. The consumer cases have mainly involved package holiday contracts, presumably because these contracts are typically among the largest items of consumer expenditure on services.[1031] In *O'Flynn v Balkan Tours Ltd*,[1032] the requirement on the tour operator to supply the service with due skill, care and diligence was held to encompass the provision of information about ski runs in a ski resort. *In McKenna v Best Travel Ltd*,[1033] the plaintiff claimed a breach of the implied condition of due skill, care and diligence after a coach on which she was travelling in the course of a trip to Bethlehem organised by the defendants was hit by a rock during political disturbances, causing her serious injury. The High Court held that the tour company had exercised due care in accordance with section 39 and rejected the claim of breach of the implied condition, though it found that there had been a breach of the duty of care to the plaintiff in tort. In *Irish Telephone Rentals v Irish Civil Service*

[1031] More recent cases have tended to be taken under the Package Holidays and Travel Trade Act 1995 which gave effect to Directive 90/314/EEC on Package Travel, Package Holidays and Package Tours. See *Scaife v Falcon Leisure Group* [2007] IESC 57.
[1032] High Court, unreported 1 December 1995.
[1033] [1998] 3 IR 57.

Building Society Ltd,[1034] the plaintiff contracted to install and maintain a telephone system in the defendant's offices. While the system originally functioned satisfactorily, it subsequently proved unable to cope with increased levels of telephone traffic. The defendants terminated their contracts with the plaintiff and the latter sued for wrongful termination. Costello J. held that the defects in the telephone system amounted to a breach of the plaintiff's express obligations under the contract and of the implied term under section 39 that goods supplied under a contract for the supply of a service should be of merchantable quality. A similar outcome would presumably have been reached had the implied terms applicable to consumer hire contracts also applied to commercial hire contracts, or had a corresponding common law duty been held to apply by the court.

Issues Arising

14.18. The provisions of Part IV of the 1980 Act on contracts for the supply of services give rise to a number of different issues. Some of these issues are symptomatic of the fact that the Act's regulation of services is less detailed than that of goods under the 1893 and 1980 Acts. Though matters such as property and title which loom large in respect of goods have no equivalent in the case of services, 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.[1035] 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.[1036] Queries and complaints about services also featured prominently among the approximately 40,000 referrals to the National Consumer Agency in 2009 which related to the sale of goods and the supply of services; the sectors accounting for the largest number of referrals

[1034] [1991] I.L.R.M. 880.
[1035] http://www.esri.ie/irish_economy
[1036] CSO. 2007. **Household Budget Survey 204-05: Final Results,** table .

were telecoms (5,465), travel/holidays (3,924) and house repairs (2,480).[1037] There is no policy justification consequently for according a lower priority, or applying a lesser degree of stringency, to the regulation of services contracts.

SCOPE OF PART IV

14.19. Part IV of the 1980 Act on the supply of services was intended to be of general scope and application. According to the second stage speech introducing the Bill:[1038]

> These provisions apply to all suppliers of services in their contractual relationships. In other words, the term 'services' in this context extends to all those areas in which the consumer today spends much of his disposable income on travel, leisure, holidays, personal requisites, house repairs and so forth.

Section 2(1) of the Act defines 'service' negatively, stating only that 'it does not include meteorological or aviation services provided by the Minister for Transport or anything done under a contract of service'. Despite the intentions of the framers of the Act, a restrictive interpretation was given by the High Court to 'contract for the supply of a service' in *Carroll v. An Post National Lottery Co*.[1039] A Lotto agent authorised by the defendant had incorrectly entered the numbers requested by the plaintiff and, as a result of this error, the latter was denied a prize of £250,000. The plaintiff argued, among other things, that the supply of the lottery ticket by the defendant was a contract for the supply of a service and that there had been a breach of the implied term of due skill, care and diligence under section 39 of the 1980 Act. Costello J. held that section 39 did not apply to the contractual relation between the purchaser of a lottery ticket and the lottery company on the ground that the transaction was for the sale of 'a ticket which confers rights and obligations on the parties to the contract' and not a contract for the supply of a service. The curtailment of the scope of Part IV of the Act in this way is unsatisfactory in our view and should be addressed by the inclusion of a more detailed and expansive definition of services in future legislation. Other transactions involving the creation of rights and obligations, such as insurance contracts, would and should be regarded as services contracts. Examples of more comprehensive definitions of services can be found in the Consumer Protection Act 2007 and the New Zealand Consumer Guarantees Act 1993. Section 2(1) of the first of these Acts states that 'services' means:

[1037] National Consumer Agency. Annual Report 2009, pp.
[1038] **Dáil Debates**, Vol. 316, 14 November 1979 Sale of Goods and Supply of Services Bill 1978 Second Stage: cols. 1660-61.
[1039] 1 IR 443.

any service or facility provided for gain or reward or otherwise than free of charge, including, without limitation -

a) services or facilities for –
   (i) banking, insurance, grants, loans, credit or financing,
   (ii) amusement, cultural activities, entertainment, instruction, recreation or refreshment,
   (iii) accommodation, transport, travel, parking, or storage, or
   (iv) the care of persons, animals or things,
b) membership in a club or organisation or any service provided by the club or organisation, and
c) any rights, benefits, privileges, obligations or facilities that are, or are to be, provided, granted or conferred in the course of services,

but does not include services provided under a contract of employment.

14.20. The application of Part IV of the 1980 Act to various services currently or previously provided by State bodies remains subject to a number of exemptions:

- As noted above, the definition of 'service' in section 2 of the Act excludes meteorological or aviation services provided by the Minister for Transport, Tourism and Sport.

- Section 40(5) provides that nothing in section 40 shall invalidate a term of an agreement for the international carriage of passengers or goods by land, sea or air, including an agreement between parties whose places of business or residence are situated in the State.

- Section 40(6) provides that Section 39 shall not apply to a contract for the carriage of passengers or goods by land, sea, air or inland waterway from one place to another within the State until such date, as the Minister for Enterprise, Jobs and Innovation, after consultation with the Minister for Transport, Tourism and Sport, by order provides whether in relation to such contracts generally or in relation to contracts of a class defined in the order in such manner and by reference to such matters as the Minister, after such consultation, thinks proper. No such order has been made to date.

Prior to its repeal by the Restrictive Practices (Amendment) Act 1987,[1040] section 40(5)(a) of the 1980 Act provided that nothing in section 40 of the Act 'would invalidate a term of an agreement for the supply of electricity exempting the supplier from liability (arising otherwise than from negligence) for an interruption, variation or defect of supply'. Prior to its repeal by the Postal and Telecommunications Services (Amendment) Act 1999,[1041] section 88(3) of the Postal and Telecommunications

[1040] Restrictive Practices (Amendment) Act 1987 (No. 31 of 1987), s. 31. The then Minister for Industry and Commerce stated that the repeal of the provision relating to exemption clauses in electricity contracts was 'in keeping with the policy of bringing regulated services within the scope of competition and consumer protection legislation.' **Dáil Debates.** Vol. 374, 5 November 1987 Restrictive Practices (Amendment) Bill 1987 Second Stage: col. 2492.

[1041] Postal and Telecommunications Services (Amendment) Act 1999 (No. 5 of 1999), s. 3 & First Schedule.

Services Act 1983 stated that section 39 would not apply to international telecommunications services provided by Bord Telecom Eireann and, until prescribed by Ministerial order, to telecommunications services provided by the company within the state. Prior to its repeal by the Communications Regulation (Postal Services) Act 2011[1042], section 64(3) of the Postal and Telecommunications Act 1983 provided that section 39 would not apply to the provision of international postal services by An Post or, until prescribed by Ministerial order, to the provision of postal services within the state; no such order was made prior to the repeal of the section. The remaining restrictions on the scope of Part IV of the Act have no place in a competitive economy or in a modern regulatory system and should be repealed.

14.21. Recommendations

A broadly-based definition of 'services', modelled on the definition at section 2 of the Consumer Protection Act 2007, should be included in future legislation. This definition should remove the exclusion in the present definition of meteorological or transport services provided by the Minister for Transport.

The present restrictions on the application of section 39, and on the applicability of exclusion clauses under section 40, to contracts for the carriage of passengers or goods should be removed.

Contracts for Work and Materials

14.22. No matter how detailed the definition of services in future legislation, however, some element of indeterminacy will almost certainly remain about what is, and is not, a contract for services. As discussed in Chapter 2 above, this applies in particular to what have traditionally been known as contracts for 'work and materials'. This term encompasses both contracts that result in the supply of goods (for example, a contract with a tailor to supply a suit) as well as those which, though involving the use of materials, do not result in the supply of goods (a contract with a housepainter to paint a house using paint that he supplies). Where such contracts involve the supply of goods, it is, as Benjamin has noted, 'sometimes extremely difficult to decide whether a particular agreement is more properly described as a contract of sale of goods, or a

[1042] Communications Regulation (Postal Services) Act 2011 (No. 21/2011), s.4 & Schedule 1.

contract for the performance of work or services to which the supply of materials or some other goods is incidental'.[1043] Over time, the courts have devised various tests, not always consistent, for determining into which category a particular contract falls. The dominant approach involves an assessment of the 'substance' of the contract. If this consists of the skill and labour of the supplier, the contract is one for services; if the substance of the contract is the end product, the goods to be supplied, it is a contract of sale. While this test has perhaps brought some clarity to the classification of this type of transaction, it has by no means resolved all of the matters at issue.[1044]

14.23. As noted above, the terms implied into service contracts by virtue of section 39 of the 1980 Act cover the skill and care exercised in the supply of the service, the soundness and fitness for purpose of any materials used, and the merchantable quality of any goods supplied. This suggests a clear intention on the part of the legislature to treat contracts for work and materials as service contracts.[1045] Matters are complicated, however, by the different approach to the categorisation of contracts for work and materials arguably taken by Directive 1999/44/EC on the Sale of Consumer Goods and Associated Guarantees. Article 1(4) of the Directive as given effect by the European Communities (Certain Aspects of the Sale of Consumer Goods and Associated Guarantees) Regulations 2003 provides that 'contracts for the supply of consumer goods to be manufactured or produced shall be regarded as contracts of sale for the purpose of these Regulations'.[1046] While a narrow reading of this provision might suggest that it refers simply to contracts for the sale of future goods, as is done at section 5(1) of the 1893 Act, it has been suggested that it covers contracts to produce and supply finished goods – in other words, contracts for work and materials.[1047] This interpretation is supported by the use of the word 'supply' rather than 'sale' in Article 1(4) of the Directive and by the related provision at Article 2(3) that the seller is not liable for a lack of conformity originating in materials supplied by the consumer. The implication of the latter provision is that a contract in which a

[1043] **Benjamin's Sale of Goods**, op. cit., para. 1-041. .
[1044] Ibid., pp. 41-43. Atiyah, **The Sale of Goods**, op. cit., p. 26.
[1045] Grogan. V., et al. **Sale of Goods and Supply of Services: A Guide to the Legislation.**, op. cit., pp. 86-87.
[1046] S.I. No. 11 of 2003, Regulation 2(4).
[1047] Bradgate, R. & Twigg-Flesner, **Blackstone's Guide to Consumer Sales and Associated Guarantees,** op. cit., pp. 23-25.

supplier works on materials provided by a consumer to produce a finished good is a contract of sale within the meaning of the Directive.

14.24. The divergent approach to the categorisation of contracts for works and materials taken by domestic Irish law and by Irish law implementing EU legislation is another example of the confusion that has resulted from the failure to date to integrate these two bodies of law. Our recommendations in this Report are directed at bringing an end to this system of dual regulation. As stated previously, it is equally important to render the distinctions between different types of transaction as immaterial as practicable by minimising their consequences. At present, the categorisation of a transaction as either a contract of sale or a contract for the supply of services can have significant consequences. Contracts of sale for sums in excess of €12.70 remain subject to the formalities requirements of section 4 of the 1893 Act while no such requirements apply to services contracts. The provisions governing the exemption of the implied terms for services contracts are less restrictive than those applying to the implied terms for sales contracts. Our recommendations in both these areas would have the effect of putting sales and services contracts on a similar footing.

Form and Content of the Implied Undertakings under Section 39

14.25. Section 39 raises a number of issues: first, the status of the implied undertakings as 'terms' rather than conditions or warranties; second, the substance of the implied terms relating to the skill and care of the service supplier; and, third, the substance of the implied terms relating to the quality of materials used or goods supplied under a contract for the supply of a service. We will look at each of these questions in turn.

Form of the Implied Undertakings

14.26. The implied undertakings in section 39 of the 1980 Act are expressly said to be terms of the contract. As discussed in Chapter 4, the equivalent undertakings in contracts of sale are classified by the 1893 and 1980 Acts as either conditions (breach of which may give rise to a right to treat the contract as repudiated) or warranties (breach of which may give rise to a right may give rise to a claim for damages, but not a right to reject the goods and treat the contract as repudiated). Most of the main implied undertakings in contracts of sale – those relating to title, correspondence with

description, merchantable quality, fitness for particular purpose, and correspondence with sample – have the status of conditions. Though the description of the implied undertakings in section 39 as terms might suggest a conscious intention to apply the category of innominate term first applied in *Hong Kong Fir Shipping Co. Ltd v. Kawasaki Kisen Kaisha Ltd*,[1048] there is no firm evidence to this effect.[1049] In *Irish Telephone Rentals v. Irish Civil Service Building Society Ltd*,[1050] the issue arose as to whether the breach of the implied quality terms for goods supplied under a service contract caused by defects in a telephone system was such as to justify the repudiation of the contract. Costello J. applied the test outlined in *Hong Kong Fir* as to whether the breach had the effect of depriving the injured party of substantially the whole of the benefit which it was envisaged that he would obtain from the contract and found against the plaintiffs' claim for damages for breach of contract.

14.27. In our discussion of section 11 of the 1893 Act, we concluded that the distinction between 'conditions' and 'warranties' still served an important purpose and recommended its retention. If the classification of contract terms as conditions or warranties is to apply to sales contracts, however, the issue obviously arises as to whether or not it should also apply also to service contracts. Though the existing provision in section 39 does not appear to have created significant practical difficulties to date, the logic of treating the implied undertakings for the two types of contract differently can be questioned, particularly where implied undertakings for service contracts include an undertaking as to the quality of any goods supplied, the counterpart of which has the status of a condition in a contract of sale. It can also be argued that, the contract terms implied by virtue of section 39 touch on fundamental aspects of the contract and are of a kind that merits the status of conditions. On the other hand, giving the implied terms in section 39 the status of conditions would mean that breaches of those terms would give rise to a right to treat the contract as repudiated. This outcome is less straightforward and more problematical in the

[1048] [1962] 1 QB 26. As discussed in greater detail in Chapter 4, an innominate term is one whose consequences, specifically whether the injured party is entitled to repudiate the contract, depends on the gravity and effects of the breach.

[1049] The second stage speech on the Sale of Goods and Supply of Services Bill cited above, for example, refers to the absence of a reasonable basis on which suppliers of services should be exempt from the implied 'conditions and warranties' as to the quality of the service which are obligatory on a seller of goods. **Dáil Debates**, Vol. 316, 14 November 1979 Sale of Goods and Supply of Services Bill 1978 Second Stage: cols. 1660-61

[1050] [1991] I.L.R.M. 880.

context of service contacts than in contracts of sales where the goods that are not in conformity with the contract can be returned to the seller.

14.28. The options on the status of the implied undertakings as to services can be summarised as follows:

1) Leave section 39 unchanged so that the implied undertakings are said simply to be 'terms'.
2) Retain the classification of the implied undertakings in section 39 as terms, but clarify expressly that they are innominate terms.
3) Reclassify as conditions only the implied undertakings in section 39 which apply to goods supplied under the contract.
4) Reclassify all of the implied undertakings in section 39 as 'conditions'.

Another approach might be to hold the implied terms in services contracts to be conditions and warranties. In determining whether the term subject to breach was a condition or warranty, courts should take the same approach to interpretation as in cases concerning contracts of sale, with particular attention being paid to the need for consistency of approach and result in both sales and services contracts.

14.29 Though there are arguments for and against all of these options, we favour, on balance, giving the implied statutory undertakings as to services the status of conditions. As we indicated in Chapter 4, it is entirely justified on grounds of both policy and practice for the law to acknowledge that some contract terms are more important than others and should attract more potent remedies. Classifying terms as innominate, the remedies for which would depend on the nature and effects of a breach, is a source of potential uncertainty and litigation. The approach taken in *Hong Kong Fir* has not been universally embraced and, in practice, cases have commonly been resolved by holding terms to be conditions. In insurance cases, for example, most judges have been hostile to the innominate term approach despite the perceived benefits of greater flexibility. The implied undertakings under section 39 relate, moreover, to quite fundamental aspects of the performance of contracts of service – the possession of the necessary skill by the supplier, the supply of the service with due skill, care and diligence, the soundness and reasonable fitness for purpose of any materials used, and the merchantable quality of the goods. In the case of the last-named undertaking, treating the implied term as anything other than a condition

would perpetuate the existing inconsistency in the treatment of goods supplied under a contract of sale and goods supplied under a contract for work and materials. The other implied undertakings, furthermore, have a measure of flexibility built into them as instanced by the references to 'necessary' skill', 'due' skill, care and diligence, and 'reasonably' fit for the purpose for which they are required.

14.30. Recommendation

The implied terms as to the quality of services should be classified as conditions of the contract in future legislation.

Content of the Implied Undertakings: Skill, Care and Diligence

14.31. Sections 39(a) and (b) stipulate, first, that the supplier should have the necessary skill to render the service and, second, that he should supply the service with due skill, care and diligence. While this provision is broadly similar in substance to the equivalent provisions in other common law jurisdictions,[1051] the legislative provisions in those other jurisdictions expand and elaborate on the implied terms in ways not done in the 1980 Act. The legislation in force in the UK, Australia and New Zealand includes, first, an implied term that, where the time for the service to be carried out is not fixed by the contract, left to be fixed in a manner agreed by the contract or determined by the course of dealing between the parties, the supplier will carry out the service within a reasonable time. The UK and New Zealand Acts, secondly, contain an implied term that, where the price or consideration for the service is not fixed by the contract, left to be fixed in a manner agreed by the contract or determined by the course of dealing between the parties, the price or charge will be reasonable. The New Zealand legislation further provides that, where the trader fails to comply with this implied term, the consumer's right of redress is to refuse to pay more than a reasonable price. The implied terms about time of performance of services and the price in these jurisdictions mirror the provisions applicable to contracts of sale at sections 8 and 29 of the 1893 Act. Given that the stated aim of Part IV of the 1980 Act was to apply quality terms to service contracts comparable to

[1051] The corresponding provision at section 13 of the UK Supply of Goods and Services Act 1982 provides that, in contracts for the supply of a service, there is an implied term that the supplier will carry out the service with reasonable skill and care. The provisions under the Australian Competition and Consumer Act 2010 and the New Zealand Consumer Guarantees Act 1993 are more or less identical to the UK provision.

those in force for sales contracts, it is perhaps surprising that it did not include equivalent provisions about time and price. This omission should be rectified in future legislation by the inclusion of provisions along the lines of those in force in the UK, Australia and New Zealand.

14.32. A more fundamental issue concerns the basis of the implied terms governing contracts for the supply of a service. The requirement under section 39 that the supplier should supply the service with due skill, care and diligence is a negligence or fault-based standard. Though the service provided may fail to achieve the desired result or even be defective, the supplier is liable only if he has failed to exercise due skill, care and diligence. This will normally be judged by reference to the degree of skill and care exercisable by a reasonably competent person in the same trade, business or profession.[1052] The courts can, of course, imply a term entailing a higher level of liability in the circumstances of a particular case, or take the view that the generally accepted level of skill and care in a particular trade or profession is not an acceptable benchmark.[1053] In *Greaves & Co (Contractors) Ltd v. Baynham Meikle and Partners*,[1054] Lord Denning stated, in relation to a claim against consultant structural engineers arising from defects in the design of a building that the fact that other competent engineers might also have omitted to take adequate precautions against certain risks was not a defence of itself as 'other designers might have fallen short too.'

14.33. The fault-based standard which applies to services is in contrast to the strict liability or result-based standard applicable to goods. In the case of a contract of sale, there are implied terms that goods will comply with description and sample, be of merchantable quality, and be reasonably fit for any particular purpose made known expressly or by implication to the seller. The degree of skill and care shown by the seller is immaterial. What matters is whether or not the goods comply with the implied terms. As noted in Chapter 4, however, the strict liability nature of the implied terms is offset to some extent by the element of flexibility built into these

[1052] *Bolem v Friem Hospital Management Committee* [1957] 1 WLR 582; *Whitehouse v Jordan* [1981] 1 W.L.R. 246; *Maynard v West Midlands Regional Health Authority* 1 W.L.R. 246; Sidaway v Board of Governors of the Bethlem Royal Hospital and the Maudsley Hospital [1985] A.C. 871.
[1053] *Lloyds Bank Ltd v Savory and Co*. [1933] A.C. 201; *Cavanagh v Ulster Weaving Co. Ltd* [1960] A.C. 145; *Bolitho v City and Hackney Health Authority* [1998] AC 232.
[1054] [1975] 1 W.L.R. 1095 at 1102.

terms. Thus, per section 14(3) of the 1893 Act, goods are of merchantable quality if they are as fit for the purpose or purposes for which goods of that kind are commonly bought and as durable as it is reasonable to expect having regard to any description applied to them, the price (if relevant) and all the other relevant circumstances. Per section 14(4), goods are required only to be reasonably fit for any particular purpose made known to the seller.

14.34. The traditional rationale for the distinction between the fault-based standard applicable to services and the strict liability standard applicable to goods has been the fact that the more complex and less standardised nature of services makes it both unrealistic and unreasonable to apply a result-based standard to these transactions. In *Singer and Friedlander Ltd v John D Wood and Co*, for example,[1055] Watkins J. observed as follows of the advice given by property surveyors and valuers:

> … the valuation of land by trained, competent and careful professional men is a task which rarely, if ever, admits of a precise conclusion. Often beyond certain well-founded facts so many imponderables confront the valuer that he is obliged to proceed on the basis of assumptions. Therefore he cannot be faulted for achieving a result which does not admit some degree of error.

While this argument may have validity in respect of certain professional services, other services are relatively standardised in ways that are akin to goods, for example dry-cleaning, fast-food outlets, telecommunications and cable services, many transport and accommodation services, and some types of software. The courts have shown a willingness to differentiate between different types of service contract and to apply a higher standard of liability in certain circumstances, most notably cases involving contracts to design and supply a building or other structure in accordance with specifications furnished by the client. In *Greaves & Co (Contractors) Ltd v Baynham Meikle and Partners*,[1056] contractors were engaged by an oil company to build a warehouse to store barrels of oil, and they sub-contracted the design of the building, including the floors, to a firm of structural engineers. Though the engineers were informed that stacker trucks carrying barrels of oil would be moving across the floors, cracks caused by the weight and vibrations of the truck appeared in the floors shortly after the warehouse was completed. Lord Denning observed as follows:

> The law does not usually imply a warrant that he [the professional man] will

[1055] [1977] 243 Estates Gazette 212 at 213.
[1056] [1975] 1 W.L.R. 1095 at 1101-02; *Stewart v Reavell's Garage* [1952] 2 QB 545; *Independent Broadcasting Authority v EMI and BICC* (1980) 14 BLR 1.

> achieve the desired result, but only that he will use reasonable care and skill. The surgeon does not warrant that he will cure the patient. Nor does the solicitor warrant that he will win the case. But when a dentist agrees to make a set of false teeth for a patient, there is an implied warranty that they will fit his gums… What then is the position when an architect or engineer is employed to design a house or a bridge? Is he under an implied warranty that, if the work is carried out to his design, it will be reasonably fit for the purpose? Or is he only under a duty to use reasonable skill and care? This question may require to be answered some day as matter of law. But in the present case I do not think that we need answer it. For the evidence shows that both parties were of one mind on the matter. Their common intention was that the engineer should design a warehouse which would be fit for the purpose for which it was required. That common intention gives rise to a term implied in fact. In the light of that evidence it seems to me that there was implied in fact a term that, if the work was completed in accordance with the design, it would be reasonably fit for the use of loaded stacker trucks. The engineers failed to make such a design and are therefore liable.

Though this case, and that of *Independent Broadcasting Authority v EMI and BICC* in which a similar approach was taken, occurred before the adoption of the statutory fault-based standard at section 13 of the UK Supply of Goods and Services Act 1982, a ruling along these lines could still be upheld by the courts. Section 16(3) of the 1982 Act expressly provides that the Act's provisions do not prejudice any rule of law which imposes a duty stricter than that imposed by section 13.

14.35. While the courts could imply a similar fitness for purpose term in cases involving other types of service, this seems unlikely, particularly in cases involving professional services such as medicine or law. The question arises, consequently, as to whether a standard based on the result to be achieved by a contract for the supply of services, as well as one based on the skill and care to be shown by the supplier should be included in future legislation. A possible model for a provision along these lines can be found in the Draft Common Frame of Reference (DCFR). This states that:[1057]

> (1) The supplier of the service must achieve the specific result stated or envisaged by the client at the time of the conclusion of the contract, provided that in the case of a result envisaged but not stated:
>
> a) the result envisaged was one which the client could reasonably be expected to have envisaged; and
>
> b) the client had no reason to believe that there was a substantial risk that the result would not be achieved by the service.

[1057] Von Bar, C. et al (eds). 2009. **Draft Common Frame of Reference: Outline Edition** , IV. C.-2: 106. http://ec.europa.eu/justice/policies/civil/docs/dcfr_outline_edition_en.pdf.

While a rule of this kind might reasonably be applied to certain services, it would be inappropriate to those services in which a range of variables and uncertainties are liable to intervene between intention and outcome. It is necessary to keep in mind in this context the great range and heterogeneity of the activities that go to make up the services sector in modern economies. A single, all-purpose rule of the kind found in the DCFR is unsuited in our view to this diversity of circumstances and the flexibility that it requires.

14.36. Though we are not in favour of the introduction of an inflexible result-based standard for services contracts, we think that there is scope for a measured reform of the purely fault-based standard at Part IV of the 1980 Act. In addition to the implied guarantee at section 28 that the service will be carried out with reasonable care and skill, section 29 of the New Zealand Consumer Guarantees Act 1993 contains the following provision as to fitness for particular purpose:

> … where services are supplied to a consumer there is a guarantee that the service, and any product resulting from the service, will be -
> (a) reasonably fit for any particular purpose; and
> (b) of such a nature and quality that it can reasonably be expected to achieve any particular result, -
> that the consumer makes known to the supplier before or at the time of the making of the contract for the supply of the service, as the particular purpose for which the service is required or the result that the consumer desires to achieve, as the case may be, except where the circumstances show that –
> (c) The consumer does not rely on the supplier's skill or judgement; or
> (d) It is unreasonable for the consumer to rely on the supplier's skill or judgment.

There is no right of redress, however, in respect of a service, or any product resulting from a service, which fails to comply with a guarantee under this section of the Act because of (a) an act or default or omission of, or any representation made, by any person other than the supplier or a servant or agent of the supplier, or (b) a cause independent of human control. A broadly similar provision can be found at section 61, Part 3-2, Chapter 3 of the Australian Competition and Consumer Act 2010.

14.37. Though the provisions in the New Zealand and Australian legislation take a significant step towards a result-based approach to the liability of the supplier of services, they do so in a nuanced and flexible way. First, they apply only to an outcome that the consumer has made known to the supplier expressly or impliedly. Second, they do not stipulate that a particular result must be achieved, but provide instead that the services should be such that they might be reasonably be expected to

achieve the intended result. If the services provided would normally achieve this result, therefore, the supplier would not be liable because of a failure to achieve it in the circumstances specific to a particular transaction. A further degree of flexibility stems from the fact that the supplier's obligation under the section arises only where there has been reasonable reliance on his skill and judgement. If the supplier is of the view that he cannot supply a service that is reasonably fit for a particular purpose or can reasonably be expected to achieve a particular result, he can make this clear to the consumer. This gives the supplier a reasonable degree of control over his responsibilities and liabilities. Though these aspects of the provisions should help to allay some concerns about the proposed change, we recognise that a reform along these lines would represent a significant departure from the present approach to the regulation of services contracts. It is desirable in our view, therefore, that the introduction of such a provision, and the manner of its application, should be the subject of detailed consultation.

14.38. Recommendations

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.

Future legislation should also expressly provide that its provisions on implied terms in contracts for the supply of services are without prejudice to any rule of law that would impose stricter duties of skill and care.

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 reasonably fit for any particular purpose, and of such a nature and quality that it can reasonably be expected to achieve any particular result, that the consumer makes known to the supplier as the particular purpose for which the service is required or the result that the consumer desires to achieve. This provision should apply to both consumer and commercial contracts for the supply of services.

Substance of the Implied Terms: Fitness for Purpose of Materials and Quality of Goods

14.39. Sections 39 (c) and (d) of the 1980 Act contain implied stipulations (i) that where materials are used in a contract for the supply of a service, they will be sound and reasonably fit for the purpose for which they are required, and (ii) that where, goods are supplied under the contract, they will be of merchantable quality within the meaning of section 14(3) of the 1893 Act. As noted already, it is unclear why the implied terms as to goods in such cases exclude the terms relating to title, fitness for particular purpose, correspondence with description, and correspondence with sample at sections 12-15 of the 1893 Act and the implied terms at sections 12-13 of the 1980 Act on spare parts and after-sale service and the safety of motor vehicles. By contrast, the terms implied into hire purchase and hire contracts under Parts VI and VII of the Consumer Credit Act 1995 cover, subject only to necessary modifications to the implied terms regarding title, all of the implied terms under the 1893 and 1980 Acts. Under the UK Supply of Goods and Services Act 1982, goods supplied under a contract of hire or a contract for work and materials are subject similarly to the full range of implied terms governing contracts of sale. Under existing Irish law, however, the implied terms, other than that of merchantable quality, do not apply to service contracts in which goods are supplied and the property in those goods is transferred from seller to buyer. This situation is clearly unsatisfactory and should be addressed in future legislation. As noted earlier, our recommendation for the adoption of the definition of 'sales contract' in the proposed Consumer Rights Directive would mean that goods supplied under a consumer contract for work and materials would be treated on the same basis as goods supplied under a consumer contract of sale. Likewise, under our recommendation for a consolidated statutory framework for the implied terms in different contracts involving the supply of goods, goods supplied under a contract for services would be regulated on the same basis as goods supplied under other types of transaction.

14.40. Recommendation

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.

SECTION 40 EXCLUSION OF IMPLIED TERMS

14.41. Section 40 of the 1980 Act provides that the implied undertakings as to quality of service under section 39 may be negatived or varied by an express term of the contract, by the course of dealing between the parties, or by usage that binds both parties to the contract. Where the recipient of the service deals as consumer, however, the implied undertakings may be negatived or varied only where the express term in question is fair and reasonable and has been specifically brought to the attention of the recipient. In the case of contracts of sale, by contrast, any term exempting from any or all of the implied undertakings as to title under section 12 of the 1893 is void for both consumer and commercial contracts. Any term exempting from any or all of the implied undertakings regarding correspondence with description, quality and fitness for purpose, and correspondence with sample under sections 13-15 of the Act is void where the buyer deals as consumer and, in any other case, is not enforceable unless shown to be fair and reasonable. A term in a consumer contract which has not been individually negotiated and which seeks to exclude or restrict the implied undertakings under section 39 is also subject to the unfairness test under the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 and 2000 which give effect to Directive 93/13/EEC. Under the Regulations, a contract term is regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations to the detriment of the consumer, taking into account the nature of the goods or services, all circumstances attending the conclusion of the contract, and all other terms of the contract. Schedule 3 of the Regulations includes the following term among 'an indicative and non-exhaustive list of terms which may be regarded as unfair' pursuant to the unfairness test:

> Terms which have the object or effect of:...
> (b) inappropriately excluding or limiting the legal rights of the consumer vis-à-vis the seller or supplier or another party in the even of total or partial non-performance or inadequate performance by the seller or supplier of any of the contractual obligations, including the option of offsetting a debt owed to the seller or supplier against any claim which the consumer may have against him.

Though the 'fair and reasonable test' under the 1980 Act and the unfairness test under the Unfair Terms in Consumer Contracts Regulations are broadly similar, this is a further example of the undesirable and unnecessary duplication in Irish consumer law caused by the failure to integrate provisions of domestic and EU origin.

14.42. In the UK, liability for the implied term of 'reasonable skill and care' applicable to contracts for the supply of a service can be excluded or restricted in consumer and commercial contracts where the exclusion clause satisfies the reasonableness requirement under the Unfair Contracts Terms Act 1977. In the case of consumer contracts, exemption clauses of this kind are also subject to the unfairness test under the Unfair Terms in Consumer Contracts Regulation 1999 which give effect to Directive 93/13/EEC on Unfair Contract Terms. Section 11(5) of the UK Unfair Terms Act places the burden of showing the reasonableness of any such clause on the supplier of the service. Where a contract does not entirely exclude liability but restricts it to a specified sum of money, the court is directed by section 11(4) of the Act to have regard, in particular, to (i) the resources which the party for whose benefit the term would operate 'could expect to be available to him for the purpose of meeting the liability should it arise' and (ii) how far it was 'open to him to cover himself by insurance.' The guidance for the application of the reasonableness test at Schedule 2 of the UK 1977 Act is confined, however, to exclusion clauses in non-consumer contracts for the supply of goods and, unlike the identical Schedule of 'fair and reasonable terms' in the Irish 1980 Act, is not applicable to the assessment of contract terms which exclude or restrict the implied terms governing contracts for the supply of services. The issue of whether contract terms which exclude liability for the implied term of reasonable skill and care in services contracts should be void in consumer contracts was considered by the Law Commission for England and Wales in a report published in 1986.[1058] The Commission recommended against any change to the Unfair Contract Terms Act on the ground that its provisions were adequate to ensure that suppliers observed acceptable standards while also permitting a degree of flexibility. The Commission's conclusions were also influenced by concerns expressed to it about the implications of an absolute prohibition of exclusion clauses in consumer services contracts for business costs generally and insurance costs in particular. The issue of exclusion clauses for consumer contracts for the supply of services has been re-examined recently in a report prepared by a group of academics for the UK Department for Business, Innovation and Skills.[1059] The report recommends that exclusion or restriction of liability for defective services in such

[1058] The Law Commission. 1986. **Implied Terms in Contracts for the Supply of Services** (Law Com. No. 156), paras. 3.1-3.24.
[1059] Howells, G. & Twigg-Flesner, C. (eds). **Consolidation and Simplification of UK Consumer Law**, op. cit., paras. 4.96-4.113.

cases should be made wholly ineffective in line with the corresponding provisions in contracts for the supply of goods. In both Australia and New Zealand, contracting out of the statutory guarantees implied into consumer contracts for the supply of services is prohibited.[1060]

14.43. The differential treatment of exemption clauses in contracts of sale and contracts for the supply of a service is the legacy of a period when the regulation of services contracts was new and, as a result, was undertaken in a tentative and qualified way. It is now time in our view to put exemption clauses pertaining to the implied terms in services contracts on the same footing as those for sales contracts, namely that they should be void in consumer contracts and enforceable in commercial contracts where shown to be fair and reasonable. It is likely that consumers assume that similar rules apply to goods and services, and this is a reasonable expectation on their part. Unwarranted differences of this kind in the treatment of sales and services contracts only serve, moreover, to place an artificial importance on the classification of contracts. As noted above, the implied terms governing the provision of services are currently fault-based and would largely remain so under our recommendations. It is difficult to see why implied terms which operate on a fault-based standard should be subject to more permissive rules on exclusion clauses than apply to the strict liability terms implied into contracts of sale. Though it may be argued that a prohibition on the exclusion of the implied terms in consumer services contracts would increase costs for businesses, it would also bring about greater legal certainty and should help consequently to reduce recourse to litigation. As discussed in Chapter 5, the Unfair Terms in Consumer Contracts Regulations are the most appropriate vehicle for the regulation of exclusion clauses in consumer contracts. Clauses of this kind in contracts for the supply of services to consumers should accordingly be deemed to be automatically unfair under the Regulations.

14.44. Recommendations

Contract terms which exclude the terms implied by statute into commercial contracts for services should be regulated on the same basis as exemption

[1060] Competition and Consumer Act 2010, Chapter 3, Part 3-2, s. 63. Consumer Guarantees Act 1993, s.43.

clauses in contracts of sale, namely that they are unenforceable unless shown to be fair and reasonable.

Contract terms which exclude the terms implied by statute into consumer contracts for services should be automatically unfair in all circumstances under the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 and 2000. The 1995 Regulations should be amended in order to give effect to this recommendation.

SECTION 41 STATEMENTS PURPORTING TO RESTRICT RIGHTS OF RECIPIENT OF SERVICE

14.45. This provision is the equivalent of the provision at section 11 of the 1980 Act on statements purporting to restrict the rights of the buyers of goods which is discussed at paragraphs 5.30-5.34 above. It functions as a complement to the provisions of Section 40 on exclusion clauses by rendering it a criminal offence to make statements of various kinds that are likely to be taken as indicating that a right conferred by, or a liability arising under, section 39 is restricted or excluded otherwise than in accordance with section 40. As we noted in our discussion of section 11, the provisions of section 43 of the Consumer Protection Act on false, misleading and deceptive information serve a similar function and are capable of providing adequate protection for consumers in this respect. Equivalent prohibitions apply to transactions involving businesses under the European Communities (Misleading and Comparative Marketing Communications) Regulations 2007

14.46. Recommendation

Section 41 of the Sale of Goods and Supply of Services Act 1980 on statements purporting to restrict the rights of recipients of services should be repealed in line with the recommended repeal of section 11 of the Act on statements purporting to restrict the rights of buyers.

CHAPTER FIFTEEN THE UNITED NATIONS CONVENTION ON THE INTERNATIONAL SALE OF GOODS

15.1 The United Nations Convention on the International Sale of Goods [CISG], [1061] commonly known as the Vienna Convention, comprises a set of uniform substantive rules for the regulation of contracts of sales involving parties with a place of business in states that have ratified the Convention (Contracting States). To date, 76 states have ratified the Convention, including most of the world's main trading economies and all EU member states other than Ireland, the United Kingdom, Portugal and Malta..[1062] Consideration of the CISG involves two principal questions. First, should Ireland ratify the Convention and, secondly, if so, should it avail of any or all of the opt-outs permissible under it? Unlike virtually all of the issues considered in previous Chapters of this Report, these questions have previously been the subject of thorough and detailed review. A report on the CISG undertaken by the Law Reform Commission in 1992 recommended that Ireland should accede to the Convention and should not exercise any of the available derogations.[1063] As the Commission's analysis and conclusions remain valid in our view, we do not propose to go in detail over the ground covered comprehensively in its Report. Before considering the main matters at issue, we will first briefly set out the background to, and main features of, the CISG.

The CISG: Background and Main Features

15.2. The CISG was adopted in 1980 and came into force in 1988 after securing the required number of ratifications. Its adoption followed a number of attempts to establish a uniform substantive law for international contracts of sale that would prove capable of securing broad acceptance among trading nations. The two Hague Conventions of 1964[1064] on the international sale of goods came into force in 1972,

[1061] The text of the Convention can be accessed at http://www.uncitral.org/pdf/english/texts/sales/CISG/V1056996-CISG-e-book-pdf

[1062] All data cited on accessions to, and derogations from, the Convention is from UNCITRAL: Status 1980 – United Nations Convention on Contracts for the International Sale of Goods, http://www.uncitral/org/uncitral/en/uncitral_texts/sale_goods/1980CISG/status.html

[1063] Law Reform Commission. 1992. **Report on United Nations (Vienna) Convention on Contracts for the International Sale of Goods** (LRC 42-1992).

[1064] Uniform Law for the International Sale of Goods (ULIS), and Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF).

but were ratified by just nine states.[1065] The United Nations Commission on International Trade Law (UNCITRAL), which had been established in 1966, took the initiative in efforts to come up with a Convention capable of securing greater international acceptance. Following extensive discussions over a number of years, the final version of the CISG was agreed at a conference held in Vienna in 1980.

15.3. The purpose of the CISG is to facilitate increased certainty and reduced transaction costs in international trade by the provision of uniform, even-handed rules governing the rights and obligations of parties to trans-national sales contracts.[1066] It aims in particular to circumvent the potential difficulties and barriers to trade arising from choice of law rules that determine whether the law applicable to an international contact of sale is that of the seller's or the buyer's place of business. Article 1(1) of the Convention provides that the Convention applies to contracts of sale of goods between parties whose places of business are in different States where:

a) both parties are in Contracting States, or
b) the rules of private international law lead to the application of the law of a Contracting State.

Where a contract of sale involves a party from a Contracting State and a party from a state that has not ratified the Convention, the party from the non-CISG state may, by reason of Article 1(1)(b) find itself bound by the Convention if a court in the Contracting State determines on the basis of rules of private international law that its law (in this case, the CISG) is the law applicable to the contract. Article 95 of the Convention, however, permits a Contracting State to declare that it will not be bound by the second of these provisions and, to date, six such states have availed of this derogation.[1067]

15.4. Article 2 of the Convention sets out a number of exclusions from its scope, including goods bought for personal, family or household use; ships, vessels,

[1065] The United Kingdom, Belgium, West Germany, Italy, Luxembourg, the Netherlands, San Marino, Israel and Gambia.
[1066] Article 4 of the Convention states that it governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract and expressly excludes from its scope the validity of the contract or the effect of the contract on the property in the goods.
[1067] China, Czech Republic, St Vincent & the Grenadines, Singapore, Slovakia, and the United States. Though Germany did not derogate as such from the rule regarding application of the law of a Contracting State by reason of the rules of private international law, the terms of its ratification provide that it does not apply this provision in respect of any State that has availed of the derogation.

hovercraft or aircraft; and electricity. Article 3 excludes from the scope of 'sales' (i) contracts for the supply of goods to be manufactured or produced where the party who orders the goods undertakes to supply a substantial part of the necessary materials and (ii) contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services. Article 4 stipulates that the Convention governs only the formation of the contract and the rights and obligations of the parties to such a contract and, in particular, does not deal with either the validity of the contract or its effect on the property in the goods.

15.5. The CISG incorporates elements from both common and civil law traditions, and shows the influence in particular of Article 2 of the US Uniform Commercial Code.[1068] The main substantive provisions of the Convention are located in Part II which deals with the formation of the contract and Part III which deals with the obligations of the seller and buyer under the contract. As outlined previously at paragraphs 3.59-3.61, Part II of the Convention contains rules governing offer and acceptance, including provisions on a receipt rule of acceptance and on qualified acceptance or the 'battle of the forms'. Part III on the obligations of the seller and buyer covers much the same ground as the Sale of Goods Acts, and includes provisions on delivery, conformity with the contract, examination, the buyer's remedies, payment of the price, the seller's remedies, and the passing of risk.[1069] As party autonomy is a core principle of the CISG, Article 6 provides that the parties may exclude the application of the Convention or, with one exception, 'derogate from or vary the effect of any of its provisions.'[1070] The evidence suggests that this opt-out provision is widely exercised. The standard form contracts of many leading trade associations expressly exclude the CISG as do those of the large oil companies.[1071]

[1068] Bridge, M.2007. **The International Sale of Goods: Law and Practice** (2nd ed.) (Oxford: Oxford University Press), para. 11.09.
[1069] For a comparison between the CISG and the UK Sale of Goods Act 1979 that is also broadly applicable to Irish sales law, see ibid. paras. 12.01-12.65.
[1070] The exception applies where Contracting States derogate under Article 96 from the Convention's provision that a contract need not be concluded in or evidenced, modified or terminated by writing. Where one or both parties have their place of business in a Contracting State which requires contracts of sale to be in writing, this requirement may not be derogated from or varied. To date, 10 Contracting States have availed of this derogation: Argentina; Armenia; Chile; China; Hungary; Latvia; Lithuania; Paraguay; the Russian Federation; and the Ukraine.
[1071] For example, the Grain and Feed Trade Association, the Federation of Oils, Seeds and Fats Association, and the Refined Sugar Association. Bridge, M. **The International Sale of Goods**, op. cit., para. 11.42 & fn. 197.

Opt-out rates are reported to be in the region of 70 per cent in the US and 45-55 per cent in Austria and Germany.[1072]

Should Ireland Ratify the CISG?

15.6. In its 1992 Report, the Law Reform Commission examined a wide range of issues relevant to Ireland's ratification of the CISG and concluded as follows:[1073]

> Although there are arguments both for and against accession, … the former appear to outweigh the latter. Analysis of the provisions of the Convention and of domestic and international considerations surrounding it lead us to conclude that, on balance, it would be desirable for Ireland to become a party to the Convention.

The Commission added that, 'though not a perfect document', the Convention[1074]:

> … does represent the greatest level of compromise possible in the international community at the present time. Above all, we must bear in mind that the principle of party autonomy gives Irish traders the liberty to contract out of the Convention in its entirety or to exclude the application of any individual provision, with one limited exception, namely, the provision in Article 12 allowing a state to require that a contract be in writing. As a general rule, the freedom to contract out of the Convention allows parties to use the Convention to the degree which they find beneficial.

15.7. In our view, the case for Ireland's accession to the Convention is, if anything, stronger now than when the Law Reform Commission reported in 1992. At that time, thirty-four states had ratified the Convention compared with seventy-six states now. All of Ireland's main trading partners,[1075] with the exception of the United Kingdom, are parties to the Convention. In view of Ireland's position as one of the most open economies in the world, it is difficult in fact to understand why its accession has been so long delayed, particularly in the light of the conclusions and recommendations of the Law Reform Commission's report. As matters stand, Irish companies engaged in contracts for the sale of goods with parties from Contracting States can find

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[1072] Howells, G. 2010. 'European Contract Law Reform and European Consumer Law – Two Related but Distinct Regimes', p.11 & fn. 32.
http://ec.europa.eu/justice/news/consulting_public/0052/contributions/188_en.pdf

[1073] Law Reform Commission, **Report on United Nations (Vienna) Convention on Contracts for the International Sale of Goods**, op. cit, p.85

[1074] Ibid., p. 84.

[1060] The top ten countries of destination for Irish exports in the first quarter of 2011 were as follows: (1) the USA; (2) Belgium; (3) the UK; (4) Germany; (5) France; (6) Spain; (7) Switzerland; (8) the Netherlands; (9) Italy; and (10) China. The top ten countries of origin for Irish imports in the same period were: (1) the UK; (2) the USA; (3) Germany; (4) China; (5) the Netherlands; (6) France; (7) Norway; (8) Belgium; (9) Japan; and (10) Denmark. CSO. June 2011. **External Trade**, table 4.
http://www/cso.ie/releasespublications/documents/external_trade/current/extrade.pdf

themselves inadvertently bound by the Convention for the reasons set out in paragraph 15.3. In addition to the positive benefits of accession, ratification would make it clearer to Irish businesses engaged in international sales with parties from another Contracting State that, unless expressly excluded or varied, their rights and obligations under the contract would be governed by the CISG's provisions. In considering the pros and cons of accession, a key factor to be borne in mind is, as the Law Reform Commission pointed out, the fact that the provisions of the Convention consist almost entirely of default rules. We are mindful also that, as accession to the Convention will require the adoption of appropriate legislative provisions, the opportunity presented by the need for new legislation to give effect to our other recommendations should be utilised for this purpose. If the legislative provisions necessary in order to allow Ireland to become a party to the CISG are not introduced when new sale of goods legislation is being enacted, it is likely to be a long time before a suitable opportunity again presents itself.

15.8. While a relevant background factor, the UK's position in regard to the Convention should not carry any decisive weight in the consideration of the merits or otherwise of Irish accession. All of the UK's main trading partners,[1076] with the exception of Ireland, are parties to the Convention, and there is nothing to suggest that this has impaired trade between those states and the UK. There appears to be no prospect of UK accession in the immediate future. The last official statement on the issue from a Government source came in 2005 when a Minister from the UK Department of Trade and Industry stated in the House of Lords that:[1077]

> … the UK intends to ratify the Convention, subject to the availability of Parliamentary time.

No steps have since been taken, however, to ratify the Convention. In response to the question as to why the UK had not ratified the CISG, a UK civil servant observed that:[1078]

[1076] The top ten countries of destination for UK exports in the first quarter of 2011 were: (1) the USA; (2) Germany; (3) France; (4) the Netherlands; (5) Ireland; (6) Belgium; (7) Italy; (8) Spain; (9) China; and (10) Sweden. The top ten countries of origin for UK imports were: (1) Germany; (2) the USA; (3) the Netherlands; (4) China; (5) Norway; (6) France; (7) Belgium; (8) Italy; (9) Ireland; and (10) Spain. HM Revenue and Customs. **Overseas Trade Statistics**, https://www.uktradeinfo.com/pagecontent/datapages/tables/cyts_1104.xls

[1077] 669 Parl. Deb., H.L. (5th series) (2005) WA86.

[1078] Moss, S. 'Why the United Kingdom Has Not Ratified the CISG'. (2005-06) *J.L & Com* 483 at 483.

> The short answer is that Ministers do not see the ratification of the Convention as a legislative priority… The question, therefore, is why Ministers do not consider it a priority. One of the main reasons is that there seems to be relatively little interest in the country to ratify the Convention.

Others have suggested that that there is antipathy to the Convention, and opposition to the UK's ratification of it, among influential elements of the English legal profession, as well as a concern that its adoption might adversely affect London's position as a centre of international litigation and arbitration.[1079]

15.9. Recommendation

Ireland should accede to the United Nations Convention on Contracts for the International Sale of Goods. The proposed new legislation on the sale and supply of goods and the supply of services should include the provisions necessary to give effect to the entry into force of the Convention in Ireland.

Derogations from the Convention

15.10. The CISG contains a number of provisions which permit a Contracting State to make a declaration limiting the application of specific provisions of the Convention in respect of that State. These declarations cover the following aspects of the Convention:

- Article 92 permits Contracting States to preclude the application of Part II (Formation of the Contract) or Part III (Sale of Goods) of the Convention. To date, Denmark, Finland, Norway and Sweden have availed of the first of these derogations, while no Contracting State has exercised the second derogation.

- Article 93 provides that a federal state may declare the Convention applicable to some, but not others, of its territorial units. While Canada initially exercised this option in respect of a number of its provinces and territories, it subsequently extended the application of the Convention to the excluded territorial units.

- Article 94 permits two or more Contracting States with the same or closely related legal rules on matters governed by the CISG to limit or exclude the application of the Convention in respect of contracts of sale between parties which have their place of business in those States. It also permits a Contracting State to make a similar declaration in respect of a non-Contracting State with which it has common or closely related legal rules. To date,

[1079] Forte, A. 'The United Nations Convention on Contracts for the International Sale of Goods: Reason or Unreason in the United Kingdom'. (1997) *U. Balt, L. Rev 51* at 54-56. See also Hoffmann, N. 'Interpretation Rules and Good Faith as Obstacles to the UK's Ratification of the CISG and to the Harmonization of Contract Law in Europe', (2010) *Pace Int'l L. Rev* 145.

Denmark, Finland, Iceland, Norway and Sweden have exercised this opt-out in respect of contracts of sale between parties based in the Scandinavian states.

- Article 95 provides that a Contracting State may declare that it is not to be bound by Article 1(1)(b) of the CISG in respect of the applicability of the Convention on the basis of rules of private international law. The effect of such a declaration is to limit the application of the CISG to parties whose place of business is in States that are parties to the Convention. As noted above, six States have availed of this derogation to date.

- Article 96 provides that a Contracting State may maintain requirements that contracts be concluded, evidenced, modified or termination in writing. As noted above, ten States have exercised this option to date.

Declarations under Articles 94 and 96 may be made at any time, while those under Articles 92 and 93 may be made at the time of signature, ratification, acceptance or approval. If made at the time of signature, however, the latter declarations must be confirmed upon ratification, acceptance or approval. A declaration under Article 95 may be made at the time of the deposit of the instrument of ratification, acceptance, approval or accession.

15.11 As noted already, the Law Reform Commission recommended against the exercise of any of these derogations. It reached this conclusion both on the general ground that such derogations lessened the impact and standing of the Convention, and for reasons specific to the individual opt-outs.[1080] We are in agreement with the general stance taken by the Commission on the issue. In the light of the generally low level of recourse to the derogations, this position would appear to be shared by the great majority of Contracting States.

15.12 If we consider the individual derogations permissible under the Convention, the exercise of the Article 92 option to exclude the application of Part III of the CISG on the sale of goods would arguably defeat the main purpose of accession. While the same cannot be said of the exclusion of Part II on the formation of the contract, we are not in favour of a derogation from these provisions of the Convention. Though we decided in Chapter 3 against the incorporation of rules along these lines in Irish law, we see no reason to deny contracting parties the option to make use of some or all of

[1080] Law Reform Commission, **Report on United Nations (Vienna) Convention on Contracts for the International Sale of Goods**, op. cit, pp. 85-88.

these provisions as they see fit. The Article 94 option for a derogation in the case of contracts involving parties from States with similar legal rules has obvious resonance for Ireland given the historically close connection between our sale of goods legislation and that in the UK and other common law countries. As the Law Reform Commission noted,[1081] and as previous Chapters of this Report have shown, however, the differences between the Sale of Goods Acts in the various common law countries concerned are also significant. It is noteworthy in this connection, moreover, that none of the common law countries which are party to the CISG – Australia, New Zealand, Canada and Singapore – have chosen to avail of this opt-out either vis-à-vis one another or vis-à-vis the UK. The Article 95 derogation would exclude the application of the Convention where rules of private international law would lead to the application of the law of a Contracting State. Recourse by Contracting States to this derogation would appear to reflect a concern to avoid the confusion and uncertainty that can result from the application of rules governing the conflict of laws. As the Law Reform Commission pointed out, however, a choice has to be made between domestic and foreign law in any event where Article 1(1)(b) of the Convention does not apply.[1082] Where the Convention constitutes the applicable law, the difficulties associated with conflict of law rules may, if anything, be lessened. Finally, the Article 96 derogation for writing requirements in respect of contracts has some limited relevance to Ireland while section 4 of the 1893 Act remains in force. As discussed in Chapter 3, section 4 provides that a contract valued at €12.70 or more is not enforceable unless one of a number of specified conditions are met, among them the making and signature of a note or memorandum of the contract. As this requirement has long outlived its usefulness and its repeal is recommended in Chapter 3, there is no case consequently for an opt-out under Article 96. Though we are of the view that none of the derogations permitted by the CISG should be exercised by Ireland, this recommendation should be reviewed if subsequent consultations show convincing grounds for availing of one or more of the opt-outs.

15.12. Recommendation

Ireland should not avail of the option of making a declaration under Articles 92-96 of the Convention. This recommendation should be reviewed if consultations

[1081] Ibid., p. 86.
[1082] Ibid., pp. 86-87.

provide evidence of convincing grounds for any or all of the derogations provided for under these Articles.

ANNEX I
LIST OF RECOMMENDATIONS

CHAPTER TWO SALE OF GOODS ACT 1893: INTERPRETATION OF TERMS, SECTION 62

1. The definition of 'consumer goods' in Directive 1999/44/EC on Consumer Sales and Guarantees as 'any tangible moveable item' should be the basis of the general definition of 'goods' in future legislation. (para. 2.4)

2. The definition of 'goods' should not be amended to include computer software. 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. (para. 2.29)

3. 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)

4. That 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. The term 'emblements' should be replaced by more modern language which clarifies that it does not apply only to annual crops produced by cultivation. This would permit the deletion of the reference to 'industrial growing crops'. (para. 2.42)

5. The definition of 'goods' in future legislation should include an undivided share in goods. (para. 2.45)

6. Future legislation should include a definition of 'unascertained goods' and should also clarify the relations between the categories of future/existing and specific/unascertained goods. (para. 2.55)

7. The definition of 'specific goods' in future legislation should be extended to provide that an undivided share in specific goods which is specified as a fraction is itself specific goods. (para. 2.55)

CHAPTER THREE SALE OF GOODS ACT 1893: FORMATION OF THE CONTRACT, SECTIONS 1-9 & 58.

8. While the definition of 'contract of sale' in the recently agreed Consumer Rights Directive will require the corresponding definition in future Irish legislation to include any consumer contract 'having as its object both goods and services', this part of the definition should not apply to commercial contracts of sale. (para. 3.8)

9. The 'necessaries' rule in future legislation on the sale and supply of goods and the supply of services should be amended in line with the Law Reform Commission's 2006 Report on Vulnerable Adults and the Law to provide as follows:

- A person who lacks capacity to enter a contract for the sale of goods would be obliged to pay a reasonable sum for necessaries supplied at his or her request.
- 'Necessaries' would be defined as 'goods or services which are suitable to the individual's personal reasonable living circumstances at the time when the goods are supplied but excluding goods and services which could be classed as luxury in nature in all the circumstances'.

The reference to 'mental capacity' should be excluded from the 'necessaries' provisions in future legislation on the sale and supply of goods and the supply of services if proposed legislation on mental capacity includes provisions on contractual capacity in relation to 'necessaries'. (para. 3.15)

10. Section 4 of the 1893 Act should be repealed. (para. 3.23)

11. Future legislation should clarify that the term 'perish' is to be construed so as to cover situations where goods perish in a commercial as well as in a physical sense. (para. 3.29)

12. Section 6 of the 1893 Act should be amended to enable the parties to a commercial contract, though not a consumer contract, to vary its operation. (para. 3.32)

13. Section 9 of the 1893 Act should be amended to provide that, where the valuer cannot or does not make a valuation, the buyer should be required to pay a reasonable price for the goods. (para. 3.41)

14. Future legislation should provide that:

- In a sale by auction without reserve, a lot cannot be withdrawn from the sale by the owner or auctioneer after the auctioneer has called for bids unless no bid is made within a reasonable period of time.
- Where goods are stated to be sold at auction 'without reserve', that statement shall be binding upon the auctioneer once bidding commences. Without prejudice to the remedy of specific performance, the highest *bona fide* bidder at the time the hammer falls, or when the sale is stopped by the auctioneer, shall have a right to damages for the loss occasioned by the breach of the collateral contract. (para. 3.47)

15. Future legislation should provide that, where goods are purchased at auction by a person who has entered into agreement with others to abstain from bidding, the seller may avoid the contract. Where a contract is avoided in such circumstances and the purchaser has obtained possession of the goods without restitution therefor being made to the seller, the parties to the agreement to abstain from bidding should be jointly and severally liable to make good to the seller any loss he has sustained by reason of the agreement. (para. 3.50)

16. The provisions of section 58(3) of the Sale of Goods Act 1893 regulating bids by sellers, or persons employed by sellers to bid, should apply to auctions conducted on online platforms as well as to conventional auctions. The recommendations at paragraph 3.50 on the right of the seller to avoid the contract where goods are purchased at auction by a person who has entered into an agreement with others to abstain from bidding, and the liability of the parties to any such agreement for any loss to the seller, should also apply to online auctions. Issues of definition and the application of the other provisions of section 58 of the 1893 Act to online auctions, or the introduction of rules specific to such auctions, should be the subject of consultation with industry and consumer interests. (para. 3.55)

CHAPTER FOUR SALE OF GOODS ACTS 1893 & 1980: CONDITIONS AND WARRANTIES, SECTIONS 11 & 13-15 1893 ACT & SECTIONS 12-14 1980 ACT.

17. Future legislation should retain the distinction between conditions and warranties. The legislation should clarify, however, that express contractual terms may be innominate in character where the ordinary principles of construction of the contract lead to such a conclusion. (para. 4.17)

18. 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)

19. The provisions of section 13 of the Sale of Goods Act 1893 on sale by description should be retained in their present form. (para. 4.27)

20. 'Satisfactory quality' should replace 'merchantable quality' as the statutory standard for the purpose of the implied terms as to the quality of goods. (para. 4.43)

21. 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'. (para. 4.48)

22. 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. (para. 4.48)

23. The provisions of Article 2(2)(c) of Directive 1999/44/EC relating to public statements about the specific characteristics of goods should be incorporated in the provisions on implied quality terms in future legislation. (para. 4.50)

24. The definition of the quality of goods as including their state or condition now at section 62 of the 1893 Act should be incorporated in the provision on the specific aspects of the quality of goods in future legislation. (para. 4.50)

25. Section 14(1) of the 1893 Act should not be retained in future legislation. (para. 4.50)

26. Section 15 of the 1893 Act should be retained in amended form in future legislation to provide for sale by model as well as sale by sample and for the other requirements of Article 2(2)(a) of Directive 1999/44/EC on Consumer Sales and Guarantees. (para. 4.57)

27. Section 15(2)(c) of the 1893 Act which limits the implied condition as to quality in the case of sale by sample to defects which would not be apparent on reasonable examination of the sample should not apply to consumer contracts of sale. (para. 4.60)

28. Under section 14(2)(b) of the 1893 Act, the implied general condition as to quality applies in the case of sale by sample where the buyer fails to examine the sample, while the implied condition as to quality specific to sale by sample under section 15(2)(c) of the Act does not apply where the buyer fails to examine the goods and the defect is one that would have been apparent on a reasonable examination of the sample. Future legislation should address this inconsistency by providing that, in the case of commercial contracts of sale by sample, the implied general condition as to quality does not apply to any defect that would have been apparent on a reasonable examination of the sample. (para. 4.60)

29. The implied condition at section 15(2)(b) of the 1893 Act that the buyer shall have a reasonable opportunity of comparing the bulk with the sample should be replaced by a substantively similar right of examination at section 34 of the Act. (para. 4.62)

30. The implied warranty as to the availability of spare parts and an adequate after-sale service at section 12 of the Sale of Goods and Supply of Services Act 1980 should in principle be retained in future legislation. The operation of the section, including the reasons for its under-utilisation, should be the subject of consultation with interested parties. (para. 4.68)

31. A provision along the lines of section 13 of the 1980 Act on the implied condition of freedom from dangerous defects in motor vehicles should be retained in future legislation, and should be supplemented by a presumption that the defect existed in the vehicle at the time of the contract of sale. The burden of proof should be on the seller to show either that the defect was drawn specifically to the attention of the buyer who undertook to repair it before use, or that the defect arose after the contract was concluded. (para. 4.73)

32. Section 14 of the 1980 Act on the liability of finance houses should be retained in future legislation and extended to cover similar transactions involving the supply of services. (para. 4.77)

CHAPTER FIVE SALE OF GOODS ACT 1893: EXCLUSION OF IMPLIED TERMS AND CONDITIONS, SECTION 55

33. The 'fundamental breach' of contract as a rule of law should not be applied in any Irish contract for the sale of goods or the supply of services, and the new legislation that will replace the 1893 and 1980 Acts should specifically abrogate that rule. (para. 5.10)

34. Clauses exempting the implied statutory terms as to goods in consumer sales and related contracts should be automatically unfair in all circumstances under the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 and 2000. The 1995 Regulations should be amended in order to give effect to this recommendation. (para. 5.16)

35. Clauses exempting the implied statutory terms as to goods in commercial sales and related contracts should be unenforceable unless shown to be fair and reasonable. (para. 5.22)

36. The 'deals as consumer' test at section 3 of the 1980 Act which governs the application of section 55 of the 1893 Act and a number of the provisions of the 1980 Act should be repealed. The definition of 'consumer' for the purpose of the regulation of exemption and other clauses in future legislation should refer accordingly to a natural person acting for purposes unrelated to his or her business. (para. 5.22)

37. The provisions at sections 12(3) and 13(9) of the Sale of Goods and Supply of Services Act 1980 regarding contract terms which exempt any or all of the implied terms as to spare parts and after-sale service and the safety of motor vehicles should be amended in future legislation so that they apply on the same basis as the provisions governing the exemption of other terms implied by the 1893 Act. (para. 5.25)

38. The provisions regulating exemption clauses in future legislation should include a provision modelled on section 13(1) of the UK Unfair Terms Act 1977 that would specify, and prohibit, a number of the ways in which liability is excluded or restricted. (para. 5.29)

39. Subsection (1) of section 55 of the 1893 Act is at odds with the remainder of the section and should not be retained in future legislation. (para. 5.29)

40. The restriction of section 55 of the 1893 Act and of a number of the provisions of the 1980 Act in their application to consumer sales to 'goods or services of a type ordinarily supplied for private use or consumption' and the exclusion of sales by competitive tender that results from the definition of 'deals as consumer' is not compatible with Directive 1999/44/EC and should not be retained in future legislation. (para. 5.29)

41. Section 11 of the Sale of Goods and Supply of Services Act 1980 on statements purporting to restrict the rights of buyers should be repealed as it duplicates the provisions of the Consumer Protection Act 2007 and the European Communities (Misleading and Comparative Marketing Communications) Regulations 2007. (para. 5.35)

CHAPTER SIX SALE OF GOODS ACT 1893: TRANSFER OF PROPERTY AS BETWEEN SELLER AND BUYER, SECTIONS 16-20

42. Rule 1 of section 18 of the 1893 Act should be amended to make clear that the term 'unconditional contract' does not refer to conditions in the sense of essential terms of the contract. (para. 6.5)

43. Provisions along the lines of those contained in the UK Sale of Goods (Amendment) Act 1995 should be introduced to deal with the issue of unascertained goods forming part of an identified bulk. (para. 6.26.)

44. No other changes are recommended to the provisions governing the passing of property in sections 16 to 18 of the 1893 Act. (para. 6.33)

45. Section 20 of the 1893 Act should be amended to provide that risk will pass with delivery. This provision should be mandatory for consumer contracts of sale, but a default rule for commercial contracts of sale. (para. 6.56)

CHAPTER SEVEN SALE OF GOODS ACT 1893: TRANSFER OF TITLE, SECTIONS 12, 21-23 & 25-26

46. The market overt exception to the *nemo dat* rule at section 22 of the 1893 Act should be repealed. (para. 7.40)

47. The burden of proof for all of the exceptions to the *nemo dat* rule should be harmonised by stipulating that it rests with the seller under section 23 of the 1893 Act. (para. 7.40)

48. Section 23 of the 1893 Act should be simplified by abolishing the distinction between void and voidable. (para. 7.40)

49. Section 23 of the 1893 Act should be amended to provide that, unless the other contracting party is notified of the rescission of the contract, an innocent purchaser from this party should acquire a good title to the goods. (para. 7.40)

50. Section 25 of the 1893 Act should be amended by providing that subsection (2) be brought into line with subsection (1) so as to enable a good title to be acquired by an innocent purchaser regardless of whether or not the person with whom he was dealing appeared to be acting in the course of a business. (para. 7.40)

51. Section 26 of the 1893 Act on the effects of writs of execution should be repealed and transferred to courts legislation. (para. 7.40).

52. Sections 2, 8 and 9 of the Factors Act 1889 should be repealed and consolidated in the new legislation that will replace the 1893 and 1980 Acts. (para. 7.40)

CHAPTER EIGHT SALE OF GOODS ACT 1893: PERFORMANCE OF THE CONTRACT I – DELIVERY OF THE GOODS, SECTIONS 10, 27-33 & 37.

53. The default rule at section 10(1) of the 1893 Act should be reformulated in line with those at sections 17(2) and 18 of the Act to provide that, for the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, and the circumstances of the case. (para. 8.13)

54. The provision for a thirty-day default delivery rule in the recently agreed Consumer Rights Directive will, in the case of consumer contracts of sale, replace the rule at section 29(2) of the 1893 Act requiring delivery within a reasonable time where the seller is bound to send the goods to the buyer, but no time for sending the goods is fixed. The existing 'reasonable time' rule should be retained for commercial contracts of sale. (para. 8.23)

55. Section 32 of the 1893 Act on delivery to carrier should be amended to provide that subsections (1) to (3) are not applicable to consumer contracts of sale and that delivery of the goods to the carrier is not delivery of goods to the buyer in consumer contracts of sale unless the carrier has been commissioned by the consumer. (para. 8.23)

56. In the case of commercial contracts of sale, the existing rule at section 32(1) of the 1893 Act that delivery of the goods to a carrier for the purpose of transmission to the buyer is deemed *prima facie* to be a delivery of the goods to the buyer should be retained. (para. 8.23)

57. Section 33 of the 1893 Act on risk where goods are delivered at a distant place should be repealed. (para. 8.23)

58. 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. (para. 8.35)

59. 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. This general right of partial rejection should replace the limited right of partial rejection for goods of mixed description at section 30(3) of the 1893 Act. Future legislation should also state that section 11(3) of the 1893 Act is subject to the provision on partial rejection. (para. 8.39)

CHAPTER NINE SALE OF GOODS ACT 1893 PERFORMANCE OF THE CONTRACT II – EXAMINATION, ACCEPTANCE AND REJECTION OF THE GOODS, SECTIONS 34-37.

60. Future legislation should integrate the examination provision at section 34(1) of the 1893 Act with the acceptance provisions at section 35 of the Act in order to clarify the interrelation between the provisions on the examination and acceptance of goods. (para. 9.14)

61. Where acceptance by the buyer is subject to his having a reasonable opportunity of examining the goods for the purpose of ascertaining their conformity with the contract, future legislation should provide that consumer buyers cannot lose this right by agreement, waiver or otherwise. (para. 9.16)

62. The rules on acceptance in future legislation should be amended to provide 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. (para. 9.21)

63. In the case of consumer contracts of sale, intimation by acceptance should be excluded from the rules governing acceptance in future sale of goods legislation. (para. 9.21)

64. 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.

(b) the buyer asks for, or agrees to, the repair of the goods. (para. 9.28)

65. The time period for the exercise of the right to reject goods not in conformity with the contract should normally be thirty days in the case of consumer contracts. (9.44)

66. Where the normal thirty-day period for rejection is incompatible with the nature of the goods, it should be open to the seller to argue for a rejection period shorter than thirty days. (para. 9.44)

67. Where it is reasonably foreseeable by both parties to the contract of sale that a longer period will be needed to examine the goods, the consumer should be able to argue for a rejection period longer than thirty days. (para. 9.44)

68. Except where the contract of sale provides otherwise, the time period in non-consumer sales for the buyer's right to reject goods not in conformity with the contract should normally be thirty days. As in the case of consumer sales, the seller or buyer would be entitled to argue for a shorter or longer period where the nature of the goods made a shorter period more appropriate or it was reasonably foreseeable that the buyer would need a longer period of time in which to examine the goods. This recommendation should be reviewed if evidence emerges that the proposed rule is unsuited to certain types of commercial contract. (para. 9.44)

69. For the avoidance of doubt, any non-consumer contract of sale that stipulates a time limit within which the buyer must exercise a right to reject non-conforming goods should be subject to the statutory test of fairness and reasonableness. (para. 9.44)

70. The remedial frameworks for consumer contracts of sale under the Sale of Goods Acts and the Consumer Sales and Guarantees Regulations should be integrated by

providing that the following would comprise remedies of first resort, exercisable at the choice of the consumer, for goods not in conformity with the contract:

- termination of the contract and full refund of the price within a normal thirty-day period or, in specified circumstances, a longer or shorter period;
- replacement of the goods;
- repair of the goods. (para. 9.53)

71. Where the repair or replacement of the goods are the remedies of first resort, the consumer should be entitled to proceed to the remedies of termination and full refund or reduction of the price where:

- The seller has not completed the repair or replacement within a reasonable time or without significant inconvenience to the consumer; or
- The lack of conformity of the goods has not been remedied by the first repair or first replacement. (para. 9.53)

72. The remedy of termination and refund should apply to 'minor' defects where such defects constitute a breach of the implied condition of satisfactory quality in consumer contracts of sale. (para. 9.53)

73. The thirty day period for rejection of the goods not in conformity with the contract should, where applicable, be suspended while repairs or discussions about repairs take place. (para. 9.53)

74. The presumption that a lack of conformity which becomes apparent within six months of the delivery of the goods existed at the time of delivery should apply in consumer contracts of sale to the remedy of termination and refund in the same way as to the remedies of repair and replacement. (para. 9.53)

75. The presumption that a lack of conformity which becomes apparent within six months of the delivery of the goods existed at the time of delivery should apply in consumer contracts of sale for a further period of six months where replacement goods are supplied as a remedy for goods not in conformity with the contract. (para. 9.53)

76. In the case of commercial contracts of sale, the right to reject and the related rules on examination and acceptance would operate in tandem with the statutory 'cure'

provision for commercial contracts of sale recommended at paragraph 11.36. (para. 9.53)

CHAPTER TEN SALE OF GOODS ACT 1893: RIGHTS OF UNPAID SELLER AGAINST THE GOODS, SECTIONS 38-48.

77. For the avoidance of doubt, the provision at section 39(2) of the 1893 Act should be amended in future legislation to provide that the buyer has a right of resale. (para. 10.6)

78. The unpaid seller's lien at sections 41-43 of the 1893 Act should be retained in future legislation. (para. 10.22)

79. The right of stoppage in transit at sections 44-46 of the 1893 Act should be repealed. If evidence is forthcoming from future consultations that the right retains some utility in present-day commercial practice, this recommendation should be reviewed. If the right is retained following such a review, the conditions governing its operation should be simplified. (para. 10.22)

80. Sections 48(3) and (4) of the 1893 Act should be amended in future sale of goods legislation to clarify that:

(1) The seller's right of resale applies where:

(a) the goods have not been delivered to the buyer;

(b) the buyer's breach of contract is a repudiatory breach; and

(c) the contract has been terminated.

(2) Where the seller lawfully exercises a right of resale, any property in the goods which has passed to the buyer revests in the seller. (para. 10.32)

CHAPTER ELEVEN SALE OF GOODS ACT 1893: ACTIONS FOR BREACH OF CONTRACT, SECTIONS 49-54.

81. The Group favours the adoption of a provision linking an action for the price to delivery modelled on Section 9.11 of the Canadian Uniform Sale of Goods Act, as adopted in 1982. This should replace Section 49 of the 1893 Act. (para. 11.12)

82. Section 50 of the 1893 Act should be retained in slightly amended form as follows: .

1) 'Available market' should be defined in line with case law dicta as meaning that the situation in the particular trade in the particular area is such that the goods in question can be freely sold.
2) The section should incorporate provisions on the lines of those at section 9.10 of the 1982 Canadian Uniform Sales law or section 2-706 of the Uniform Commercial Code on sellers' right of resale.
3) No specific legislative provisions are recommended in section 50 to deal with the problem of lost volume sellers. (para. 11.21)

83. The reference to 'specific or ascertained goods' should be deleted from the first sentence of section 52. A new second sentence as follows should also be added to the section:

> In particular, the court shall consider, in the case of goods that are physically or commercially unique for that buyer, whether the circumstances make specific performance an appropriate judgment or decree for the court. (para. 11.28)

84. A statutory cure provision along the lines of that at Article 46 of the United Nations Convention on the International Sale of Goods should be introduced for commercial contracts of sale in future legislation. (para. 11.36)

85. The words 'prima facie' should be deleted from section 53(5) on the estimation of loss in the case of breach of warranty of quality. (para. 11.36)

CHAPTER TWELVE: SALE OF GOODS AND SUPPLY OF SERVICES ACT 1980: MISREPRESENTATION, SECTIONS 43-46.

86. Serious consideration should be given to the introduction of statutory provisions on misrepresentation that would apply to contracts generally. (para. 12.23)

87. The application of the statutory provisions on misrepresentation to consumer hire agreements should be clarified. The provisions should also be extended to commercial hire agreements. (para. 12.23)

88. A new definition of 'contract' as follows should be included for the purposes of the misrepresentation provisions in future legislation:

> 'contract' means a contract for a sale or supply of goods, a hire purchase agreement, an agreement for the licensing or letting of goods or a contract for the supply of services or any combination in whole or in part of any of the aforesaid. (para. 12.23)

89. Future legislation should provide that the statutory provisions on misrepresentation are a supplement to, and not a replacement for, the rules of the common law and equity. (para. 12.23)

90. Future legislation should include provisions setting out the conditions under which an innocent party can rescind a contract on grounds of misrepresentation. The rules at sections 7(4)(b) and 5 of the New Zealand Contractual Remedies Act 1979 offer a useful model in this respect and provisions along similar lines should be incorporated into Irish law. (para. 12.25)

91. Future legislation should include provisions setting out the basis for the determination of damages for innocent, negligent and fraudulent misrepresentation respectively. Definitions of the three forms of misrepresentation should be included accordingly in the legislation. (para. 12.30)

92. Future legislation should incorporate the common law prohibition on the exclusion of liability for fraudulent misrepresentation. (para. 12.36)

93. Contract terms that exclude or limit liability for other forms of misrepresentation should be permissible where shown to be 'fair and reasonable'. (para. 12.36)

94. A provision along the lines of section 13(1) of the UK Unfair Contract Terms Act which elaborates on the ways in which exemption clauses may seek to exclude or restrict liability should be added to the statutory provisions on the exemption of liability for misrepresentation. This would help to clarify the nature and type of clauses seeking to exclude or restrict liability for misrepresentation which come within the scope of the statutory provisions. A similar recommendation is made at paragraph 5.29 above in respect of clauses seeking to exempt liability for the implied undertakings under the 1893 Act. (12.36)

CHAPTER THIRTEEN SALE OF GOODS AND SUPPLY OF SERVICES ACT 1980: GUARANTEES AND MISCELLANEOUS (UNSOLICITED GOODS, DIRECTORY ENTRIES AND REGULATIONS), SECTIONS 15-19, 47-49 & 51-54

95. There should be a single set of statutory rules on product guarantees in future legislation. Those rules should be based on the provisions of sections 15-19 of the Sale of Goods and Supply of Services Act 1980 along with the addition of those elements of the guarantee provisions of Directive 1999/44/EC not found in the Act, including the requirement that guarantees be expressed in English. (para. 13.10)

96. The provisions regarding guarantees in future legislation should, like the existing statutory provisions, apply to all purchasers of goods covered by guarantee. (para. 13.14)

97. An extensive review of Irish extended warranty documents and practices should be undertaken across all sectors in which extended warranties are commonly available. As an interim measure, regulations based on the UK Supply of Extended Warranties on Domestic Electrical Goods Order 2005 should be introduced to regulate extended warranties in electrical retailing. (para. 13.17)

98. The conditions governing the receipt of unsolicited goods under section 47(1) of the Sale of Goods and Supply of Services Act 1980 should be repealed. Persons receiving unsolicited goods should be entitled to treat them as an unconditional gift, and the rights of the sender to such goods should be extinguished, without regard to such conditions. The provisions on unsolicited goods and services which are currently contained in separate pieces of legislation should also be brought together in future legislation. (para. 13.28)

99. The supply of unsolicited goods or services to businesses should be regulated by provisions similar to those governing the supply of such goods and services to consumers under Directives 97/7/EC and 2005/29/EC. (para. 13.30)

100. Section 48 of the 1980 Act should be amended to permit agreement to a charge for a first-time directory entry to be made on a durable medium where there has been

prior provision of prescribed information about the directory and the charge. (para. 13.42)

101. The rules at Section 48 of the 1980 Act regulating orders for first-time directory entries should also be revised to permit such orders to be made by electronic means. The content of the future rules on first-time orders should be the subject of consultation with directory companies and business groups in order to ensure that effective safeguards are maintained against the activities of rogue directory companies. (para. 13.42)

102. Section 48 of the 1980 Act should be further amended to provide that the requirements relating to orders and payment for renewed or extended directory entries are simplified along the lines set out in the UK Regulatory Reform (Unsolicited Goods and Services Act 1971) (Directory Entries and Demands for Payment) Order 2005. (para. 13.42)

103. Section 49(2) of the 1980 Act should be repealed and replaced by a provision indicating the conditions which an invoice or similar document must satisfy if it is not to be regarded as asserting a right to payment. (para. 13.42)

104. Future legislative provisions on directory entries should take full account of e-commerce legislation currently in force. (para. 13.42)

105. Regulations governing print size and related presentational issues in consumer contracts should be introduced. The content of such Regulations should be determined after consultation with business and consumer interests. (para. 13.50)

106. The Minister for Jobs, Enterprise and Innovation should be empowered to make regulations requiring the issue of a receipt in consumer transactions. The scope and manner of application of such a requirement should be the subject of consultation with consumer and business interests. (para. 13.49)

CHAPTER FOURTEEN: I NON-SALE CONTRACTS FOR THE SUPPLY OF GOODS & II SALE OF GOODS AND SUPPLY OF SERVICES ACT 1980: SUPPLY OF SERVICES, SECTIONS 39-42

107. 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. The concept of 'contract for the transfer of goods' in the UK Supply of Goods and Services Act 1982 offers a suitable framework for such consolidation. (para. 14.14)

108. A separate Consumer Contract Rights Act should be enacted that would incorporate the main statutory provisions applicable to consumer contracts, including the provisions of the recently agreed Consumer Rights Directive and of Directive 93/13/EC on Unfair Contract Terms. 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 and Supply of Goods and Supply of Services Act. (para. 14.14)

109 The implied statutory undertakings as to goods applicable to consumer hire-purchase and hire agreements under Parts VI and VII of the Consumer Credit Act 1995 should apply also to commercial hire-purchase and hire agreements in future legislation on the sale and supply of goods and the supply of services. (para. 14.14)

110. The restriction of the definition of 'hire agreement' in the Consumer Credit Act 1995 to contracts of more than three months' duration should not be retained in future legislation. (para. 14.14)

111. Future legislation should clarify that goods supplied 'free' or at a reduced price when bought in conjunction with other goods under promotional campaigns are subject to the same implied quality and other terms as goods purchased for a price. (para. 14.14)

112. Future legislation should also clarify that goods supplied under loyalty schemes are subject to the same implied quality and other terms as goods supplied under a contract of sale. (para. 14.14)

113. A broadly-based definition of 'services' modelled on the definition at section 2(1) of the Consumer Protection Act 2007 should be included in future legislation. This definition should remove the exclusion in the present definition of meteorological or transport services provided by the Minister for Transport. (para. 14.21)

114. The current restrictions on the application of section 39 of the 1980 Act, and on the applicability of exclusion clauses under section 40 of the Act, to contracts for the carriage of passengers or goods should be removed. (para. 14.21)

115. The implied terms as to the quality of services should be classified as conditions of the contract in future legislation. (para. 14.30)

116. 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. (para. 14.38)

117. Future legislation should expressly provide that provisions on implied terms in contracts for the supply of services are without prejudice to any rule of law that would impose stricter duties of skill and care. (para. 14.38)

118. 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 reasonably fit for any particular purpose, and of such a nature and quality that it can reasonably be expected to achieve any particular result, that the consumer makes known to the supplier as the particular purpose for which the service is required or the result that the consumer desires to achieve. This provision should apply both to consumer and commercial contracts for services. (para. 14.38)

119. All of the implied terms applying to contracts of sale should also apply to goods supplied under a contract of service in which the property in the goods is transferred from seller to buyer. (para. 14.40)

120. Contract terms which exclude the terms implied by statute into commercial contracts for services should be regulated on the same basis as exemption clauses in commercial contracts of sale, namely that they are unenforceable unless shown to be fair and reasonable. (para. 14.44)

121. Contract terms which exclude the terms implied by statute into consumer contracts for services should be automatically unfair in all circumstances under the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 and 2000. The 1995 Regulations should be amended in order to give effect to this recommendation. (para. 14.44)

122. Section 41 of the Sale of Goods and Supply of Services Act 1980 on statements purporting to restrict the rights of recipients of services should be repealed in line with the recommended of section 11 of the Act on statements purporting to restrict the rights of buyers. (para. 14.46)

CHAPTER FIFTEEN: UNITED NATIONS CONVENTION ON THE INTERNATIONAL SALE OF GOODS

123. Ireland should accede to the United Nations Convention on Contracts for the Internatonal Sale of Goods. The new legislation that will replace the 1893 and 1980 Acts should include the provisions necessary to give effect to the entry into force of the Convention in Ireland. (para. 15.9)

124. Ireland should not avail of the option of making a declaration under Articles 92-96 of the Convention. This recommendation should be reviewed if consultations provide evidence of convincing grounds for any or all of the derogations provided for under these Articles. (para.15.12)

ANNEX II

MEMBERSHIP AND STAFF OF REVIEW GROUP

Robert Clark, Chair, Emeritus Professor of Law University College Dublin.

Tony Burke, head of commercial department Mason, Hayes and Curran Solicitors, nominee of the Irish Exporters' Association.

Caterina Gardiner LL.B (Dub.), LL.M (NUI), lecturer in law NUI Galway.

Judy Dunne, assistant CEO and nominee of the Consumers' Association of Ireland.[1]

Roderick Maguire LL.B., LL.M. (Lond.), M.A., B.L., Honorary Secretary and nominee of the Bar Council of Ireland.

Sean Murphy, legal adviser to, and nominee of, the National Consumer Agency.

Richard Nesbitt S.C., Chairman of Arnotts Ltd, nominee of IBEC.[2]

Kevin O'Higgins, solicitor, nominee of the Incorporated Law Society.

Nathan Reilly LL.B (Dub.), LL.M. (Cantab.), Ph.D (Dub), barrister.

Dr. Fidelma White, B.C.L., LL.B., LL.M (NUI), LL.M (Lond.), LL.D (NUI)**,** Senior Lecturer in Law University College Cork.

Researchers

Evelyn Boyce (January-December 2009)

Gerard Kelly (January-December 2009)

Dr. Ewa Komorek (February-October 2010)

Kevin O'Sullivan (February-November 2010)

Secretariat

Bill Cox, Department of Jobs, Enterprise and Innovation

Margaret Dunniece, Department of Jobs, Enterprise and Innovation

[1] Replaced Michael Kilcoyne as nominee of Consumers' Association of Ireland from April 2009.
[2] Participated in the work of the Group to mid-2009 and contributed to the Position Paper on the proposed Consumer Rights Directive, but was unable to participate thereafter.

ANNEX III

LIST OF SUBMISSIONS AND MEETINGS

The following organisations and individuals made written submissions to the Review Group on the legislation governing the sale of goods and supply of services :

Consumers' Association of Ireland

Irish Hardware and Building Materials Association

Matheson Ormsby Prentice Solicitors

Hugh M. Pollock

RGDATA

Patrick J. Roche

Royal Institute of the Architects of Ireland

The Review Group had the benefit of submissions on the proposed Consumer Rights Directive from the following organisations and individuals:

Business Law Committee of the Law Society of Ireland

Consumers' Association of Ireland

Department of Defence

Department of Transport

Financial Regulator

Robert M. Foley & Associates Architects

Irish Small and Medium Enterprises Association (ISME)

Matheson Ormsby Prentice Solicitors

Kathy Sinnott MEP

Udarás na Gaeltachta

The Review Group met with the following:

Michael Bridge, Professor of Law, London School of Economics

Professor Marco Loos, Faculty of Law, University of Amsterdam

Dr Chantal Mak, Faculty of Law, University of Amsterdam

(Researchers undertaking a study on The Legal Framework for Digital Content Services for Consumers commissioned by the European Commission.)

ANNEX IV

EVOLUTION OF THE SALE OF GOODS ACT 1893 IN OTHER JURISDICTIONS AND THE LESSONS FOR THE REFORM OF IRISH SALES LAW

DR. FIDELMA WHITE, FACULTY OF LAW, UNIVERSITY COLLEGE CORK.

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Chapter 1
Introduction

1.1 The Remit of the Study

This study reports upon amendments made in other common law jurisdictions to the provisions of the Sale of Goods Act 1893 (or legislation based on that Act) which have relevance to, or lessons for, the reform of Irish legislation on the sale of goods and the supply of services. It deals also with proposals for reform by Law Commissions or similar bodies that were not adopted and the reasons for their non-adoption. The jurisdictions surveyed are:

- The United Kingdom
- Canada
- New Zealand
- Australia
- Hong Kong
- Singapore

The report also has regard to relevant provisions of the United Nations Convention on the International Sale of Goods, and of the Draft Common Frame of Reference and the Principles of European Law (Sales) prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law. As the remit of the study is broad, it can be difficult to draw the line between topics that are properly within, and those that are outside, its scope. Certain topics which impact indirectly on the law of sale of goods, such as reform of the doctrine of privity of contract and reform of the parol evidence rule, have been excluded from the study on the ground that they belong more properly to the general law of contract and the law of evidence.

Developments in the law of sale of goods and supply of services and related proposals for law reform in each of the jurisdictions surveyed are discussed separately in Chapters 2-7. Emphasis is placed on those reforms and proposals for reform that are significant in terms of the reform of Irish law on sale of goods and supply of services. Chapter 8 synthesises the findings of the country studies in the preceding Chapters.

Chapter 2
The 1893 Act and the English Legal System

By the end of the nineteenth century, a substantial body of sale of goods common law existed. Furthermore, the case law was not easily reconciled. To make sales law more accessible, there was a partial codification of this area, in the form of the Sale of Goods Act, 1893.[1083] Hence, it is notable that the 1893 Act was itself not a reforming statute. The Act is expressed to be: *An Act for codifying the law relating to sale of goods*, although, as noted above, it is not a complete code of the law of sale of goods.[1084] 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.[1085] 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.[1086]

The 1893 Act has been amended on numerous occasions since its enactment in the UK. A number of these amendments have been mirrored in the Irish legal system. For example, in the UK in 1973, in the Supply of Goods (Implied Terms) Act (an Act mainly concerned with consumer transactions) rules which restricted the extent to which the seller could exclude liability for breach of the statutory implied terms were introduced; a new definition of merchantable quality was provided; and the legislation applied the same or similar statutory implied terms to other supply contracts, such as hire-purchase contracts. In Ireland, the Sale of Goods and Supply of Services Act

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[1083] Other areas of commercial law underwent similar treatment, including bills of sale (Bills of Sale (Ireland) Acts 1879 and 1883); bills of exchange (Bills of Exchange Act 1882); the operation of factors (Factors Act 1889); partnership (Partnership Act 1890); and marine insurance (Marine Insurance Act 1906). All this legislation continues in force in England (and indeed in Ireland) today.

[1084] 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".

[1085] The 1893 Act came into operation on January 1, 1894: 1893 Act, s.63. See further Bridge, 'The evolution of modern sales law', [1991] *Lloyd's Maritime and Commercial Law Quarterly* 52; Goode, *Commercial Law*, (London: Penguin, 3rd 2004) Ch.6; and the Introduction to the First Edition of Chalmer's *Sale of Goods Act 1893* (London: Butterworths, 18th ed., 1981).

[1086] E.g. the distinction between sales of specific goods and sales by description was not maintained, allowing the implication of implied terms to contracts for the sale of specific goods.

1980 sought to make similar (though not identical) amendments. Following the 1973 Act, further changes were made by the Unfair Contract Terms Act (UCTA) 1977 and the 1893 Act and its amending legislation was consolidated and re-enacted as the Sale of Goods Act 1979. Therefore, much of this legislation will not be considered in detail further below. Only amendments that are significant in terms of reforming Irish sale of goods law are explored further below, in chronological order. Further, proposals for reform in relation to sale of goods which have not been implemented will be addressed.

2.1 Law Reform (Enforcement of Contracts) Act 1954 - formalities.

At common law, a contract for the sale of goods required no formalities. The Sale of Goods Act 1893 contained two provisions on 'formalities of the contract': sections 3-4. This common law position was reflected in the opening lines of section 3, which stated:

> Subject to the provisions of this Act and of any statute in that behalf, a contract of sale may be made in writing (either with or without seal), by word of mouth, or partly in writing and partly by word of mouth, or may be implied from the conduct of the parties.[1087]

But section 4(1) of the 1893 Act (which derived from section 17, Statute of Frauds 1677) provided that a contract for the sale of goods of the value of £10 or more was not enforceable by action unless:

(i) the buyer accepts, and actually receives, part of the goods sold;[1088] or

(ii) the buyer gives something in earnest to bind the contract;[1089] or

(iii) the buyer has made part payment;[1090] or

(iv) there is a note or memorandum in writing of the contract and signed by the party to be charged.

- **impetus for reform**

Criticism of the Statute of Frauds and section 4 of the Sale of Goods Act 1893 was widespread and consistent from the turn of the twentieth century.[1091] The Law

[1087] The provision further states that nothing in the section shall affect the law relating to corporations.
[1088] *Hopton v McCarthy* (1882) 10 LR (IR) 266; *Tradax (Ireland) v Irish Grain Board* [1984] IR 1.
[1089] *Kirwan v Price* [1958] Ir Jur 56.
[1090] *Ibid.*

Revision Committee (the fore-runner to today's Law Reform Commission) first recommended that section 4 of the 1893 Act be repealed in 1937 but their report was not accepted.[1092] The matter was remitted to the Law Revision Committee in 1952 when repeal of section 4 of the 1893 Act was again recommended. The proposals of the Committee were accepted this second time.

- **rationale**
  (a) original rationale of Statute of Frauds (and hence s.4, 1893 Act) was widely recognised as obscure and any original *raison d'être* was no longer applicable;[1093]
  (b) financial limit of '£10 sterling' was out of date in the twentieth century; as a result, the provision caught a whole range of transactions that were never intended to come within its scope;[1094]
  (c) the case law on the original section 17, 1677 and section 4, 1893 Act, was numerous and unreliable, as judges sought to navigate their way around statutory provisions in the interests of justice.

- **the nature of the reform**

Section 4 of the 1893 Act, in the United Kingdom, was repealed by section 1 of the Law Reform (Enforcement of Contracts) Act 1954.

- **critique**

There is no significant criticism of this repeal – other than it took so long to achieve![1095] Many jurisdictions have followed the lead of the UK in this regard. Where the provision remains, there are calls for its reform (e.g. increase financial limit) or, more often, its repeal.

[1091] See e.g. Pollock, 29 *LQR* 247; Holdsworth *History of English Law,* Vol. VI, p.396; Williams, *The Statute of Frauds*, *Section IV,* p.283.
[1092] Sixth Interim Report (***1937***), Cmnd. 5449; see further [1937] *MLR* 97.
[1093] Indeed, when drafting section 4 of the 1893 Act, it is noted that Sir MD Chalmers did so with 'obvious reluctance', its inclusion being necessitated by the codifying nature of the statute: Chalmers, *Sale of Goods Act* (12th ed , 1945) p.26; Cheshire Fifoot & Furnston's, *Law of Contract* (Oxford University Press, 15th ed., 2007) pp.259-262.
[1094] In the United States of America, the relevant figure in the Uniform Commercial Code was set at $500. In its latest revision, this figure has been raised to $5,000: see UCC 2-201.
[1095] See e.g. Cheshire Fifoot & Furnston's, *Law of Contract* (Oxford University Press, 15th ed., 2007) p.263.

2.2 Unfair Contract Terms Act 1977

As noted above, UCTA 1977 incorporated the rules on exclusion of liability for breach of the statutory implied terms in relation to contracts for the sale of goods, first introduced in the Supply of Goods (Implied Terms) Act 1973. Again, as noted above, similar rules apply in Ireland in this regard. But it is notable that UCTA does more than merely regulate exclusion clauses in the context of the statutory implied terms (in sections 6-7 in relation to sale of goods; supply of goods and services; and hire-purchase agreements). While UCTA does not impose a general test of fairness to all contract terms, it does, for example:

- in section 2, regulate contract terms and notices which exclude or restrict liability for loss caused by negligence;
- in section 3, provide that where a person makes a contract on his own standard terms or with a consumer, he cannot by reference to any term in the contract:
    (a) exclude or restrict his liability for breach of contract, or
    (b) claim to be entitled
        (i) to render a contractual performance substantially different from that which was reasonably expected of him; or
        (ii) in respect of the whole or any part of his contractual obligation, to render no performance at all,

    unless the clause is a reasonable one to have included in the contract;
- in section 5, provide that a term or notice in a manufacturers' guarantee cannot exclude or restrict liability for any kind of loss or damage caused by goods of a type ordinarily supplied for private use or consumption which prove defective whilst in consumer use as a result of negligence in manufacture or distribution;

Moreover, UCTA applies not only to terms in the form of exclusion clauses but to other terms including terms which:

- make a liability or its enforcement subject to restrictive or onerous conditions;
- exclude or restrict any right or remedy;
- exclude or restrict rules of evidence or procedure.[1096]

[1096] 1977 Act, s.13.

2.3 Supply of Goods and Services Act 1982

The Supply of Goods and Services Act 1982 did not reform the law of sale, as such, but extended some of the features of sale of goods legislation, to contracts for the supply of goods and/or services (a similar extension of the sale rules exists in sections 8-11 of the Supply of Goods (Implied Terms) Act 1973, in relation to hire-purchase contracts; and section 16 of the Supply of Goods (Implied Terms) Act 1973 as regards trading stamps.)

Subject to a number of exceptions, the 1982 Act applies to all contracts for the supply of services, including those which involve the supply or bailment of goods. 'Contract for the supply of service' is defined as a contract under which a person ('the supplier') agrees to carry out a service. Although 'services' is not defined further, the 1982 Act does exclude contracts of apprenticeship or employment. Further exemptions exist under secondary legislation (e.g. section 13 on provision of service with reasonable care does not apply to advocates, arbitrators, company directors etc.).

Pursuant to Part I of the 1982 Act, where the contract involves the supply of goods (with or without services) but the contract is not a sale of goods, implied terms as to description, satisfactory quality, fitness for particular purpose and sample apply (e.g. contracts of exchange/barter, and hire). Where the transferee does not deal as a consumer, his remedies are restricted where the breach is 'minor', as per sale of goods contracts. Moreover, where the transferee deals as a consumer, his rights have been augmented pursuant to the EC Consumer Sales Directive 1999/44.

Further, Part II of the 1982 Act applies to contracts for the supply of services alone and to the work element of 'work and materials' contracts. Section 13 provides simply that where a service is provided in the course of a business there is an implied term (hence an innominate term) that the service will be provided with reasonable skill and care. Liability for breach of this term can be excluded or limited, subject to restrictions imposed by section 2 of UCTA 1977 (cf. with sale of goods contracts, no exclusion or limitation of liability is permissible where the buyer deals as a consumer). Section 14 contains a default rule as regards the time of performance of

the service in the course of a business: accordingly there is an implied term that the service will be performed within a reasonable time. Lastly, section 15 provides another default rule about consideration: there is an implied terms that the party contracting with the supplier will pay a reasonable charge.

Like the original Sale of Goods Act 1893, the 1982 Act has acted as a model for other jurisdictions seeking to regulate the supply of services.

2.4 Sale and Supply of Goods Act 1994

This legislation amended the Sale of Goods Act 1979, which specific reference to the implied terms as to quality and fitness and the remedies available to buyers under the legislation, including issues of examination, acceptance, and rejection. It is notable for altering the core quality standard from merchantable to satisfactory quality. It also introduced changes regarding examination (by extending the right of examination), acceptance (and the effect of requests for repair and sub-sales, for example) and rejection (by prohibiting rejection where the breach was minor in relation to commercial sales and by allowing partial rejection).

- **impetus for reform**

This reform was the result of a long gestation period. Following the introduction and subsequent withdrawal, of a Private Member's Bill which sought to alter the statutory definition of 'merchantable quality', the Law Commission was requested to review the provisions regarding implied terms as to quality and buyer's remedies and to make recommendations, in 1979. In 1983 a joint consultation document was issued.[1097] The Commissions issued the joint final report in 1987,[1098] a less radical document than the earlier consultation documents. This final report considered three closely related questions.

(i) What terms as to quality of the goods should the law imply into supply contracts?

[1097] Law Commission Working Paper No.85 and Scottish Law Commission Consultative Memorandum No.58.
[1098] *Report on Sale and Supply of Goods*, Law Commission No. 160 and Scottish Law Commission No. 104.

(ii) If the supplier is in breach of one of those terms, what should the customer's rights be?

(iii) Should the right to reject continue for a long time or be lost soon after delivery?

The Commission made a total of 24 recommendations, including that the quality standard be changed from 'merchantable quality' to 'acceptable quality' to be defined by a general statement of principle followed by a list of aspects of quality, to include fitness; appearance and finish; freedom from minor defects; safety; and durability (Recommendations 1-5). (It was agreed that the other implied terms as to description, particular purpose, and sample were not in need of reform.) The Commission also made recommendations concerning the rights of examination, rejection and termination (see further below). Under the heading, 'Miscellaneous Matters', the Commission recommended that the decision in *Rowland v Divall*[1099] not be reversed (see further below).

There was no immediate legislative response to this joint Report from the Law Commissions. The matter was resurrected by a DTI Consultation Paper on *Consumer Guarantees* (1992). The main significance of this paper was that in it the Government accepted the Law Commissions' proposals subject to one change: the quality standard would be 'satisfactory' and not 'acceptable' quality.

- **rationale**

The above Law Commission reports sought to address two major aspects of sale of goods law: the implied terms as the quality and fitness (in particular s.14(2), 1979 on merchantable quality); and buyer's remedies following breach of the statutory implied terms (sections 11, 34-35, in particular). In relation to the former, there was a number of commonly held objections to the term 'merchantable quality' and its definition (which had been introduced in 1973). In particular:

- the word 'merchantable' itself was regarded as outmoded (it referred to transactions between merchants and it was not suitable for consumer transactions), and of uncertain meaning, based on case law; and

[1099] [1923] 2 KB 500 (CA).

- the term concentrated too exclusively on fitness for purpose and did not take account of other important aspects of quality, such as appearance and finish, freedom from minor defects, durability and safety.

As regards remedies, there was a view that the existing rules were inflexible (e.g. partly due to the rigid classifications of terms as conditions or warranties; and the 'all or nothing' nature of the rules on rejection) and that the rules needed to be modernised.

- **the nature of the reform**

Closely following the recommendations of the Law Commissions and the proposals in the DTI Consultation Paper, the Sale and Supply of Goods Act 1994 introduced major reforms in relation to the quality and fitness of goods supplied and buyer's remedies, through a process of substitution. The main changes are set out, in outline, below.

(a) The requirement of merchantable was replaced by a requirement of satisfactory quality (still a condition) defined with reference to a general principle and a further list of aspects to quality to include fitness for *all* common purposes (reversing *Aswan Engineer v Lupdine*[1100]); appearance and finish; freedom from minor defects; safety; and durability (new s.14(2));

(b) Reference to the quality of the goods including their 'state and condition' (s. 62, 1893 Act; s.61, 1979 Act) was brought into the implied condition in section 14(2), 1979;

(c) Right of examination (s.34, 1979) is extended such that where goods are delivered and the buyer has not previously examined them, he is not deemed to have accepted them (i) when he intimates acceptance, or (ii) when he does an act inconsistent with the seller's ownership, until he has had a reasonable opportunity of examining them to assess conformity with the contract (new s.35(2), 1979);

(d) Moreover, on the issue of acceptance following lapse of a reasonable time, the amending legislation makes clear that whether the buyer has had a reasonable opportunity of examining the goods is relevant or 'material' in

[1100] [1987] 1 All ER 135.

determining whether the goods have been accepted or not (new s.35(4) and (5), 1979);

(e) Further, a person is not 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 (new s.34(6), 1979);

(f) A right of partial rejection is recognised (including partial rejection within an instalment) (s.35A, 1979) subject to 'commercial unit' proviso;

(g) Section 30(4) which allowed partial rejection where goods did not match the contract description (but not on any other ground) was repealed;

(h) The non-consumer buyer cannot reject the goods and terminate the contract where the breach of ss.13-15 is minor (s.15A(1), 1979);

(i) Section 30 regarding delivery of wrong quantity is amended in relation to non-consumer sales, such that a buyer cannot reject the goods for a minor excess or shortfall (s.30(2)A-E, 1979);

(j) Section 15(2)(b) concerning right of examination and sales by sample was repealed;

(k) In Scotland, the implied terms were all classified as 'terms' (s.15B, 1979), with consequential amendments.

- **critique**

The reform introduced by the 1994 Act was broadly welcomed. However, various aspects of the legislation have been the source of criticism. For example,

- again, there were criticisms from many sources concerning the delay in implementing the Law Commissions' recommendations;
- many criticised what they viewed as the 'patch-work' nature of reform (this was in fact recognised as a deficiency by the Law Commissions themselves in their 1987 Report);
- some academics viewed the new quality standard as consumer oriented and more cosmetic than substantive in terms of altering the law. In fact, subsequent case law provides broad support for this view (e.g. *Clegg and another v Olle Andersson* [2003] EWCA Civ 320; *Albright & Wilson v*

Biachem Ltd & ors [2000] All ER(D) 530 (successfully appealed to House of Lords on other grounds [2002] UKHL 37).

- while the amendments around acceptance and rejection sought to bring clarification to certain matters, case law since the Sale and Supply of Goods Act 1994 evidences the continued uncertainty in the law in this area (e.g. *Clegg and another* v *Olle Andersson* [2003] EWCA Civ 320; *Jones* v *Gallagher* [2004] EWCA Civ 10; *J&H Ritchie Ltd v Lloyd Ltd* [2007] UKHL 9).

2.5 Sale of Goods (Amendment) Act 1994 – abolition of market overt exception

This very short piece of legislation (two sections only) repealed section 22 of the Sale of Goods Act 1979 (formerly section 22 of the 1893 Act) and thereby abolished the *market overt* exception to the *nemo dat* rule.

The fundamental rule of property law that no one can transfer a better title than he himself has - *nemo dat quod non habet* was restated in section 21 of the 1893 Act. Over time, a number of common law exceptions to this fundamental rule were developed, in order to protect innocent purchasers and thus encourage commercial activity by reinforcing the security of sale transactions. These exceptions were set out in sections 21 - 26 of the Sale of Goods Act 1893 and re-produced in sections 21-26 of the UK Sale of Goods Act 1979.[1101] The exceptions relate to agency (section 21, 1893); market overt (section 22, 1893); sale under voidable title (section 23, 1893); seller in possession after sale (section 25(1), 1893) and buyer in possession after sale (section 25(2), 1893). In particular, section 22 provided that 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.

- **impetus for reform**

The matter of title conflicts was considered on a number of occasions. For example, the Law Reform Committee made a number of recommendations in a report published

[1101] Other exceptions exist e.g. see Factors Act 1889, section 2, 8-9.

in April 1966 (Cmnd 2958).[1102] In broad terms, these recommendations sought to simplify, and in some cases amend, the case law that had developed since the 1893 Act, and, in the general interest of the innocent purchaser. Notably, the Committee recommended an extension of the market overt exception, whereby if a person bought goods by normal retail sale or at a public auction he should acquire good title to these goods regardless of whether the seller had a good title.[1103]

The matter was considered again by Professor Diamond in his Review of Security Interest in Goods (HMSO, 1989).[1104] He also seems to have come down on the side of the innocent purchaser and proposed a general principle that where the owner of goods has entrusted to another person, or acquiesced in their possession by another person, then if that person disposes of the goods to an innocent purchaser in the ordinary course of business, the innocent purchaser would get good title.

The immediate impetus for this reform came in early 1994, when the Department of Trade and Industry issued a Consultation Document, *Transfer of Title: Sections 21-26 of the Sale of Goods Act 1979* which, referring to the above reports, made three proposals for reform:

- simplify the law, in favour of the innocent purchase by replacing the existing exceptions with one broad principle;
- abolish the market overt exception;
- extend the principle in Part 3 of the Hire Purchase Acts to all goods, and to goods on lease or covered by a bill of sale.

There are no further details concerning the consultation process or its findings publicly available. Ultimately, only one of the above proposals was given effect to in the Sale of Goods (Amendment) Act 1994: the abolition of the *market overt* exception.

The origins of and rationale for the DTI paper are unclear although without doubt there were representations for the abolition of the *market overt* exception (described

[1102] See [1966] *MLR* 431; see further below.
[1103] Lord Donovan dissenting.
[1104] Aspects of this matter were also considered by the Law Commission in 1983 and 1987, as regards the reversal of *Rowland v Divall*.

as a 'thieves' charter') from those in law enforcement and the fine arts and antique trade (e.g. Council for the Prevention of Art Theft).[1105]

- **rationale**

In relation to the abolition of the *market overt* exception, it was argued that the exception was archaic (dating from medieval times) and anomalous in its application (e.g. all sale from the ground floor within the City of London were included). Moreover, it was argued that it facilitated the laundering of stolen goods through as many as 20 such markets in the UK.

- **the nature of the reform**

The reform involved a simple repeal of one single provision: section 22 of the 1893 Act (thereby leaving the remaining exceptions intact). In effect, this reform strengthens the *nemo dat* principle; accordingly, where goods are stolen, good title cannot pass to an innocent purchaser.

- **critique**

Although there was criticism of the 1994 DTI consultation process and proposals,[1106] there has been little or no criticism of the limited reform introduced by the Sale of Goods (Amendment) Act 1994. The alternative to abolishing the *market overt* exception was its extension, along the lines proposed by the Law Reform Committee in 1966. This proposal was criticised, at the time, as lacking a sound basis (no real empirical data was used to support the Committee's proposals) and for giving insufficient weight to how the proposals would operate in practice.[1107]

With regard to the wider proposals for reform, it may be that the consultation process found little support for such reform: we simply do not know. Hence, these wider proposals remain to be considered at some future date.

[1105] See e.g. *The Times,* 25th July p.5.
[1106] Davenport, "Consultation – how not to do it", [1994] *LQR* 165; Miller, "Transfer of Title: a new legal regime in only three paragraphs", [1994] *LMCLQ* 322.
[1107] Atiyah, "Law Reform Committee: Twelfth Report", [1966] *MLR* 541.

2.6 Sale of Goods (Amendment) Act 1995 – passing of property in bulk

Sections 16-20 of the Sale of Goods Act 1893 (and subsequently ss.16-20 of the 1979 Act) deal with the passing of property between seller and buyer under a sale of goods contact. Essentially, parties are free to agree when property will pass (s.17) but where it is not clear what their intention is, section 18 contains a series of rules of presumed intent for the passing of property in specific goods (Rules 1-3); goods on approval or on sale or return (Rule 4); and unascertained or future goods (Rule 5). Overriding these rules in sections 17-18 is section 16 – a mandatory rule – which provides that no property can pass in unascertained goods until they are ascertained. 'Unascertained goods' is not defined in the legislation but all goods which are not specific – defined as goods which are identified and agreed upon when the contract is made (s.62, 1893) – are unascertained. A common example of unascertained goods is where the buyer purchases part of a larger bulk e.g. 500 tons of wheat from a named ship carrying 1000 tons. In the leading case on ascertainment *re Wait*[1108] it was held that goods are ascertained when they are 'identified in accordance with the agreement *after* [the] contract ... is made'.[1109] The operation of this rule can result in situations quite contrary to modern day expectations, in particular where a buyer has purchased goods forming part of a larger bulk and paid for those goods, indeed he may have received a document purporting to be a document of title to the goods, nevertheless, he does not own the goods while they remain part of the larger bulk. Hence in situations where the seller becomes insolvent before the goods are ascertained, the buyer has no property rights over the goods and is left with a personal action for non-delivery against the insolvent seller. The Sale of Goods (Amendment) Act 1995, by the insertion of two new provisions in the legislation (s.20A and s.20B, 1979 Act), and consequential amendments, sought to remedy the position of pre-paying buyers of goods in bulk by making them tenants-in-common of the bulk.

- **impetus for reform**

A long line of case law illustrated the precarious position of pre-paying buyers of goods in bulk but the issue was highlighted in more modern times by a case decided by the Commercial Court in Rotterdam in 1985 – *The Gosforth*.[1110] The publicity of

[1108] [1927] 1 Ch 606.
[1109] *re Wait* [1927] 1 Ch 606, *per* Atkin LJ at 630.
[1110] See Davenport, "Ownership of Bulk Cargos – The Gosforth", [1986] *LMCLQ* 4.

this case caused concern among commodity traders and the Law Commission was approached by a leading international commodity trading association and asked to consider examining the law in this area. Following a preliminary research programme, in 1989, the Law Commission and the Scottish Law Commission issued consultation papers on the law relating to rights to goods in bulk.[1111] These papers not only consider the issues around bulk goods under the sale of goods legislation but also problems arising out of section 1 of the Bills of Lading Act 1855 and the rights of the buyer of goods to pursue an action against the carrier where goods were lost or damaged while at sea. Two major pieces of law reform resulted from this initial consultation process. The first was the Carriage of Goods by Sea Act 1992[1112] which permitted the lawful holder of a bill of lading (and other transport documents) to sue on the bill of lading simply by virtue of being the holder, whether property in the goods had passed or not. This legislation sought to remedy the deficiencies of section 1 of the 1855 Act (still in force in Ireland) and the resulting common law and rises important question about the adequacy of Irish law.[1113] The second piece of law reform relates to the relevant provision in the sale of goods legislation. A further joint consultation was issued in relation to bulk goods and insolvency: *Sale of Goods Forming Part of a Bulk: Insolvency Aspects* (1991). A final joint report was issued in 1993, *Sale of Goods Forming Part of a Bulk,*[1114] the main recommendations of which were implemented in the Sale of Goods (Amendment) Act 1995.

- **rationale**

Following a thorough consultation process which was supported by empirical data, a number of deficiencies in the existing law were identified as in need of reform. In particular,

(a) **section 16 operated in an anomalous way:** e.g. (i) it probably did not prevent property passing to a buyer who agrees to buy an undivided share in a bulk, expressed as a fraction of the whole (e.g. half the cargo from a named ship) but it did prevent property passing where a specified quantity

[1111] Law Commission Working Paper No. 112, *Rights to Goods in Bulk*, (April 1989); Scottish Law Commission Discussion Paper No. 83, *Bulk Goods: Section 16 of the Sale of Goods Act 1979 and Section 1 of the Bills of Lading Act 1855* (August 1989).
[1112] See further joint Commission reports on *Rights of Suit in respect of Carriage of Goods by Sea* , Law Commission No. 196 and Scottish Law Commission No. 130 (March 1991).
[1113] See generally Bradgate and White, "The Carriage of Goods by Sea Act 1992" (1993) 56 *MLR* 188.
[1114] Law Commission No.215, Scottish Law Commission No.145.

from a larger bulk was bought (e.g. 500 tons from 1000 tons abroad a named ship); (ii) it did not prevent property passing where a buyer purchases the *whole* bulk under one contract, or where one buyer purchases the whole bulk but under several contracts. However, if the whole bulk was purchased by different buyers under separate contracts none of them acquired any property in any goods; (iii) it seemed that if a buyer contracted to buy goods from a bulk and the contract quantity was momentarily separated and then returned to the bulk, the buyer became the co-owner, as tenant in common with the seller, of the new bulk.

(b) **the effect of section 16 was particularly harsh** if the buyer paid the price but the seller became insolvent before the goods were ascertained. The buyer was then left as an unsecured creditor and might see the goods re-sold and the proceeds used to pay other creditors;

(c) more generally, **section 16 ran contrary to the principle of freedom of contract and reasonable expectations**.

The widely held view was that if the law was not amended, traders would alter the proper law of the sales contracts from English law and this would pose a threat to shipping and insurance, as well as legal, businesses in the UK. Notably, although the reform was driven by commercial interests it applies to all sales whether commercial or consumer.

- **the nature of the reform**

Pursuant to the Sale of Goods (Amendment) Act 1995 where there is a contract for the sale of a specified quantity of unascertained goods forming part of an identified bulk, a buyer who has paid for some or all of the contract goods obtains an undivided share in the bulk and becomes a tenant in common of the whole. This undivided share is a halfway house: when the buyer's share of the bulk is separated out and ascertained, property in those goods passes to the buyer in accordance with the normal rules on passing of property found in sections 17-18. This relatively simple proposal required provision to be made for a number of potential problems which recognition of the buyer's interest might create - for instance, if some or all of the bulk is resold, or if there proves to be insufficient in the bulk to satisfy the buyer's contract.

These amendments are to be made by inserting two new sections into the legislation. Section 20A provides for an undivided share in goods forming part of a bulk, while section 20B contains rules of deemed consent by co-owners to dealings in bulk goods. Consequential amendments were also made to section 16, section 18 (Rule 5), and the definition provision.

- **critique**

The reform was broadly welcomed by the commercial community and academics.[1115] However, academic commentary has identified some omissions and criticisms of this reform. In particular:

- unlike e.g. the US UCC, the UK reform is limited to pre-paying buyers. This arguably introduces an inconsistency in the law which otherwise does not take account of payment of the price in determining the passing of property. So, for instance, by excluding the buyer who has not paid for goods the reform permits the seller's insolvency officer to choose whether or not to perform the contract of sale and thus to take advantage of market price movements;
- arguably there is an omission in the legislation in that, there is nothing in the amending legislation about the allocation of risk between seller and buyer where the goods deteriorate before the buyer takes delivery of his share of the goods.
- questions remain as to additions to and withdraws from the identified bulk by a 'rogue' seller;
- the effect of the amending legislation on concepts of possession, and constructive possession in particular, is unclear;
- in more general terms, the reform has been criticised as being piece-meal resulting in lack of coherence in the overall statutory scheme.

[1115] Bradgate & White, 'Sale of Goods Forming Part of a Bulk: Proposals for Reform', [1994] *LMCLQ* 315; Ulph, 'The Sale of Goods (Amendment) Act 1995: co-ownership and the rogue seller', [1996] *LMCLQ* 93; Burns, 'Better Late than Never: the reform of the law on sale of goods forming part of a bulk', [1996] *MLR* 260; Gullifer, 'Constructive Possession After the Sale of Goods (Amendment) Act 1995', [199X] *LMCLQ* 93; Worthington, 'Sorting Out Ownership Interest in a Bulk: Gifts, sales and Trusts', [1999] *JBL* 1; Crinion, ' "All that Glitters …" *Re Wait*, Section 16 and the Peril for the Pre-Paying Buyer: is it time for a fresh approach', [2004] *UCDLR 76.*

There has been no case law exploring this reform reported in the UK or addressing some of the questions raised above re risk, rogue sellers etc. This legislation has been exported to a number of other common law jurisdictions.

2.7 Twelfth Report of the Law Reform Committee, *Transfer of Title in Chattels (1966),*[1116] and Joint Law Commissions Report on Sale of Goods (1987).[1117]

With the exception of the Sale of Goods (Amendment) Act 1994, which repealed section 22 of the 1979 Act on market overt, the legislative rules on conflicts of title have remained largely unchanged since the 1893 Act. This is despite the fact that the topic has been considered, on a number of occasions, as in need of reform.

In *Ingram v Little*[1118] Devlin LJ suggested that it might be possible to apportion loss between an innocent owner and an innocent purchaser where there is a conflict of title resulting from the conduct of some dishonest middle party who has disappeared. Following this suggestion, the topic of conflict of title was referred to the Law Reform Committee which reported in 1966.

The main recommendations of the Committee were as follows:

- the Committee rejected Devlin LJ's suggestion of apportionment because they argued it was impractical / too complicated to implement, especially where there is a string of transactions involved;
- the Committee also rejected the suggestion that there be a fundamental change to the law in favour of the bona fide purchaser for value.

Instead, the Committee made a number of detailed proposals for change which sought to simplify the law and reverse certain case law, in particular:

- the Committee recommended the abolition of the distinction between contracts which are void and voidable (re section 23, 1893; see further Art 2-403 of UCC);

[1116] Cmnd 2958.
[1117] *Report on Sale and Supply of Goods*, Law Commission No. 160 and Scottish Law Commission No. 104.
[1118] [1961] 1 QB 31.

- the Committee recommended the reversal of the decision in *Car and Universal Finance Co. Ltd* v *Caldwell*[1119] and hence that communication is necessary to avoid a contract under section 23, 1893;
- the Committee recommended the reversal of the dicta in *Newtons of Wembley Ltd* v *Williams*[1120] and that the legislation should be clarified to ensure that a buyer in possession can pass good title without the requirement to act as a mercantile agent;
- the Committee criticised the market overt rule and recommended that it be broadened to apply to sales from retail premises. The Sale of Goods (Amendment) Act 1994, in fact, repealed the *market overt* exception under section 22, 1893.
- The Committee recommended the reversal of the burden of proof regarding good faith etc. under section 23 which, unlike all the other exceptions, rests with the original owner.[1121]
- The Committee also recommended the reversal of *Rowland v Divall*[1122] where it had been held that if a purchaser bought goods to which the seller had no title (in breach of s.12(1), 1893) then there was a total failure of consideration and the purchaser could recover the full purchase price from the seller irrespective of any benefit he may have had of the goods in the interim. The effect of this decision could result in the unjust enrichment of the buyer in that he could have prolonged use of the goods without having to pay for them, given his right to claim a refund of the full price paid. This issue was addressed again, including in 1975, in the Law Commission Working Paper No. 65, where a number of proposals were made about the valuation of the unjust enrichment. However, on consultation these proposals were thought too complex and the matter was reserved for consideration by the Law Commissions in 1979. Accordingly, in 1983 a joint consultation document was issued which considered ways in which

[1119] [1965] 1 QB 525.
[1120] [1965] 1 QB 560.
[1121] *Whitehorn Bros v Davison* [1911] 1 KB 463.
[1122] [1923] 2 KB 500 (CA). Despite much criticism, see e.g. *Benjamin's Sale of Goods* (London: Sweet & Maxwell, 7th ed., 2006) para 4-006; Goode, *Commercial* Law (London: Penguin, 3rd ed., 2004) p.214-216; *Atiyah's Sale of Goods* (Harlow: Pearson, 11th ed., 2005) pp.114-118, Rowland *v Divall* was more recently approved, by the Supreme Court in *United Dominion Trust (Ireland) Ltd v Shannon Caravans Ltd* [1976] IR 225, and by the Court of Appeal in *Barber v NSW* [1996] 1 All ER 906.

the buyer's rights could be modified to take account of any use / possession of the goods.[1123] It was suggested that the buyer should not be automatically entitled to recover the full price. Rather than using a valuation of the use and possession, it was suggested that the buyer should have an action for damages or an action for damages subject to a deduction for the innocent party's use of the goods, whichever would yield the greater sum. However, in the joint final report in 1987, the Commissions re-examined the proposals in the Consultation Document and finding that the proposals were too complex, recommended no change in the law.

2.8 Security Interests in Personal Property and retention of title clauses (including issues of conflict of title)

A number of reports have examined the issue of security interests in personal property in England and Scotland and in doing so have made recommendations for reform which would impact on the use of retention of title clauses in sale of goods contracts. These proposals (in part, inspired by the US UCC and Canadian law) have not been implemented to date.

Sales contracts which incorporate retention of title clauses (e.g. 'no property will pass from the seller to the buyer until the price is paid in full') are in effect conditional sale arrangements, under section 19 of the 1979 Act, which have been judicially approved since the late 19th century.[1124] Today, retention of title clauses impact most notably in insolvency situations. Where a buyer who has not paid for the goods supplied under a sale contract, which includes a retention of title clause, becomes insolvent, the retention of title clause enables the unpaid seller to demand delivery of *his* goods, thereby reducing the pool of assets available to other creditors. The standard argument against the operation of such clauses is that they involve more than a simple agreement between the parties about the passing of property. Rather, in effect, they operate as a form of security for the unpaid seller. Based on this analysis, the true construction of a sale contract subject to a retention of title clause, involves the property in the goods passing to the buyer and the buyer granting back to the seller a

[1123] Law Commission Working Paper No.85 and Scottish Law Commission Consultative Memorandum No.58.
[1124] *McEntire v Crossley* [1895] AC 457.

mortgage or charge over the goods to the value of the debt. Further, such mortgage or charge would be unenforceable if not registered under the relevant legislation (retention of title clauses are typically not registered).[1125] In a long line of modern case law, since the 1970s, the courts would appear to have drawn a line in the sand and identified that certain types of retention of title clauses are effective ('simple' clauses - also recognised now under EC law[1126] - and 'all sums due' clauses) whereas other types of clauses have been interpreted as creating a security interest and hence are unenforceable for lack of registration (claims to manufactured products, and perhaps, claims to proceeds to sale). Despite a substantial body of case law and extensive academic literature surrounding retention of title clauses, many aspects of the law relating to retention of title clauses remain unclear and its impact on insolvency controversial. In particular, the *Cork Committee on Insolvency Law and Practice* found that 'the absence of any provisions requiring disclosure of retention of title clauses is unsatisfactory and should be remedied as soon as is possible'.[1127]

The broad issue of security interests over goods (including the use of retention of title clauses) was addressed in 1971 by the Crowther Committee,[1128] and in the Halliday Report, as regards Scotland.[1129] The proposals in these reports were never implemented but were reviewed further in the DTI's *Review of Security Interests in Property* (the Diamond Report, 1989). All these reports recognised a variety of deficiencies in the existing fragmented framework and, based on a policy which emphasises function over form, proposed a single statutory framework for security interests over personal property. In particular, the Diamond Report recommended:

- that the existing law be replaced by new legislation containing a simpler and unified system with similar rules applying to all types of security interest created by agreement;
- that the new legislation be based on Article 9 of the UCC and the Personal Property Security Acts introduced in the Canadian provinces;

[1125] Bills of Sales (Ireland) Acts 1879 and 1883 or Companies Acts 1963-2009.
[1126] The EC Directive on combating late payment in commercial transactions, Directive EC/35/2000, [2000] OJ L 200/35, currently under review by European Commission.
[1127] (1982) Cmnd 8558, para 1639.
[1128] *Report of the Committee on Consumer Credit,* Cmnd 4596, (1971).
[1129] Scottish Law Commission, March 1986.

- that conditional sale arrangements (and hire-purchase agreements) should be treated as creating security interests, without the need for further documentation, and that new legislation should spell this out;
- however, simple and more complex retention of title clauses should be distinguished and treated differently by the law; accordingly, simple clauses, including claims to proceeds, should be treated as a 'purchase money security interests' and secure favourable treatment; but favourable treatment should not extend to claims to manufactured products and all monies clauses;
- most security should be registered by filing a 'financial statement' in a central registry but as regards retention of title clauses such filing would not be linked to each actual security agreement but per customer;
- given the impact of the topic on matters of title conflicts, Diamond also recommended the simplification and rationalisation of sections 23, 24 and 25 of the Sale of Goods Act and section 2 of the Factors Act, and, the repeal of sections 8 and 9 of the Factor Act, thereby widening slightly the protection afforded to innocent purchasers.

As noted above, the recommendations in the Diamond Report were not implemented. Professor Sir Roy Goode addressed the matter also in the wider context of a Commercial Code for the UK, along the lines of the US UCC, a significant part of which would have been a part dealing with personal property security interests.[1130] Despite initial interest in Professor Goode's codification idea, including that expressed by the Department of Trade and Industry, it would appear that the proposal of a Commercial Code fell out of favour, not least, because of the large amount of Parliamentary time that would be required to pass a Commercial Code.

Security interests over personal property returned to the agenda again in the late 1990s when the Secretary of State for Trade and Industry launched a fundamental review of company law. In 2000, the Company Law Review Steering Group published a consultation document which raised the possibility of a 'radical option' of changing the existing system of registration to one of 'notice-filing'. Following a positive response to this proposal, the final report, published in 2001, made such

[1130] See (1988) 14 *Monash LR* 135.

proposal for reform.[1131] However, the Steering Group noted that it did not have sufficient time to consider fully its proposals and in particular whether, as Crowther and Diamond had recommended, any new scheme should cover 'quasi-security devices' such as retention of title clauses. Moreover, the creation and registration of security interests, other than by companies, was outside the remit of the Steering Group. As a result the Steering Group recommended that the matter be referred to the Law Commissions.

The Law Commission published a consultation paper in 2002.[1132] The Paper provisionally proposed a notice-filing system, and associated priority rules, for company charges and this proposal applied to quasi-security devices including retention of title clauses. The intention was to extend such a system to security devices created by unincorporated businesses as soon as possible (replacing the Bills of Sale legislation). Particular attention was paid to security interests created by consumers. Lastly, it was asked whether such a scheme should include a 'restatement' of the rights and remedies of the parties to the security agreement. Response to the paper was mixed.

In response to calls for more details in relation to the proposed scheme, the Law Commission published a 'consultative report' in 2004.[1133] This report contained more details about the operation of the scheme (similar to the Western Canadian model), which would first apply to security interests created by companies and later be extended to unincorporated businesses. As regards retention of title devices the report was more guarded: it did recommend that such devices be brought within the scheme but recognised that this proposal was controversial and so the report sought views about the costs and benefit of this proposal. Responses to this report were again mixed. In particular, there was little support for including retention of title devices in a companies-only scheme.

The Law Commission published its final *Report on Company Security Interests* in 2005 which proposed electronic notice filing, and associated rules, for security

[1131] Final Report, *Modern Company Law for a Competitive Economy,* URN 01/942.
[1132] Consultation Paper No. 164, *Registration of Security Interests: Company Charges over Property other than Land.*
[1133] Consultation Paper No. 176, *Company Security Interests: a Consultative Report.*

interests created by companies.[1134] As regards retention of title devices it was recommended that this matter should be deferred for further consideration after there was a review of the whole question of transfer of title to goods by non-owners, and then it should be considered for all debtors, and not just companies. It has been argued that, in the UK context, the attractions of personal property security legislation as regards retention of titles clauses are questionable.[1135] At common law, there is a significant degree of certainty surrounding the law on retention of title clauses; from the supplier's perspective such a scheme, which would require registration, would make it harder to pursue certain claims e.g. to original goods; and while it would allow a supplier to create a security interest over 'new goods' (not effective at common law) it is not clear that this is a priority for suppliers. While financiers were initially in favour of such a scheme, this attitude changed in the course of the Law Commission's work, not least because of the relative degree of certainty in the law.

2.9 Conclusions

The above analysis illustrates that since the mid-twentieth century, the UK has been most active in terms of reviewing, recommending reform but less frequently amending sale of goods legislation in relation to a wide variety of topics from issues of contract formalities; to matters of quality standards and buyer's remedies; to issues concerning the transfer of property and conflicts of title, and beyond. Nevertheless, the reform agenda can be described as limited and cautious. At no time has there been any attempt to move from the basic framework and principles which underlie the Sale of Goods Act 1893 (as in the US and Canada). Instead, the reform process can be characterised as ad hoc; often focussed on single issues or restricted in scope; and driven by changes in the market and market operators (e.g. consumers; bulk traders; fine art dealers). This patch-work development of the law of sale has been recognised as a deficiency in the law by the English Law Commission (1987) and the position has become exacerbated with the transposition of the EC Consumer Sales Directive, in the form of the Sale and Supply of Goods to Consumers Regulations 2002 (SI 2002 No, 3045) which amends further the Sale of Goods Act 1979. Therefore, while the

[1134] Law Comm No. 296.
[1135] Beale, "The Exportability of North American Chattel Securities Regimes: the fate of the English Law Commission's Proposals", (2006) 43 *Canadian Business Law Journal* 178.

skeleton of 1893 Act remains clearly visible it is not clear how long this position can be sustained, in particular given the impact of the European consumer law agenda.

Chapter 3
The 1893 Act and Canada

Canada is the only jurisdiction under review where a real attempt was made to re-cast sale of goods legislation in recent times, which would involve abandoning the framework and principles of the Sale of Goods Act 1893 as out-of-date and inappropriate to modern commercial conditions and putting in its place a Uniform Sale of Goods Act, inspired by Article 2 of the US UCC. Ultimately, this process failed. Instead, there remains a series of provincial Sale of Goods Acts, which closely reflect the original 1893 Act. Amendments to this legislation have been modest, few in number and ad hoc in fashion. Much of the focus of reform has been on providing further protection to consumers, including by prohibiting the exclusion of liability for breach of various statutory implied terms (akin to the terms implied by the sale of goods legislation) under a variety of Consumer Protection Acts.[1136] The Saskatchewan Consumer Products Warranties Act is notable in this regard because it provides for further implied warranties in consumer contracts for the sale of goods (e.g. acceptable quality) and its scope extends beyond the immediate seller and buyer of goods.[1137] Further consumer legislation deals with unfair or unconscionable practices.[1138]

In this section the development, form and legacy of the Uniform Sale of Goods Act will be considered first and then a number of particular reforms, in relation to formalities, the nemo dat and *market overt* rules; the consumer buyer's lien; personal property securities legislation, and the international sale of goods, will be examined.

[1136] See e.g. Consumer Protection Act, RSBC, 1979; Consumer Protection Act, RSY, 1986; Consumer Protection Act, RSM, 1987; Consumer Protection Act, RSNWT, 1988; Consumer Protection Act, RSNS, 1989; Consumer Protection Act, RSO, 1990. Much of this legislation has been updated, e.g. in Ontario, a new Consumer Protection Act 2002 repeals and replaces the pre-existing Consumer Protection Act 1990 and Business Practices Act 1990; see also Business Practices and Consumer Protection Act, SBC, 2004.

[1137] See further Romero "Jurisprudence on the Saskatchewan Consumer Product Warranties Act", (1983-4) 8 *Can Bus LJ* 288. See also Consumer Products Warranties Act, RSS, 1978; see also New Brunswick Consumer Product Warranty and Liability Act, SNB 1978.

[1138] See e.g. Unfair Trade Practices Act, RSA, 1980; Trade Practice Act, RSBC, 1979; and Business Practices Act, RSO, 1990. Again, much of this legislation has been updated e.g. Consumer Protection Act, RSO, 2002; Business Practice and Consumer Protection Act, SBC, 2004. But see Ziegel, "Is Canadian Consumer Law Dead" (1994-5) 24 *Can Bus LJ* 417.

3.1 Draft Uniform Sale of Goods Act (1981)

In Canada, all the common law provinces adopted, more or less verbatim, the Sale of Goods Act 1893.[1139] Inspired by the US experience, discontent with the law on sale of goods was apparent from the mid-twentieth century onwards in Canada..[1140] However, it was not until the 1970s that the impetus for major reform manifested itself; in the work of the Ontario Law Reform Commission. The Commission published a Report on Sale of Goods (1979) which proposed that a committee be appointed to consider the need for a new, revised, uniform sale of goods legislation. The Commission Report, and draft Bill, was to form the basis of this review. A Sale of Goods Committee was established in 1979. Recognising the many changes that had occurred in Canada since the adoption of the 1893 Act, the Committee agreed with the Ontario Law Reform Commission for the need for a revised Sale of Goods Act tailored to meet Canadian conditions and perceptions and designed to maintain uniformity among the Provinces by the adoption of a Uniform Sale of Goods Act.

Notable Features of the draft Uniform Act

- **Origins and Structure –** The drafting of the Uniform Act was expressly based on Article 2 of the US UCC and the Ontario Law Reform Commission's draft Bill, although the wording of the Uniform Act (as opposed to the UCC) is perhaps closer in style to Irish parliamentary drafting. Like the UCC, the Uniform Act contains a useful text following each section, explaining the purpose and effect of each provision, including its source (e.g. UCC or Sale of Goods Act) and whether the provision is new or not. The Uniform Act is sub-divided into ten parts, which follow the life-cycle of the contract of sale: Part 1 – Interpretation; Part 2 - Scope and Application; Part 3 – General Provisions; Part 4 – Formation, Adjustment and Assignment of Contracts; Part 5 – General Obligation and Construction of Contracts; Part 6 – Transfer of Title and Good Faith Buyers; Part 7 –

[1139] The Sale of Goods Act 1893 was adopted 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 Sale of Goods Act 1893 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.

[1140] See e.g. Sutton, "The Reform of the Law of Sales", (1969) 7 *Alberta Law Review* 130.

Performance; Part 8 – Breach, Repudiation and Excuse; Part 9 – Remedies; and Part 10 – Miscellaneous.

- **Scope and Application** – In broad terms, the scope of the draft Uniform Act is broader than the Sale of Goods Act 1893 and in defining its scope, in a series of more detailed provisions, the Act seeks to bring certainty to specific areas where the law is unclear. For example, the relationship between sales legislation and the personal property security legislation is addressed using a test based on substance rather than form in section 2.2; in an optional provision, the Act can be applied to 'near sales', as a means of encouraging courts to apply the sales legislation by analogy (s.2.2(4)); specific provisions address the sale of minerals and fixtures (s.2.5); the price is payable in money *or otherwise*, so barter comes within the scope of the legislation (s.2.6).
- **General Provisions** – in a controversial provision, a general obligation of 'good faith' in the performance of duties under the contract (but not the enforcement of rights) is imposed (s.3.2).
- **Formation –** It is notable that the draft Uniform Act covers a wider range of topics than the Sale of Goods Act. In particular, and like the Vienna Convention, Part 4 deals with matters of contract formation, in 11 sections. Some of these provisions merely restate the existing law from the Sale of Goods Act e.g. rules on capacity in (s.4.1). Other provisions seek to bring greater clarity to the law e.g. detailed rules on delegation and assignment (s.4.11); while other provisions expressly amend the law with the introduction of a new provision. Examples of such new provisions include:
    - New rules, based on the Vienna Convention, re the mirror image rules (s.4.2(3)-(5));
    - New rules, based on the UCC, dealing with the battle of the forms issue (s.4.3);
    - Changes to the doctrine of consideration including that offers may be irrevocable without consideration (s. 4.4), and variations may be binding without new consideration (s.4.10);
    - Abolition of the parol evidence rule (s.4.8).

  Importantly, there are no formal requirements under the Uniform Act (section 4.2(1)).

- **General Obligations** – the basic obligations to delivery and pay are restated and expanded upon with more detail on the payment obligation, in particular (s.5.1 and s.5.8). Moreover, contrary to the common law, contracts may be concluded despite an 'open price' i.e. the price is not settled. In a key normative provision section 5.2 confers an express power on courts to refuse enforcement of the contract if it was unconscionable at the time it was made. This Part of the legislation addresses, in detail, specific types of sale contracts, including: output and requirement agreements; exclusive dealing agreements, various international sale contracts (fob; cif etc, s.5.19 – s.5.24) and sales on approval and return. In a new provision, section 5.10 deals with liability for 'statements'; addressing the distinction between contractual and non-contractual representations inducing the contract. The implied condition on sale by description is deleted and absorbed in an express warranty (s.5.10), further express and implied warranties as to sample, title, merchantable quality and particular purpose are maintained, with minor amendments. In addition, provision for the direct liability from the 'prior merchant seller' to a 'subsequent buyer', without privity of contract, is made in section 5.18.
- **Transfer of Title –** In another key feature of the draft Uniform Act the concept of title/property is rejected as definitive regarding parties' rights and obligations, e.g. as regards risk; right to sue for the price; and right to reject. Retention of title clauses are recognised as creating 'security interests' only and in the absence of an express agreement to the contrary title passes at delivery (s.6.1). This Part also maintains the basic structure of the nemo dat rule followed by the usual exceptions, sometimes altered and sometimes expanded. For instance, there is a new provision on 'negligent entrustment'; the concept of voidable title is expanded. There is no market overt exception.
- **Performance –** a new concept of 'identification' (replacing ascertainment) is used to resolve various issues (s.7.1); aspects of tender, delivery and shipment are clarified. A seller's right to cure is introduced in section 7.7. Significantly, risk is linked to delivery (s.7.8) and the implication of reject and risk are clarified (s.7.9).
- **Breach, Repudiation and Excuse –** includes provision for part-acceptance, and new grounds of acceptance (s.8.2). Concepts of mistake and frustration are collapsed; the concept of perishing is replaced by 'casualty'; and matters of partial

loss and theft are addressed in the legislation (s.8.11-8.14). The resulting provision has been described as 'complex and extremely detailed' and it is questionable whether this reform proposal would lead to an improvement in the law.[1141]

- **Remedies –** contains an exhaustive 'index' of seller's and buyer's remedies, clarified in a series of detailed provisions.

As noted above, the draft Uniform Sale of Goods Act remains an academic exercise. In commenting on the failure of the Canadian common law provinces to adopt the Uniform Sales of Goods Act, one commentator stated in 1991:

> That they have not yet done so is proof of various things: the ability of merchants to work their way round an enactment that gives them freedom of movement; the fear of conforming to American cultural patterns; and the felling that international unification, as well as the existing intra-Canadian unification, should not lightly be sundered.[1142]

3.2 Provincial Sale of Goods Acts

As noted above, Canadian provincial statutes largely follow faithfully the structure and language of the 1893 Act.[1143] That said, two matters - in relation to formalities and the continued application of the *market overt* rule - are worthy of brief mention.

- **formalities**

There are no formal requirements in the draft Uniform Sale of Goods Act and the relevant provisions have been repealed in some Provinces including British Columbia;[1144] Manitoba;[1145] New Brunswick;[1146] and Ontario.[1147] In other Provinces, formal requirements remain, including in Alberta, Newfoundland, and Saskatchewan

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[1141] Fridman, *Sale of Goods in Canada* (5th ed., 2004) .
[1142] Bridge, 'The Evolution of Modern Sales Law', [1991] *LMCLQ* 52 at 54.
[1143] See generally, Sale of Goods Act 1973, RSNB; Sale of Goods Act 1978, RSS; Sale of Goods Act, 1986, RSY; **Sale of Goods Act 1987, RSM; Sale of Goods Act, 1988, RSNWT; Sale of Goods, 1990, RSPEI;** Sale of Goods Act 1989, RSNS; **Sale of Goods Act 1990, RSO;** Sale of Goods Act 1990, RSN; **Sale of Goods Act 1996, RSBC;** Sale of Goods Act, RSA, 2000.
[1144] RSBC, 1985, c.10, s.8.
[1145] SM, 1982-3-4, c.34,s.1.
[1146] SNB 1987, c.54.
[1147] SO 1994, c.27.s.54. See further Ziegel, "Ontario repeals section 5 of the Sale of Goods Act", (1995) 25 *Can Bus LJ* 478.

where under the relevant sales legislation, formalities apply to contracts of $50 or more. In Nova Scotia, the relevant figure is $40.

- **nemo dat rule and *market overt* exception**

Again, there is variation between the Provinces as regards the application of the *market overt* rule. The rule has been repealed in all the Provinces, except it remains in its original form in British Columbia. Moreover, in British Columbia a further Part (Part 7) was added to the Sale of Goods Act 1996 dealing with Disposition by Agents (incorporating provisions from the Factors Act).

3.3 Pre-Paying Consumer Buyers and Insolvency - a buyer's lien

In the UK, the precarious position of pre-paying buyers of goods who did not take delivery of the goods but subsequently got caught up in the insolvency of the seller focussed on the position of commercial buyers of goods in bulk and lead to the enactment of the Sale of Goods (Amendment) Act 1995 which sought to remedy the position of pre-paying buyers of goods in bulk by making them tenants-in-common of the bulk. In contrast, in British Columbia, the focus was placed on the position of pre-paying consumer buyers of goods, who through the operation of the rules on the passing of property (in particular as regard the purchase of unascertained or future goods) were left with no proprietary rights over the goods purchased and hence were treated as unsecured creditors in the seller's insolvency and unlikely to receive any monies from the insolvency officer. A proprietary claim to the goods by a buyer clearly provides better protection in an insolvency situation than a personal claim for non-delivery. But, the basic difficulty for a buyer in such circumstances is that normally under the statutory rules, payment of the price is not linked to the passing of property (ss.21-23, B.C. Sale of Goods Act 1979 (or ss16-18, 1893 Act)). Rather where 'specific' goods are sold property usually passed at the time the contract is concluded (irrespective of delivery and payment). But where unascertained goods or future goods are sold, the rules are more demanding and required the goods to be 'ascertained and unconditionally appropriated', or 'unconditionally appropriated', to the contract.

- **impetus for reform**

The Law Reform Commission of British Columbia examined and reported on this issue following reports of consumer complaints to a local newspaper, where consumers had paid some or part of the purchase price of goods without taking delivery of them. In each case the seller became insolvent before he could complete his part of the bargain and delivery of the goods to the consumer, leaving the consumer without an effective remedy in certain circumstances. A Working Paper was published in 1986 and a final report in 1987. The reports considered two basic questions: first, as an issue of legal policy, should consumer buyers be singled out as a particular favoured group, when compared with non-consumer buyers or other classes of persons who may have claims on the seller? A positive answer led to a second question. Is it possible to enhance the legal position of the consumer buyer without significantly disrupting business practices or frustrating the legitimate expectations of other interested persons and groups? Ultimately, in its *Report on the Buyer's Lien: a new consumer remedy*[1148] the British Columbia Law Commission recommended a new remedy, in the form of a lien, geared to this particular problem for consumers and not businesses on the basis that consumers were in greater need of protection. This recommendation was implemented in the Consumer Protection Statutes Amendment Act SBC 1993.

- **rationale**

A number of arguments were put forward to support reform in favour of the consumer buyer. In particular, the Law Commission found that:

  - the consumer buyer could be distinguished from others in a similar position, in particular commercial creditors, because the commercial creditor extends credit with a profit motive in mind; he is in a position to acquire accurate information and weigh his risks carefully; he is able to extract higher prices or interest rates to compensate for that risk; he is able to spread his losses efficiently among others with whom he does business, and he may be in a position to extract security to minimize his risk. In contrast, such avenues are not practically open to the consumer buyer;

[1148] LCR93 (1987).

- moreover, the consumer buyers rights to recover the goods purchased may depend on fortuitous circumstances over which he has no control, including, for example, internal stock control procedures of the seller, such as whether the buyer's goods have been separated from the trading stock and identified with the buyer's contact by labelling or other identifying system, for instance.

- **the nature of the reform**

In order to protect the consumer buyer, a statutory, non-possessory lien over all the seller's goods matching the contract description and over any account in a savings institution in which the seller usually deposited proceeds of sale was brought into force by the Consumer Protection Statutes Amendment Act SBC 1993 which added a new Part 9 to the Sale of Goods Act 1979 (now Part 9 of the Sale of Goods Act 1996). These provisions are mandatory and cannot be contracted out of. Accordingly, the buyer's lien arises subject to the following pre-conditions:

(i) if in the usual course of a seller's business the seller makes an agreement to sell goods,

(ii) the buyer pays all or part of the price,

(iii) the goods are unascertained or future goods, and

(iv) the buyer is acquiring the goods in good faith for use primarily for personal, family or household purposes.

The lien is for the amount the buyer has paid towards the purchase price of the goods and is against all goods in possession of the seller, that correspond with the contract description and the property in which has not passed to another buyer. The lien can also apply to any account in a savings institution in which the seller usually deposits the proceeds of sales.

The legislation contains further rules dealing with the termination of the lien (when property passes to buyer or where purchase price has been refunded, at the seller's option); the lien's priority over other security interests; proceeding to enforce the lien and matters of conflict where two or more liens exist over the same property (e.g. any

shortfall is attributed to the buyers' claims in the proportion that their respective claims bear to the sum of those claims).

- **critique**

The Commission's proposals and subsequent legislation were largely welcome by the academic community as providing a 'simple and workable scheme' to protect consumer buyers in certain, thought not all, circumstances.[1149]

This reform can usefully be compared with the UK reform under the Sale of Goods (Amendment) Act 1995. The Canadian reform is both wider and narrower in its scope. It is wider because it applies to both unascertained and future goods whereas the UK reform only applies quasi-specified goods (i.e. unascertained goods from an identifiable source). It is narrower in that the Canadian reform is limited to consumer buyers whereas the UK reform applies to consumers and non-consumers. There are other points of contrast. As against other buyers with liens, the interest operates akin to a tenancy in common when there is a shortfall with each buyer sharing proportionately in the shortfall. Questions remain: the exact nature of the lien is unclear – is it legal, equitable or, perhaps mostly likely *sui generis*? Also, where the lien applies to funds held by a savings institution, questions arise as to how the lien will be reconciled with a competing claim by the savings institution.

An alternative means of protecting the consumer buyer would be to give him an enhanced status under insolvency legislation which could identify his claim as having preferred status over competing unsecured creditors, such as employees' unpaid wages. However, this option was rejected by the Law Reform Commission for a number of reasons. In particular, matters of insolvency come within the jurisdiction of the federal authorities and hence are outside the scope of provincial law reform agencies. More significantly, it was recognised that the law on insolvency had crystallized to a point where the introduction of a new concept would be difficult. Moreover, in many situations where consumer buyers were left unprotected, the provision of insolvency legislation were not invoked. Other alternatives, using the

[1149] See further Wood, 'Law Reform Commission of British Columbia Report on the Buyer's Lien: A new consumer remedy', (1988) 14 *CBLJ* 118; Bridge, 'The Prepaying Buyer and the Bankrupt Seller', (1989) 3 *BFLR* 171; Close, 'The British Columbia Buyer's Lien - a new consumer remedy', (1995) 25 BCLJ 127.

'trust' vehicle, were also rejected as being impractical and placing an unreasonable burden on retail sellers.

3.4 Personal Property Security Acts (PPSA)

While a number of UK reports, notably the Diamond Report (1989), recommended a single statutory framework for security interests over personal property, including purchase money security interests (such a conditional sale arrangements i.e. sale contract subject to a retention of title clause) no such changes have been implemented in the UK. Inspiration for these recommendations came in part from the Canadian experience and the Diamond Report recognised that the Canadian legislation provided useful models of the sort of enactment which could be introduced in the UK.

Personal Property Security Acts, of a similar nature, although different in detail, have been enacted in many Provinces including Ontario in 1967 (though not effective until 1976); in Manitoba in 1973; Saskatchewan in 1980; Yukon Territory in 1980; Alberta in 1990; British Columbia in 1990; New Brunswick in 1995 and Nova Scotia in 1995-6. A Uniform Personal Property Security Act had been adopted by the Canadian Bar Association and the Uniform Law Conference of Canada in 1982, replacing an earlier Uniform Act of 1971.[1150] It is questionable however whether the desired uniformity has been achieved. [1151]

3.5 United Nations Convention on the International Sale of Goods

Canada is also notable for the extent to which all the Canadian Provinces and Territories have now ratified and incorporated the UN Convention on the International Sale of Goods (CISG).[1152] The CISG was adopted by a diplomatic conference in 1980. It establishes a comprehensive code of legal rules governing the formation of contracts for the international sale of goods, the obligations of the buyer and seller, remedies for breach of contract and other aspects of the contract. The Convention entered into force on 1 January 1988.

[1150] Ziegel, "The Uniform Personal Property Security Act 1982", (1982-3) 7 *Can Bus LJ* 494.
[1151] Ziegel, " Personal Property Security Legislative Activity 1986-88", (1989) 15 *Can Bus LJ* 108; Canadian Perspectives on 'How Far is Article 9 Exportable'", (1996) 27 *Can Bus LJ* 226.
[1152] Ziegel, "Canada Prepares to Adopt the International Sales Convention", (1991) 18 *Can Bus LJ* 1.

The CISG was adopted at federal level pursuant to the International Sale of Goods Contracts Convention Act 1991. Upon accession in 1991, Canada declared that, in accordance with Article 93 of the Convention, the Convention would extend to

- Alberta – International Conventions Implementation Act, 1991,
- British Columbia – International Sale of Goods Act 1996,
- Manitoba – International Sale of Goods Act 1989-90,
- New Brunswick – International Sale of Goods Act 1989,
- Newfoundland and Labrador – International Sale of Goods Act 1990,
- Nova Scotia – International Sale of Goods Act 1988,
- Ontario – International Sale of Goods Act 1990,
- Prince Edward Island – International Sale of Goods Act 1988.
- The Northwest Territories – International Sale of Goods Act 1988.

In 1992, Canada extended the application of the Convention to

- Quebec - An Act respecting the United Nations Convention on Contracts for the International Sale of Goods 1991
- Saskatchewan – International Sale of Goods Act 1990-1.
- the Yukon Territory – International Sale of Goods Act 1992.

In 2003, Canada extended the application of the Convention to the Territory of Nunavut – International Sale of Goods Act 1988.

Canada is now one of 74 states which have ratified the CISG.[1153]

3.6 Conclusions

While Canada is notable in terms of its adoption of personal property security legislation and the UN Convention, developments concerning domestic sale of goods, especially outside the consumer sphere, have been minimal. Despite the best efforts of many to bring about reform the Sale of Goods Act 1893, its framework and principles remain largely unaffected by time.

[1153] See further www.uncitral.org.

Chapter 4
The 1893 Act and New Zealand

The Sale of Goods Act 1893 was incorporated into New Zealand law in the Sale of Goods Act 1895. The 1895 Act was subsequently replaced by the Sale of Goods Act 1908 which was a consolidation of the 1895 Sale of Goods Act and sections 10-11 of the Mercantile Agents Act 1890 (an re-enactment of the Factors Act). The 1908 Act, as amended, remains in force today.

This 1908 Act has been amended a number of times. For example, the Contractual Remedies Act 1979 made some amendments in relation to misrepresentation and remedies.[1154] Other amendments / additions have been more consumer-orientated, including the Consumer Guarantees Act 1993. New Zealand is also notable for enacting new personal property security legislation (following the examples of the US and Canada).

Noteworthy features of the relevant sale of goods rules, as amended, are set-out below as well as an outline of the personal property security legislation. Reform proposals in relation to e-commerce are also considered.

4.1 Sale of Goods Act 1908

The 1908 Act remains faithful to the structure and main rules of the 1893 Act.[1155]
Notable features of the legislation, as amended, include:

- The provision on capacity has been amended, by the Minors' Contract Act 1969, such that references to 'infants and minors' have been removed from section 4 of the 1908 Act on capacity and instead this aspect of the law is regulated by separate legislation.
- In relation to formalities, the equivalent of section 4 of the 1893 Act was to be found in section 6 of the Sale of Goods Act 1895, which was itself replaced by section 6 of the Sale of Goods Act 1908 which applied to contracts in excess

[1154] Burrows "The Contractual Remedies Act 1979", (1980) 1 *Canterbury Law Review* 82.
[1155] Manyam, "Sale of Goods Contracts and the Requirement of Fitness for Purpose in the Sale of Goods Act 1908", [2003] *Wko L Rev* 4

of $20. Section 6 of the 1908 Act was repealed by the Contracts Enforcement Act 1956.

- Pursuant to section 3 of the Sale of Goods Amendment Act 2003 (2003 No 35), from 8 July 2003, the definition of goods has been extended to include computer software.
- The phrase 'merchantable quality' is still utilised in section 16(b), without further definition.
- The legislation, in particular the provisions on title conflicts, has been made subject to the Personal Property Securities Act 1999.
- The *market overt* exception was repealed by section 2 of the Sale of Goods Amendment Act 1961 (1961 No 98).
- The rules on examination and acceptance in sections 36 and 37 were modified by the Contractual Remedies Act 1979 to ensure that certain types of deemed acceptances were made subject to a right of examination.
- Importantly, the main provisions of the Sale of Goods Act on implied terms and remedies (sections 10 (ascertainment of the price), 13-17 (statutory implied terms), 38 (buyer not bound to return rejected goods) and 54 (remedy for breach of warranty) do not apply to any supply of goods to which the Consumer Guarantees Act 1993 applies.

Further to the last bullet point above, following criticism of the 1908 Act,[1156] in particular as regards the consumer buyer, new legislation in the form of the Consumer Guarantees Act 1993 was introduced (cf. Saskatchewan Consumer Product Warranties Act, 1977).[1157] This 1993 Act applies to the supply of goods and services (including electricity, gas, telecommunications signals, water and computer software) to consumers, and it sets out various rights (in the form of guarantees, in effect innominate terms, as opposed to conditions and warranties[1158]) and remedies against

[1156] See e.g. the Vernon Report on *An Outline for Post-Sale Consumer Legislation in New Zealand* (1986). See further Harland, "Post-Sale Consumer Legislation for New Zealand", (1988) 3 *Canterbury Law Review 410.*

[1157] Hawes, "Consumer Law Reform: the Consumer Guarantees Bill", (1992) 5 *Canterbury Law Review* 17.

[1158] As far back as 1977, the Contracts and Commercial Law Reform Committee of the Department of Justice produced a Working Paper on Warranties in Sales of Consumer Goods which proposed that the distinction between conditions and warranties in contracts for the sale of goods should be abolished and replaced with a single concept of warranty, with an associated new regime of remedies. No legislation was enacted on the basis of the report, at the time.

business sellers and manufacturers (the remedies available depend on the seriousness of the breach).[1159] Mirroring the sales of goods legislation, the various guarantees relate to title; acceptable quality (defined to include reference to fitness for all common purposes; appearance and finish; freedom from minor defects; safety and durability); fitness for particular purpose, description; sample, price, repairs and spare parts, and express guarantees. Importantly, these guarantees cannot be contracted out of in relation to consumer purchases. Remedies against the seller are outlined in Part 2 of the Act (including rights of remedy and rejection) and remedies against a manufacturer (direct liability) are available under Part 3. Part 4 deals with the supply of services. As well as including guarantees as to reasonable care and skill, the time for completion of a service and the price payable (cf. UK Supply of Goods and Services Act 1982) there is also a guarantee as to fitness for particular purpose of the service and any resultant product. Further detailed rules relate to rights of redress against suppliers of services.

4.2 Personal Property Securities Act

Following a recommendation from the Law Commission in their Report, 'A Personal Property Securities Act (PPSA) for New Zealand',[1160] a Personal Property Securities Act 1999 was enacted in place of the Chattels Transfer Act 1924, Part IV of the Companies Act 1955, Motor Vehicle Securities Act 1989, and the Industrial and Provident Societies Amendment Act 1952.[1161] The PPSA reformed the law relating to security interests in personal property by providing for a new single regime dealing with the creation and enforceability of security interests in personal property; issues of priority between security interests and other types of interests; and, the establishment of an online register of security interests in personal property. Like other similar regimes, under the PPSA, the emphasis is on the substance rather than form of the security agreement and conditional sale arrangements, such as retention of title clauses are treated as security interests under this legislation and afforded "super priority" in certain circumstances.

[1159] See also Fair Trade Act 1986 (based on Division I of Part V of the Australian Trade Practices Act 1974) which prohibits certain misleading and deceptive conduct, false representations and unfair practices, as well as regulating consumer information and issues of safety.

[1160] No. 8, (1989). See further Farrar, "New Zealand Considers a Personal Property Security Act", (1989-90) *Can Bus LJ* 328.

[1161] See further Webb, [2000] *New Zealand Law Review* 175, and [2002] *New Zealand Law Review* 199.

4.3 United Nations Convention on the International Sale of Goods

Following a recommendation from the Law Reform Commission in their 1992 Report,[1162] (based primarily on the growing acceptance of the Convention by New Zealand's main trading partners and satisfaction with its substantive rules), the UN Convention was incorporated by the Sale of Goods (United Nations Convention) Act 1994.

4.4 E-Commerce

In a three part report on E-Commerce,[1163] the Law Reform Commission identified various questions concerning the impact of e-commerce on the domestic legal framework and, based on five key principles (the choice principle, the adaptation principle, the technology–neutral principle, the compatibility principle and the private sector leadership principle), recommended the enactment of legislation, similar to Electronic Transactions legislation in Australia, and in line with the UNCITRAL Model Law,[1164] to remove barriers to e-commerce and to facilitate its development.[1165]

The purpose of the Electronic Transactions Act 2002 is stated to be to facilitate the use of electronic technology by reducing legal uncertainty concerning the effect of information and communications in electronic form and by providing that certain paper-based legal requirements may be met by using electronic technology that is functionally equivalent to those legal requirements.[1166] Accordingly, the Electronic Transactions Act 2002 provides for the validity of information in electronic form and includes default rules regarding the time and place of despatch and receipt of electronic communications. Part 3 addresses electronic transactions and various legal requirements of writing; signatures, retention of documents and information, and, production and access to documents and information, as well as originals. Interestingly, there is no express provision dealing with contracts – offer and acceptance – although clearly electronic contracts (in particular their formation and validity) come within the scope of the legislation. Further, a provision on

[1162] Report No. 23, 'The United Nations Convention on Contracts for the International Sale of Goods: New Zealand's Proposed Acceptance'.
[1163] Report No. 50 (1998), Report No. 58 (1999), and Report No. 68 (2000).
[1164] See further s.6.
[1165] See further Webb, [2001] *New Zealand Law Review* 171.
[1166] Section 3.

acknowledgement of receipt has also been omitted from the legislation, as unnecessary.

4.5 Conclusions

While the shadow of the Sale of Goods Act 1893 is still more than evident in New Zealand, a number of points can be made about developments in the law there, including,

- The existence of separate though related regimes for commercial and consumer sales;
- In relation to the Sale of Goods Act 1908, it is notable that:
    - The formalities requirements have been repealed;
    - The market overt rule has been repealed; and
    - goods have been re-defined to include computer software (this is also the case under the Consumer Guarantees Act, 1983).
- The significance of external influences, in particular, from Australia (regarding e.g. fair trading legislation, and e-commerce legislation) and international harmonising bodies (e.g. UNCITRAL), although the Consumer Guarantees Act is an exception to this pattern.

Chapter 5
The 1893 Act and Australia

Sale of Goods Acts, based on the 1893 Act, were enacted in South Australia and Western Australia in 1895; in Queensland, Tasmania and Victoria in 1896; and in New South Wales in 1923. Much of this legislation remains in force today, subject to amendment. Layered upon this basis framework, at federal and state levels, is a raft of consumer protection legislation, most notably in the form of fair trading legislation which addresses the matters of conditions and warranties in consumer sales and direct producer liability. This current legislative framework at federal and states levels will be considered further below, as well as a number of law reform initiatives at state level. Australia has also enacted e-commerce legislation, as well as incorporating the Vienna Convention at state and territory levels. These areas of the law will be outlined further below.

5.1 Sale of Goods Acts

The principle sales legislation in force today, at state/territory level, is as follows:

- South Australia - Sale of Goods Act 1895
- Western Australia - Sale of Goods Act 1895
- Queensland - Sale of Goods Act 1896
- Tasmania - Sale of Goods Act 1896
- New South Wales - Sale of Goods Act 1923
- Australian Capital Territory - Sale of Goods Act 1954
- Victoria – Goods Act 1958
- Northern Territory - Sale of Goods Act 1972

The structure and substance of much of the 1893 Act remains in the above enactments, despite criticism of the legislation.[1167] A number of features are worthy of further comment.

[1167] See e.g. Sutton, "The Reform of the Law of Sale", (1969) *Alta L R* 130; Lambiris, "Reform of the Law of Sale in Australia", [1996] *Melbourne University Law Review* 690.

- **formalities**

Originally, the sale legislation in all states and territories required that contracts in excess of $20 comply with formal requirements. However, such requirements have been repealed in all states and territories except Western Australia and Tasmania.[1168] The Law Reform Commission of Western Australia has recommended repeal of these formal requirements.

- **merchantable quality**

The implied condition of merchantable quality remains undefined in statutory form as regards commercial sales and is also restricted to goods bought by description from a seller who deals in goods of that description (as in original 1893 Act).

- **sale of bulk goods**

More recently, a number of states have amended the rules on the passing of property in relation to bulk goods in line with the UK's Sale of Goods (Amendment) Act 1995.[1169]

- **nemo dat rule & market overt exception**

The *market overt* exception to the *nemo dat* rule has been repealed in a number of states including New South Wales; Victoria, and Queensland. It remains in force in the other states/territories, although the Law Reform Commission of Western Australia has recommended repeal of this exception also.

Some Sale of Goods Acts have been amended with reference to the relevant personal property security legislation: e.g. New South Wales; and Southern Australia.[1170]

- **miscellaneous**

[1168] Qld, Statute of Frauds 1972, s.3; SA, Statutes Amendment (Enforcement of Contracts) Act 1982, s.4; ACT, Sale of Goods Act 1975, s.2; Vic, Sale of Goods (Vienna Convention) Act 1987, s.9; NSW, Sale of Goods (Amendment) Act 1988; NT, Sale of Goods Amendment Act 1999, s.2.

[1169] NSW, Sale of Goods and Warehouseman's Liens (Bulk Goods) Act 2006; SA, Statutes Amendment (Bulk Goods) Act 2008; Vic Fundraiser Appeals and Consumer Acts Amendment Act 2009.

[1170] See generally, ACT, Sale of Motor Vehicles Act 1977, Part 4A; Tas, Motor Vehicles Securities Act 1984; NSW, Registration of Interests in Goods Act 1986; Qld, Motor Vehicle and Boat Securities Act 1986; SA, Goods Securities Act 1986; Vic, Chattel Securities Act 1987; WA, Chattel Securities Act 1987; NT, Registration of Interests in Motor Vehicles and Other Goods Act 1989.

- **further inclusions -** the Victoria Sale of Goods Act 1958 is notable for its inclusion of a new Part II which addresses the role of consignees and mercantile agents, and documents of title including, in particular, bills of lading, within its scope.

- **sheep's wool and skins -** a number of the Sale of Goods Acts also include special provisions as regard the sale of sheep's wool and skins which seek to prohibit deductions in relation to 'draft allowances'.

- **innominate terms -** the NSW Sale of Goods (Amendment) Act 1988 is notable for its introduction into statute of the concept of an intermediate term. Section 4(5) of the Sale of Goods Act provides:

  > Nothing in this Act shall be construed as excluding a right to treat a contract of sale as repudiated for a sufficiently serious breach of a stipulation that is neither a condition nor a warranty but is an intermediate stipulation.

As noted above, layered on top of the sale of goods legislation, is a raft of consumer protection measures at both federal and state/territory levels. In particular, the Commonwealth Trade Practices Act 1974, as well as addressing anti-competitive practices, provides consumers with a variety of forms of protection: Part V of which contains provisions dealing with the quality and fitness of goods supplied to 'consumers'; the direct liability of producers of defective goods; and remedies in the event of false representations being made in connection with the supply of goods. State legislation also provides protection in relation to consumer sales which generally mirrors the provisions of the Commonwealth Trade Practices Act 1974.[1171]

As regards conditions and warranties in consumer contracts, Part V, Division 2 of the 1974 Act implies into contracts for the supply of goods and services to consumers conditions as to title, description, merchantable quality (defined as in Irish Sale of Goods Act 1893, as substituted by 1980 Act) and fitness for purpose, akin to those in the sale of goods legislation although the application of the legislation differs and the

[1171] See SA, Fair Trading Act 1987, Part 10 Div 2 and Consumer Transactions Act 1972; WA, Fair Trading Act 1987; NSW, Fair Trading Act 1987, Parts 4&5; Qld, Fair Trading Act 1989, Part 3; Tas, Fair Trading Act 1990, Part 2; NT, Consumer Affairs and Fair Trading Act, 1990, Part 5; ACT, Fair Trading Act 1992, Part 2; Vic, Fair Trading Act 1999, Parts 2 & 2A;

legislative phrases may have been interpreted differently, at times. Moreover, these implied conditions are mandatory and cannot be excluded, restricted or modified.

As regards the supply of services in the course of a business, it is interesting to note that, unlike the minimalist approach of the UK Supply of Goods and Services Act 1982, there is a detailed definition of 'services' in section 4 of the 1974 Act:

> ***services*** includes any rights (including rights in relation to, and interests in, real or personal property), benefits, privileges or facilities that are, or are to be, provided, granted or conferred in trade or commerce, and without limiting the generality of the foregoing, includes the rights, benefits, privileges or facilities that are, or are to be, provided, granted or conferred under:
>
> (a) a contract for or in relation to:
>
> (i) the performance of work (including work of a professional nature), whether with or without the supply of goods;
>
> (ii) the provision of, or the use or enjoyment of facilities for, amusement, entertainment, recreation or instruction; or
>
> (iii) the conferring of rights, benefits or privileges for which remuneration is payable in the form of a royalty, tribute, levy or similar exaction;
>
> (b) a contract of insurance;
>
> (c) a contract between a banker and a customer of the banker entered into in the course of the carrying on by the banker of the business of banking; or
>
> (d) any contract for or in relation to the lending of moneys;
>
> but does not include rights or benefits being the supply of goods or the performance of work under a contract of service.

Subject to certain exceptions, section 74 implies a number of warranties in relation to due care and skill of the service provider and fitness for purpose of materials; and fitness for particular purpose of service and materials. In particular, section 74(1) requires that in contracts for work and materials any materials supplied in connection with those services will be reasonably fit for the purpose for which they are supplied. The English Law Commission in its 1979 Report on Implied Terms in Contracts for the Supply of Goods[1172] criticised this section for omitting the qualification that there has to be reliance on the supplier's skill and judgment thereby rendering a supplier

[1172] Law Com. No. 95.

liable for damages even where the customer insisted on using materials contrary to the supplier's advice.

This latter implied warranty in section 74(2) is also of significance. Under the UK Supply of Goods and Services Act 1982 there is no implied obligation on the supplier that the promised services will produce the intended effect. In contrast, pursuant to section 74(2) of the Trade Practices Act there is an implied warranty that where the consumer makes known the purpose for which the services are required or the result that he wishes to achieve, the services will be reasonably fit for that purpose or are such that they might reasonably achieve that result, unless the consumer does not rely on the supplier's skill or judgment, or it is unreasonable for him to do so. In its 1986 report the English Law Commission considered the Australian provisions but thought it would be inappropriate to add them to the 1982 Act because they thought there was as yet no clear evidence of a positive need for an extension of the range of terms implied in the SGSA. Such extension was also opposed by the Hong Kong Law Commission (1990) in part because of the belief that imposing such a statutory obligation could in fact decrease consumer protection because there would be no liability if the supplier could show that the consumer did not rely on his skill or judgment.

The English Law Commission in its 1986 report also considered and rejected the term that the supplier should possess the necessary skill implied in the Irish Sale of Goods and Supply of Services Act. They thought it unnecessary because the customer would not sustain damage unless the supplier failed to exercise reasonable skill. Further, the term was implied at common law and since the SGSA does not affect any term implied by common law, the term would continue to be implied.

In 2009, an Issues Paper, *Consumer rights: statutory implied conditions and warranties* was published. Under its terms of reference the Commonwealth Consumer Affairs Advisory Council has been asked to review the relevant provisions in the Trade Practices Act 1974 and in particular to consider:

- the adequacy of the current implied terms;
- the need for any amendments;

- the need for 'lemon laws' to protect consumers who purchase goods that repeatedly fail to meet expected standards;
- the existence of extended warranties in the marketplace and their interaction with the statutory implied terms.

The outcome of this process is awaited.

Manufacturer's direct liability to consumers is addressed in Part V Division 2A of the 1974 Act. In effect, provided certain conditions are met, these provisions make a manufacturer/importer concurrently liable with the seller of goods to compensate the consumer for any loss or damage arising from:

- the goods not being merchantable;
- the goods not being fit for their particular purpose;
- the goods not corresponding to description; and
- the goods not corresponding to sample.

Manufacturers may be additionally liable for failure to ensure that facilities to service and provide spare parts are available and in relation to guarantees and other express warranties.

Moreover, a regime of strict liability of manufacturers for injury or property damage caused by a defective product is provided for in Part VA of the 1974 Act.

The 1974 Act also contains prohibitions against engaging in unconscionable conduct (Part IVA). Section 51AA codifies the common law by referring to the 'unwritten law' (i.e. the common law). Section 51AB bans unconscionable conduct when supplying goods or services to consumers, and lists a number of factors relevant to determining whether conduct is unconscionable or not, including

(a) the relative strengths of the bargaining position of the supplier and the consumer;
(b) whether, as a result of conduct engaged in by the supplier, the consumer was required to comply with unreasonable conditions;
(c) whether the consumer was able to understand any document relating to the supply of goods or services;
(d) whether any undue influence or pressure etc. was exerted on the consumer;

(e) the amount for which, and the circumstances under which the consumer could have acquired identical goods or services.

Hence, the legislation seeks to clarify the application of unconscionability and circumstances where a consumer is at a "special disability". The inclusion of s51AC, added in 1998, extends unconscionability by, in effect, classing 'small business' as 'business consumers'.[1173]

The Trade Practices Act contains other prohibitions in relation to misleading and deceptive conduct (s.52); false representations (s.53); and other unfair practices.

5.2 Law Reform Commission of New South Wales – Sale of Goods Reports and Papers (1972, 1975, 1987 & 1988)

The matter of sale of goods has come before the Law Reform Commission of New South Wales on a number of occasions in the form of working papers, issue papers, and reports.

The matter of sale of goods law was referred to the Law Commission in 1966, with the following terms of reference:

> To review the law relating to the sale of goods and to review the liability of manufacturers, sellers and other persons having a connexion in the course of trade with goods to buyers, users and other persons suffering damage through defects in goods; and to consider proposing uniform legislation on these subjects throughout the Commonwealth.

However, work on the above terms of reference was delayed for a number of reasons. In particular, the Commission was requested by the Attorney General to make an interim report on the significance of the English and Scottish Law Commission on exemption clauses in contracts for the sale of goods (Law Comm No.24; Scot. Law Comm. No.12). No reform in this regard was ultimately proposed, in particular, the Law Commission of New South Wales stated:

[1173] Legislation controlling unconscionable contracts has also been enacted at state / territory level, e.g. New South Wales Contracts Review Act 1980.

> This Commission thinks that it is probable that the future law as to sale of goods will vary as between England and Australia. British entry into the European Economic Community is likely to lead to assimilation of its law to that of the Market countries. Australia will not necessarily wish to follow that course. There seems to be justification for proceeding to a general revision of the law relating to the sale of goods for Australian purposes without adopting for the time being reforms now being undertaken or considered in England. A general review of this area of law is likely to be more beneficial and easier of implementation than measures of interim relief.

The above terms of reference were addressed in a Working Paper (1975) and, belatedly, in a Second Report on the Sale of Goods published in 1987. The Report made relatively modest recommendations as regards innocent misrepresentation; innominate terms; formalities, passing of property in specific goods and the interplay between examination and acceptance. In particular, the Commission recommended that:

- the Sale of Goods Act 1923 should be amended to make it clear that it does not exclude the right to treat a contract of sale as repudiated for a sufficiently serious breach of an intermediate stipulation;
- the formal requirements in section 9 of the Act should be repealed;
- the passing of property in specific goods should no longer of itself bar rejection of the goods;
- the description of acceptance in section 38 of the Act should be subject to section 37 on right of examination in the case of acceptance by an act of the buyer inconsistent with the ownership of the seller.

This Second Report proved more fruitful and lead to the enactment of the Sale of Goods (Amendment) Act 1988.

Further to the above terms of reference a more fullsome Issues Paper on Sale of Goods was produced in 1988. The Issues Paper identified a number of areas for review and made tentative proposals for reform including that there should be separately reforming legislation dealing with commercial and consumer sales,

respectively. In relation to commercial sales the Commission expressed the following views, or, sought views on the following matters.

- The legislation was in need of review for the purpose of updating the Act but a new Sale of Goods Act was not warranted;
- The Commission identified two types of issues – general contract issues and specific sale of goods matters;
- General contract issues included:
    - misrepresentation aside, what was the appropriate role of equity in sale of goods contracts;
    - should more detailed rules on contract formation be included in the sale of goods legislation (see e.g. UCC and Vienna Convention);
    - should the doctrine of privity of contract be reformed in the context of sales legislation or a wider contract law context;
    - should the distinction between representations and terms be abolished in the context of sale of goods contracts;
- Specific sale of goods issues included:
    - Legislative provision was needed to bring certainty as regard retention of title clauses and their impact on company charges and the need for registration;
    - Should international sale contracts (fob and cif) be addressed specifically in the sales legislation (see UCC) and should aspects of the Vienna Convention be incorporated into domestic law;
    - Should the legislation make clear the distinction between rejection and termination;
    - Are the implied terms satisfactory e.g. should merchantable quality be further defined or updated;
    - Should the concept of cure be introduced;
    - Should issues of mistake and frustration be covered within the sales legislation and if so, should the rules be amended to address gaps in the current legislative rules e.g. unascertained and future goods; partial perishing etc.
    - Should the legislation include rules on claims to damages for late delivery and late payment;

- Should the legislation contain more detailed rules (based on common law) relating to damages claims e.g. regarding causation, remoteness, mitigation , definition of available market etc.;
- Are the nemo date exceptions in need of reform;
- Should a general duty of good faith, or an unconscionability provision be introduced; should either (or both) be limited to the terms of the contract themselves or extended to their enforcement; and should these matters come within the scope of the sale legislation or the wider law of contract.

As regards consumer sales the following views were expressed / sought:

- Separate legislation dealing with consumer sales was required. Further matters for consideration included:
  - The definition of consumer and whether 'small business operator' should come within this definition/protection;
  - The relationship with other legislation;
  - Simplifying the implied terms and remedies regime for consumers;
  - The right to reject should lapse on the first business day one calendar month after purchase, except re perishable goods;

Lastly, the Report considers matters of scope of the legislation (and related contracts of hire, hire-purchase, services etc). The Report also states that there should be specific legislation dealing with contracts for computer software and the Commission identified two areas of particular concern:

- The manner of creation and the scope of the obligations which should be imposed on the supplier of the software.
- The relationship between such terms and copyright under the copyright legislation.

However, no further reports or legislative action followed the Issues Paper and an end to this period of review of the law of sale of goods was marked by a withdrawal of the remainder of this reference by the AG at the request of the Law Commission in 1997.

5.3 Law Reform Commission of Western Australia – Sale of Goods Papers and Reports (1995 & 1998)

In 1989, the Sale of Goods Act 1895 was referred to the Law Reform Commission for general review. At the time of the reference the 1895 Act was virtually identical to the English Sale of Goods Act 1893 and hence the reference arose out of recognition of the need for reform following similar developments in other Australian jurisdictions, Britain and Canada.

Two discussion papers were published in 1995. The first discussion paper dealt with implied terms in sections 12–15 of the Act together with a number of general issues such as the relationship between the Act and the Trade Practices Act 1974 and the distinction between conditions and warranties. The second discussion paper was confined to the issue whether section 59(2) could validly be interpreted as including principles of equity in a sale of goods context with particular reference to misrepresentation, duress, mistake, fraud and equitable interests and remedies.[1174]

The final Report containing the Commission's recommendations was delivered in June 1998.[1175] The Report is notable for recommending only minimal reforms to the Act. These reforms were of an uncontroversial nature and reflected similar reforms in other Australian jurisdictions. In summary, the Commission recommended that:

- The formal requirements in section 4 be abolished.
- The market overt exception to the rule that no one can give better title than he possesses (section 22) be abolished.
- The provisions in section 11 dealing with the passing of property in specific goods be repealed, because the interaction between this provision and the rules in section 18 dealing with when the property in such goods passes produces an unfair result for the buyer.
- The provisions of section 35, dealing with acceptance be amended to give the buyer a realistic right of examination before he is deemed to have accepted the goods.

[1174] Section 59(2) provides that '[t]he rules of common law, including the law merchant, save in so far as they are inconsistent with the express provisions of the Act … shall continue to apply to contracts for the sale of goods'.
[1175] Law Reform Commission of Western Australia, *The Sale of Goods Act 1895,* Project No 89 (1998).

• Further provisions be inserted in sections 59 and 35 to make it clear that equitable principles, as well as those derived from common law, have a part to play in contracts for the sale of goods.

However, to date, there has been no action to implement the Commission's recommendations, despite the modest nature of the reforms proposed.

5.4 Personal Property Security legislation

Following various reports and consultations,[1176] the Personal Property Security Act 2009 and the Personal Property Securities (Consequential Amendments) Act 2009 were enacted. The new uniform scheme is expected to be operational in mid 2011.

5.5 United Nations Convention on the International Sale of Goods

The Standing Committee of Attorneys General decided in 1984 that Australia would ratify the Convention once all States and Territories passed legislation to give effect to the Convention. Australia acceded to the Convention on 17 March 1988 and it took effect from 1 April 1989. The Convention was given legal effect in the various states/territories, as follows:

- Australian Capital Territory - Sale of Goods (Vienna Convention) Act 1987
- New South Wales - Sale of Goods (Vienna Convention) Act 1986
- Northern Territory - Sale of Goods (Vienna Convention) Act 1987
- Queensland - Sale of Goods (Vienna Convention) Act 1986
- South Australia – Sale of Goods (Vienna Convention) Act 1986
- Tasmania - Sale of Goods (Vienna Convention) Act 1987
- Western Australia - Sale of Goods (Vienna Convention) Act 1986
- Victoria - Sale of Goods (Vienna Convention) Act 1987.

5.6 E-Commerce

The Commonwealth Electronic Transactions Act is based on the UNCITRAL Model Law. In May 1999, the States and Territories agreed to exact parallel legislation based on the federal legislation and this has now been achieved.[1177] The legislation

[1176] See e.g. Law reform Commission Report No 64 *Personal Property Securities* (1993).
[1177] NSW Electronic Transactions Act 2000; Vic, Electronic Transactions (Victoria) Act 2000, SA, Electronic Transactions Act, 2000; Tas, Electronic Transactions Act 2000; NT, Electronic Transactions

provides for the legal equality between hard copy and digital copy in relation to writing; signatures; production of documents; and retention of information and documents. It also contains rules on the time and place of dispatch and receipt of electronic communication and the attribution of electronic communications. However, there is not express provision dealing with electronic contracts and issues concerning the formation of contracts online and the incorporation of terms remain to be decided at common law.

5.7 Conclusions

Despite a number of papers and reports on reform of the law of sale of goods in some states, the sale of goods legislation in the various states and territories is still closely linked to 1893 Act (e.g. with merchantable quality remaining undefined in a commercial context). Broadly speaking, any reforms which have been enacted are modest and uncontroversial including:

- Repeal of formalities requirements in the majority of states/territories;
- Repeal of market overt rules in some states.

Reform of the law on bulk sales, where it has occurred, has followed UK legislation. More ambitious plans for reform at state/territory levels (e.g. see NSW Issues Paper 1988) appear to have been shelved. The reform agenda has largely been driven at federal level (see most recently the 2009, an Issues Paper, *Consumer rights: statutory implied conditions and warranties*).

Despite continued reference to the 1893 Act, in the form of the states legislation of sale of goods, there is some evidence of a move away from UK developments (except re bulk sales) and a move towards more regional harmonisation (with New Zealand) and more international driven harmonisation (e.g. UNCITRAL's Model Law on E-Commerce).

(Northern Territory) Act, 2000; Qld, Electronic Transactions (Queensland) Act 2001; ACT, Electronic Transactions Act 2001; WA, Electronic Transactions Act 2003.

Chapter 6

The 1893 Act and Hong Kong

The Sale of Goods Act 1893 was originally adopted in Hong Kong in 1896. Since then it has been amended a number of times. With the establishment of the Hong Kong Special Administrative Region in 1997, the Basic Law of the Region carried over all laws previously in force and compatible with the Basic Law. The current sale of goods legislation is to be found, in consolidated form, in the Sale of Goods Ordinance, Cap 26 of 1997.

In this Chapter, the principle legislation on sale of goods is first considered, followed by a review of a number of Law Commission Reports relevant to the broad topic that is sale of goods.

6.1 Sale of Goods Ordinance, Cap 26

The principle legislation is the Sale of Goods Ordinance, Cap 26, which replicates closely the Sale of Goods Act 1893, subject to various amendments, inspired to a large extent by the UK experience. The main features of note in the legislation include the following:

- A definition of 'dealing as a consumer' based on the UK's UCTA 1977 has been added (added 85 of 1994, s.3);
- Section 6 on formalities was repealed (58 of 1977, s.3);
- A more detailed definition of merchantable quality which includes reference to appearance and finish; freedom from minor defects; safety and durability (replaced 85 of 1994, s.2);
- The basic principle of caveat emptor is not re-stated in section 16(1) (replaced 85 of 1994, s.4);
- The *market overt* exception has been extended to 'goods sold openly in a shop or market in Hong Kong … ' (66 of 2000, s.3);
- Section 26 on revesting of property in stolen goods and section 28 on the effect of writs of execution were repealed (21 of 1970, s.35; 52 of 1987, s.45);
- Rules on examination and acceptance revised in sections 36-7 (85 of 1994, ss.5-6);

- On exclusion clauses generally see Control of Exemption Clauses Ordinance Cap 71, 1989 (following the recommendation of the Law Commission Report on the Control of Exemption Clauses (1986), and inspired by the UK Unfair Contract Terms Act 1977).[1178]

6.2 Law Commission Report on Sale of Goods and Supply of Services (1990)

A number of the above amendments followed a Law Commission Report on Sale of Goods and Supply of Services in 1990. The relevant terms of reference were to consider:

> 1. Whether under the Sale of Goods Ordinance the obligations of a seller of goods to supply goods that are of merchantable quality and reasonably fit for their purpose should be reformulated.
> 2. Whether in a contract for the sale of goods the remedies available to the buyer for breach of the seller's obligations as to quality and fitness of the goods should be altered.
> 3. Whether it would be desirable to introduce any statutory control over unfair terms in contracts for the sale of goods or supply of services.
> 4. Whether in relation to contracts for the supply of services any statutory obligation should be imposed on the seller.

Following analysis which included looking at developments in other common law jurisdictions, the Law Commission made a number of recommendations, many of which were designed to enhance consumer protection. The reforms recommended in the 1990 report included:

- that the phrase 'merchantable quality' be retained for commercial and consumer sales;
- that the existing section 16 (or section 14 of the 1893 Act) should be redrafted in a positive form to emphasis the fact that there is a positive requirement for goods to comply with the quality standard;
- that in relation to consumer sales the definition of merchantable quality be clarified further listing aspects of quality to which the court should have

[1178] See Aitken, "The Control of Exemption Clauses Ordinance", (1990) 20 *HKLJ* 382.

regard, including the appearance and finish of the goods and their safety and durability;

- (it would seem reluctantly) that the distinction between condition and warranty be retained in all sale of goods contracts;
- that cure provisions (i.e. a right to repair or replace) should not be introduced for either commercial or consumer sales;
- that there should be legislative provision which makes it clear that the signing of an acceptance note, or other such document, does not result in the buyer's loss of his right of rejection of the goods unless he has in fact had a reasonable opportunity to examine them;
- that the inconsistent act rule be retained but that it be clarified that a buyer would be able to return defective goods even if he had sold them and that they had been rejected by the sub-buyers.

On the obligations of a supplier of services, the report recommended adopting the English Supply of Goods and Services Act 1982 which sets out the main common law obligations concerning the quality of the services, the time for performance and the consideration. Provisions should also be made to prohibit the exclusion or restriction of liability for breach of these obligations in consumer transactions.

Moreover, the Law Commission recommended that legislation should go beyond limiting exemption clauses only, and that a provision such as section 52A of the Australian Trade Practices Act be included in the Ordinance to control harsh or unconscionable terms for consumer sale of goods and supply of services contracts (but not commercial transactions).

A series of legislative enactments in 1994 implemented the report's recommendations. These were the Sales of Goods (Amendment) Ordinance, the Supply of Services (Implied Terms) Ordinance, Cap 457, and the Unconscionable Contracts Ordinance, Cap 458.

In relation to the supply of services, the Supply of Services (Implied Terms) Ordinance implies terms as to reasonable skill and care; time for performance; and the price, in line with the UK Supply of Goods and Services Act 1982. However, as

against consumers, liability for breach of the statutory implied terms cannot be excluded or limited.

As regards the Unconscionable Contracts Ordinance, 1994, Cap 458, section 6 states that in determining whether a contract or part of a contract was unconscionable in the circumstances relating to the contract at the time it was made, the court may have regard to (among other things):

> (a) the relative strengths of the bargaining positions of the consumer and the other party;
>
> (b) whether, as a result of conduct engaged in by the other party, the consumer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the other party;
>
> (c) whether the consumer was able to understand any documents relating to the supply or possible supply of the goods or services;
>
> (d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the consumer or a person acting on behalf of the consumer by the other party or a person acting on behalf of the other party in relation to the supply or possible supply of the goods or services; and
>
> (e) the amount for which, and the circumstances under which, the consumer could have acquired identical or equivalent goods or services from a person other than the other party.

Moreover, in determining whether a contract was unconscionable the court shall not have regard to

> (a) any unconscionability arising from circumstances that were not reasonably foreseeable at the time the contract was made; and
>
> (b) conduct engaged in, or circumstances existing, before the commencement of this Ordinance.

Section 5 provides that where one of the parties deals as consumer, and the court finds the contract or any part of it to have been unconscionable, the court may

> (a) refuse to enforce the contract;
>
> (b) enforce the remainder of the contract without the unconscionable part;

(c) limit the application of, or revise or alter, any unconscionable part so as to avoid any unconscionable result.

The burden of proof is on the person claiming that the contract or part of it is unconscionable.

6.3 Law Commission Report on Contracts for the Supply of Goods (2002)

This Report is notable for making a number of recommendations in relation to supply of goods, including in the context of a sale. Following a consultation paper in 2000, and a final report in 2002, the Law Commission has recommended that in relation to contracts for the supply of goods (other than by sale), such as contracts of hire, hire-purchase, and contracts for work and materials (regarding the materials), the law should be clarified and made more certain, by setting out, in new legislation, suppliers' implied undertakings to customers in contracts for the supply of goods. The recommendation is that these undertakings should be consistent with those which apply at present in contracts for the sale of goods. Hence, a supplier under a contract for the supply of goods would be implied to have made the following statutory undertakings:

- that the supplier has the right to transfer or hire out (as the case may be) the goods, and the customer will enjoy quiet possession of the goods;
- where the supply is by description, that the goods correspond with the description;
- that the goods are of satisfactory quality, and are fit for the particular purpose for acquiring the goods which the customer has made known to the supplier;
- where the supply is by sample, that the bulk corresponds with the sample in quality.

The Commission also recommended that where a customer is a non-consumer, if the breach by the supplier is so slight that it would be unreasonable for the customer to repudiate the contract, the customer cannot reject the goods but can claim damages only.

The Commission also reviewed the position in relation to the supply of computer software but did not reach a conclusive decision as to the way forward.

The Commission took the opportunity to make a number of proposals concerning sale of goods, also. In particular, the Commission made the following recommendations:

- where there is a sale of a specified quantity of unascertained goods forming part of an identified bulk and the buyer has paid for the goods, property in an undivided share in the bulk should pass to the buyer, unless otherwise agreed;
- where the goods delivered under a contract are defective, the buyer should be able to reject the defective goods and accept those that conform;
- repealing the *market overt* exception: at present, a buyer buying from a shop or market, without notice that the seller's title is defective, can still retain the goods even though the true owner claims them back;
- where a buyer is a non-consumer, he should not be able to reject for delivery of a wrong quantity if the error is so slight that it would be unreasonable for him to do so;
- clarifying that a buyer shall not be deemed to have accepted the goods merely because he asks for, or agrees to, their repair by or under an arrangement with the seller.

These recommendations have yet to be acted upon.

6.4 United Nations Convention on the International Sale of Goods

The UN Convention has not been adopted in Hong Kong although it was approved by the People's Republic of China, with reservations, in 1986 and where it entered into force in 1988.[1179]

6.5 Bills of Lading and International Sales

Inspired by the UK's Carriage of Goods by Sea Act 1992, the Bills of Lading and Analogous Shipping Documents Ordinance, Cap 440 (originally 85 of 1993) permits the lawful holder of a bill of lading (and other analogous shipping documents, such as sea waybills and ship's delivery orders) to sue on the bill of lading simply by virtue of being the holder, whether property in the goods had passed or not, under the underlying sale of goods contract. As well as addressing the transfer of rights the legislation also deals with the transfer of liabilities and other related matters.

[1179] See further Bridge, "A Law for International Sale of Goods", (2007) 37 *HKLJ* 17.

6.6 E-Commerce

The Electronic Transactions Ordinance, Cap 553 (1 of 2000), subject to certain exceptions, provides for the equivalence of electronic records and digital signatures with paper based records and signatures; the regulation of certification authorities; duties of certification authorities and applicable codes of practice. Section 17 deals specifically with the formation and validity of electronic contracts; and sections 18-19 deal with the attribution and sending and receiving of electronic records (based on UNCITRAL Model Law). But, like the UNCITRAL Model Law, key questions concerning when and where an e-contract is formed and issues concerning the incorporation of terms of contract are not addressed in the legislation.[1180]

6.7 Class Actions

The Law Reform Commission issued a consultation paper, in 2009, proposing that a mechanism for multi-party litigation should be adopted in Hong Kong (cf. European Commission Green Paper on Consumer Collective Redress, COM (2008) 794 final). The report is critical of the current restrictive rules on representative proceedings (see also Final report of Working Party on Civil Justice Reform, 2004).

Aware of the risk that a class action regime might unduly encourage litigation the Paper recommends that in order to filter out cases that are clearly not suitable, class action proceedings should only be allowed to continue as collective proceedings if they have been certified by the Court. In addition, any new regime should be introduced on a phased basis. The Paper also recommends that the new class action regime should adopt an 'opt-out' approach, i.e. once the court certifies that a case is suitable for a class action, any member of the class, as defined in the order of court, will be automatically bound by the subsequent litigation, unless he 'opts out' of the class action within the time limits prescribed by the court order. The consultation paper also seeks views on the funding models which allow plaintiffs with limited funds to take proceedings.

[1180] Pun et al, "Review of Electronic Transactions Ordinance", (2002) 32 *HKLJ* 241.

6.8 Conclusions

Based on the above analysis, notable features of the law of sale of goods in Hong Kong include the following.

- In general, developments in Hong Kong mirror closely the UK experience, in relation to sale of goods; supply of services; unfair contract terms; and bills of lading and other shipping documents;
- However, the enactment of legislation on unconscionable contracts with consumers (1994), is a significant exception to this general approach;
- First, the extension (Cap 66, 2000, s.3), and now, recommended repeal, of the *market overt* rule (Law Commission Report, 2002);
- The recommendation to amend the rules on passing of property re bulk goods along the lines of the UK Sale of Goods (Amendment) Act 1995 (Law Commission Report 2002);
- Others recommendations regarding acceptance and buyer's remedies in the Law Commission Report 2002 (largely inspired by UK) yet to be implemented; and lastly,
- The recent Law Commission consultation paper on 'Class Actions' (2009).

Chapter 7

The 1893 Act and Singapore

As a former British colony, English law, including the Sale of Goods Act 1893, was received into the colony's legal system when enacted. In particular, section 5 of the Civil Law Act (Cap 30), introduced in 1879, ensured that Singapore commercial law was at one with English commercial law.[1181] Singapore sale of goods legislation has been amended a number of times since, most recently in 1996. Broadly speaking, the effect of these amendments has been to update the law of sale of goods in Singapore, in line with developments in the UK. The main features of this and related legislation will be outlined below in the context of a number of law reform proposals, concerning bills of sale and personal property security interests (including retention of title clauses), e-commerce, the parol evidence rule, and the international sale of goods.

7.1 Sale of Goods Act, Cap 393.

The principal legislation in relation to domestic sale is the Sale of Goods Act, Cap 393 (amended most recently by the Sale of Goods (Amendment) Act 1996).[1182] This is, in effect, a re-enactment of the UK Sale of Goods Act 1979, as amended (incorporating changes to the quality standard and buyer's remedies; new rules on the passing of property in relation to bulk goods; and, a repeal of the market overt rule). Accordingly, sale of goods law in Singapore while derived from the 1893 Act, has been amended in line with UK experience and therefore includes the following noteworthy features:

- Formal requirements based on the Statute of Frauds have been repealed;
- A switch from merchantable quality to satisfactory quality with expanded list of factors, following UK Sale of Supply of Goods Act 1994 (43 of 1996);
- Different remedies for commercial and consumer buyers exist e.g. re minor breach, in line with UK Sale of Supply of Goods Act 1994 (43 of 1996);
- A new provision for co-ownership of goods in bulk, in line with the UK Sale of Goods (Amendment) Act 1995 (43 of 1996);
- Repeal of the market overt rule (following the UK Sale of Goods (Amendment) Act 1994);

[1181] See further Application of English Law Act 1993.
[1182] See Neo, "The Sale of Goods (Amendment) Act 1996", (1997) 9 *SA J* 362.

- Re-formulated rules on examination and acceptance, including a right to partial rejection, as with the UK Sale of Supply of Goods Act 1994 (43 of 1996).

Moreover, legislation in the form of the Supply of Goods Act, Cap 394 (44 of 1996) and the Unfair Contract Terms Act, Cap 396 (44 of 1996) adopted the UK Supply of Goods Act 1982 and UCTA 1977, respectively, into the law of Singapore.

7.2 Security over Personal Property

Bills of Sale Act, Cap 24, though amended on a number of occasions, remains faithful to the structure and principles of the original Bills of Sale Act 1886. This legislation was the subject of a Report of the Law Reform Committee of the Singapore Law Academy in 1996. Following a review of the legislation, and, in light of international developments, the Committee made a number of recommendations. In particular:

- The Bills of Sale Act represented a rigid, restrictive and archaic approach to personal property security and should be replaced by a comprehensive personal property security law applicable whether the property to be subject to a security interest is goods or a chose in action and whether the debtor is a corporate or non-corporate person.
- This law should define the security interest as an interest in personal property created by a transaction which in substance secures payment or performance of an obligation.
- This general definition of security interest should be amplified by a list of interests which are included or excluded as security interests.
- This law should also lay down uniform requirements for the creation of a security interest, whether possessory or non-possessory in nature.
- Where several security interests are created in the same property, their priorities should depend on whether, in the case of a possessory interest, the collateral has been taken into possession and in the case of a non-possessory interest, a financing statement describing the transaction creating it has been filed.
- As a general rule, priority should be given to that interest in respect of which all the necessary steps for securing priority were first taken and completed.

- As a qualification to that general principle of priorities, purchase money security interests (including retention of title clauses) which inject new value to the debtor's business should be accorded super-priority.
- Security interests in consumer goods (including motor vehicles) of less than a specified value should be excluded.
- To facilitate trade, purchasers of goods sold or leased in the ordinary course of the debtor's business should take free of any security interest in those goods.
- Financing statements should be filed on a real time basis with a computerised Register of Personal Property Security.

These proposals remain to be acted upon.

7.3 E-Commerce and e-contracts

The Electronic Transactions Act, Cap 88 (25 of 1998, amended by 54 of 2004) was inspired by the UNCITRAL Model Laws on e-commerce (1996) but like the Model Law is not exhaustive.[1183] The Electronic Transactions Act was introduced to facilitate electronic communications; electronic commerce; the electronic filing of documents with government; and to minimise forgery and fraud in electronic communications.[1184] The legislation addresses many aspects of e-commerce, in particular, the legal recognition of electronic records, writing and signatures; liability of network service providers; aspects of electronic contracts; secure electronic records and signatures and issues surrounding digital signatures (including duties and regulation of certification authorities and subscribers); and e-government issues.

In relation to e-contracts, the legislation addresses the formation and validity of e-contracts, as well as containing provisions on acknowledgement of receipt and rules on the time and place of despatch and receipt.[1185] Nevertheless, many important questions remain unanswered. In particular, questions such as whether a despatch or receipt rules applies to different types of electronic communications is not addressed

[1183] Phang & Seng, "The Singapore Electronic Transactions Act, 1998", (1999) 7 *Int'l J L & Info. Tech.* 104.
[1184] Section 3.
[1185] Sections 11-15.

in the legislation, and issues around the incorporation of terms by means of browse-wrap and click-wrap agreements remain to be resolved by the common law.[1186]

In a paper published in 2002 by the Singapore Academy of Law a number of questions were identified in this regard, including:

(1) Should there be legislative clarification on the issue of ascription of responsibility for actions of computer agents in the context of formation of electronic contracts? This issue of attribution of origin is dealt with by section 13 of the Electronic Transactions Act and it is questionable whether further clarification is needed.

(2) Should the substantive law of mistake be modified to give greater allowance in electronic contracting for one party to nullify or withdraw from the transaction?

The Paper notes that the desirability of this type of reform depends on empirical evidence, if any, as to the relative likelihood of errors being made in such contexts compared to normal contexts, as well as considerations of policy as to whether it is desirable for the law to be more indulgent with contracts made over electronic media, and of possible prejudice to third parties.

(3) Should the legislature clarify the applicability of the postal acceptance rule in the contexts of electronic contracting?

The Paper notes that the arguments are finely balanced as to which rule (despatch or receipt) is preferable. However, it opts for a general default rule, based in legislation, as not only necessary but also inevitable. The Paper does not identify which rule should be the general default rule but further notes that, exceptions could be incorporated in order to achieve a balance between the parties in question. The alternative is to leave the matter to be addressed on a case by case basis 'by reference to the intentions of the parties, by sound business practice and … by a judgment where the risks should lie?' (*Brinkibon v Stahag* [1983] 2 AC 34).

[1186] See further Singapore Academy of Law, "The Impact of the Regulatory Framework of E-Commerce in Singapore", (2002).

(4) Should the legislature modify the existing law on the incorporation of terms to deal with specific situations relating to browse-wrap/click-wrap contexts in electronic contracting?

This follows from Question 3. The Paper asks whether the Legislature might also like to consider if a separate regime of rules is required in order to achieve fairness in the context of 'browse-wrap' as well as 'click-wrap' agreements. It is suggested that it might retain the existing rules (subject to the clarification proposed above) but add, for example, further rules pertaining to incorporation in order to achieve fairness for all concerned. Again, the alternative is to leave such matters to be resolved on a case by case basis. It is noted that the US Uniform Computer Information Transactions Act ('UCITA') uses the concept of 'opportunity to review', a concept which, although defined extensively in the UCITA, is still not much clearer than the common law position.

Further questions relate to alternatives to electronic signatures, protection of consumers, international harmonisation, and conflict of laws issues.

7.4 Parol Evidence Rule

The Evidence Act, Cap 97 contains detailed rules of evidence, including sections 93-102 in relation to parol evidence. In a Report of the Law Reform Committee on a Review of the Parol Evidence Rule (2006), the Committee considered various methods of reform including:

(i) maintain status quo – no legislative amendments;
(ii) abolish parol evidence rule by statute;
(iii) abolish statutory rules and rely on common law; and
(iv) retain and improve statutory rules.

Following detailed analysis and a survey of the parol evidence rule in other jurisdictions, the Committee favoured the fourth option. This recommendation remains to be acted upon although the Consumer Protection (Fair Trading) Act, Cap 52A (27 of 2003) has abolished the parol evidence rule in relation to consumers, by providing that parol or extrinsic evidence establishing the existence of an express warranty is admissible in any action relating to a consumer transaction between a consumer and a supplier even though it adds to, varies or contradicts a written contract (section 17).

7.5 United Nations Convention on the International Sale of Goods

Following a Report and recommendation from the Law Reform Committee of the Singapore Academy of Law, (1994), and based on strong support from the business community, the Sale of Goods (United Nations Convention) Act, Cap 283A, (14 of 1995) was enacted to incorporate the Vienna Convention into Singapore's legal system.[1187]

7.6 Conclusions

Of all the jurisdictions surveyed, Singapore is perhaps most faithful to the UK Sale of Goods Act 1979, as amended. And, as with the UK, reform of personal property security interests remains on the back-boiler. Other calls for reform, i.e. regarding e-commerce and the parol evidence rule, also remain to be addressed. However, Singapore is notable for its incorporation of the Vienna Convention.

[1187] Sun, "Sale of Goods (United Nations Convention) Act 1995", (1996) 8 *SAcLJ* 104; Hsu, "Remedies available for breach of contract under the UN Convention on Contracts for the International Sale of Goods", (1996) 8 *SAcLJ* 113.

Chapter 8

Summary of Reforms and Reform Proposals in Other Jurisdictions

This Chapter seeks to summarise the different reforms and proposals for reform from the six jurisdictions surveyed in Chapters 2-7 and, in so doing, to identify options for the reform of Irish sale of goods and supply of services law. First, the general approaches to reform followed in other jurisdictions are considered. Secondly, specific options for reform of the Sale of Goods Act 1893, as amended by Part II of the Sale of Goods and Supply of Services Act 1980, are examined. Thirdly, reform of aspects of Part IV of the 1980 Act on the supply of services is considered, followed by a brief consideration of the United Nations Convention on the International Sale of Goods.

8.1 Approaches to Reform

1. **Nature of Reform.** The study of the reform agenda in the six jurisdictions in Chapters 2-7 indicate two main approaches to reform:

    a. Complete review and 'codification', including a clear move away from the principles and structure of the Sale of Goods Act 1893 (e.g. US UCC and as attempted in Canada);

    b. Piecemeal approach, amending particular provisions which are in need of reform, but maintaining the framework of 1893 Act.

    The question is which of these two approaches is best suited to the Irish legal system. A number of points can be made in respect of the first of these approaches to reform.

    - In the US, reform of the law of sale in the form of Article 2 of the UCC, was part of a wider review and codification process, driven largely by the federal nature of the US legal system. There was, at the time, strong momentum driving the process and clear political will to give effect to the process.

- No other jurisdiction surveyed has evidenced such momentum and political will. Canada came closest in its draft Uniform Sale of Goods Act (1981) (**see 3.1**). In the UK, while the notion of commercial law codification is promoted by some academics[1188] and, more recently, seemed to have attracted government attention, ultimately it would appear that the proposal for a Commercial Code fell out of favour, not least, because of the large amount of Parliamentary time that would be required to pass a Commercial Code (**see 2.8**).
- It is also worth noting the slow nature and uncertain future of the various attempts at codification at a European level.

The following points can be made in respect of the alternative piecemeal approach to reform taken in most countries.

- Five of the six jurisdictions surveyed clearly subscribe to this approach, in practice, including the UK. The approach of the UK is particularly important, in an Irish context, bearing in mind Ireland's close connection to the English legal system and our shared position within the EU.

- Other smaller jurisdictions, such as Singapore and Hong Kong, have followed closely developments in the UK.

- Subscription to this piecemeal approach to reform, led by the UK, provides access to a pool of case law interpreting the legislation, vital in an Irish context.

- Criticism of the reform agenda in the UK has largely been based on its ad hoc and patchwork nature (**see 2.4**), with the principal sales legislation being amended, at least, twelve times in the UK. The Irish approach of 'haste more slowly' avoids this particular criticism. Any legislation seeking to reform the law of sale would be in addition to the 1980 Act, only, and could be omnibus in nature, bringing together in one place a series of reforms.

[1188] See e.g. Goode, (1988) 14 *Monash LR* 135.

2. **Current and Future Impact of European Law.** Any reform of sale of goods and supply of services law must be mindful of developments at European level, as regards consumer sales, in particular. The current uncertain nature of the Consumer Rights Directive (COM(2008) 624 final) (especially in terms of the proposed shift from minimum to 'maximum' harmonisation) places a constraint on the work of Sales Law Review Group. European law impacts not only on the substance of the law of sale (see earlier Position Paper on the proposal for a Directive of the European Parliament and of the Council on Consumer Rights), but also on the architecture of the legislation. In this latter regard, there are at least three possible options for reform which merit further consideration:

    a. Option 1 – one statute with rules of general application and further specific provisions addressing consumer sales and commercial sales. This integrated approach has been followed in the UK but has resulted in strong criticism that to deal with both commercial and consumer concerns within the one statute is no longer sustainable.[1189]

    b. Option 2 – two separate statutes: one for consumers and another for non-consumers but seek to maintain commonality in substance between statutes as much as possible – e.g. keep framework of implied terms but amend as required (to a minimum extent) to conform with Consumer Sales Directive, as has been achieved in the UK, to date.

    c. Option 3 – two separate exclusive statutes: one for consumers, based in part, on the Consumer Sales Directive, and another for non-consumer sales based on a revised Sale of Goods Act.

3. **Remit.** As noted in the Introduction, the remit of this study is broad, and as a result, it can be difficult to draw the line between topics which are properly within and those which are outside the scope of the study. Topics such as reform of the doctrine of privity of contract and the parol evidence rule have been largely excluded from the scope of the study whereas other topics such as security over personal property and certain aspects of insolvency law have been included. The question of what topics should come within the scope of sale of goods and supply

[1189] See e.g. Bridge [2003] *LQR* 173.

of services legislation is a perennial one, to be addressed on a case by case basis, with no clear rules, one way or the other.

4. **Limitations of Comparative Legal Research.** As with any comparative legal study, there are inherent limitations in such research, and therefore it almost goes without saying that, for the purpose of this study, all proposals for reform need to be assessed, at a particular time (i.e. 2010 onwards) and in an Irish context.

8.2 Reform of the Sale of Goods Act 1893, as amended by Part II of the Sale of Goods and Supply of Services Act 1980.

1. **Definition (Section 1).** This provision remains largely unchanged in the jurisdictions surveyed (see e.g. minor re-structuring of provision in UK Sale of Goods Act 1979). The major reform of significance which relates to this definition occurred in New Zealand in 2003 when the definition of goods was extended to include computer software (**see 4.1**). The Law Reform Commission of New South Wales also recognised the need for legislation as regards the supply of computer software but no legislative action has resulted there (**see 5.2**). Despite the arguments made in favour of reform, no other jurisdiction has sought to extend the legislation to cover digital content, leaving the matter to the common law to resolve.[1190] Also relating to the definition of goods, in Canada, in the draft Uniform Sale of Goods Act, specific provision sought to clarify issues around the sale of minerals and fixtures (s.2.5) (**see 3.1**).

2. **Wider Application.** Aspects of the legislation (principally the statutory implied terms and related provisions) have been applied beyond contracts for the sale of goods, as defined in section 1, to other similar transactions, in the jurisdictions surveyed. For example, in the UK, provisions similar to those in the Sale of Goods Act 1979 apply to contracts of hire; hire-purchase, and exchange (**see 2.3**). In Canada, the draft Uniform Sale of Goods Act sought to extend the application of the sale legislation. In particular, the Draft legislation applied to 'near sales', as a means of encouraging courts to apply the sales legislation by analogy (s.2.2(4));

[1190] See e.g. *Toby Construction Products Pty Ltd v Computa Bar (Sales) Pty Ltd* [1983] 2 NSWLR 48; and *St Albans City and District Council v International Computers Ltd* [1996] 4 All ER 481.

and the price was payable in money *or otherwise*, so barter came within the scope of the legislation (s.2.6) (**see 3.1**). In contrast, in Ireland, similar terms apply only as regards goods supplied under trading stamp schemes, pursuant to the Trading Stamp Act 1980, and goods supplied under consumer hire and consumer hire-purchase arrangements, pursuant to the Consumer Credit Act 1995.

3. **Capacity (Section 2).** Sections 2 notes that capacity to buy and sell is regulated by the general law. In some jurisdictions, where the law on capacity has been reformed, consequential amendments have been made to this provision but otherwise the provision has been largely untouched.[1191]

4. **Formalities of the Contract (Sections 3 and 4).** Section 3, which restates the common law, remains largely untouched. Section 4, which requires certain formalities for contract in excess of 'ten pounds' before the contract is enforceable, has been repealed in a large number of jurisdictions surveyed (though not all). (**see e.g. 2.1**).

5. **Further Provisions on Formation.** It is notable that, other than sections 3 and 4, the only other provision on contract formation in the 1893 Act is section 58 on auction sales. Other more modern sale of goods instruments include more detailed provisions on contract formation, including the Vienna Convention on the International Sale of Goods (1980) (Articles 14-24) and the Canadian draft Uniform Sale of Goods Act (1981) (**see 3.1**). However, in the jurisdictions surveyed no such additions were made to the relevant sale of goods legislation.

   Of particular interest is the application of the rules of contract formation in the digital environment. Despite an abundance of e-commerce legislation in the jurisdictions surveyed, other than recognising the validity of contracts formed using electronic means and requiring equality of treatment, no jurisdiction has addressed the more detailed questions in this regard, such as when an e-contract is formed by e-mail or over the Internet and, issues concerning the incorporation of

[1191] See e.g. NZ Minors' Contracts Act 1969; and UK Mental Capacity Act 2005. Note Irish Law Reform Commission Reports on *Minors' Contracts* LCR 15 – 1985, and *Vulnerable Adults and the Law* LRC 83-2006 and any subsequent legislation.

terms of contract using browsewrap or clickwrap methods, instead preferring to leave such matters to be resolved on a case by case basis (**see e.g. 7.3**).

6. **Subject Matter of Contract (Section 5).** Section 5 addresses the distinction between existing and future goods. However, no jurisdiction surveyed has sought to amend this provision and thereby clarify whether future goods can be 'specific' (see further s.62, 1893 Act).

7. **Mistake and Perishing (Section 6 and 7).** Again, this couplet of provisions remains untouched in the jurisdictions surveyed, despite many gaps in the legislation (e.g. the provisions only apply to 'specific goods') and questions about its application arising (e.g. what constitutes 'perishing' and how does it relates to the concept of merchantable quality) since enactment of the legislation. The Canadian draft Uniform Sale of Goods Act sought to reform these provisions by collapsing the two concepts of mistake and frustration into one; replacing the concept of perishing with one of 'loss through casualty'; and addressing matters of partial loss and theft. However, the resulting provision has been described as 'complex and extremely detailed'.[1192]

8. **The Price (Sections 8-9).** Again these provisions have been untouched in the jurisdictions surveyed, although the Canadian draft Uniform Sale of Goods Act did make provision for the conclusion of contracts despite an 'open price' i.e. the price is not settled (**see 3.1**).

9. **Conditions and Warranties – stipulations as to time (Section 10).** Subject to some minor re-structuring of this provision in the UK, section 10 has not been amended e.g. to incorporate the common law *prima facie* rule that, in commercial contracts, time is of the essence.[1193] It has also been questioned why stipulations as to the time of payment should be treated differently from stipulations as to the time of delivery.

[1192] Fridman, *Sale of Goods in Canada* (5th ed., 2004) .
[1193] *Hartley v Hymans* [1920] KB 475.

10. Conditions and Warranties (Section 11). In conjunction with the interpretation section, section 62, which defines a 'warranty', section 11 introduces the basic distinction between conditions and warranties which permeates the whole Act. In particular, the statutory implied terms in relation to sale of goods contracts are all identified as either conditions or warranties. In contrast, the terms implied in Part IV of the Sale of Goods and Supply of Services Act 1980 in relation to the supply of services are described merely as 'terms' and have been interpreted as 'innominate' in nature.[1194]

The distinction between conditions and warranties in the sales legislation has been criticised for allowing parties to terminate a contract and reject goods following breach of a condition even though the effect of the breach may be minor. This has led to calls to move away from this distinction and to reclassify the implied terms as innominate, allowing a court flexibility to determine, in the circumstances of a particular case, what the appropriate remedy is. This matter was considered by the Law Reform Commissions in England and Scotland, in 1983 and 1987 (**see 2.4**). Ultimately, while the implied terms in Scotland where reclassified as 'terms' (s.15B, Sale of Goods Act 1979), the distinction between conditions and warranties was maintained in England. Instead, 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 – see further below). 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.[1195]

In the other jurisdictions surveyed, the principal sale of goods legislation maintains the distinction between conditions and warranties. Singapore has amended its legislation, following the UK example, to limit the right to reject and terminate for non-consumers where the breach is minor (**see 7.1**). Notably, New Zealand, in its consumer sales legislation, the Consumer Guarantees Act 1993, uses the concept of 'guarantees' (a form of innominate term) when addressing

[1194] *Irish Telephone Rentals v ICS Building Society* [1991] ILRM 880.
[1195] E.g. *Atiyah's Sale of Goods* (Harlow: Pearson, 11th ed., 2005) p. 97.

seller's obligations in relation to the goods (**see 4.1**). Moreover, New South Wales has introduced into statute the concept of an innominate term in sale of goods contracts (**see 5.1**).

11. Implied Terms as to Title (Section 12). Again, in the jurisdictions surveyed, this provision remains unchanged, bar minor alterations of a drafting nature. The main proposals for reform in this regard relate to the reversal of the decision in *Rowland v Divall*[1196] where it has been held that if a purchaser bought goods to which the seller had no title (in breach of s.12(1), 1893) then there was a total failure of consideration and the purchaser could recover the full purchase price from the seller irrespective of any benefit he may have had of the goods in the interim. This case was considered on a number of occasions in the UK (1966, 1975, 1983 and 1987) (**see 2.7**) but ultimately it was decided that the proposals for reform were too complex, and hence no change in the law was recommended.

12. Implied Terms as to Description and Quality (Sections 13-15). The main focus of reform in this regard has been on the implied term of merchantable quality in section 14(2) of the 1893 Act. Before looking at this aspect of the legislation in more detail a number of comments can be made more generally and in relation to the other implied terms in this collection.

- **Section 13 –** A number of academics have noted that the implied term as to description adds little, if nothing, to protect the buyer of goods over and above the express terms of the contract. Judicial support can also be found for this view.[1197] Indeed, in the Canadian draft Uniform Sale of Goods Act the implied term as to description was deleted and absorbed into the provision dealing with express warranties (s.5.10) (**see 3.1**). Despite these criticisms, this provision remains unaltered in the jurisdictions surveyed.

- **Section 14(1) –** which restates the common law rule, *caveat emptor*, has also been criticised, by a variety of sources, as out of date, and hence inappropriate and inaccurate in modern times. This basic

[1196] [1923] 2 KB 500 and approved by the Supreme Court in *United Dominion Trust (Ireland) Ltd v Shannon Caravans Ltd* [1976] IR 225.
[1197] See e.g. *Harlingdon & leinster v Christopher Hull Fine Arts Ltd* [1990] 1 All ER 737.

restatement of the common law has been removed from the Hong Kong Sale of Goods Ordinance (**see 6.1**), though it remains in the other jurisdictions surveyed.

- **Sections 13, 14(4) and 15** - As part of its review of the statutory implied terms, the English and Scottish Law Commissions (1987) while recommending various reforms in relation to merchantable quality, agreed that the other implied terms as to description, particular purpose, and sample were not in need of reform.

- **Section 15** – in the UK and Singapore, in the context of the reform of the rules on examination and acceptance in sections 34 and 35 of the 1979 Act, some repetition between sections 15 and 34 on the right to examine was removed from section 15, by the repeal of section 15(2)(b) on the right to a reasonable opportunity to compare the bulk with the sample (**see 2.4 and 7.1**).

- **Sections 14(2) and (3)** – Two main issues arise in this regard: (i) the use of the term 'merchantable quality'; and (ii) the definition or meaning of the phrase.

  As regards the former issue, the English and Scottish Law Reform Commissions, in their joint 1987 report, recommended a change from merchantable quality to 'acceptable quality'. However, the Sale and Supply of Goods Act 1994 opted for a different phrase: 'satisfactory quality' (**see 2.4**). Singapore followed suit. The other jurisdictions under review still use the phrase 'merchantable quality' in their sale of goods legislation. While in New Zealand, the Consumer Guarantees Act 1993 implies a guarantee of 'acceptable quality'; 'acceptable quality' is also the phrase used in the Saskatchewan Consumer Protection Act 1996 (which replaces the Consumer Product Warranties Act, 1977 where 'acceptable quality' was also utilised) (**see 4.1**). The question is whether this difference in terminology results in a difference in substance. Case law since the enactment of the Sale and Supply of Goods Act 1994 in the UK would suggest not, and the

definitions of 'acceptable quality' in the New Zealand and Canadian legislation are very similar to the modern definitions of merchantable.

As regards the issue of definition or meaning, the Irish Sale of Goods and Supply of Services Act 1980 introduced a definition of merchantable quality with specific reference to a number of factors, namely reasonable fitness for purpose and durability, taking into account description, price and other relevant factors (s.14(3), 1893). Other definitions of the quality standard (whether merchantable, acceptable or satisfactory; see also DCFR IV A 2:301) identify further relevant factors such as:

- Appearance and finish,
- Freedom from minor defects;
- Safety;
- Express terms;
- Accessories and instructions;
- Packaging.

Lastly, in the UK Sale of Goods and Supply of Services Act 1994, as well as changing the quality standard to satisfactory quality, with an expanded list of factors, the definition of 'satisfactory quality' also reversed the decision in *Aswan v Lupdine*[1198] by requiring that goods be fit for *all* their common purposes (and not merely one of their common purposes).

13. Passing of Property (Section 16-18)

The operation of the rules on the passing of property, found in sections 16-18 of the 1893 Act, may result in outcomes contrary to parties' expectations, in particular where the goods sold are unascertained or future goods. As noted in earlier Chapters of this study (**see 2.6 and 3.3**) detriment can result where buyers

[1198] [1987] ! All ER 135.

(consumer and commercial) have paid for the goods in advance but because the goods have not been ascertained (under section 16 because, for example, they remain part of a larger bulk) and/or have not been unconditionally appropriated (under section 18, Rule 5) no property passes to the buyer. Therefore, in the case of the seller's insolvency, the buyer is, in practice, left unprotected.

In the UK, the Sale of Goods (Amendment) Act 1995 was enacted to protect pre-paying buyers (both commercial and consumer) of goods in bulk by making them tenants-in-common of the bulk (**see 2.6**). This legislation, while not uncomplicated nor without its critics, has achieved more popular support abroad. Following the UK lead, identical amending legislation has been enacted in Singapore (**see 7.1**), New South Wales, Southern Australia and Victoria (**see 5.1**), and, proposed in Hong Kong (**see 6.3**).

In British Columbia the position of consumer buyers was singled out for special treatment and has been enhanced following the enactment of the Consumer Protection Statutes Amendment Act SBC 1993 which uses the concept of a lien over the seller's property to protect the pre-paying consumer buyer (**see 3.3**). However, the same effect could have been achieved more simply by giving such consumer buyers preferential status (like employees as regards their unpaid wages) on insolvency. This option was not open to the Legislature in British Columbia because insolvency law is a federal matter.

14. Reservation of Title (Section 19 etc)

While the legislation envisages the use of reservation of title devices (s.17 and s.19), modern retention of title clauses, which have become popular since the 1970s are regulated, in detail, by the common law and can operate to undermine the statutory scheme of distribution on insolvency (**see e.g. 2.8**). Accordingly, the courts have sought to draw a line in the sand identifying certain types of clauses which are effective, and those which are ineffective for lack of registration. Importantly, questions concerning the exact position of this 'line in the sand' have not been fully resolved in Ireland.

It has been argued that legislative provision is needed to bring certainty as regard retention of title clauses, including their impact on company charges and the need for registration / disclosure (**see e.g. 5.2**). A number of jurisdictions have addressed the matter of retention of title clauses in the wider context of personal property security legislation, led by the USA and Canada (**see 3.4**). More recently, personal property security legislation has been enacted in New Zealand (**see 4.2**) and Australia (**see 5.4**).

The matter has been considered on numerous occasions in the UK but to date no such legislation has been enacted (**see 2.8**). Proposals to introduce personal property security legislation in Singapore also remain on the back-boiler (**see 7.2**).

The Irish Law Reform Commission in its *Report on Debt Collect (2) Retention of Title*[1199] recommended reform in this regard. In particular, it recommended that such clauses should not be enforceable unless evidenced in writing and signed by the buyer, and that such clauses would not be deemed to create any form of charge over goods unless expressly provided for at the time the contract of sale was concluded. A scheme for the registration of such charges was also recommended. However, based on international developments, both where personal property security schemes have been put in place and where they have been merely considered, the clear preference is to address these issues in the wider context of personal property security reform leading to a unitary system where matters of substance prevail of that of form.

15. Risk (Section 20)

Under the 1893 Act risk passes with property, unless agreed otherwise. It was the dominant influence of property within the scheme of the Act (e.g. in relation to risk; claims for the price; etc.) which was one of the main criticisms of the 1893 Act by the drafters of the US UCC. The Canadian draft Uniform Sale of Goods Act 1981 also sought to break the link between property and a number of 'unrelated' areas, including risk.

[1199] LRC 28-1988.

Again, the rules on the passage of risk, due to this link with property, often give rise to results which are contrary to the reasonable expectation of the parties. The alternative is to link the passage of risk with delivery. This is the approach proposed in Article 23 of the draft Consumer Rights Directive[1200], and in IV.A. 5:102 of the Draft Common Frame of Reference.

Despite criticism, the rules on the passing of risk in section 20 have, with the exception of the amendment introduced in the UK in 2002 which provides that where the buyer deals as consumer the goods remain at the seller's risk until they are delivered to the consumer[1201], not been amended to date in the jurisdictions surveyed.

16. Conflict of Title (Sections 21-26)

The provisions in sections 21-26 on conflicts of title have been considered suitable for law reform on various occasions in a number of jurisdictions. These reforms or proposals for reform can usefully be classed as 'major' and 'minor'. Starting with the more minor reforms, which involve maintaining the basic structure of the *nemo dat* rule followed by a number of exceptions, it is possible to identify a number of potential areas of reform.

- Perhaps most significant within this class would be the repeal of the *market overt* exception in section 22 (**see e.g. 2.5**). An alternative option would be to extend the scope of this rule, as occurred in Hong Kong (**see 6.1**), for instance. Repeal has been favoured in most of the jurisdictions surveyed and has also been recommended in Hong Kong.

- As a means of tidying the statute book, some jurisdictions have integrated the provisions of the Factors Act, which includes three exceptions to the *nemo dat* rule (section 2 on mercantile agents; and sections 8 and 9 on sellers and buyers in possession, overlapping with section 25, of the 1893 Act) into the sales legislation.

[1200] COM (2008) 614 final.
[1201] Section 20(4) Sale of Goods Act 1979, inserted by Sale and Supply of Goods to Consumers Regulations 2002 (S.I. 2002/3045), reg. 4(2).

- In their 1966 report, the UK Law Reform Committee proposed a number of amendments, namely,
    - removal of the distinction between void and voidable contracts in section 23;
    - reversal of the decision in *Car and Universal Finance Co. Ltd* v *Caldwell*[1202] and hence that communication is necessary to avoid a contract under section 23;
    - reversal of the dicta in *Newtons of Wembley Ltd* v *Williams*[1203] and that the legislation should be clarified to ensure that a buyer in possession can pass good title without the requirement to act as a mercantile agent;
    - the reversal of the burden of proof regarding good faith etc. under section 23 which, unlike all the other exceptions, rests with the original owner.[1204]

  None of these proposals were implemented in the UK (**see 2.7**) or elsewhere.

A number of more major reforms can be identified, including the following.

- It has been suggested that it might be possible to apportion loss between an innocent owner and an innocent purchaser where there is a conflict of title resulting from the conduct of some dishonest middle party who has disappeared.[1205] However, the UK Law Reform Committee (1966) rejected this suggestion of apportionment because they argued it was impractical / too complicated to implement, especially where string transactions are involved.
- It has also been proposed (e.g. in the UK, Diamond report (1989); **see 2.8**) that consideration should be given to whether the exceptions to *nemo dat* rules should be reformulated into a single coherent principle. However, no such reformulation has occurred in any of the jurisdictions surveyed (cf. US UCC).

[1202] [1965] 1 QB 525.
[1203] [1965] 1 QB 560.
[1204] *Whitehorn Bros v Davison* [1911] 1 KB 463.
[1205] *Ingram v Little* [1961] 1 QB 31 as per Devlin LJ.

17. Performance of the Contract (Sections 27-37)

There have been a number of significant reforms in relation to this section on performance of the contract. Like the amended remedies for breach of the statutory implied terms, these new rules seek to bring a flexibility to the legislation by allowing partial rejection and by amending the rules on the amount to be delivered where the breach is 'minor' for commercial sale. Moreover, various amendments have sought to clarify the relationship between examination and acceptance.

First, in England and Singapore, section 30 on delivery of the wrong quantity has been amended in two main ways. Section 30(4) of the UK 1979 Act on delivery of goods of a mixed description has been repealed (s.30(3) of the 1893 Act). Moreover, specific rules have been introduced for commercial buyers to limit their ability to reject goods under section 30 where the excess or shortfall is minor (see e.g. s.30(2) A-E of the UK Sale of Goods Act 1979) (**see 2.4**).

Secondly, in England and Singapore, a right to partial rejection was introduced, including partial rejection within an instalment, subject to the 'commercial unit' proviso (see e.g. s.35(7) and s.35A, UK Sale of Goods Act 1979) (**see 2.4**).

Thirdly, in a number of jurisdictions, including the UK, New Zealand, Singapore, and Hong Kong, the rules on examination and acceptance have been modified. For example, in the UK and Singapore:

- the right of examination (e.g. s.34, UK Sale of Goods Act 1979) is extended such that where goods are delivered and the buyer has not previously examined them, he is not deemed to have accepted them (i) when he intimates acceptance, or (ii) when he does an act inconsistent with the seller's ownership, until he has had a reasonable opportunity of examining them to assess conformity with the contract (new s.35(2), 1979);
- moreover, on the issue of acceptance following lapse of a reasonable time, the amending legislation makes clear that whether the buyer has had a reasonable opportunity of examining the goods is relevant or 'material' in

determining whether the goods have been accepted or not (e.g. new s.35(4) and (5), UK Sale of Goods Act 1979);

- further, a person is not 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 (e.g. new s.34(6), UK Sale of Goods Act 1979).

Furthermore, the Canadian draft Uniform Sale of Goods Act (1981) in a section on general obligations included details in relation to certain types of contracts including international trade contracts such as f.o.b. and c.i.f. contracts, and more (see also US UCC). The usefulness of such detail is open to question now in light of the widespread usage of the ICC's Incoterms.

18. **Unpaid Seller's Remedies (Sections 38-48)**

The provisions in section 38-48 although important when the legislation was enacted are rarely relied upon today to protect the unpaid seller. The prevalence of credit sales and developments in transportation make it difficult to utilise these protections and instead retention of title clauses have been developed to fill this gap in protection. However, no amendments have been made to sections 38-48 in the jurisdictions surveyed.

19. **Actions for Breach of Contract – Seller's Remedies (Sections 49-50)**

Despite criticism about the link between the passing of property and an action for the price[1206], and the existence of alternative approaches (e.g. US UCC use of 'acceptance' of the goods, under Art 2-709, or the use of 'delivery' under s.9.11 of the Canadian draft Uniform Sale of Goods Act), there has been no amendment to these provisions in the jurisdictions surveyed. It is also notable that there is no statutory provision addressing the matter of late payment (although s.54 refers to claims for interest: see further EC (Late Payment in Commercial Transactions) Regulations 2002).

[1206] See e.g. *Atiyah's Sale of Goods* (Harlow: Pearson, 11th ed., 2005) p.485.

20. **Actions for Breach of Contract - Buyer's Remedies (Sections 51- 54)**

Again, despite various questions about the operation of sections 51-54 (e.g. the lack of statutory provision for late delivery; the appropriateness of a market based rule for assessing damages in consumer sales, and indeed in commercial cases) there has been no amendment to these provisions in the jurisdictions surveyed.

The Irish Sale of Goods and Supply of Services Act 1980 introduced a right for consumer buyer's to request cure (s.53(2), 1893 Act). It is difficult to assess how this provision has operated in practice, though the intention was clearly to offer consumer buyer's a wider range of remedies. The matter of a right to cure has been considered on a number of occasions in different jurisdictions. There are many issues to be considered in this regard, including its application in a consumer and a commercial context, and, whether it is the seller who has a right to cure, or, the buyer who has a right to request cure. For example, under the Vienna Convention, a commercial buyer, in certain circumstances, may request cure under Article 46. Moreover, in Articles 37 and 48 the seller can cure a defective performance, at his own expense. A right to cure also features in the EC Consumer Sales Directive 1999/44, in a series of provisions that have raised many questions about their operation. The cure principle is also recognised by a number of Canadian jurisdictions in their consumer legislation.

In their joint consultative document in 1983, the English and Scottish Law Commissions originally recommended that the seller be given the right to repair or replace defective goods. On consultation, the following objections were raised:

(1) The recommendation was too adverse to consumers because it would give a seller reason to argue that the consumer was not entitled to return defective goods and get the price back.

(2) The recommendation left too many questions unanswered and disputes about how the cure principle would actually operate would create uncertainties. For example, did the seller have to redeliver the 'cured' goods to the buyer, or did the buyer have to collect them?

In the end, in their final 1987 Report, the Law Commissions recommended that the classification of the implied terms in sections 13-15 of the Sale of Goods Act

as ‘conditions’ should be retained for consumer sales so that the consumer would continue to enjoy an absolute right to reject defective goods.

The Law Commissions were also not in favour of applying the cure principle to commercial sales which usually involve more substantial sums of money than consumer sales because firstly, it would be difficult to provide a detailed enough code which would cover all eventualities in commercial transactions. Secondly, sellers may seek to do all they can to impose cure upon the buyer in some cases, and in others, buyers may seek cure for minor but irremediable defects simply to have the opportunity to reject goods because the market has changed. Further, a cure principle may not be practical where goods were imported with the seller many miles away. Therefore, the Law Commissions recommended that in commercial sales the statutory implied terms should also remain as conditions but that the Sale of Goods Act should provide that where the breach is so slight that it would be unreasonable for the buyer to reject the goods, the breach is not to be treated as a breach of condition but may be treated as a breach of warranty (**see 2.4**).

A right to cure was also considered in Hong Kong in their 1990 Report on *Sale of Goods and Supply of Services* (**see 6.2**). Arguments for and against were identified. Accordingly, the strongest arguments for establishing cure provisions for both commercial and consumer transactions were:

- that it was already common practice; and
- that their existence would prevent an opportunistic buyer from reneging when he no longer wanted to abide by the contract.

On consultation, there was substantial agreement that cure provisions should be established.

Arguments against establishing cure provisions included:

- if there was no absolute right to reject defective goods and if there was an obligation to submit goods for cure, the original state of the goods may be rendered undiscoverable by the cure process;

- that it was incorrect to assume that when a buyer made a purchase that he wanted the goods and would be willing to have defects rectified, quite the contrary, when a buyer buys goods, he expects them to be free from defects and it would be quite wrong to give a statutory right to the seller to provide cure;

- in addition, there would be arguments about the operation of such cure provisions (for example, as to whether the cure had been effective).

The Commission ultimately rejected the introduction of cure provisions. As regards commercial sales, it stated that it would not be easy to devise cure provisions for commercial transactions which would be simple to operate. Businessmen generally find solutions through negotiations and the Commission was not convinced that having a statutory right to cure would help businessmen in the resolution of disputes on quality of goods. As for consumer purchases, the Commission stated that the general level of consumer education was relatively low in Hong Kong. The law should therefore stand on the side of the consumer who is often in a weaker bargaining position than the seller. The Commission did not want to give the seller any grounds for arguing that he has a legal ground to resist rejection of defective goods.

21. Supplementary (Sections 55-62)

There have been no amendments of a significance nature in relation to these final provisions of the Act.

8.3 Reform of Part IV of the Sale of Goods and Supply of Services Act 1980.

Contracts for the supply of services are regulated in four provisions in Part IV of the 1980 Sale of Goods and Supply of Services Act. There are a number of aspects of this regulation which can be considered in terms of its reform.

1. Definition and Application

Unlike the Sale of Goods Act 1893 where a contract for the sale of goods is defined (s.1, 1893), Part IV of the Sale of Goods and Supply of Services Act 1980 includes no definition of a 'contract for services' as such, although there are some statutory exceptions (s.2, 1980). The exact application of legislation can cause problems of a

preliminary nature, as evidenced in *Irish Telephone Rentals v ICS Building Society.*[1207] .

In the UK, a 'contract for the supply of a service' is defined as a contract under which a person ('the supplier') agrees to carry out a service. The 1982 Act, and secondary legislation thereunder, contains a number of exemptions (**see 2.3**). In contrast, a much more expansive definition exists in Australia under the Commonwealth Trade Practices Act 1974 (**see 5.1**). (See also Application and Exclusions under the DCFR IV C).

2. The Quality Standard and other provisions

The 1980 Act implies four terms into contracts for the supply of services:

- that the supplier has the necessary skill to render the service;
- that the supplier will supply the service with due skill, care and diligence;
- that any materials used will be sound and reasonably fit for the purpose for which they are required;
- that any goods supplied will be of merchantable quality.

A number of points can be made in relation to the statutory implied terms.

First, the English Law Commission in its 1986 report considered and rejected the term that the supplier should possess the necessary skill implied in the Irish legislation. They thought it unnecessary because the customer would not sustain damage unless the supplier failed to exercise reasonable skill. Further, the term was implied at common law and since the legislation does not affect any term implied by common law, the term would continue to be implied. As statutory implied terms, by their nature, codify the common law, the UK criticism can be questioned in this regard.

Secondly, in the UK and other jurisdictions which have been inspired by the UK Supply of Goods and Services Act 1982, further terms as to the time of performance and the consideration are implied (**see 2.3**).

[1207] [1991] ILRM 880.

Thirdly, the Australian provisions in the Commonwealth Trade Practice Act 1974 (see also DCFR IV C 2:106) goes a step further in that there is an implied warranty that where the consumer makes known the purpose for which the services are required or the result that he wishes to achieve, the services will be reasonably fit for that purpose or are such that they might reasonably achieve that result, unless the consumer does not rely on the supplier's skill or judgment, or it is unreasonable for him to do so. In 1986, the English Law Commission considered this provision but thought it would be inappropriate to add it to the UK 1982 Act because they thought there was as yet no clear evidence of a positive need for such an extension of the range of terms implied. Such extension was also opposed by the Hong Kong Law Commission (1990) in part because of the belief that imposing such a statutory obligation could in fact decrease consumer protection because there would be no liability if the supplier could show that the consumer did not rely on his skill or judgment (**see 5.1**).

Lastly, the Draft Common Frame of Reference (IV C) also contains detailed provisions in relation to services including a pre-contractual and contractual duty to warn; an obligation to co-operate; rules on sub-contracting; a duty to follow directions from the client; rules on variation; client's obligation to notify anticipated non-conformity; and client's right to terminate.

3. Exclusion of Liability

In Ireland and the UK, for example, liability for breach of the statutory implied terms in relation to contracts of services can be excluded or limited, even where the recipient is a consumer, provided certain conditions are met. This can be contrasted with the position in relation to sale of goods contracts where consumers are better protected. In contrast, in Hong Kong, the Supply of Services (Implied Terms) Ordinance, Cap 457, prohibits the exclusion or restriction of liability for breach of these obligations in consumer transactions. (**see 6.2**).

8.4 United Nations Convention on the International Sale of Goods [CISG]

The Irish Law Reform Commission has previously recommended adoption of the UN Convention, although no action has been taken as a result of this recommendation.[1208]

[1208] LRC 42 – 1992.

Since that time, more states have incorporated the Convention, though the fact that the UK has still not incorporated it is significant.

8.5 Consequential Reforms

Repeal of section 1 of the Bill of Lading Act 1855 and reform along lines of UK Carriage of Goods by Sea Act 1992.

In the course of the review of the law of sale in relation to bulk goods, the English and Scottish Law Commissions recommended repeal of section 1 of the Bills of Lading Act 1855 and further reform of the law. These proposals were enacted in the Carriage of Goods by Sea Act 1992 (**see 2.6**) and have been adopted elsewhere including Hong Kong (**see 6.5**). From a purely legal perspective, the case for repeal of section 1 of the 1855 Act and reform of the law is strong.