Report No. 38

THE UNIFORM SALE OF GOODS ACT

INSTITUTE OF LAW RESEARCH AND REFORM

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INSTITUTE OF LAW RESEARCH AND REFORM

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The Institute wishes to acknowledge the contributions of Michael G. Bridge, of the Faculty of Law, McGill University, formerly a Counsel on the Institute's legal staff, in the preparation of Report No. 38. Professor Bridge prepared extensive discussion materials for the Institute's Board of Directors, he attended meetings of the Board and actively participated in its deliberations with respect to the Uniform Sale of Goods Act, and he was the draftsman of this Report. However, the Institute's Board of Directors assumes sole responsibility for the opinions and recommendations contained in Report No. 38.

SUMMARY

The origins of this report lie in the Report on Sale of Goods issued by the Ontario Law Reform Commission in 1979. The Ontario Law Reform Commission put its recommendations and draft bill before the Uniform Law Conference of Canada with a view to the adoption of the latter as uniform legislation. The Uniform Law Conference then appointed a committee to consider the subject of reform of Sale of Goods law and in 1981 this committee reported back to the Uniform Law Conference recommending the adoption as uniform legislation of a revised version of the Ontario Law Reform Commission's draft bill. This recommendation was accepted and the revised draft bill became the Uniform Sale of Goods Act.

The Uniform Act has two principal aims: first, to modernize existing Sale of Goods law; and secondly, to render this body of law sufficiently flexible to respond to the changing conditions that will inevitably occur in the years ahead.

Existing Sale of Goods law is based on the Sale of Goods Act, which was first enacted by the United Kingdom Parliament in 1893. The purpose of the Sale of Goods Act was not to reform the law but simply to codify the developments that had taken place in the course of the nineteenth century. It is outdated in two major respects. First, it is based on a conception of Contract law that is no longer current in the late twentieth century. The enactment of the Sale of Goods Act has prevented Sale of Goods law from responding to changed social and economic conditions to the same degree as the general common law of Contract. In this regard, particular difficulties have been posed by the subject of

breach of the contract of sale. Secondly, the Sale of Goods Act places heavy emphasis on title, an abstract concept, as a universal guide for determining the rights and duties of parties to a sale of goods contract. The Uniform Act, on the other hand, is committed to the goal of examining each legal problem arising between a buyer and a seller in its functional setting and solving that problem in the fairest and most efficient manner. Consequently, the Uniform Act modifies the rules relating to risk, the buyer's entitlement to reject goods and the seller's right to sue for the price.

The aim of the Uniform Act to make Sale of Goods law adaptive to future conditions is served in two principal ways. First, the drafting of individual sections is left as open-textured as the interests of certainty allow, so as not to tie the hands of judges dealing with novel problems. Secondly, the Uniform Act is designed to reduce the gap between law and practice and to be practical, flexible and responsive to the needs of the business community. A heavy emphasis is therefore placed on trade custom and practice.

The Institute of Law Research and Reform also favours the goals pursued by the Uniform Act and therefore recommends, subject to certain conditions, its adoption by the Province of Alberta.

SALE OF GOODS

CHAPTER I. INTRODUCTION

a. Purpose of Report

The purpose of this report is to evaluate the Uniform Sale of Goods Act, adopted as uniform legislation by the Uniform Law Conference of Canada at its 1981 annual meeting in Whitehorse, and to consider whether it should be recommended to the Government of Alberta for legislative adoption.

b. Evolution of the Ontario Report

The sale of goods reference to the Uniform Law Conference stemmed from the Ontario Law Reform Commission's 1979 Report on Sale of Goods. The origins of the project lie in the report issued by a sub-committee to the Commercial Law Subsection of the Ontario Branch of the Canadian Bar Association. This sub-committee judged existing sales law to be deficient in a number of respects and recommended that Ontario replace the existing law with Article 2 of the Uniform Commercial Code (hereafter Article 2)[1] in view of the magnitude of trade conducted between Ontario and the United States. On September 29, 1969 the sub-committee's report[2] was approved by a resolution of the Ontario Branch of the Canadian Bar Association and submitted by this body to the Minister of Justice. In February, 1970 the subject of sale of

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[1] References to individual sections of Article 2 will be styled in the following way. For example, section 2-601 of Article 2 of the Uniform Commercial Code will appear as UCC 2-601.

[2] The report of this sub-committee may be found in Appendix 7 of Volume III of the Ontario Law Reform Commission's Report on Sale of Goods.

goods was referred by the Attorney General to the Ontario Law Reform Commission (hereafter the OLRC) and serious work was begun in 1972.

The research for the project was directed by Professor Jacob Ziegel of the Faculty of Law at the University of Toronto, and he presented a research report, summarizing the various research papers and recommendations, to the OLRC. The OLRC examined this report at length and its decisions were reduced to legislative draft form by Professor Ziegel and a number of colleagues. In 1979, the OLRC published its Report on Sale of Goods (hereafter, the OLRC Report) which also contained a Sale of Goods Bill (hereafter, the OLRC bill) in draft form.

The OLRC Report is a monumental piece of work, clear and comprehensive in its treatment of sale of goods law. It formed the foundation for the later work of the Uniform Law Conference and was indispensable to us in the preparation of this report. We should therefore like to place on record our appreciation of the work of the OLRC in the area of sale of goods.

c. Referral to the Uniform Law Conference

The common law provinces all have sale of goods legislation based on the United Kingdom Sale of Goods Act, 1893.[3] Though the Sale of Goods Act was never uniform legislation in Canada, the Conference of Commissioners on Uniformity of Legislation in

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[3] 56 & 57 Vict., ch. 71.See R.S.A. 1980, c. S-2; R.S.B.C. 1979, c. 370; R.S.M. 1970, c. S-10; R.S.N.B. 1973, c. S-1; R.S. Nfld. 1970, c. 341; R.S.N.S. 1967, c. 97; R.S.O. 1980, c. 462; R.S.P.E.I. 1974, c. S-1; R.S.S., c. S-1. The Yukon and North-West Territories also have almost identical Sale of Goods Ordinances: R.O.Y.T. 1958, c. 97; R.O.N.W.T. 1974, c. S-2.

Canada, the predecessor of the Uniform Law Conference of Canada, in 1918 urged commissioners from provinces that had not yet adopted the Act to recommend it to their legislatures.[4] Noting the importance of interprovincial sales to the Ontario economy, the OLRC Report urged the early involvement of the Uniform Law Conference to consider the adoption of a Uniform Sale of Goods Act.[5] It might have added that participation by the Uniform Law Conference was particularly apt since the OLRC bill, if enacted in Ontario alone, would break the existing pattern of uniformity of sale of goods legislation.

The Ontario Uniform Law Commissioners submitted a report to the Uniform Law Conference at its annual meeting held in Saskatoon in August, 1979.[6] In it they proposed that the Executive appoint a committee to consist of six members drawn from the Federal Government, Ontario, Quebec, British Columbia, the Prairie Provinces and the Atlantic Provinces, with a mandate to consider the OLRC Report as the basis for new uniform sale of goods legislation. This committee would be advised by Professor Ziegel and would report back to the Uniform Law Section.

Since the provincial law reform agencies could provide persons with expertise in the area of sale of goods, the agencies offered their services to the Uniform Law Conference, which decided to recommend to the Executive that appointments to the

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4 Proceedings of the First Annual Meeting of the Conference of Commissioners on Uniformity of Law throughout Canada (1918) at p. 9 and Proceedings of the Second Annual Meeting (1919) at pp. 7, 11 and 60.

5 OLRC Report at p. 30 and recommendation 2 thereof at p. 32.

6 Proceedings of the Sixty-First Annual Meeting of the Uniform Law Conference of Canada.

proposed committee be made in accordance with this offer. Those appointments were duly made so that the committee, as finally constituted, was composed of the following members:

Dr. Derek Mendes da Costa, Q.C. (Chairman) (Ontario)
Professor E. Arthur Braid (Manitoba)
Professor Michael G. Bridge (who replaced Mr. George Field) (Alberta)
Professor R.C.C. Cuming (Saskatchewan)
Mr. Karl J. Dore (New Brunswick)
M. Michel Paquette (who replaced Professor Claude Samson) (Quebec)
Miss Diane Campbell (Prince Edward Island)
Professor David Vaver (British Columbia)

The Uniform Sale of Goods Committee (hereafter the Uniform Committee) thus formed was assisted in its work by Professor Ziegel and was empowered to move directly to the formulation of a draft Uniform Sale of Goods Act without first having to report back to the Uniform Law Section. The Uniform Committee met on thirteen occasions in Toronto, usually for two days at a time, between 1979 and 1981. Its deliberations were thorough and it recommended for adoption by the Uniform Law Section a draft Uniform Sale of Goods Act (hereafter the Uniform Act) which revised considerably the OLRC bill. The Uniform Act was adopted by the Uniform Law Section in Whitehorse in 1981,[7] subject to minor drafting changes to bring the Act into line with the

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[7] Proceedings of the Sixty-Third Annual Meeting of the Uniform Law Conference of Canada: Appendix S at pp. 185-321.

Uniform Law Conference's drafting standards.[8]

d. Need for reform

A preliminary question which should be addressed is whether there exists any need to amend or repeal the Sale of Goods Act of this province.[9] It was the opinion of the OLRC that the Sale of Goods Act was in need of so much reform that little would remain of the Act if the necessary changes were made.[10] The deficiencies in the Sale of Goods Act and in its application are set out at length in the OLRC Report and will not be repeated here in detail.[11] Briefly, the OLRC cited difficulties with the over-conceptualization of title in the Sale of Goods Act; the scope of the merchantable quality implied term; the buyer's right of rejection; the law governing warranties and conditions; the nemo dat doctrine; basic contract doctrines such as privity, parol evidence and the Statute of Frauds; the remedies provisions of the Act, including the unpaid seller's rights over the goods and the buyer's right to specific performance; the absence of coverage of documentary sales and the limited treatment of delivery and shipment obligations; the abuse of bargaining power; and the inapplicability of the Act to transactions similar to sale of good contracts (hereafter, near sales).[12]

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8 Id., at p. 34.

9 Supra, note 3.

10 OLRC Report at pp. 26-27.

11 Id., at pp. 23-24.

12 Id.

The OLRC is not alone in its opinion that the Sale of Goods Act stands in need of major reform. In the opinion of Professor Sutton:

> "[T]he law governing the every day transactions of the buying and selling of goods is that representing the outlook and marketing conditions of the England of the years of the industrial resolution. A statute which was concerned with the business practices of the mid-nineteenth century determines the rights and duties of the consumer in the vastly different society of today."[13]

The Sale of Goods Act, 1893 was not a reforming statute. Its purpose was to consolidate existing law. The long title of the statute is "An Act for codifying the Law relating to the Sale of Goods". Consequently, the Act encapsulates a body of law which developed mainly in the early and middle years of the nineteenth century. Nor is Professor Sutton's concern with the outmoded nature of the Sale of Goods Act confined to its impact on consumer transactions. In a passage worth quoting in full he points to the Act's preoccupation with nineteenth century patterns of trade and marketing techniques:

> "In Victorian England the marketing of goods was an uncomplicated process, when most articles were "custom made" and the success of a manufacturer depended on his reliability and the excellence of his product. Mass production with its assembly-lines and the supply of myriad components by sub-contractors was as yet unknown. Nation-wide distribution of these mass produced goods by means of a complex system of wholesalers, distributors, and local "agents" was a thing of the future; while the existence of highly organized marketing

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[13] Sutton, Reform of the Law of Sales, (1969) 7 Alta. L. Rev. 130, 173.

> departments, where manufacturers could plan massive sales promotion campaigns and influence consumer demand in a dozen different ways through the media of press, radio and television, was as yet undreamed of. In the nineteenth century, the relationship between manufacturer and consumer was a fairly close one; individual contracts were negotiated to fit the circumstances of each transaction; the use of credit in the purchase of goods was quite exceptional, a man buying only what he could afford to pay for in full; and the items he bought were uncomplicated and open to view and he could usually see by inspection if he was getting value for money. This was a far cry from the marketing practices of today where the era of the supermarket and the self-service store has given rise to the packaging of goods in sealed containers which defy inspection, and where in any case many consumer goods are so complex and of such intricate design that an inspection would convey nothing about the quality of the article to the average purchaser.
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> Finally, the nineteenth century knew little of the modern marketing techniques of bulk buying and the "forward" contract, and it was left to another generation to develop the extensive use of documents of title and their concomitant instruments of credit. As has been well put, a legal historian analysing the English Sale of Goods Act in the future might well conclude that at the time of its enactment the middleman had scarely emerged, credit was unusual, and the normal buyer was expected to carry his own goods away."[14]

It might, however, be argued that the Sale of Goods Act, in the hands of a sensitive and creative judiciary, has been and can continue to be adapted to changing conditions. Indeed, Professor Gilmore has said:

> "As a statute approaches its hundredth birthday, it ceases for all practical purposes to be a statute at all; it is, so to say, reabsorbed in the bloodstream of the common law - as, for example, the Elizabethan

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[14] Id., at pp. 1-2.

> Statute of Fraudulent Conveyances and the Carolingian Statute of Frauds have long since been."[15]

While this may be true up to a point, it probably takes insufficient account of the fact that the Sale of Goods Act, as a codifying statute, is a more exhaustive statement of the law than the statutes Professor Gilmore cites. Furthermore, the Sale of Goods Act was enacted after the courts developed a doctrine of binding precedent. This explains, at least in part, why the Act has never been subject to the broad interpretation experienced, for example, by the Statute of Frauds. The Sale of Goods Act's influence in preventing adaptive changes in sales law has been stressed very recently by Lord Diplock, an eminent English judge:

> "As a concise statement of the English law relating to the commonest kind of contract that came before the High Court at the close of the nineteenth century, the Sale of Goods Act of 1893 could hardly be bettered; but its influence in preventing the development of that law from meeting the changes in society and recent business methods has been regrettable."[16]

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15 Gilmore, Commercial Law in the United States: its Codification and other Misadventures, in Ziegel and Foster (ed.), Aspects of Comparative Commercial Law (pp. 449-62) at p. 456.

16 Diplock, The Law of Contract in the Eighties, (1981) 15 U.B.C.L. Rev. 371 at pp. 373-74.

CHAPTER II. ADOPTION OF THE UNIFORM ACT

a. Desirability of Uniform Act

Although we do not agree with every provision in the Uniform Act, we believe that on the whole it would modernize and improve the law of Alberta relating to the sale of goods and near sales. It would introduce much order into the law and would restate it in modern terms, thereby making much of it clearer and easier to understand. For transactions falling within it, the Uniform Act would repeal certain anachronisms such as the writing requirement[17] and the parol evidence rule.[18] Without imposing a strait jacket on business, the Act would do something towards raising standards of behaviour and would do much to avoid disappointing the legitimate expectations of business parties who have attempted to make binding contracts and believe that they have succeeded. The Uniform Act would also take some steps towards the modernization of product liability law by extending implied and express warranty rights to subsequent buyers and owners of the goods.[19] In general, we believe the Uniform Act would provide a satisfactory legal framework for the conduct of business transactions, paying due regard to considerations of efficiency and the proper balancing of interests of sellers and buyers.

In so massive a work as the Uniform Act, there will inevitably be matters of important detail upon which there will

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17 Subsection 4.2(1).

18 Section 4.8.

19 Sections 5.10 and 5.18.

be disagreement. In our view, some aspects of the Uniform Act should be changed before the Act is adopted in Alberta. Those changes, and the reasons for them, will be dealt with later in this report. In recommending changes, we have borne in mind that the Uniform Act is the product of a large project of the OLRC and of a very substantial review of that project by a Uniform Committee consisting of lawyers eminently qualified to design a legal regime in this field. We recognize also that the Act is a coherent whole and that there is a great danger that modifying a part of it will do unforeseen damage to the whole. With these considerations in mind, together with the desirability of uniformity of law which is discussed below, we have kept our recommendations for change to a minimum.

b. Desirability of uniformity

Subject to important changes produced by the introduction of special provincial legislation affecting consumer transactions,[20] there is uniformity of sale of goods law among the common law provinces and the territories based on the United Kingdom Sale of Goods Act 1893. We regard it as highly desirable that provincial sales law be uniform with only minor local differences. The general activities of business parties, even the carrying out of specific transactions, transcend provincial boundaries. It is important for business parties that legal sales regimes be as similar as possible in different jurisdictions. Moreover, society has an interest in a legal order that will contribute to the efficient conduct of business transactions. Much time and

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[20] In the fields of consumer protection, trade practices and product warranties.

money would be wasted if lawyers had to learn different bodies of sales rules and if each individual province had to devote resources to the development and maintenance of its own sales law.

The preparation and adoption by the Uniform Law Conference of the Uniform Act is a very substantial effort towards maintaining in the future uniformity in the sales law of the common law provinces. The effort will succeed if the Uniform Act achieves substantial acceptance across the country with minimal local changes. We have already stated our opinion that the law of Alberta would be improved by the adoption with some changes of the Uniform Act, and we are also of the opinion that if other provinces adopt it, Alberta should do likewise in order to preserve uniformity of law with them.

If the Uniform Act were adopted by only one province or by a small minority of provinces, there would be less uniformity of sales law than at present. That consideration suggests the desirability of taking steps to ensure that a substantial majority of provinces, or at least of those that have significant business links with Alberta, adopt the Uniform Act. Perhaps the adoption of the Uniform Act by one leader will cause other provinces to follow suit, though this would create some risk of disunity in the absence of coordination. Since we consider uniformity of sales law among most of the common law provinces and territories to be of great importance, we recommend that, before the Alberta legislature adopts the Uniform Act, the Government of Alberta conduct discussions with the other governments with a view to the general adoption of the Uniform

Act.

Another aspect of uniformity of law should be noted. The Uniform Act incorporates many of the ideas and provisions of Article 2. Its adoption would therefore bring about a greater degree of uniformity with the sales law of the United States. The contrary consideration is that adoption of the Uniform Act would somewhat lessen the similarity between the present law of the common law provinces and the law of England and the Commonwealth. Nevertheless, giving greater weight to business than cultural and historical arguments, we find compelling the argument that economic efficiency will be promoted by legal harmony between Canada and its greatest trading partner, the United States.

Recommendations. For the reasons given above, we make the following recommendations:

1. That, subject to the following two recommendations, Alberta adopt the Uniform Sale of Goods Act.

2. That before the Uniform Sale of Goods Act is adopted, changes be made in it in accordance with the recommendations which follow later in this report.

3. That before the Uniform Sale of Goods Act is introduced into the Alberta legislature, the Government of Alberta, by consultation with the governments of the other provinces and the territories, be satisfied that the adoption of the Uniform Act will promote uniformity of law among the provinces and territories.

CHAPTER III. CONTENT AND ORGANIZATION OF REPORT

In view of the size and complexity of the Uniform Act, we will assess its various innovations under subject headings which correspond to the law reform values it espouses. The list contained in the following paragraph is designed only to facilitate analysis and evaluation of the Uniform Act: we have no intention of asserting that the scheme of assessment contained therein is the only valid way to consider the Act. Furthermore, the list does not produce a neat and hermetic division of the sections of the Act, some of which appear under more than one heading. Finally, we have decided that, in view of the exhaustive discussion of the subject of sale of goods in the OLRC Report, our coverage should be selective.[21] Accordingly, not all of the innovations contained in the Uniform Act will be considered in this report. The Institute of Law Research and Reform is generally in favour of the Uniform Act: consequently, where a provision is not discussed, it can be assumed that it has our support, whether it is innovative or merely restates existing law.

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[21] The largest omission in this report is Part VI of the Uniform Act which deals with the rule of nemo dat quod non habet and exceptions thereto. The rule has long been regarded as an integral part of sales legislation though it is not immediately obvious why this should be so. There is no substantial departure from existing law in the treatment of title disputes by the Uniform Act which does nothing to upset the view that it is the role of the law to draw a sensible balance between the competing principles that private property rights should be protected and that reasonable expectations arising from transactions should be safeguarded. Furthermore, much of the work done in the Uniform Committee was concerned with rendering the nemo dat scheme compatible with personal property security legislation. A report dealing with the contract of sale is not the appropriate place for a discussion of this.

The list of reforming values is as follows:

1. Additional Protection for the Reliance Interest

   a. Formation of the contract of sale: sections 4.2 and 4.3;
   b. Firm offers: section 4.4;
   c. Offers inducing reasonable reliance: section 4.5;
   d. Unilateral contracts: section 4.6;
   e. Contractual modifications: section 4.10;
   f. Express warranties and remedies for breach thereof: sections 5.10 and 9.19.

2. Imposing Minimum Standards of Contractual Behaviour

   a. Unconscionability: section 5.2;
   b. Good faith: section 3.2;
   c. Firm offers: supra;
   d. Contractual modifications: supra.

3. Asserting Issue-Orientated Rules at the Expense of General Conceptual Rules

   a. Formation of the contract of sale: supra;
   b. Reducing the significance of property (or title): sections 5.26, 6.1, 7.1, 7.8, 7.9, 8.1, 9.11 and 9.20;
   c. Unilateral contracts: supra;
   d. Extended warranties: section 5.18;
   e. Express warranties: supra.

4. Modernizing and Streamlining Sale of Goods Law

   a. Statute of Frauds: section 4.2;
   b. Parol evidence rule: section 4.8;
   c. The hierarchy of contractual terms: sections 8.1, 5.11, 5.12, 5.13, 5.14 and 5.15;
   d. Redefining "goods": section 2.5.
   e. Remedies changes: sections 9.4, 9.5, 9.6, 9.8, 9.9, 9.10, 9.11, 9.12, 9.13, 9.14, 9.15, 9.16, 9.19, 9.20 and 9.21.

5. Salvaging Bargains and Preventing Waste when the Contractual Process or Contractual Performance Breaks Down

   a. Formation of the contract of sale: supra;
   b. Unsettled price: section 5.3;
   c. Output and requirements contracts and exclusive dealing agreements: section 5.4;

d. Strict tender, rejection and cure: sections 8.1, 8.2, 7.7 and 8.6;
e. Impossibility of performance: sections 8.11, 8.12, 8.13 and 8.14;
f. Adequate assurance of due performance and anticipatory repudiation: sections 8.7, 8.8 and 8.9.

6. Statutory Enunciation of Unclear and Unwritten Law

a. Delivery rules: sections 7.2 and 7.3;
b. Inspection rules: section 7.12;
c. Custody and disposal of rejected goods: sections 8.3, 8.4 and 8.5;
d. Trade terms: sections 5.19, 5.20, 5.21, 5.22, 5.23, 5.24, 5.25 and 5.26.

Additional values. The above classification embraces most of the innovations contained in the Uniform Act. Certain reforming values, however, are not so easily localized in specific sections of the Act. For example, the Uniform Act, in keeping with the spirit of the age, is more interventionist than the Sale of Goods Act of which its draftsman, Sir Mackenzie Chalmers, said: "Sale is a consensual contract and the Act does not seek to prevent the parties from making any contract they please. Its object is to lay down clear rules for the case where the parties have either formed no intention, or failed to express it."[22] The Uniform Act imposes certain restrictions on the freedom of the parties. Thus they are bound by obligations of good conscience in the formation of contracts[23] and of good faith in their performance.[24] These obligations, as well as those of diligence, care and

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[22] Chalmers, Introduction to the First Edition of The Sale of Goods Act, 1893 (1894).

[23] Section 5.2.

[24] Section 3.2.

reasonableness, may not be excluded in the contract.[25] Nevertheless, the Act does permit parties to formulate concrete standards for the application of these overriding principles.[26]

Another feature of the Uniform Act worth noting at this point is its predilection for open-textured rather than tightly-defined rules. The purpose of this is to give the Act room to adapt to the inevitable changes in social conditions that would otherwise overtake a less flexible statute. This drafting policy places a great deal of responsibility on the courts to apply the law with sensitivity to the particular circumstances. In this regard, the Act favours open declarations of statutory policy not typically found in the statutes of common law countries other than the United States. Hence, section 2.1 of the Act states:

> "The purposes of this Act are to revise, reform, and modernize the law governing the sale of goods, to promote fair dealing, to assist the continued expansion of commercial practices through custom, usage and agreement of the parties, and to seek greater uniformity with the laws of other jurisdictions."

Furthermore, the courts are encouraged by subsection 2.2(4) to apply the Uniform Act by analogy to near sales, thus diminishing the risk of an incongruous difference of result between similar contracts, only one of which fits the definition of a contract of sale of goods.

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[25] Subsection 3.1(2).

[26] Id.

CHAPTER IV. ADDITIONAL PROTECTION FOR THE RELIANCE INTEREST

What is at issue here is not the question whether parties to a contract of sale should continue to be entitled to their expectancy or "expectation interest",[27] namely the fruits of expectations generated by entry into the contract. With two exceptions,[28] that entitlement is not threatened by the Uniform Act, so it remains accurate to say, as the Privy Council put it in Sally Wertheim v. Chicoutimi Pulp Co., that: "[I]t is the general intention of the law that, in giving damages for breach of contract, the party complaining should, so far as it can be done by money, be placed in the same position as he would have been in if the contract had been performed...".[29]

What unites the various provisions considered in this chapter is the protection they give to the "reliance interest",[30] by extending relief to parties who have relied to their detriment on the pre-contractual statements or promises of others. At present, the common law affords scant protection to such parties.[31] It is one of the aims of the Uniform Act to make up for this deficiency in existing law.

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27 See Fuller and Perdue, The Reliance Interest in Contract Damages, 46 Yale L.J. 52 (1936).

28 Sections 4.3 and 9.19, both discussed below.

29 [1911] A.C. 301, per Lord Atkinson at p. 307 (an appeal from the province of Quebec). This dictum is a substantial restatement of an earlier one by Parke B. in Robinson v. Harman (1848), 1 Exch. 850, 154 E.R. 363 (Exch.).

30 Fuller and Perdue, supra, note 27.

31 This is particularly so where no contract between the parties is actually forthcoming.

a. Formation of the contract of sale

Sections 4.2 and 4.3 deal with the formation of a contract of sale by the process of offer and acceptance. The major problem addressed by them is the difficulty of inferring the existence and ascertaining the terms of a contract where parties have used standard forms in the contracting process.

Subsections 4.2(1) and (2) exemplify one of the principal values underlying those provisions of the Uniform Act dealing with the formation of the contract of sale, namely the eschewal of mechanical rules for determining the method by which and the moment when a contract is concluded. The courts are instructed by the subsections to take a sensible, practical view of the contract-making process. Though the question whether the parties have made a contract is one of fact, there is a tendency in existing law for guidelines of offer and acceptance to harden into rules of law.[32] The Uniform Act seeks to counter this inclination.

Subsections 4.2(3)-(5) of the Uniform Act deal with minor discrepancies in the communications exchanged by the parties in the contract-making process. Subsection 4.2(3) states that a reply to an offer which purports to be an acceptance, but which contains additional or different terms not materially altering the terms of the offer, will function as an acceptance.

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[32] The area of formation of contract is replete with examples, only one of which need be mentioned here, namely the rule in Hyde v. Wrench (1840), 3 Beav. 334, 49 E.R. 132 (Ch.), that a counter-offer has the effect of cancelling any antecedent offer by the other party. It is easy for likely inferences from fact to harden into universal inferences, in other words rules of law.

Furthermore, subsection 4.2(4) provides that these additional or different terms will be added to the remaining terms of the offer unless the offeror seasonably objects to them. Subsection 4.2(5) gives guidance as to when a purported acceptance is to be treated as materially altering the terms of an offer.

The provisions of section 4.2 of the Uniform Act are relatively modest and probably would do little to alter existing law. Certainly, at present, if the offeror proceeded with performance after receipt of the purported acceptance he would be taken to have submitted himself to the additional or different terms: his conduct would be interpreted as an assent to the terms of a purported acceptance which was really a counter-offer.[33]

Section 4.2 of the Uniform Act does, however, leave at least three interpretative difficulties. The first difficulty concerns the so-called rule in Felthouse v. Bindley [34] that a party cannot by his silence be bound to an offer stipulating silence as an acceptance. It is a difficult question whether the rule, which is not without its critics,[35] is repealed by subsection 4.2(1) which allows a contract to be made "in any manner sufficient to show agreement". In at least one context arising under section 4.2, the rule would appear to have been dispensed with. A purported acceptance under subsection 4.2(3), which does not depart from the offer in a material respect, would seem to

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[33] Brogden v. Metropolitan Railway Co. (1876), 2 App. Cas. 666 (H.L.).

[34] (1862), 11 C.B. (N.S.) 869; 142 E.R. 1037 (C.P.); affd. (1863), 7 L.T. 835 (Exch. Ch.).

[35] See Miller, (1972) 35 Mod. L.R. 489.

conclude a contract unless the offeror rouses himself to object under subsection 4.2(4) to the departure from his offer of the purported acceptance. The treatment of this problem indicates that subsection 4.2(1), despite its failure to come to terms specifically with the Felthouse v. Bindley problem, is meant to be read as broadly as its language suggests. In so far as subsection 4.2(1) encourages the courts to eschew artificial formation rules and to consider the question of formation according to the particular facts of a case, it receives our support.

The seasonable protest of the offeror under subsection 4.2(4) of the Uniform Act to a purported acceptance that departs from the terms of his offer raises the second interpretative difficulty in section 4.2. Is there a contract if the offeror objects? No clear answer is afforded by the section. The difficult case is where the contract remains purely executory, since performance usually resolves formation difficulties. There seem to be two possible solutions: either there is no contract at all, or there is a contract on the protesting offeror's terms. The latter view should be preferred on the ground that what is sauce for the goose should be sauce for the gander: if the offeror's silence can bind him to the offeree's additional or different terms, why should not the offeree's silence after the offeror's objection bind him to their excision? To put the matter beyond doubt, we think that subsection 4.2(4) should be amended to reflect this view which involves a departure from existing law on contractual formation.

The third interpretative difficulty concerns the meaning of "seasonably" in subsection 4.2(4) of the Uniform Act.[36] Should for example the buyer be required to communicate his objection to the counteroffering seller before the latter tools up for performance, before he ships the goods or before the buyer receives them? Problems of this nature are unavoidable in any statute governing contractual relations and are not susceptible to any more precise solution. We are content to leave such problems to the courts, the agency best able to deal with the varied individual cases that will arise.

Recommendation. For the reasons given above, we make the following recommendation:

> 4. That subsection 4.2(4) of the Uniform Sale of Goods Act be redrafted so as to show that, where an offeror objects to the additional or different terms in a purported acceptance and the offeror does not respond to this objection, there is a contract on the terms of the original offer.

While section 4.2 is quite a conventional provision which changes the law little, section 4.3 of the Uniform Act goes considerably further in modifying rules of contractual formation. It applies when the failure of offer and acceptance to correspond goes to a material term or terms of the contract and one of the parties has proceeded with performance. According to existing law, as

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[36] The definition of "seasonably" in subsection 1.1(2)(f) is not very informative since it states that an action takes place seasonably if it occurs within the agreed time or, failing such agreement, a reasonable time.

exemplified by the "last shot" rule, if an offeree's communication to the offeror is at variance with the terms of the offer, it will constitute a counter-offer.[37] This counter-offer will, however, mature into a contract if the original offeror commences performance since this will be interpreted as taking place in response to the counter-offer.[38] The party dispatching the "last shot", frequently on his own standard form, therefore secures the advantage of the contract being on his terms. Section 4.3 alters that. It recognizes that a factual inference has tended to harden into a rule of law; hence, the section applies "where under the rules of offer and acceptance the parties are deemed to have concluded a contract of sale" but one of the parties "by his conduct in receiving or shipping the goods or otherwise has not in fact assented to conflicting terms of the other party and...it would be unreasonable to hold such party to such terms".

Where section 4.3 of the Uniform Act is applicable, the court, in accordance with a discretion guided by subsection 4.3(3), has three choices: it can enforce the contract, minus the conflicting terms but supplemented by any additional terms implied under the Act; it can substitute reasonable terms for the disputed terms and enforce the contract; or it can conclude that no contract has been formed at all and make any appropriate order for consequential relief. The first two choices represent attempts to salvage a contract of some kind from the contracting process; the last clearly cuts back on the expectation interest

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[37] Brogden v. Metropolitan Railway Co., supra, note 33.

[38] Id.

promoted by the "last shot" rule as described earlier, though consequential relief could be granted to protect the reliance or restitution[39] interests of a party who has committed himself to performance of a contract that is valid under existing rules but aborted by section 4.3.

Section 4.3 of the Uniform Act poses a number of interpretative difficulties. First of all, whose performance must trigger the application of the section, that of the offeror or of the offeree? On a close analysis of section 4.3, the performance of either party can set the section in motion. Two fact situations should be borne in mind. The first of these is where S Co. makes an offer on one of its standard forms to B Co. which purportedly accepts the offer on one of its own standard forms. B Co.'s form, however, contains terms differing in a material respect from those on S Co.'s form. S Co., the original offeror, commences performance in response to B Co.'s "acceptance", which is in reality a counter-offer. The second situation would arise where B Co. sends an order on one of its standard forms to S Co. which dispatches the goods immediately in response to B Co.'s offer. Some time later, S Co., the offeree, sends a confirmation of the order on one of its own standard forms which differ materially from those used by B Co. Since section 4.3 is designed to avoid a mechanical application of the "last shot" rule, it should apply to both of these situations.

A second difficulty stems from doubt as to whether the section deals with a non-existent problem. If the courts in fact show no tendency to apply mechanical offer and acceptance

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[39] Fuller and Perdue, supra, note 27.

analysis where a party has not truly assented to the other's conflicting terms, there would seem to be no need for the section. But there are instances of the courts inferring the existence of a contract from confused and protracted negotiations which can be understood only by analysis after the fact.[40]

A third problem concerns the section's use of the phrase "conflicting terms" in lieu of "additional or different terms", the phrase used in section 4.2 of the Uniform Act. Presumably, the same effect is intended because it would be irrational not to apply section 4.3 of the Act where a counter-offer contains major additional terms which are not explicitly at variance with anything in the offer. Lastly, the meaning of the phrase "proceeded with performance" is not obviously clear. It is however coloured by subsection 4.3(2); moreover, the performance must have been so substantial that it would have invoked at common law the "last shot" rule. It is not anticipated that the phrase will cause much difficulty in practice.

Since section 4.2 of the Uniform Act represents such a modest change to existing law and serves to preserve contracts where the formation differences between the parties are minor, we have given it our support. Section 4.3 of the Act, though its practical effect is likely to be confined to a small number of cases, merits a more critical assessment. Its disadvantages are that it introduces a greater measure of uncertainty than is represented by the existing law and that, instead of directing courts simply to set aside the contract on terms, it allows them

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[40] See for example Peter Lind & Co. v. Mersey Docks and Harbour Board, [1972] 2 Lloyd's Rep. 234 (Q.B.).

to intervene by creating such provisions of the contract as they consider to be appropriate. On the other hand, enforcing some kind of the contract may be the most efficient way of resolving an imbroglio. Furthermore, the present law's certainty is bought at the price of imposing an artificial contract on parties who are genuinely at variance. Professor Waddams has observed that business parties are frequently aware of and tolerate a considerable degree of ambiguity in their contractual relations:

> "It is worth asking why, as a practical matter, buyers and sellers should want to leave...essential questions in a state of uncertainty. It can hardly be from ignorance of the law, for it does not take any knowledge of the law to realise that matters could be clarified. Nor can it be from ignorance of the devices available to make matters more certain. Everyone knows that the way to bind another to contractual terms is to secure his signature to a document containing them. The answer must surely be that the parties themselves are ambivalent. The seller knows quite well that his is not the best way to an ironclad exclusion of warranties, but he does not want to risk the commercial consequences of insisting upon the buyer's signature to a fearsome set of exclusions. So he puts the formula into his letter as a compromise in the hope that in the unlikely event of a dispute it may be of use without initially frightening the buyer away from the sale. The buyer knows that he could have required the seller's signature to a generous set of warranties, but he may consider that the seller would probably not supply on those terms, and in any case the possibility of a defect is remote, or the buyer would not be dealing with this seller at all."[41]

The virtue of section 4.3 is that it recognizes the existence of such genuine ambiguity, which can exist even where the parties do

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[41] Waddams, The Effect of Unsigned Writings in the Formation of Sales Contracts: "The Battle of Forms" and Related Questions (Research Paper for OLRC Report).

intend to contract, and it shuns artificial solutions. It affords a better solution than does existing law for the problem of the parties who act in reliance on a flawed agreement. For that reason, we support it.

b. Firm offers

According to present law, an offer expressly left open for acceptance may freely be revoked by the offeror before acceptance, except where it is made under seal or purchased as an option by the offeree.[42] In the absence of consideration moving from the offeree, there is nothing to bind the offeror to his promise to keep the offer open. In 1937, the English Law Revision Committee stated:

> "It appears to us to be undesirable and contrary to business practice that a man who has been promised a period, either expressly defined or until the happening of a certain event, in which to decide whether to accept or to decline an offer cannot rely upon being able to accept it at any time within that period."[43]

Moreover, the Committee saw no reason why the common law should be satisfied with a lower moral standard than the laws of a number of other countries where offers of this kind were made binding.[44] Consequently, the Committee recommended that such offers should not be unenforceable by reason of the absence of

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[42] Routledge v. Grant (1828), 4 Bing. 653, 130 E.R. 920 (C.P.); Offord v. Davies (1862), 12 C.B. (N.S.) 748, 142 E.R. 1336 (C.P.).

[43] Sixth Interim Report (1937), Statute of Frauds and the Doctrine of Consideration, at p. 22.

[44] Id., at p. 23.

consideration.[45] A similar recommendation was provisionally made in 1975 by the English Law Commission.[46]

In the United States, UCC 2-205 states that irrevocable offers, whether or not left open by the offeror for a definite period, may not be revoked. A similar provision is to be found in the Uniform Law on the Formation of Contracts for the International Sale of Goods[47] and in the UNCITRAL Convention on Contracts for the International Sale of Goods.[48] Indeed, the volume of support for making binding those offers containing an assurance of irrevocability is overwhelming.

Section 4.4 of the Uniform Act assures an offeree that he will be able to accept a merchant's offer expressly left open for acceptance, whether or not the offer refers to a definite period. Though our support for section 4.4 is qualified, as will shortly be revealed, we are in agreement with the general principle of imposing a measure of legal obligation on merchants who leave offers open for acceptance. Like the English Law Revision Committee, we see no reason why the common law should be satisfied with a lower moral standard than the law of other countries.

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45 Id., at p. 31.

46 Working Paper No. 60 (Firm Offers).

47 Adopted at the 1964 Hague Conference, this convention came into force in 1972 on ratification by five states. See Article 5(2).

48 The United Nations Commission on International Trade Law reached unanimous agreement on the draft of this convention in 1978 and the draft was later approved by a specially-convened diplomatic conference in Vienna on March 10, 1980. See Article 16(2).

There do remain, however, three points of difficulty in section 4.4 of the Uniform Act. First, was the Uniform Committee right to require a separate signature if the irrevocable offer is made on a form supplied by the offeree? On the one hand, the requirement introduces a measure of formalism which in general we consider to be undesirable. On the other hand, however, there is a real danger that an offeree who has the initiative in the contract-forming process might, by imposing the use of his forms on the offeror, compel him to give an assurance of irrevocability that the offeror may not feel free to refuse or may not seriously have considered. We find the latter argument compelling and therefore support section 4.4 on this issue.

The second problem is whether an assurance of irrevocability should be binding if it specifies no period of duration. Neither of the English law reform agencies referred to above would go so far. The Law Commission thought that a reasonable time obligation "would introduce an element of uncertainty and would lead to disputes over what would in the given case be a reasonable time".[49] The Commission nevertheless said that the problem was a nicely balanced one.[50] Since the period of uncertainty may not exceed three months and since the notion of an offer lapsing because it is not accepted within a reasonable time is a familiar one,[51] we think that the problems posed in this respect by section 4.4 of the Uniform Act are not insuperable. We therefore support the policy of making binding

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[49] Supra, note 46.

[50] Id.

[51] See for example Barrick v. Clark, [1951] S.C.R. 177.

for a maximum of three months those offers containing an assurance of irrevocability of unspecified duration.

Finally, it might be asked what should be the remedy if an offeror purports to retract an offer containing an assurance of irrevocability. A reasonable inference from section 4.4 of the Uniform Act would be that the retraction is a nullity, so that a later acceptance produces a fully-formed contract entitling the offeree to his expectancy. This seems to be in line with the general assumption concerning the effect of binding options.[52] An alternative view would be to treat the retraction as a species of statutory tort and compensate the offeree for any detrimental reliance on the offer before retraction. We have decided that the alternative view is to be preferred. It does less violence to the principle of consensualism underlying our law of contract and yet protects the offeree who has injuriously relied on the assurance of irrevocability. Furthermore, we see no reason why an offeree who has not paid for an offer to be kept open should be able, after the purported retraction, to watch the market rise or fall before deciding to accept: he would enjoy the profit of a contract without incurring any commitment. In this respect, a particular problem is raised in connection with section 4.4 by output and requirements contracts: this will be discussed below.

Two further points flow from our conclusion that the offeree should not receive his expectancy under section 4.4 of the Uniform Act. First, we wish to make it clear that our conclusion

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[52] See for example Mountford v. Scott, [1975] Ch. 258 (C.A.). But see also the various views expressed in the Australian High Court in Goldsborough, Mort & Co. Ltd. v. Quinn (1910), 10 C.L.R. 674.

is limited to cases where the offeree does not provide consideration for the offer to be left open. Where there is consideration moving from the offeree, we have seen that the general assumption is that the offer truly is irrevocable at common law. Secondly, although our proposed redraft of section 4.4 borrows some of the language of section 4.5 of the Uniform Act, it does not incorporate references to the restitution of benefits received by the offeror. In such cases, it is a practical certainty that the offeree could be regarded as having supplied consideration for the offer to be left open in which case section 4.4 would be inapplicable anyway.

We regret that our conclusion on section 4.4 departs from the recommendations of the OLRC and the text of the Uniform Act. Nevertheless, it does not involve a major departure from uniformity and it does further the dominant policy in section 4.4 of the Uniform Act, namely that offers expressly left open for acceptance should not freely be revocable.

Recommendation. For the reasons given above we make the following recommendation:

> 5. That section 4.4 of the Uniform Sale of Goods Act be amended so that the courts be empowered only to award damages computed on the basis of an offeree's reliance on an offer, or generally to the extent necessary to avoid injustice, in those cases where a merchant offeror revokes an offer that has been expressly left open for acceptance and where no consideration has been given by the

offeree for the offer to be left open.

c. Offers inducing reasonable reliance

Even though an offer is not expressly left open for acceptance, the offeree may reasonably alter his position in reliance on it, in the belief that he has a reasonable period in which to accept. According to subsection 87(2) of the American Restatement Second of Contracts:[53]

> "An offer which the offeror should reasonably expect to induce action or forbearance of a substantial character on the part of the offeree before acceptance and which does induce such action or forbearance is binding as an option contract to the extent necessary to avoid injustice."

The Uniform Committee was persuaded by the view that a provision along these lines followed on naturally from section 4.4; such a provision canvassed no issues that had not already been considered. Hence the new section 4.5 of the Uniform Act, which is substantially similar to subsection 87(2). The principal argument in favour of the provision is that it permits the courts to achieve by overt means what frequently they accomplish by artificial unilateral[54] and bilateral contract[55] analysis. This, together with the arguments in favour of section 4.4, persuades

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[53] American Law Institute, Restatement of the Law Second, Contracts 2d (1979).

[54] See for example New Zealand Shipping Co. v. A.M. Satterthwaite & Co., [1975] A.C. 154 (P.C.); Port Jackson Stevedoring Ltd. v. Salmond and Spraggon Ltd. (1978), 52 A.L.J.R. 337, per Barwick C.J. (Aust. H.C.).

[55] See for example Dawson v. Helicopter Exploration, [1955] S.C.R. 868.

us to support the new section 4.5. However, our support is qualified in the following respect. Though section 4.5 empowers the court to limit relief to the restitution of benefits received by the revoking offeror or to the degree of injurious reliance suffered by the offeree, it also permits the court to award expectation damages on the basis that a contract has been formed. For the reasons we gave in connection with section 4.4, we do not agree with this position. Furthermore, we question whether there is any need at all for such a power, given the provisions of section 4.6 of the Act to which we will shortly turn.

As a result of the amendments we have proposed to sections 4.4 and 4.5, the two sections are now so similar that the question arises whether the former section can be merged in the latter. If so, there would be no further need in these sections formally to distinguish between merchants and non-merchants, and between offers expressly left open and offers reasonably inducing reliance. Nevertheless, there are still appreciable differences between the two sections. First, it is easier for the offeree to make his case under section 4.4 than under section 4.5. Under section 4.4, the offeree need not show that the offeror should reasonably have foreseen reliance on his part. Furthermore, section 4.4 simply calls for reliance by the offeree rather than for substantial action or forbearance. Secondly, as we have seen, the redraft of section 4.4 contains no reference to the restitution of benefits. Finally, in a case falling under section 4.5 there is no promise to keep open an offer and hence no need to take account in that section of the doctrine of consideration. On balance, we therefore believe the two sections cannot be merged.

Recommendation. For the reasons given above, we make the following recommendation:

> 6. That section 4.5 of the Uniform Sale of Goods Act be amended so as to remove from the courts the power to award damages computed on the basis of a concluded contract in those cases where the offeree has substantially relied on an offer not expressly left open for acceptance and the offeror could reasonably have expected such reliance.

d. Unilateral contracts

One of the weaknesses of our present law on formation of contracts lies in the area of unilateral contracts. As we have seen, the existing rule is that a promise which has not been purchased by consideration is freely revocable since it has not yet matured into a binding contract. Where the offeror bargains for an act instead of a return promise, this rule threatens hardship to the offeree who must in principle perform in full before securing the benefits of the promise. The offeror's freedom to revoke his promise even as the offeree is on the point of completing his protracted act of acceptance tends to be limited in practice by courts relying on collateral contract analyses, by which a promise not to revoke the offer is implied and then accepted by the offeree when he starts out on the task of performing the main contract.[56] Sometimes the courts will

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[56] See for example Errington v. Errington, [1952] 1 K.B. 290 (C.A.); Daulia Ltd. v. Four Millbank Nominees Ltd., [1978] 2 All E.R. 557 (C.A.).

construe the parties' agreement as bilateral in character even though a more natural reading would support the unilateral contract analysis.[57] Sometimes, decisions are reached which are difficult to justify in terms of existing contractual doctrine.[58]

The purpose of section 4.6 of the Uniform Act is to encourage courts to retreat from the blind alley of unilateral contract analysis and encourage them, unless the language of the parties or the circumstances clearly tell against it, to interpret incipient sales as bilateral contracts. In particular, a buyer who simply instructs a seller to ship goods is not without more ado to be understood as bargaining only for the act of shipment; rather, he will be taken to have bound himself to a contract of sale either if the seller gives a return promise to ship - in which case, a failure to ship will constitute a breach of contract - or if the seller ships the goods - in which case a short or defective shipment will constitute a breach unless the seller informs the buyer that the shipment is only by way of accommodation to him.

Section 4.6 goes on to provide that in any case where acceptance by performance (as opposed to return promise) is permitted to or required of the offeree, the commencement of performance or the tender of at least part performance shall bind both offeror and offeree. In effect, by treating commencement of performance as promissory on the offeree's part and therefore conclusive of a contract, section 4.6 is responding to one of the

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[57] See for example Dawson v. Helicopter Exploration, supra, note 55.

[58] Supra, note 56.

criticisms levelled at attempts to ameliorate the position of the offeree in an inchoate unilateral contract, namely that they are one-sided in imposing on the offeror an obligation which does not rest on the offeree.

Subsection 4.6(3) of the Uniform Act deals with the offeror who is unaware that a contract has been concluded as a result of the offeree's commencement of performance. In this situation, there are three basic choices available to the law reformer: first of all, he can say that no contract has been concluded at all since communication in some form is an intrinsic part of the act of acceptance; secondly, the offeree's failure to communicate can be regarded as a breach of contract sounding in damages if the offeror is injured by the offeree's default; or thirdly, the offeror's ignorance can be treated as a condition subsequent which determines or permits the offeror to determine the contract. It can be said with confidence that the first option has not been chosen. As for whether subsection 4.6(3) is to be analyzed along the lines of the second or third option, the answer is not at all clear. Probably the third option was intended by the draftsman since, unlike existing law on breach of contract, the subsection apparently deprives the offeror of the right to elect to continue with the contract in the face of the other party's breach of condition. We agree with section 4.6 in principle and, while we might have drafted the section in such a way as to resolve the problem of interpretation referred to above clearly in favour of the third option, we do not think the problem is sufficiently serious to justify a departure from uniformity.

Section 4.6 of the Uniform Act in sum alters existing law on contractual formation. It permits an offeree to conclude a contract by return promise when a court might more naturally interpret the offer as calling for an act and it dispenses altogether with unilateral contract analysis where there is a commencement of performance by the offeree. Since such a commencement can be treated as though it were a promissory acceptance, the dividing line between this section and section 4.5 of the Act, which protects offerees who act in reliance on an offer being kept open, must be a fine one indeed, which reinforces the criticism made earlier that there was no need to permit the courts to grant expectation damages in section 4.5 cases.

Notwithstanding the criticisms made above, we support section 4.6. It affords an offeree the security to act in reliance on an offer and, in imposing an obligation also on the offeree, it breaks away from sterile doctrinal analysis and promotes the even-handed treatment of the parties. The only obvious price paid for this reform is the abandonment of a teasing legal conundrum which has haunted generations of law students.

e. Contractual modifications

The area of promissory estoppel, waiver, rescission and variation is one of the most intractable in contract law.[59] Its difficulties are due in no small part to the doctrine of consideration and to attempts made to avoid the writing

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[59] See Stoljar, The Modification of Contracts, (1957) 35 Can. Bar Rev. 485.

requirements of the Statute of Frauds[60] and the Sale of Goods Act. The result is a tangle of confused principles which unduly complicate our law of contract. The Uniform Act, however, is not the appropriate place for a thoroughgoing rationalization of these doctrines. Section 4.10 of the Act therefore deals only with variation and rescission: promissory estoppel and waiver are left to the general law.

Briefly, section 4.10 of the Uniform Act applies to agreements varying or rescinding contracts of sale and consequently excludes from its scope promissory estoppel and waiver. This division is reflected by existing law. To avoid the formal requirements of the Statute of Frauds and the Sale of Goods Act, which extended only to agreements modifying certain contracts, waiver and promissory estoppel were rationalized in the case law as unilateral acts of concession; thus they fell outside the scope of these statutes.

Contrary to the present law, agreements which vary or rescind a contract of sale need no consideration to be binding under section 4.10. Nevertheless, the Uniform Committee felt that a party who had not given consideration should be protected only to the extent of his material reliance. Accordingly, rescissions and variations made without consideration were invested with one of the characteristics of promissory estoppel and waiver: they were made retractable on reasonable notice, provided the other party had not materially relied on them.

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60 (1677) 29 Car. II, ch. 3 (as amended). This statute is received legislation in Alberta.

It is with some regret that we depart from the recommendations of the Uniform Committee. We have decided to revert to the stance taken by the OLRC and make binding agreements that vary or rescind contracts, even in the absence of reliance, for the following reasons. First of all, it seems to us that this course of action would better promote the desired goals of simplicity and justice than does section 4.10 in its present form. Reasonable parties, in our view, would regard such agreements, even if executory, as binding. Furthermore, our proposal would obviate the difficulty which, for the sake of simplicity, we may refer to as the Morris v. Baron[61] problem. What that case reveals is that there is a distinction to be drawn between agreements varying an existing contract and agreements rescinding an existing contract and substituting a new contract for it. While the former type of agreement poses consideration problems, the latter does not if some contractual performance is outstanding on both sides. The distinction is best understood by means of an example.[62] A, a subcontracter, undertakes to supply steel at x dollars per ton to B, who is a building contractor. B is to pay monthly in arrears for the steel supplied. During the course of performance of the contract, the market price of steel rises and A and B agree that the contract price will be raised to x + y dollars per ton. If the later agreement merely varies an existing contract, it will fail as a binding agreement for the reason that B's promise to pay an additional y dollars per ton is not supported by consideration moving from A. But if A and B

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[61] [1918] A.C. 1 (H.L.).

[62] The following facts are drawn from the decision of the Ontario Court of Appeal in Gilbert Steel Ltd. v. University Construction Ltd. (1976), 67 D.L.R. (3d) 606 (Ont. C.A.).

have rescinded the first contract and entered into a new contract, the new contract is binding for the following reasons. A and B, by agreeing to exchange back their promises to supply and pay for steel at x dollars per ton in the future, have validly rescinded their contract. Each promise is a thing of value. The fact that, because of the rise in steel prices, B's promise is worth more then A's is not relevant: consideration must be something of value but the law does not in principle assess the adequacy of it. Once the first contract is validly rescinded and the slate wiped clean, the parties are perfectly free to exchange promises to supply and pay for steel at x + y dollars per ton.

The distinction between the two types of contractual modification set out above has recently troubled the Ontario Court of Appeal.[63] In our view, the distinction is excessively refined and divorced from reality. Section 4.10 of the Uniform Act would encourage the perpetuation of this distinction for it would extend only to agreements without consideration that modify contracts. The reliance limitations on the scope of the section would therefore apply only in the case of variations, the first of the two types of modification discussed above. If all agreements modifying contracts were made fully binding despite the absence of consideration, as we propose with our amended version of section 4.10, there would be no practical need to invoke any distinction between the two types of modification. In summary, therefore, we favour an approach towards agreements modifying existing contracts that we believe to be simpler and

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[63] Id.

more just.

We do, however, see some merit in the proposal of the Uniform Committee. Section 4.10 of the Uniform Act strikes a harmonious balance with sections 4.4 and 4.5 which, as revised by our proposals, are essentially motivated by the policy of protecting a promisee to the extent of his reliance on certain contractual offers. Furthermore, in protecting only parties who have relied on agreements modifying contracts, section 4.10 of the Uniform Act is broadly consistent with the developing law of promissory estoppel and waiver. Our proposal would go beyond promissory estoppel and waiver and would therefore encourage the drawing of a difficult distinction between waivers and agreed modifications. Nevertheless, on balance, we believe that the reasons for reverting to the Ontario position are convincing and we are fortified in our conclusion by the knowledge that, even as we depart from uniformity, we are adopting the same position as Article 2[64] and taking a course of action compatible with the civil law of Quebec.[65]

No discussion of contractual modification would be complete without reference to subsection 13(1) of the Judicature Act.[66] According to that provision, part performance of an obligation extinguishes the obligation, even in the absence of fresh consideration, if expressly accepted by the creditor in full

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64 UCC 2-209.

65 Quebec civil law does not apply the doctrine of consideration as understood in the common law and so would not face difficulties of the kind posed in Foakes v. Beer, infra, note 67.

66 R.S.A. 1980, c. J-1.

satisfaction or if rendered pursuant to an agreement to accept less than full satisfaction. The object of this provision was the reversal of the decision in Foakes v. Beer,[67] by which the doctrine of consideration was held applicable to the discharge of contracts. In that case, therefore, an agreement between a creditor and a debtor that less than the whole debt should be treated as full satisfaction of the creditor's claim was held unenforceable in the absence of some additional consideration moving from the debtor. Under subsection 13(1), where an agreement to accept less than full satisfaction remains wholly executory it would seem that the creditor cannot be prevented from repudiating it, though a partly executed agreement to accept less than full satisfaction, by virtue of a liberal reading of the provision, seems to be enforceable.[68]

Subsection 13(1) of the Judicature Act differs from section 4.10 of the Uniform Act in a number of respects. First, unlike section 4.10, subsection 13(1) is not confined to agreements but extends to simple acceptances in full satisfaction. Secondly, whereas section 4.10 allows a creditor to "withdraw from an executory portion" of an agreement lacking consideration which varies or rescinds a contract of sale, we have seen that the prevailing view of subsection 13(1) is that partial execution of the agreement makes the whole agreement enforceable. The amendment we have suggested to section 4.10, however, would render even unexecuted agreements enforceable, thereby making section 4.10 wider in this respect than subsection 13(1).

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[67] (1884), 9 App. Cas. 605 (H.L.).

[68] See the discussion in Dunlop, Creditor-Debtor Law in Canada, Toronto 1981, at p. 37.

Thirdly, section 4.10 applies only to sale of goods contracts, whereas subsection 13(1) is a general provision applicable to all contracts. Finally, whereas section 4.10 is not confined to money obligations, it is possible that subsection 13(1) is,[69] though the point has not been tested since the subsection 13(1) cases have all in fact involved money obligations.

Although section 4.10 (as we propose to revise it) and subsection 13(1) are different in scope, we have concluded that they are not in conflict. Admittedly, the two provisions extend different degrees of leniency towards obligors so that, for example, a wholly executory agreement lacking consideration would be binding under our proposed version of section 4.10 but not under subsection 13(1). Nevertheless, neither provision purports to say that only if its terms are satisfied can an agreement become binding if it is not already binding at common law; neither purports to be the exclusive statutory source of leniency towards obligors. Consequently, subsection 13(1) is not on a collision course with our proposed section 4.10 and we are therefore of the opinion that there is no need to harmonize them. Furthermore, any attempt to do so would be made difficult by certain interpretative difficulties presented by subsection 13(1)[70] which cannot be resolved in a report confined to the law of sale of goods.

Recommendation. For the reasons given above we make the following recommendation:

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[69] The better view is that it should not be since subsection 13(1) refers to part performance of obligations rather than debts.

[70] Dunlop, op. cit., supra, note 68 at pp. 36-38.

7. That section 4.10 of the Uniform Sale of Goods Act be amended so that in all cases an agreement, whether or not executed, varying or rescinding a contract of sale of goods need have no consideration to be binding.

f. Express warranties and remedies for breach thereof

This is one of the most complex areas of law in the Uniform Act. A survey of the development of warranty and surrounding rules of law is vital to an understanding of the relevant provisions. At the outset, it would be useful to give short definitions of these various rules. Briefly, "warranty" has acquired a number of meanings. Two of these meanings may be noted here: first, a lesser term of the contract whose breach does not confer on the injured party the right to terminate the contract though he may sue for damages;[71] and secondly, which is the broader meaning and the one used in this section of the report unless the context shows otherwise, a statement made about the subject matter of the contract which is incorporated into the contract as one of its terms. The remedies for breach of warranty in this broader sense will be the normal remedies for breach of contract and will include, where appropriate, damages.

An innocent misrepresentation means a false but non-fraudulent statement of material fact which induces a party to enter into a contract but which does not become a term of the

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[71] This is the sense in which the term is used in the Sale of Goods Act, section 1(n).

contract.[72] The remedy is equitable rescission which involves returning the parties to their pre-contractual positions. There is no right to damages for equitable misrepresentation.[73] When a misrepresentation is made fraudulently, however, the injured party may sue for damages in the tort of deceit.[74] In the last twenty years, tort law has developed further. Even innocent but negligent misrepresentations can now give rise to damages liability in that branch of the tort of negligence usually referred to as negligent misstatement.[75] The precise boundaries of this tortious action cannot yet be surveyed with great precision. In particular, there is some doubt as to whether such an action will lie between contracting parties, though parties,[76] though it can now be said with some confidence that a subsequent contract between the parties will not normally prevent a tortious action from lying in respect of pre-contractual statements.[77]

Finally, there is the contractual condition, implied under the Sale of Goods Act, that the goods shall correspond to their description in the contract (hereafter, the description

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[72] Redgrave v. Hurd (1881), 20 Ch. D. 1 (C.A.).

[73] Heilbut, Symons & Co. v. Buckleton, [1913] A.C. 30 (H.L.).

[74] Pasley v. Freeman (1789) 3 T.R. 51, 100 E.R. 450 (K.B.). Derry v. Peek (1889), 14 App. Cas. 337 (H.L.).

[75] Hedley Byrne & Co. v. Heller & Partners, [1964] A.C. 465 (H.L.). This decision has been applied in a great number of Canadian cases.

[76] J. Nunes Diamonds Ltd. v. Dominion Electric Protection Co., [1972] S.C.R. 769.

[77] Sealand of the Pacific Ltd. v. Ocean Cements Ltd. (1973), 33 D.L.R. 625 (B.C.S.C.) established a line of authority restricting Nunes Diamonds in this way.

condition).[78] "Condition" here signifies a term of the contract whose breach entitles the injured party to terminate the contract; unlike warranty, in the narrow sense dealt with above, it does not confine the injured party to a damages action.

Development of warranty liability. Warranty originated in the writ of trespass on the case. From its earliest days it was coupled with the notion of deceit, which, however, was then understood in terms very different from its current meaning. It was not necessary for the warrantor to have a fraudulent intent: rather, it was sufficient for the other party to be deceived, that is misled, by the statement.[79] It was not until the last quarter of the eighteenth century that it became common to plead warranty in contract.[80] Towards the middle of the nineteenth century, around the same time as the modern doctrines of privity of contract and consideration were being propounded, warranty came to be seen as a contractual action that had to be supported by consideration.[81] From from being a tortious action, warranty had in a relatively short time crossed the border into contract.

Nevertheless, the law of torts continued as a vehicle for the imposition of liability for false statements. The tort of deceit, freed from the necessity of a contract between the

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78 Section 16.

79 See for example Crosse v. Gardner (1688), Carth. 90, 90 E.R. 656 (K.B.); Medina v. Stoughton (1700), 1 Salk. 210, 91 E.R. 188 (K.B.).

80 Stuart v. Wilkins (1778), 1 Doug. 18, 99 E.R. 15 (K.B.) is the first reported case.

81 Roscorla v. Thomas (1842), 3 Q.B. 234, 114 E.R. 496 (Q.B.).

parties by the end of the eighteenth century,[82] was able for a time to support liability for deceptive statements falling far short of the modern understanding of fraud. This state of affairs, however, came to an end with the landmark decision of the House of Lords in Derry v. Peek.[83] This case had crucial implications for the development of liability for false statements. First, the tort of deceit was carefully confined to untrue statements which the maker either knew to be false or made recklessly without caring whether they were true or false. This meant that liability for fraud could be established only in comparatively rare cases. Secondly, Derry v. Peek was interpreted as precluding a tortious action in damages for negligent misstatement[84] and it had the effect of setting back this head of liability for more than seventy years. Thirdly, the doctrine of equitable misrepresentation, which had recently been introduced into the courts of common law as a result of the fusion of such courts with the Court of Chancery[85] could not be broadened to carry a liability in damages against the maker of such statements. Lastly, warranty remained penned within its contractual boundaries and, to prevent any subversion of the rule that no common law action for damages would lie for a mere misrepresentation, there developed a restrictive attitude towards the existence of warranty, particularly in collateral

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82 Pasley v. Freeman, supra, note 74.

83 Supra, note 74.

84 Low v. Bouverie, [1891] 3 Ch. 82 (C.A.).

85 Redgrave v. Hurd, supra, note 72. This case is usually relied on nowadays as supporting the proposition though the point was probably not altogether free from doubt for some time afterwards.

contracts,[86] which has endured until comparatively recent times.[87] In the last quarter of a century, however, a more liberal approach to warranty has brought to light its tortious antecedents[88] at about the same time as the tort of negligent misstatement has finally emerged. The juxtaposition of the two actions in certain cases, moreover, has further pointed to the tortious aspect of warranty liability.[89]

It would be misleading to assume that contractual liability for untrue statements is completely encapsulated by the above survey. The development of the description condition also has to be considered. The section dealing with description in the Sale of Goods Act has been described as conceptually one of the most difficult provisions of the Act.[90] In fact, the difficulty lies, not so much in what the Sale of Goods Act says about description, which is very little, but rather in the way the concept has evolved through the cases and in the differences in its application to the two categories of specific and unascertained

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86 Heilbut, Symons, supra, note 73.

87 As an example of the changing attitude, see Murray v. Sperry Rand Corp. (1979), 23 O.R. (2d) 456.

88 See for example Dick Bentley Productions Ltd. v. Harold Smith (Motors) Ltd., [1965] 1 W.L.R. 623 (C.A.).

89 A good example is Esso Petroleum Co. v. Mardon, [1976] Q.B. 44 (C.A.). This decision was recently approved by the Alberta Court of Appeal in Canadian Western Natural Gas Co. v. Pathfinder Surveys Ltd. (1980), 21 A.R. 459 (C.A.).

90 Benjamin's Sale of Goods (ed. A.G. Guest) (2nd. ed. 1981), para. 772.

goods.[91]

About the time as the Sale of Goods Act was first enacted in England, and for some years thereafter, the meaning of description was tolerably clear. In the case of unascertained goods, any statement made by the seller which was at all descriptive of the goods, even of their incidental qualities, came within the description condition.[92] Thus in one case a term that goods were "to be carefully packed and guaranteed equal in quality to any of the well-known standard brands" was held to be part of the description.[93] Description in this context, therefore, embraced number, quality, kind, state, condition and other attributes of the goods.[94] Furthermore, the effect of treating all such statements as part of the description condition endowed each of them with the potency of a contractual condition, any breach in respect of which permitted the injured party to reject the goods and terminate the contract. This party would not be confined to an action for damages on the ground that a mere warranty as opposed to a condition had been breached, nor would his remedy be confined to equitable rescission on the ground that the seller's misrepresentation fell short of becoming an actual term of the contract.

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91 See Bridge and Buckley, Sales and Sales Financing in Canada (1981), at pp. 150-53; Coote, Correspondence with Description in the Law of Sale of Goods, (1976) 50 A.L.J. 17. Still the leading case on the subject is Taylor v. Combined Buyers Ltd., [1924] N.Z.L.R. 627.

92 Bowes v. Shand (1877), 2 App. Cas. 455 (H.L.).

93 Burlington Canning Co. v. Campbell (1908), 7 W.L.R. 544 (Man.).

94 See for example Arcos Ltd. v. E.A. Ronaasen and Son, [1933] A.C. 470 (H.L.); Re Moore & Co. v. Landauer & Co., [1921] 2 K.B. 519 (C.A.)

In the case of specific goods, however, the scope of description was much less broad.[95] Since the contract goods would already have been identified by the parties at the time of the contract or during preceding negotiations, the seller's obligation was merely to deliver goods not different in kind from those ordered. Thus a seller of specific goods could not deliver a particular horse if he had sold a different horse, or a cow instead of a horse, or a barrel containing beer if he had described it to the buyer as containing port wine. Statements of the seller, however, that described a specific horse as sound, or specific port wine as aged in oak, for example, would not fall within the scope of the statutory condition since they were regarded as concerning attributes rather than kind. They might, nevertheless, take effect as express conditions of the contract, contractual warranties or misrepresentations inducing the contract.

The neat distinction between specific and unascertained goods tended to break down in certain description cases.[96] Moreover, in recent years the courts have grown disenchanted with the rejection of goods on a falling market for trivial breaches of the statutory condition.[97] There is high authority for the view that the scope of description in unascertained goods cases

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95 Taylor v. Combined Buyers Ltd., supra, note 91; Twaites v. Morrison (1918), 43 D.L.R. 73 (Alta. S.C. App. Div.).

96 This was especially the case where the buyer had not seen the goods. See Varley v. Whipp, [1900] 1 Q.B. 513 (Div. Ct.); Runnymede Iron & Steel Co. v. Rossen Engineering & Construction Co., [1962] S.C.R. 26.

97 See for example Reardon Smith Line Ltd. v. Yngvar Hansen-Tangen, [1976] 1 W.L.R. 989 (H.L.).

has become the same as that where the goods are specific.[98] It has even been said that, in all cases, a statement is descriptive under the Sale of Goods Act only if it goes to the very identity of goods and not merely if it serves to identify them as the contract goods.[99] Even as this has been said, however, there are signs that the old strict attitude will emerge again in the case of unascertained future goods sold on a commodities market.[100] In sum, the law on description is complex and difficult to state in its modern form. It is therefore not surprising that in recent years it has tended to be eclipsed by developments in the area of express warranties and negligent misstatement.[101]

Reform of warranty law. The modern law of warranty, together with related areas of description, fraudulent and innocent misrepresentation and negligent misstatement, is unnecessarily difficult and stands in need of simplification. Furthermore, warranty in particular was forged at a time when the process of selling goods was a much simpler matter than it is today. The increasing complexity of manufactured goods and the proliferation of intensive marketing campaigns has resulted in a marked increase in the weight of words surrounding each sale of goods transaction. Furthermore, the twentieth century intrusion of middlemen between manufacturer and consumer has served if anything to dilute the latter's rights. In principle, a

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98 Id.

99 Id., at p. 999.

100 Id., at p. 998 where Lord Wilberforce was prepared to take a "strict and technical view" in the case of "unascertained future goods (e.g., commodities)".

101 There are few modern Canadian cases on the description condition.

manufacturer's statements cannot be laid at the door of a retailer who did not utter them. Admittedly, manufacturers can be made liable on a collateral contract basis to remote purchasers but there are conceptual difficulties involved: the remote purchaser must at least be aware of the statements and purchase the goods in response to them.[102] If the manufacturer's misstatement is a mere misrepresentation falling short of a contractual term, the remote purchaser has no recourse to the equitable remedy of rescission since there is no contract to rescind between him and the manufacturer. So far, the tort of negligent misstatement is something of an unknown factor in this context. Furthermore, it requires reliance on the part of the remote purchaser and therefore does not address itself to the case of manufacturers whose public utterances about their products have served to build up the reputation of these goods in the eyes of a consumer who buys relying on their reputation, rather than on any particular statement made by the manufacturer about them.[103]

The OLRC was of the view that modern patterns of mass sales promotion argued a need for reform of the law of warranty.[104] It therefore proposed significant changes in warranty law which appear in a revised and expanded form in section 5.10 of the Uniform Act.

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[102] Murray v. Sperry Rand Corp., supra, note 87; Lambert v. Lewis, [1980] 2 W.L.R. 299 (C.A.), revd. on different grounds [1981] 1 All E.R. 1185 (H.L.).

[103] Lambert v. Lewis, supra. See also the judgment of the trial judge at [1979] R.T.R. 61.

[104] OLRC Report at pp. 135-42.

Contractually agreed terms are preserved as warranties by section 5.10 of the Uniform Act.[105] Nevertheless, the section changes existing law by extending warranty to cases where there has been reliance though no agreement.[106] Furthermore, some statements may be warranties under section 5.10 even in the absence of agreement or proven reliance. The section deals with four principal categories of warranty: first, statements made by a manufacturer or similar party directly to a remote buyer;[107] secondly, statements made by a manufacturer or similar party which are adopted by the seller in his dealings with the buyer;[108] thirdly, statements made by the seller to the buyer;[109] and fourthly, statements made by the buyer to the seller.[110]

Section 5.10 of the Uniform Act provides that statements made by manufacturers and similar parties to the remote buyer bind their maker when they relate to the goods and the buyer relies on them. Furthermore, when these statements are made to the public and have a natural tendency to induce reliance, they can be binding even if the buyer does not actually rely on them.[111] Thus a buyer could enforce a warranty inside packaged goods which he discovers only after he has purchased them. He could sue also on the basis of advertising statements of which he

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105 Subsection 5.10(3)(a).

106 Subsection 5.10(3)(b).

107 Subsection 5.10(8).

108 Subsections 5.10(4), (5).

109 Subsection 5.10(3).

110 Subsection 5.10(7).

111 Subsection 5.10(9).

was not specifically aware but which bolstered the manufacturer's reputation or that of his product so as to influence the purchase. Doctrines of privity of contract and consideration are expressly ruled out of play in the case of the warranty liability of remote sellers such as manufacturers by subsection 5.10(10) of the Act.

The same principle of actual and imputed reliance applies also to statements made about the goods by the seller to the buyer. Furthermore, the seller will be deemed to have made statements previously made by a remote seller if by word or conduct he has adopted them. In the case of statements made in a written form accompanying the goods, adoption is presumed on the part of merchant sellers. Such sellers incurring liability for adopted statements are, however, entitled to be idemnified by the original makers.[112]

Section 5.10 of the Uniform Act also imposes a reliance-based liability on buyers who make statements about the subject matter of the contract to the seller. While it seems just to treat the buyer and seller even-handedly, this provision would not appear to have much practical scope, though it might apply where, for example, the buyer of antique goods tells the seller that they are not really antiques at all.

The above provisions, therefore, considerably expand the range of warranty as well as the size of the class to whom the buyer can turn for recourse. Moreover, conditions and limitations on warranties, where unconscionable, can be

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[112] Subsection 5.10(6).

disregarded in accordance with subsection 5.10(2) of the Uniform Act. One desirable side effect of the expansion of warranty was that the Uniform Committee felt free to eliminate the troublesome description condition.

Though it might be argued that section 5.10 of the Uniform Act unduly expands warranty as a source of contract liability by its penetration of the field of reliance and its concomitant absorption of equitable misrepresentation, this criticism can be countered by reference to a new remedial provison, section 9.19 of the Act. This section would permit a court to distinguish for the purpose of damages liability between an agreed contractual term and a reliance-based warranty similar to our present concept of equitable misrepresentation. Furthermore, even as it penetrates reliance, the new statutory definition of warranty renders unnecessary resort to the mass of confused legal principles referred to above. Section 5.10 also takes account of the realities of modern marketing and sales promotion methods. In extending the scope of a manufacturer's liability to remote purchasers it conforms to the reasonable expectations of the latter who, if anything, look to the manufacturer rather than the retailer to satisfy their contractual complaints. We therefore support the principles of warranty liability espoused by section 5.10.

There is, however, one small drafting problem that we believe needs attention. The definition of reliance-based warranties in subsection 5.10(3)(b) of the Uniform Act suggests that the burden of proof is on the seller to establish absence of reliance or entitlement to rely on the buyer's part in order to

avoid warranty liability. We believe, however, that the buyer should have the burden of establishing reliance in which case the seller would then have to show this reliance was unreasonable. The same problem arises under subsections 5.10(7) and (8) of the Act and we recommend that the provisions be redrafted to make it clear that the burden of proof is split along the lines we have indicated.

Recommendation. For the reasons given above we make the following recommendation:

> 8. That where reliance is a necessary part of a warranty claim, section 5.10 of the Uniform Sale of Goods Act be redrafted so as to show clearly that the claimant has the burden of proof of establishing reliance.

Remedies for breach of warranty. The extension of warranty into the field of reliance, which for most purposes entails the assimilation of equitable misrepresentation and warranty, raises the question whether the award of full-scale expectation damages in the event of breach is appropriate in all cases of warranty liability. This led to the adoption in the Uniform Committee of a special remedial provision, considered necessary because of the frank recognition of warranty as a hybrid entity straddling the boundary of contract and tort. This provision, section 9.19 of the Uniform Act, introduces a judicial discretion to scale down the normal measure of damages available to a party for breach of contract where the warranty in question is reliance-based or where the need to show reliance has been dispensed with, provided

the warranty is not also an agreed term of the contract. Accordingly, warranties established according to the present test based on contractual intention will not be subject to section 9.19. The purpose of the section is to grant the courts suitable powers to deal with cases of what at present we would classify as equitable misrepresentations or even as statements falling short of that. According to the section, the court can in relevant cases compensate the plaintiff to the extent of his reliance interest, set aside the contract or grant a rebate of part of the price paid. A rebate of part of the price may be particularly appropriate in cases where a remote buyer is suing on a manufacturer's warranty in respect of which he can establish no reliance: he might in effect recover the difference between what he paid for the goods and what they were actually worth. In the exercise of its discretion, the court is assisted by various criteria set out in subsection 9.19(2). We support this provision in order to avert the mischievous consequences which could flow from imposing too fully-fledged a contractual liability on a species of warranty that has transcended the boundaries of contract. Private sellers in particular should be saved by section 9.19 from too extensive a warranty liability.

The same desire to protect private sellers from a liability in damages out of all proportion to the price they have received is apparent in subsection 9.19(1)(a) of the Uniform Act which grants the same powers to a court in the case of all breaches of contract by a non-merchant seller where it would be inequitable to award damages on the full expectation scale. Though the problem of such liability has not yet manifested itself in the case law, the Uniform Committee considered it prudent in an Act

designed for the substantial future to provide for the problem. We support this view on the ground that it will give courts a fair and honest legal ground on which to scale down liability should the need arise. It poses no threat to the sanctity of contracts and does not undercut the network of commercial relations sustaining our society.

We do, however, see a need for a minor amendment to subsection 9.19(1)(a). The word "inequitable", in our view, suggests a reference to the technical rules of equity. We think the courts' powers of review should apply to all cases of unfairness and injustice and we therefore favour amending the provision to that effect by substituting "unfair" for "inequitable".

Recommendation. For the reasons given above we make the following recommendation:

> 9. That section 9.19 of the Uniform Sale of Goods Act be redrafted so that the courts' powers to review damages awards against non-merchant sellers be exercised where a full-scale award is "unfair" rather than "inequitable".

CHAPTER V. IMPOSING MINIMUM STANDARDS OF CONTRACTUAL BEHAVIOUR

Chapter 7 of the OLRC Report is entitled "Freedom of Contract and Minimum Behavioural Standards: The Doctrines of Unconscionability and Good Faith in Performance and Enforcement". What is at issue is whether contracting parties should have the untrammelled liberty to set the terms of their contracts, however unfair or one-sided, or whether they should be bound by basic moral standards. The conflict between individual freedom and public morality is both fluctuating and never-ending. The notion of untrammelled liberty reached its apogee in the high Victorian period.[113] In our age, the pendulum has swung and is continuing to swing towards basic moral standards in the formation of contracts.[114] We agree with the OLRC and the Uniform Committee that this movement should be recorded in new sale of goods legislation, though we disagree with these bodies as to the extent to which this should take place.

a. Unconscionability

The concept of unconscionability lies at the heart of the doctrine of equitable[115] whose scope and presence in particular rules is not always appreciated. For example, its very real

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[113] See Printing & Numerical Registering Co. v. Sampson (1875), L.R. 19 Eq. 462, per Jessel M.R. at p. 465: "[I]f there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice."

[114] Besides case law, this process is observable in statutes such as the Unfair Trade Practices Act, R.S.A. 1980, c. U-3.

[115] See Morrison v. Coast Finance Ltd. (1965), 55 D.L.R. (2d) 710 (B.C.C.A.).

influence on the doctrine of equitable misrepresentation, by which contracts may be rescinded if induced by a false statement of material fact, is not apparent. Such contracts were set aside, not because equity had a more lenient view than the common law as to when contractual consent was sufficiently vitiated for the contract to be undone - that would have brought the old Court of Chancery into the sort of direct conflict with the common law courts that it studiously sought to avoid - but rather because equity deemed it fraudulent for a party to retain the benefits of a contract on learning that his false statement had induced the other to conclude the contract with him.[116]

The unconscionability doctrine was extensively employed in the eighteenth century for the protection of the weak and improvident but tended to fall into disuse in the latter years of the nineteenth century. Its modern scope has become clearer with Canadian decisions in the last twenty years marking a return to the attitude of the old Court of Chancery towards equitable fraud when faced with unconscionable behaviour.[117] There is also significant recent case law granting relief where a party, denied the chance of independent advice and at a bargaining disadvantage with the other, enters into an unfair contract.[118]

Furthermore, the equitable jurisdiction over penalty clauses

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[116] Redgrave v. Hurd, supra, note 72.

[117] Morrison v. Coast Finance Ltd., supra note 115; McKenzie v. Bank of Montreal (1975), 7 O.R. (2d) 521, affd. 12 O.R. (2d) 719 (C.A.); Harry v. Kreutziger (1978), 95 D.L.R. (3d) 231 (B.C.C.A.).

[118] Lloyd's Bank Ltd. v. Bundy, [1975] Q.B. 326 (C.A.).

has never subsided while equitable rules against forfeitures[119] and against restraint of trade clauses in personal services contracts[120] have experienced in the last quarter of a century something of a revival, in some cases even an expansion. These related developments appear to have been triggered by various phenomena, including changing standards of morality as well as inflation and economic fluctuations which have undermined the normal processes of contractual expectation and risk-allocation.

On the common law side, stricter rules of interpretation of exception clauses[121] and the emergence of the doctrine of fundamental breach[122] betoken a greater willingness on the part of the courts to intervene in private bargains. These cases frequently but not invariably involve a disparity of bargaining power between individuals and large, impenetrable corporations who have contracted on the basis of unnegotiated and often incomprehensible standard form contracts.

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[119] Stockloser v. Johnson, [1954] 1 Q.B. 476 (C.A.).

[120] A. Schroeder Music Publishing Co. v. Macaulay, [1974] 1 W.L.R. 1308 (H.L.).

[121] Hollier v. Rambler Motors (A.M.C.) Ltd., [1972] 2 Q.B. 71 (C.A.); Smith v. South Wales Switchgear Ltd., [1978] 1 W.L.R. 165 (H.L.).

[122] In recent years, the doctrine has come under heavy fire in cases such as Suisse Atlantique Societe d'Armement Maritime S.A. v. Rotterdamsche Kolen Centrale, [1967] 1 A.C. 361 (H.L.) and Photo Production Ltd. v. Securicor Transport Ltd., [1980] A.C. 827 (H.L.), the latter case laying to rest any lingering doubts as to the survival of a rule of substantive law based on fundamental breach. Though Photo Production has purportedly been followed in Beaufort Realties (1964) Inc. v. Chomedey Aluminum Co. (1980), 116 D.L.R. (3d) 193 (S.C.C.) it is quite possible that Canadian provinces, lacking specific legislation dealing with exception clauses of the kind in existence in the United Kingdom, will reintroduce fundamental breach as a rule of substantive law.

In the last twenty years, the rising tide of consumer consciousness has had a profound if confusing impact on the law. Statutes such as the Unfair Trade Practices Act[123] of this province intervene in private contracts to a degree that would have been unthinkable a generation ago. Nor, as the developing law on unconscionability has shown, have the courts refrained from intervening in contracts.

The OLRC concluded on the basis of ad hoc developments such as these that a general doctrine of unconscionability was an unchallengeable feature of future sales legislation. [124] It should be applied, in varying degrees of course, to all sales transactions though it should never become "a general dispensing agent for contractual obligations".[125] The Uniform Committee shared this opinion so that section 5.2 of the Uniform Act follows section 5.2 of the OLRC bill with only a few amendments.

According to section 5.2 of the Uniform Act, a court can deny the enforcement of a contract, in part or in full, when it finds that the contract or a part thereof was unconscionable at the time it was made. No definition of unconscionability is attempted but criteria are laid down by subsection 5.2(2) to assist the court in its inquiry. These criteria are detailed and bear upon both the circumstances surrounding the conclusion of a contract and the substance of the bargain that the parties have made. The section, it is plain, is capable of applying to commercial as well as consumer contracts. Subsection 5.2(4)

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[123] Supra, note 114.

[124] OLRC Report at p. 156.

[125] Id.

provides that it may not be excluded by contrary agreement or waiver and subsection 5.2(3) permits the court to invoke the issue of unconscionability of its own motion.

A criticism that could be made of the unconscionability doctrine is that it weakens the contractual bond and makes it too easy for a party to resile from a contract which is no longer advantageous to him. Against that, however, it can be said that the courts can be trusted to apply the doctrine with prudence and are most unlikely to allow it to become "a general dispensing agent for contractual obligations". Indeed, they are already in the process of applying just such a doctrine, perhaps varying in shape according to the context in which it is found, and it can be said that the doctrine of unconscionability has already become an established feature of our law.[126]

Another criticism of the doctrine is that it is uncertain in its scope and therefore has the potential for undermining confidence in transactions. On the other hand, the doctrine is likely to be invoked in areas already subject to judicial intervention of uncertain bounds, for example, the control of exception clauses. Furthermore, since the courts have already embarked on the development of a doctrine of unconscionability, the values of certainty and consistency of result can only be enhanced if the doctrine is laid down within clear statutory guidelines.

A further criticism that could be made of section 5.2 of the Uniform Act is that it goes too far in extending protection to

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[126] See Waddams, Unconscionability in Contracts, (1976) 39 Mod. L.R. 369.

entrepreneurs as well as consumers. Nevertheless, we do not regard this as a serious problem since the criteria laid down in subsection 5.2(2) become increasingly irrelevant in proportion to a party's ability to take care of his own interests. In addition, the line between consumers and entrepreneurs is a difficult one to draw. Where for example should one place farmers, persons who acquire knitting machines to establish a part-time home-based industry,[127] and individuals who are persuaded to enter a pyramid sale franchise agreement?[128] We believe it is preferable not to draw a hard-and-fast distinction between consumers and entrepreneurs.

One drawback in the drafting of section 5.2 of the Uniform Act is that it permits a court to review part only of a contract for unconscionability. This creates the danger of the court unduly limiting its inquiry and not recognizing that a party may be prepared to accept a harsh contractual provision in return for concessions in the remainder of the contract. The unconscionability provision, however, is unlikely to prevent a court from relying on its own common sense. Indeed, a careful application of the criteria in subsection 5.2(2) should positively militate against any such result.

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[127] Federal Discount Corp. v. St. Pierre, [1962] O.R. 310 (C.A.). The decision in Bank of Montreal v. Kon, [1978] 2 W.W.R. 503 (Alta.), based on Part V of the Bills of Exchange Act, R.S.C. 1970, c. B-5, which was not in force at the time of the St. Pierre decision and which extends only to consumer notes and purchases, would suggest that St. Pierre could not be regarded as a consumer transaction.

[128] This would be treated as a consumer transaction under the British Columbia Trade Practice Act, R.S.B.C. 1979, c. 406, section 1.

A more serious criticism of section 5.2 of the Uniform Act, and one that we are unable to counter, is that, in permitting a court to raise the issue of unconscionability of its own motion, it creates a real danger of the sort of forensic surprise that the system of pleadings and pre-trial procedures is designed to prevent. We see no justification for such a power when it is not available to courts in cases of misrepresentation, fraud and duress. Furthermore, though unconscionability is a flexible doctrine, it would be most undesirable for it to degenerate into the sort of unanalytical incantation that the system of guidelines in subsection 5.2(2) is designed to avert: unconscionability may require detailed evidence to be led and should turn on rather more than the individual judge's subjective and spontaneous sense of fairness. We cannot therefore accept this aspect of unconscionability but, for the reasons given above, we support the balance of the section.

Recommendation. For the reasons given above we make the following recommendation:

> 10. That a court exercising its powers to review transactions for unconscionability under section 5.2 of the Uniform Sale of Goods Act not be permitted to raise the issue of unconscionability of its own motion.

b. Good faith

The OLRC Report recommended the introduction of a general good faith principle in sales contracts which would be higher than honesty in fact and would extend to reasonable standards of fair

dealing.[129] This principle would apply in both the performance and enforcement of the contract of sale. This recommendation took shape as section 3.2 of the OLRC bill which, subject to a restrictive amendment, became section 3.2 of the Uniform Act.[130]

As the OLRC conceded, the principle of good faith as thus defined was not an integral part of existing sales law. When the principle is referred to in the Sale of Goods Act, it is in the sections dealing with exceptions to the rule of nemo dat quod non habet,[131] where it has the restricted meaning of honesty in fact rather than fair dealing.[132] It is, however, easy enough to point to individual rules and institutions of the common law of contract which are inspired to some extent by notions of fair dealing. There is, for example, the principle of promissory estoppel as well as the growing body of law on unconscionability. One could also point to a large number of cases dealing with questions of construction[133] and implied terms[134] terms which appear to have been motivated by a fair dealing ethic. In one

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129 OLRC Report at pp. 163-69.

130 The definition of good faith itself is to be found in subsection 1.1(1)15 of the Uniform Act.

131 Viz., sections 24-27.

132 According to subsection 2(1) of the Sale of Goods Act: "A thing is deemed to be done "in good faith" within the meaning of this Act when it is in fact done honestly, whether it be done negligently or not."

133 See for example Prenn v. Simmonds, [1971] 3 All E.R. 237 (H.L.).

134 See for example Multi-Malls Inc. v. Tex-Mall Properties Ltd. (1980), 28 O.R. (2d) 6; affd. (1981), 128 D.L.R. (3d) 192 (C.A.).

case,[135] the defendant and the plaintiff were engaged jointly in a shopping mall development scheme. When the defendant developed on its own behalf a separate piece of land in a neighbouring township and thereby stultified any chances of approval for the agreed scheme from the Ontario Municipal Board, it was held to have broken an implied term of its contract with the plaintiff to use its best efforts to secure zoning permission. Despite the number of such cases and individual rules, the prevailing view is that there is no all-encompassing doctrine of good faith, in the extended sense proposed by the OLRC, in our existing law of contract.

A principle of good faith is espoused in Article 2 where, though similar in definition to section 3.2 of the OLRC bill, it has a considerably narrower field of application. First of all, the principle, insofar as it extends beyond honesty to reasonable standards of fair dealing, applies only to merchants under Article 2,[136] whereas it applies to all contracting parties in the OLRC bill and the Uniform Act. Secondly, good faith in this broad sense only applies where individual sections of Article 2 expressly invoke it, whereas the effect of section 3.2 is to extend it throughout sales law. Finally, whereas reasonable standards of fair dealing in section 3.2 are not linked to practices and usages of particular trades, Article 2 refers to "reasonable commercial standards of fair dealing in the trade".[137]

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[135] The Multi-Malls case, supra.

[136] UCC 2-103(1)(b).

[137] Id.

The Uniform Committee was somewhat troubled by the good faith doctrine in section 3.2 of the OLRC bill and it was particularly concerned about the application of such a standard in the enforcement of contracts. It seemed to a majority of the Committee that the statutory version of good faith in section 3.2 was capable of destroying vested contractual rights and turning debt into a discretionary remedy. Consequently, the reference to enforcement was excised from section 3.2 of the OLRC bill and good faith confined to the performance of contracts. Only the scope of the good faith doctrine in section 3.2 was thereby affected: the definition of good faith in subsection 1.1(1)15 of the Uniform Act remained unchanged. Despite this limitation imposed on the doctrine of good faith, one committee member[138] remained so concerned about what he considered to be the mischievous implications of this statutory doctrine as to register on this point the only dissent recorded in the Uniform Committee.

Arguments that might be advanced in support of the doctrine, as defined and applied by the Uniform Act, are first, that it is a logical extension of the doctrine of unconscionability, and secondly, that it accords with the presumed intention of the parties. As for the first argument, one might respond that it is one thing to be circumspect in seeing that parties have entered into a broadly fair contractual regime; it is quite another to impose limits on contractual rights fairly purchased. The argument that the doctrine of good faith meets the intention of the parties is easily refuted: if it does, then a term to that

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[138] The British Columbia representative, Professor D. Vaver of the University of British Columbia.

effect can surely be implied in the contract on the basis of the parties' genuine but inarticulated agreement; this would render any overriding doctrine redundant.

There are a number of other arguments that can be mounted against the statutory doctrine of good faith in section 3.2 of the Uniform Act. First, unlike unconscionability, which has respectable case law antecedents, good faith in the sense of fair dealing is not suggested as a general principle by present trends in contract law. It would be unwise to surrender to a novel principle in a statute dealing with only a specialized contract if this would challenge the basic premises of the general law. Secondly, we cannot point to any manifest defect in present contract law which would justify the introduction of such a principle: certainly, no need is demonstrated for it in the OLRC Report. If such a need should develop and be catered for by the general law of contract, the solution thus reached could be introduced into sales law by virtue of subsection 3.4(1) of the Uniform Act, which permits the reception of common law and equitable principles. Thirdly, the statutory doctrine in section 3.2 of the Uniform Act is inherently vague. The absence of any references to trade or contextual practices or usages would permit a court to pluck its own standards from the air without reference to any evidence led by the parties: there are no guidelines equivalent to the unconscionability guidelines in subsection 5.2(2) of the Uniform Act to assist the courts in the exercise of their powers of review. Furthermore, whereas section 5.2 does not confer any entitlement to damages for unconscionable behaviour but rather scales down the enforceability of the disputed contract, there is nothing in the OLRC bill or the

Uniform Act to aid the courts in setting the appropriate remedy for a breach of the good faith standard. The statutory doctrine of good faith could introduce an undesirable measure of unpredictability into the application of the Uniform Act. Fourthly, there is a real danger that the statutory doctrine could be used to bolster a weak case or to serve as a substitute for a carefully reasoned argument. Lastly, particular sections of the Uniform Act, such as the provisions dealing with contractual modifications,[139] open price terms,[140] output and requirements contracts,[141] cure of defective tender,[142] the buyer's duty to give reasons for rejecting goods[143] and adequate assurance of due performance[144] can be seen to be inspired by notions of fair dealing. If any further need can be shown for such a doctrine of good faith, specific provisions could be drafted to meet it. Excising the statutory doctrine would not entail any restructuring of the Act. For the reasons given above, we believe that the good faith doctrine should be taken out of the Uniform Act.

Recommendation. For the reasons given above we make the following recommendation:

> 11. That no provision be made in future sale of goods legislation in Alberta for a general

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[139] Section 4.10.

[140] Section 5.3

[141] Subsection 5.4(1).

[142] Section 7.7.

[143] Section 8.6.

[144] Section 8.7.

duty of good faith based on fair dealing in the performance of duties under a contract of sale.

c. Firm offers

This subject was considered above in the discussion of section 4.4 of the Uniform Act. Reference was there made to the English Law Revision Committee's support for the principle of binding firm offers on the ground that the common law should not content itself with a moral standard lower than that of foreign laws. Opposition to the retractability of firm offers probably owes at least as much to moral abhorrence at the revocation of promises solemnly given as it does to sympathy for the plight of a promisee who has detrimentally relied on a promise later revoked. Consequently, section 4.4 of the Uniform Act can be regarded as promoting minimum standards of contractual behaviour.

d. Contractual modifications

Section 4.10 of the Uniform Act has already been discussed. Like section 4.4, it promotes the moral principle that a party who has freely given his word should be prevented from revoking his promise. It will also serve to protect parties induced by others to rely on agreements modifying contracts. We support the section for these reasons.

CHAPTER VI. ASSERTING ISSUE-ORIENTATED RULES AT THE EXPENSE OF GENERAL CONCEPTUAL RULES

It was one of the hallmarks of Article 2 that it sought to supplant abstract legal reasoning, which bore no relation to the changing demands of economic and social conditions, with articulated legal rules that were designed to meet the practical exigencies of particular problems. In this way, it was felt that the gap between law and practice could be reduced, a goal furthered also by the emphasis placed in Article 2 on trade custom and usage. Above all else, Article 2 was designed to be practical, flexible and responsive to the needs of the commercial community. It would be erroneous to regard it merely as an early example of consumer protection legislation. These values in Article 2 are supported also by the Uniform Act.

a. Formation of the contract of sale

The relevant provisions of the Uniform Act, sections 4.2 and 4.3, have already been considered in detail. One of their distinguishing features is the eschewal of the "mirror" principle of contractual formation according to which offer and acceptance must correspond exactly before it can be said that there is a contract. The sections recognize the fact that an unswerving devotion to the mirror principle does not respond to the realities of complex contract-making processes, nor to the way in which parties regard themselves as contractually committed even though outstanding details need to be filled in and disagreements ironed out. We support the principle espoused by these sections in this way.

b. Reducing the significance of property (or title)

To understand the contract of sale of goods and its treatment under the Sale of Goods Act, it is essential to appreciate that it is a hybrid of contract and conveyance. Unlike the sale of land, where the contract and the conveyance are formally identified and separate, in a sale of goods transaction the contract and conveyance are rolled up. In its earliest days, the common law required a manual delivery before the seller could effect a transfer of his property (broadly, his rights of ownership) in the goods to the buyer. Later, the same result could be achieved by a deed of transfer, and finally it became possible for the property in goods to pass, regardless of delivery of the goods or of a deed, by virtue of the agreement of buyer and seller to that effect.[145] In a sale of goods contract, therefore, the contractual and proprietary characteristics of the transaction became inseparable.

Under the Sale of Goods Act, the transfer of the property in the goods from seller to buyer is the fulcrum on which depend issues as diverse as the incidence of risk,[146] the seller's ability to sue for the price,[147] the buyer's ability to reject specific goods[148] and the rights of buyer or seller in the event

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[145] For the history of this development, see Cochrane v. Moore (1890), 25 Q.B.D. 57 (C.A.).

[146] Risk presumptively follows the property in goods: Sale of Goods Act, section 23.

[147] The basic rule is that the seller can sue to recover the price when the property in the goods has passed to the buyer: Sale of Goods Act, subsection 49(1).

[148] There is a presumption that once the property in specific goods has vested in the buyer, the buyer loses any right of rejection to which he may otherwise be entitled: Sale of Goods Act, subsection 14(4).

of the other's bankruptcy.[149] Identifying the whereabouts of property, itself an abstract concept, is therefore of crucial practical importance. A brief survey of the rules would be helpful at this point.

i) The existing law. The Sale of Goods Act divides goods which are the subject matter of a contract into two classes at the moment of contracting: they are either specific goods, which are goods identified and agreed upon at the date of the contract,[150] or unascertained goods, which represent the residuum. Goods initially unascertained are capable later of becoming ascertained under the contract, at which point they attract some of the characteristics of specific goods;[151] specific goods, however, always remain specific goods. The Act also creates a distinction between future and existing goods:[152] the former are goods either not yet in existence or not yet owned by the seller when the contract is made, while the latter constitute the residuum. Future goods, obviously, become in time existing goods. To a degree, the specific-unascertained and existing-future goods distinctions are similar; but they are by no means identically drawn. Moreover, the usefulness of the existing-future goods distinction is highly questionable.

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149 More accurately, it is bankruptcy law that attaches this significance to the passing or retention of the property in goods.

150 Sale of Goods Act, section 1(m)

151 The seller, for example, would be unable to effect a substitution of goods unconditionally appropriated to the contract.

152 Section 1(g) and subsection 8(1).

The significance of the above distinctions in the passing of property is as follows. Though the dominant rule is that the intention of the parties is paramount,[153] the parties themselves rarely express their intention. Moreover, the property in future goods and unascertained goods is incapable of passing at all until the goods become respectively existing existing[154] and ascertained.[155] In the absence of intention, the Sale of Goods Act states that the property in specific goods passes from seller to buyer at the moment the contract is made.[156] The reason given for this rule by the antecedent case law is that the selection of those goods by the parties is deemed to be equivalent to their appropriation to the contract and delivery to the buyer.[157] If, however, the specific goods have to be weighed or tested to determine the price,[158] or put in a deliverable state,[159] the moment of passing of property is delayed until this is accomplished. Unascertained goods that have become ascertained, on the other hand, pass to the buyer only when, as a result of the assent of seller and buyer (whose assent is frequently implied), the goods are unconditionally appropriated to the contract.[160] This usually occurs after ascertainment and is

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153 Sale of Goods Act, section 20.

154 Id., subsection 8(3).

155 Id., section 19.

156 Id., subsection 21(2).

157 Dixon v. Yates (1833), 5 B. 313 at p. 340, 110 E.R. 806 at p. 816.

158 Sale of Goods Act, subsection 21(4).

159 Id., subsection 21(3).

160 Id., subsection 21(6).

generally taken to have occurred when the seller has performed his last principal obligation under the contract.[161] If he has to deliver the goods to an independent carrier, as under an f.o.b. contract, putting the goods in the hands of that carrier will normally amount to an unconditional appropriation.[162] If the seller undertakes to transport the goods himself to the buyer's establishment, unconditional appropriation will occur when the goods are tendered there to the buyer.[163] Unconditional appropriation, in other words, is conventionally interpreted as amounting to the divesting of his control in the goods by the seller.

Specific goods. The operation of these rules will become clearer if two examples are given featuring specific goods and unascertained goods. After each example, the impact of the passing of property on bankruptcy, risk, the seller's entitlement to sue for the price and the buyer's rejection of non-conforming goods will be considered.

Example one concerns specific goods.

> 1. S is a used car dealer. A cash buyer, B, selects a particular used car on S's lot and a contract of sale is concluded. B gives S a deposit and the parties agree that B will return the next day with a certified cheque for the balance and take the car away.

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161 Carlos Federspiel & Co. v. Charles Twigg & Co., [1957] 1 Lloyd's Rep. 240.

162 Id.

163 Caradoc Nurseries Ltd. v. Marsh (1959), 19 D.L.R. (2d) 491 (Ont. C.A.).

First of all, has the property in the goods passed to the buyer? The goods are specific goods and the parties have expressed no contrary intention ousting the presumption found in subsection 21(2) of the Sale of Goods Act that the property in specific goods passes to the buyer at the time the contract is made. Moreover, according to subsection 21(2), "it is immaterial whether the time of payment or the time of delivery or both be postponed". On the facts of the problem, the property should therefore have vested in B. But there is modern authority, so far quite slender, explicity acknowledging that the presumption in subsection 21(2) is easily displaced.[164] There is also authority that, by putting a strained interpretation on particular phrases in subsection 21(2), has avoided its application.[165] The most one can say about subsection 21(2), is that its interpretation is likely to be influenced by the particular problem before the judge.

Suppose the seller becomes bankrupt before the buyer returns with the balance of the purchase price to take the car away. If the buyer has not acquired the general property in the car, he will rank only as an unsecured creditor and will be lucky to see any of his money again. In such a case, a court is unlikely to depart from the subsection 21(2) presumption and will therefore hold that the property has passed. Thus, on tendering the balance of the price to the trustee in bankruptcy, the buyer will be able to take the car away. Suppose, however, that the parties

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[164] R.V. Ward Ltd. v. Bignall, [1967] 1 Q.B. 534, per Diplock L.J. at p. 545 (C.A.).

[165] See for example O'Flaherty v. McKinlay, [1953] 2 D.L.R. 514, per Walsh C.J. at p. 522 (Nfld. S.C.); Wojakowski v. Pembina Dodge Chrysler Ltd., [1976] 5 W.W.R. 97 (Man.).

had agreed that certain repairs and alterations needed to be done before the buyer took away the car. This would bring into play subsection 21(3) so that it would be presumed that the property did not pass to the buyer before the seller's bankruptcy. Consequently, the buyer would rank as an unsecured creditor in the seller's bankruptcy proceedings. It is most unlikely that equitable principles could be invoked to give the buyer an edge over the seller's unsecured trade creditors.[166]

If, instead of the seller becoming bankrupt, the car is stolen or destroyed in a fire before the buyer takes delivery, the problem of risk presents itself. The doctrine of risk is a complex one whose operation in a given case normally resolves itself into the question: May the seller sue the buyer for the price of the goods notwithstanding that he is in no position to tender the goods to the buyer? If the risk of the casualty lay on the buyer, the seller may; if on the seller himself, he may not. According to section 23 of the Sale of Goods Act, in the absence of any contrary intention, risk passes with the property in goods. Consequently, since there is a presumption that on the facts of the first example the property has passed to the buyer, there is also a presumption that the risk has passed to him - a presumption built on a presumption. If, on the facts of example one as revised above, the car was destroyed before the repairs were effected, the risk would presumptively remain with the seller just as the property presumptively had remained vested in him.

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[166] Re Wait, [1927] Ch. 606 (C.A.).

According to section 49 of the Sale of Goods Act, where the buyer has acquired the property in goods, or has undertaken to pay for them "on a day certain irrespective of delivery", his wrongful failure or refusal to pay entitles the seller to maintain an action against him for the price of the goods. On the facts of example one, the seller's entitlement to sue for the price is uncertain. He would not acquire such a right on the second ground mentioned in section 49, since the buyer's obligation to pay on a day certain is by no means irrespective of delivery. As for the first ground set out in section 49, we have seen that the trend of modern authority denies the passing of property in specific goods at the time of the contract: it does this either by finding that the presumption has been rebutted or by finding that the requirements of subsection 21(2) have not been met. The property may yet pass, however, by virtue of an implied intention, at the moment when the seller tenders delivery of the car on the following day. The position remains uncertain. As for the facts of example one as revised by the addition of the seller's duty to repair, the seller could not sue for the price until he has done the necessary repairs and even then, as just shown, his entitlement is by no means certain.

Ever since the Sale of Goods Act was passed, specific goods have posed acute difficulty with respect to the buyer's right to reject non-conforming goods that are unfit for their purpose or not of merchantable quality, infringe the contractual description or fail to satisfy any other condition of the contract. The general rule in the Sale of Goods Act is that the buyer may reject goods for a breach of condition at any time before he

accepts them.[167] Acceptance in this context has a special meaning and usually takes place after the buyer has obtained possession of the goods.[168] By way of exception to this general rule, subsection 14(4) states that the buyer does not have the right to reject specific goods once he has acquired the property in them. Where this has occurred, he must treat the seller's breach of condition as though it were a breach of warranty, and so must retain the goods and sue for damages. The sting in subsection 14(4) lies in its association with subsection 21(2) by which the property in specific goods presumptively passes at the date of the contract. Where both provisions govern, the buyer is altogether denied any right to reject non-conforming goods. The perceived injustice of this has created a judicial reluctance to reach this result. How the courts accomplish this is seldom very clear and is less important than their hostility to subsections 14(4) and 21(2) when these provisions take away completely a buyer's right of rejection.

It is difficult to justify the strict attitude in the Sale of Goods Act towards the buyer's entitlement to reject specific goods; nor is any justification to be found in the case law preceding the Act. The reasons advanced in these cases for requiring the buyer of non-conforming goods to keep them in all events sound odd to the modern ear. The starting-point is the old rule that, before a quasi-contractual action could be brought for money had and received, the plaintiff had to rescind the contract ab initio (from the outset) in order to establish the

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[167] Subsection 14(4).

[168] See Sale of Goods Act, section 36.

total failure of consideration that was a necessary part of the action.[169] This requirement of retrospective rescission meant that a party who had already derived a benefit from the contract was, by virtue of this benefit, disabled from rescinding the contract.[170] For this reason, the parties to a contract of sale of specific goods could not be put back in their pre-contractual positions where the buyer had had the enjoyment of the property in the goods.[171] Even the abstract enjoyment of the property in goods without possession prevented a total failure of consideration from arising and so denied the buyer the right to rescind the contract.[172] Relevant as this reasoning may have been in the case of a buyer seeking to rescind the contract and bring a quasi-contractual action for the recovery of the price paid, it is hard to understand why the courts extended it to meet the case where the buyer had not paid and was being sued on the contract for the price by the seller.[173] The result of this extension was that all buyers of specific goods lost the right of rejection as soon as they acquired the property in the goods. There was one exception to this rule, preserved in the Sale of Goods Act, namely where the parties had agreed on a condition subsequent entitling the buyer to return the goods despite the passing of property.[174]

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169 Weston v. Downes (1778), 1 Dougl. 23, 99 E.R. 19 (K.B.); Towers v. Barrett, (1786) 1 T.R. 133, 99 E.R. 1014 (K.B.).

170 Hunt v. Silk (1804), 5 East 449, 102 E.R. 1142 (K.B.).

171 Street v. Blay (1831), 2 B. & Ad. 456, 109 E.R. 1212 (K.B.).

172 Id.

173 Id.

174 Subsection 14(4).

The position is no more favourable to the buyer's right of rejection on the facts of example one as revised by the addition of the seller's duty to repair. While the effect of the seller's obligation to repair the car is admittedly to delay the passing of property in the car, which is not in the deliverable state required by the subsection 21(2) presumption, the property would presumptively pass under subsection 21(3) as soon as the car was put in a deliverable state, that is, when the repairs were completed. Subsection 21(3), in combination with subsection 14(4), would therefore combine to the detriment of the buyer's right of rejection. Once again, however, judicial hostility to such a result is predictable.

Unascertained goods. Example two features unascertained goods and will also demonstrate the operation and effect of the passing of property rules.

> 2. S is a manufacturer of tricycles who agrees to sell a quantity of them to B, a foreign buyer, with whom he has done no previous business. S requires payment in advance and will deliver the goods on f.o.b. terms at a port of S's choice to a carrier nominated by B. B pays the price, the goods are packed and B's name and address are stamped on the crates.

Whether the property in these goods has passed to the buyer turns on their unconditional appropriation to the contract according to subsection 21(6). The probable answer is that they have not been appropriated since the seller's obligation to put the goods in the hands of the carrier has not been discharged.

Suppose the seller becomes bankrupt or enters receivership before delivery of the goods to the carrier. The buyer will rank

as an unsecured creditor and it will be irrelevant that he has paid the price in full.[175] This seems hard to justify since the obvious purpose of advance payment in example two was not to extend credit but to grant security to a seller who was unwilling to release goods to an unfamilar buyer before receiving the price. In some cases, a buyer who has paid will rank as an unsecured creditor if the goods have never been separated from bulk and hence have not been ascertained, a process that normally occurs before the unconditional appropriation. In the leading case, Re Wait,[176] the buyer purchased on c.i.f. terms five hundred tons of wheat, part of a one thousand ton bulk lying in the hold of a particular ship. The normal rule in such contracts is that the buyer pays the price against shipping documents consisting of the seller's invoice, insurance certificate and bill of lading, thereupon acquiring the property in the goods.[177]

In this case the seller, holding one bill of lading for the undivided bulk, was unable to transfer it to the buyer who had paid the price for his portion. Nor could the property pass to the buyer anyway, since the five hundred tons of wheat were not separated from bulk and hence remained unascertained at all material times. When the seller became bankrupt before the five hundred tons were ascertained and unconditionally appropriated, the buyer ranked as an unsecured creditor. The accident of ascertainment can therefore have a profound effect on a buyer's

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175 Carlos Federspiel, supra, note 161.

176 Supra, note 66.

177 Ross T. Smyth & Co. v. T.D. Bailey Sons & Co., [1940] 3 All E.R. 60(H.L.); Jannock Industries Ltd. v. Acadia Forest Products Ltd. (1977), 18 N.B.R. (2d) 361, revd. in part on different grounds 26 N.B.R. (2d) 185 (N.B.S.C. App. Div.).

property rights. If a seller ships two thousand tons of wheat on a particular ship, with one thousand tons contained in each of the ship's two holds, and sells the contents of the first hold to X and half of the contents of the second to each of Y and Z, receiving payment against documents from all three buyers, X's rights will be superior to those of Y and Z if the seller becomes bankrupt before the cargo is discharged from the ship.

There is however a recent New Brunswick case[178] which adopts a less strict interpretation of the phrase "unconditional appropriation" and thus benefits buyers in cases of seller bankruptcy or receivership. The plaintiffs, two American automobile dealers, each ordered seven Bricklin cars directly from the manufacturer. When the vehicles had almost been completed, the manufacturer-seller prepared drafts, invoices and certificates which identified the cars by serial number. Shortly afterwards, the vehicles were finished and the drafts accepted. Before the seller was able to deliver the cars to the carrier, it defaulted on its debentures and a trustee took possession of the cars. Even though the seller had not performed its last principal obligation under the contract, namely delivery to the carrier, the court held that the cars had been unconditionally appropriated to the contract when the purchasers honoured the drafts expressly identifying the cars by serial number. Decisions such as this, by removing rigidity from the interpretation of "unconditional appropriation", could ease the position of buyers in cases of seller bankruptcy or receivership.

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[178] Hayes Bros. Buick-Opel-Jeep Inc. v. Canada Permanent Trust Co. (1976), 15 N.B.R. (2d) 166.

As we have already seen, the risk presumptively follows the passing of property in a sale of goods transaction. Accordingly, the seller in example two would bear the loss if the crated tricycles were destroyed in a fire consuming his factory. At first sight, therefore, the buyers of the Bricklin cars, having acquired the property in them when honouring the drafts, would have to bear the loss if a similar catastrophe befell the cars before their delivery to the carrier. But in view of the insurance realities of the case - the seller would be very likely and the buyer most unlikely to have coverage - this result would not necessarily represent a sensible conclusion from the commercial point of view. In such a case, a court might lean against the section 23 presumption that risk follows property, but the position is uncertain.

In example two, the seller would, if the buyer had not paid, be unable to sue for the price before the delivery of the tricycles to the carrier, for that act would constitute the unconditional appropriation of the goods. This would be so even if the buyer had definitely undertaken to pay before delivery, provided his obligation to pay was not expressed to be on a day certain irrespective of delivery. If, for example, the seller was ready and willing to transfer the goods to a carrier of the buyer's choice, as in the case of an f.o.b. contract, but the buyer was unable or unwilling to name an effective ship, the seller could not sue for the price. It would not matter that the seller had done almost everything required of him and that he might have gone to considerable trouble to transport the goods to

the docks.[179] His remedy would be for unliquidated damages for the buyer's refusal to take delivery of the goods. He would be deprived of the more effective remedy of suing for a liquidated sum in debt, where the disposal of the goods would be the buyer's problem. Obviously, however, a relaxation of the meaning of "unconditional appropriation" would be likely to benefit such a seller.

If the tricycles were actually delivered to the carrier and the buyer later learned that they were non-conforming, his ability to reject them would turn on whether he had already accepted them. Though not without its difficulties,[180] the acceptance test is much more beneficial to the buyer than the passing of property rule applicable to specific goods. In normal cases, the buyer would not be taken to have accepted the goods before acquiring the opportunity or exercising the right to inspect them. The concept of acceptance will be dealt with below.

ii) The Uniform Act. In view of the different practical issues turning on the passing of property, which frequently pull in different directions, the following judicial criticism of the passing of property rules, uttered long before the enactment of the Sale of Goods Act, strikes a particularly responsive chord:

> "It is impossible to examine the decisions on this subject without being struck by the ingenuity with which sellers have contended that the property in goods contracted for had, or had not, become vested in the buyers, according as it suited their interest; and

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[179] Colley v. Overseas Exporters, [1921] 3 K.B. 302.

[180] See for example Hardy & Co. v. Hillerns & Fowler, [1923] 2 K.B. 490 (C.A.).

> buyers, or their representatives, have, with equal ingenuity, endeavoured to show that they had, or had not, acquired the property in that for which they contracted; and Judges have not unnaturally appeared anxious to find reasons for giving a judgment which seemed to them most consistent with natural justice. Under such circumstances, it cannot occasion much surprise if some of the numerous reported decisions have been made to depend on very nice and subtle distinctions, and if some of them should not appear altogether reconcileable with each other."[181]

The enactment of the Sale of Goods Act did nothing to dispel arguments of this kind.

One of the chief features of Article 2 was the abandonment of what its principal architect, Karl Llewellyn, called the "lump concept" of title[182] (or property as it is referred to in the Sale of Goods Act). By this he meant the general and mechanical use of the abstract concept of title to resolve the actual rights and duties of the parties to a contract of sale. Llewellyn favoured instead "narrow issue thinking"[183] which dictates a search for the functional rule that best resolves the particular issue. An example of this would be to link risk with possession, rather than with title, since the party in possession is the one who is better placed to insure the goods against risk of loss.[184] This approach does not merely substitute a tangible for a metaphysical phenomenon (possession for title); further, it explores the practical considerations which make a

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[181] Gilmour v. Supple (1858), 11 Moo. P.C. 551 at p. 556, 14 E.R. 803 at p. 809 (P.C.).

[182] Llewellyn, Through Title to Contract and a Bit Beyond, 15 N.Y.U. L. Rev. 159 (1938).

[183] Id.

[184] OLRC Report at p. 267.

possession-based rule superior to a title-based rule.

We are persuaded by Llewellyn's view that our rules should be drawn so as to provide functional solutions to particular problems. 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.

An argument in favour of retaining the present law is that, while the transfer of the property in goods appears to play a pivotal role under the existing system, closer examination reveals that it is generally associated with the transfer of possession.[185] For example, the seller in example two would have transmitted the property in the tricycles to the buyer if he had surrendered possession of them to the carrier. It could therefore be said that the present law, in fact, produces practical rather than abstract solutions when dealing with a problem such as risk. But whether this could be said of bankruptcy, for example, is a different matter. 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. In the words of

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[185] This is because the unconditional appropriation of unascertained goods is normally equated with the surrender of possession of the goods by the seller.

Llewellyn, "covert tools are never reliable tools".

Our conclusions are the same as those in the OLRC Report which proposed new rules with respect to the passing of property and risk, the buyer's right of rejection and the seller's entitlement to the price.[186] Furthermore, the OLRC recommendations had an impact on bankruptcy.[187] These rules, with some amendments, were incorporated in the Uniform Act.[188] The topics with which these rules are concerned will now be considered with reference to Article 2, the OLRC bill and the changes made by the Uniform Committee.

iii) Title. The Uniform Act follows Article 2 in its terminological preference for "title" instead of "property". While the significance of title has been greatly reduced to make way for more functional rules, a provision dealing with the transfer of title was retained because it was thought important for certain non-sales purposes, such as the exigibility of goods by execution and their exposure to various forms of taxation.[189] Subsection 6.1(1) of the Uniform Act therefore underscores the general irrelevance of title in sales questions while the remainder of the section is devoted to the location of title for non-sales purposes. Subject to at least four exceptions dealt

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[186] See the recommendations in the OLRC Report, at pp. 280-82.

[187] Though the OLRC doubted Ontario's legislative competence in the area of bankruptcy (OLRC Report, at p. 443), it will be shown later in this report that its conclusions regarding special property could have bankruptcy ramifications.

[188] Sections 6.1 (title or property), 7.8 and 7.9 (risk), 8.1, 8.2 and 8.6 (rejection) and 9.11 (price).

[189] OLRC Report at pp. 278-80.

with in the following paragraphs, section 6.1 of the Act follows existing law on the passing of property. The intention of the parties is paramount, but in the absence of agreement (reduced from express agreement in the OLRC bill) title passes according to a series of rules similar in substance to the existing notion of unconditional appropriation.

The first exception is that no distinction is drawn in the Uniform Act between specific and unascertained goods. In effect, the existing rules governing the latter are extended to all goods, even so far as to provide that the goods must first have been "identified" (which seems to mean the same thing as "ascertained") before title can pass.

The second exception concerns subsection 6.1(2)(b) of the Uniform Act. Under the present law, a seller who takes out a bill of lading in his own or his agent's name is treated as having retained the property in the goods notwithstanding the occurrence of an event, namely the surrender of possession to the carrier, which normally signifies the transfer of property to the buyer.[190] The seller thus reserves the right of disposal of the goods under section 22 of the Sale of Goods Act, which is treated as tantamount to fixing a later time for the property to pass under section 20. Subsection 6.1(2)(b) applies functional considerations. The seller is regarded as seeking in effect to preserve the lien over the goods which he would ordinarily lose by surrendering them to the carrier.[191] The seller's action is

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[190] Graham v. Laird Co. (1909), 20 O.L.R. 11 (Div. Ct.); Scott v. Melady (1900), 27 O.A.R. 193.

[191] This is the effect under present law of Sale of Goods Act subsection 43(1).

an attempt to secure for himself a continuing interest in the goods until the buyer pays the price, in which event the bill of lading will be endorsed to the buyer. Hence, the provision treats the seller's action for what it is, namely the reservation of a security interest, and title passes to the buyer subject to that interest.

The third exception changing existing law which is contained in section 6.1 of the Uniform Act concerns c.i.f. transactions. Under present sales law, the rule is that the property in the goods passes when the bill of lading, included in the shipping documents, is given to the buyer against payment of the price. Again, this retention after shipment of the bill of lading, which is generally treated as a document of title, serves a security purpose. Consequently, consistently with subsection 6.1(2)(b) of the Act, subsection 6.1(3) of the Act provides that title passes at an earlier point, namely when the seller completes his physical delivery of the goods to the carrier. The combined effect of subsections 6.1(2) and (3), in cases where the goods are already in transit when the contract of sale is made, would presumably be to vest title in the buyer at the date of the contract.

The fourth exception concerns goods to be delivered without being moved and in respect of which the seller is to deliver to the buyer a "document of title", broadly, a document addressed to a third party bailee which in the ordinary course of business is treated as entitling the holder to use and dispose of it as well

as the goods it represents.[192] Subsection 6.1(3) rule 2(a) of the Uniform Act provides here that title passes when the seller delivers the document of title to the buyer; thus it departs from existing law to the extent that the property in goods, if specific, would presumptively pass at the date of the contract by virtue of section 21 rule 1 of the Sale of Goods Act.

On the whole, section 6.1 of the Uniform Act adheres closely to UCC 2-401 but two changes of substance introduced by the Uniform Committee signify a relatively minor departure from the American model. First of all, as we have seen, the Committee felt that an intention to depart from the statutory title rules should not have to be "explicit" or "express": normal principles of contractual intention permit an implied intention, and an exception from these principles was felt not to be justified. Secondly, in the case where goods are held by a bailee and the seller does not deliver a document of title to the buyer, the Committee felt that title should not pass simply when the bailee acknowledges that the goods are held for the buyer; such an acknowledgment might be made to the seller rather than the buyer.[193] Rather, the Committee believed that in such cases title should pass when the bailee attorns to the buyer, that is, acknowledges to the buyer that the goods are being held on the buyer's behalf. Subsection 6.1(3) rule 2(b) embodies this conclusion. In the Committee's view, the dominant feature of section 6.1 is the linking of title to possession: title passes when actual or constructive possession is vested in the buyer.

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[192] Uniform Act, subsection 1.1(1)11.

[193] See for example the facts of Inglis v. James Richardson & Sons (1913), 29 O.L.R. 229 (App. Div.).

According to well-settled principles of bailment law, the buyer is entitled as against the bailee to demand possession, whether unconditionally or on payment of outstanding storage charges, only when the bailee has attorned to the buyer.[194] In the Committee's view, it was desirable, where no document of title was transferred, for title transfer rules to track bailment rules if it was reasonably practicable to do so.

We support the reform of existing title transfer rules made by the Uniform Act. The distinction between specific and unascertained goods is thoroughly outmoded and the reasons given for distinguishing them when title is at issue are unconvincing. Since particular problems such as risk and price entitlement have been separated from title by the Uniform Act, we consider it appropriate for the seller's reservation of the right of disposal of goods already shipped to the buyer to be treated according to its practical purpose, namely the reservation of a security interest by the seller. Nothing is served by concealing this process behind a title screen. Similarly, we support the change made for the same reason to c.i.f. contracts and we note that, although title normally passes with the shipping documents, it is clearly established that this does not affect risk, which is treated as passing from the date of shipment.[195] On the whole, we support the linking of title to possession insofar as it provides a clear test in an area of law where clarity is necessary and, for that same reason, we support the new rules on

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[194] Dublin City Distillery Ltd. v. Doherty, [1914] A.C. 823 (H.L. (Ire.)), per Lord Atkinson at pp. 847-48.

[195] Comptoir d'Achat et de Vente du Boerenbond Belge S.A. v. Luis de Ridder Limitada, [1949] A.C. 293 (H.L.).

documents of title and bailees' attornment.

It has been shown that the Uniform Act, following Article 2, has accepted the principle that the resolution of individual problems should be emancipated from the transfer of title. The Uniform Act will now be considered as it applies to the buyer's special property in goods, the seller's bankruptcy, risk, the seller's entitlement to sue for the price and the buyer's right to reject non-conforming goods.

iv) The buyer's special property. "Special property", as used in section 7.1 of the Uniform Act, although not defined by the Act, appears to signify some kind of qualified title. It does not have the meaning conventionally attached to it in personal property law where it connotes the possessory rights of parties such as bailees and pawnees.[196] Briefly, section 7.1 would do two things: it would rationalize and broaden a little the concept of an insurable interest in a sale of goods context; and it would introduce the principle that a buyer obtains a special property in goods once they are "identified" to the contract.

Identification is similar in meaning to the present test of ascertainment. What we now call specific goods, namely goods agreed upon by the parties when the contract is made, would be considered as identified under section 7.1 as soon as the contract is made; other goods would be identified when they are earmarked by the seller for the purposes of the contract. In

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[196] See Lord's Trustee v. Great Eastern Railway Co., [1908] 2 K.B. 54, per Fletcher Moulton L.J. (C.A.) (dissenting). This judgment was approved at [1909] A.C. 109 (H.L.) when the judgment of the Court of Appeal was reversed.

effect, an event (ascertainment-identification), which currently serves to remove a barrier to the passing of property, would endow the buyer with a special property under section 7.1. The buyer would acquire this special property, in most cases, before acquiring the property in goods under existing law or the title to goods under section 6.1 of the Uniform Act. In example two, the buyer would have a special property once the tricycles were crated and addressed to him. On the facts of Re Wait,[197] however, the buyer would not have a special property in the wheat since identification would not occur until the wheat was separated from bulk. Nevertheless, subsection 2.4(5) of the Uniform Act gives such a buyer a tenancy in common in the undivided bulk which obviates any need for a special property.

It remains to consider the practical consequences of the buyer's special property. According to the OLRC Report, special property under Article 2 "is a necessary ingredient in the following cases: namely, the buyer's right to claim goods on the seller's insolvency; the exercise of the right to replevy; or, the right to sue third parties for injury to goods".[198] This suggests that section 7.1 of the Uniform Act, by following UCC 2-501, is poised to make major changes to bankruptcy law and to entitlement to sue in the property torts. We have already seen that, as conventionally interpreted, "unconditional appropriation" will normally occur after the ascertainment of goods under a contract of sale. We have also seen that ascertainment is the equivalent of identification under section

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[197] Supra, note 166.

[198] OLRC Report at p. 264.

7.1. If the acquisition of a special property were to support a preferential right in bankruptcy, the position of the buyer of the tricycles in example two would be radically improved.

As regards the property torts, it is established law that the plaintiff must have either possession or the right to immediate possession at the time of the disputed act in order to maintain a suit in conversion. conversion.[199] Detinue[200] and trespass,[201] however, might be rather more restrictive. One can certainly say that the mere ascertainment of goods under a sale contract will not give the buyer a right to immediate possession of them. Even if the buyer has under the present law acquired the property in the goods, he may not yet have acquired a possessory right to them, for example where the sale is on c.o.d. terms and he has not tendered the price. If, therefore, the acquisition of a special property is meant to be relevant in the context of the property torts, it would extensively change existing law on standing to sue.

In order to determine whether section 7.1 is meant to be relevant in bankruptcy and the property torts, it is necessary to consider how the parent provision, UCC 2-501, is related to other provisions of Article 2. There are three relevant sections which have no counterparts in the Uniform Act. First, UCC 2-502 gives a buyer who has paid "a part or all of the price", and who has obtained a special property in the goods under UCC 2-501, a right

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199 Penfolds Wines Pty. v. Elliott (1946), 74 C.L.R. 204 (Aust. H.C.).

200 Jarvis v. Williams [1955] 1 W.L.R. 71 (C.A.).

201 Penfolds Wines, supra, note 199.

to recover the goods if the seller becomes insolvent within ten days of receipt of the price or a portion thereof. UCC 2-502 does not seem to have had much practical effect in bankruptcy cases but it does make it plain that UCC 2-501 alone does not give buyers bankruptcy rights. The OLRC Report declined to adopt UCC 2-502 on the ground that it might invade the federal jurisdiction in bankruptcy matters.[202] Nevertheless, the absence of a provision like UCC 2-502, which would operate as a leash on section 7.1, prompts the question whether the courts will endow the concept of special property in section 7.1 with substantial bankruptcy attributes. This will be considered shortly.

That the concept of special property in Article 2 is similar to a qualified title is apparent also from UCC 2-716 which grants the buyer of goods identified to the contract, that is, goods in which he has a special property, the right to replevy them in the event of the seller's failure to deliver, but only when he cannot procure substitutes for them. Again, this provision was not adopted in the Uniform Act. Finally, UCC 2-722 gives standing to sue in the property torts in respect of sale goods to anyone who "has title to or a security interest or a special property or an insurable interest in" the goods. Once more, the Uniform Act did not adopt this provision. In the result, the Uniform Act borrowed the concept of special property from Article 2 but declined to adopt any of its particular uses.

Although we believe that the uses to which special property is put by Article 2 deserve further consideration, in our view the adoption of the Uniform Act should not be delayed until this

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[202] Supra, note 187.

is done. We now turn our attention to an area where the Uniform Committee did something with the concept of special property and in doing so departed from the OLRC bill.

v) Bankruptcy of the seller. It might be argued that, since bankruptcy is not a sales problem, it should be resolved by the normal application of the title rules in section 6.1 of the Uniform Act. Bankruptcy is a matter of federal jurisdiction and this course of action would present the least risk of a province trespassing in an area of federal jurisdiction. Nevertheless, the concept of special property in UCC 2-501 is clearly designed to play a part in the seller's bankruptcy, though this part is limited in scope by UCC 2-502. It therefore has to be asked whether special property in section 7.1 of the Uniform Act also has relevance in bankruptcy proceedings. With minor changes, section 7.1 of the Uniform Act is identical to section 7.1 of the OLRC bill. There is nothing on the face of either section to answer this question, nor, in the case of the OLRC bill, is there any other provision giving assistance in the inquiry. However, as a result of changes made by the Uniform Committee to the OLRC bill provision that became section 9.20 of the Uniform Act, it will be seen that special property can be given at least a limited role in cases of seller bankruptcy by virtue of section 9.20.

In its review of the OLRC bill, the Uniform Committee was faced with a concept, special property, whose practical meaning was determined by three provisions of Article 2,[203] none of which had been incorporated in the OLRC bill. The Committee also

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[203] UCC 2-502, 2-716 and 2-722.

declined to adopt these provisions, though it recognized that if special property were left untouched, it would either be bereft of meaning or endowed with substantial bankruptcy attributes. Moved by the plight of certain buyers, such as the one in the tricycles example, who in no realistic sense intend to become creditors of the seller, the Committee decided that the concept could be retained and given a bankruptcy significance which did not impinge upon federal jurisdiction. The Committee agreed with the general recommendation of the OLRC Report that the scope of the discretion to award specific performance should be broadened and, taking the matter further, concluded that, when a buyer seeking specific performance has a special property in goods, this is a factor which the courts should consider in the exercise of their discretion to award the remedy. This explains the changes made by the Committee in drafting section 9.20 of the Uniform Act. We think this provision is a modest one that can be employed to give relief in hard cases without trespassing on the federal domain in bankruptcy, and we therefore give it our support. In our view, given the limited role of special property in section 9.20, a court should decline to infer a legislative intention to give broader bankruptcy implications to the concept of special property in section 7.1 of the Uniform Act.

vi) Risk. It has been stated above that under the Sale of Goods Act risk is presumptively transferred when the property in goods passes from seller to buyer. Where, however, delivery is delayed through the fault of either party, that party bears the

risk of loss attributable to the delay.[204] But the Act says nothing about a buyer's unlawful refusal to take delivery of goods, a seller's breach of condition in respect of their quality, or the exercise by the buyer of a right of rejection. The common law on the subject, moreover, is unclear and in need of definition.[205]

Sections 7.8 and 5.26 of the Uniform Act deal with the passing of risk where there is no breach of contract; section 7.9 of the Act applies to cases where either the seller or the buyer is in breach.

According to section 7.8 of the Uniform Act, the passing of risk occurs when the seller performs his delivery obligations. Delivery, in turn, takes place essentially when the buyer acquires actual possession of the goods or, if they are handled by a carrier or warehouseman, constructive possession. The OLRC Report and the Uniform Committee were in agreement that risk rules should reflect insurance realities and that, moreover, the passing of risk should depend on an easily observable event instructing the buyer when he should prudently insure the goods.

Where the goods are to be sent to the buyer by carrier, subsection 7.8(1) rule 1(a) of the Uniform Act provides that the risk will pass to the buyer on delivery to the carrier. There are two exceptions to this: first, in the case of destination contracts, such as an f.o.b. destination contract, subsection 7.8(1) rule 1(b) of the Act provides that the risk will pass when

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[204] Sale of Goods Act, subsection 23(2).

[205] Sealy, 'Risk' in the Law of Sale, [1972B] Camb. L.J. 225.

the carrier tenders the goods at destination to the buyer;[206] secondly, where the seller is a merchant and the buyer is not, subsection 7.8(1) rule 1(c) of the Act provides that the risk will pass in all cases on tender to the buyer at destination. This second exception, not to be found in Article 2, was designed primarily to meet the case of a mail order transaction where the goods are lost in transit. It assumes that the seller is aware of this risk, is well placed to insure against it and in practice does so; and, moreover, that it is most unlikely that the buyer will carry insurance.

Subsection 7.8(1) rule 1(a) of the Uniform Act changes existing law more in form than in substance. It substitutes delivery instead of the passing of property as the event which transfers risk. According to existing law, however, the property and therefore the risk in unascertained goods will normally pass on delivery to a carrier, which is treated as tantamount to unconditional appropriation. Moreover, the exception in subsection 7.8(1) rule 1(b) of the Act is in tune with existing law since, under an f.o.b. destination contract, the property and therefore the risk will normally pass to the buyer on tender at destination.[207] But the exception in subsection 7.8(1) rule 1(c) of the Act probably does alter existing law. The seller will have unconditionally appropriated goods to the contract once he deposits them in the mail. Consequently, the risk will be on the buyer if the presumption in section 23 of the Sale of Goods Act that risk follows property is borne out. Nevertheless, the

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[206] This is consistent with existing law. See Beaver Specialty Ltd. v. Donald H. Bain Ltd., [1974] S.C.R. 903.

[207] Id.

unconditional appropriation rule, section 21 rule 5 of the Sale of Goods Act, is subject to a contrary intention and there is some chance of a court inferring such an intention in circumstances like these. The possibility, however, is an untested one: there is little evidence that mail order companies assert the liability of buyers to pay the price in cases of mail loss. Since the exception contained in subsection 7.8(1) rule 1(c) shows an appreciation of insurance realities and does not run counter to established business practices, it merits our support. We also support the balance of subsection 7.8(1) rule 1 of the Act: while it follows existing law, it puts the doctrine of risk on a simpler and more practical basis.

Subsection 7.8(1) rule 2 of the Uniform Act, which applies to cases where the goods are held by a bailee such as a warehouseman, follows the same principles as rule 1 above. Delivery is the event which marks the shift of risk and occurs either when the buyer receives a document of title or, if no document of title is transferred, when the bailee attorns to the buyer. Rule 2 therefore runs parallel to the title transfer rules in section 6.1 of the Act which in turn are substantially similar to the existing law on passing of property. But section 7.8 draws no artificial distinction between specific and unascertained goods and goes directly to the heart of the matter, namely delivery. For the reasons given above, we support subsection 7.8(1) rule 2 and also rule 3, which provides that the transfer of risk is coincidental with the buyer's actual receipt of the goods in residual cases.

Sale on approval and sale or return. Section 5.26 of the Uniform

Act deals with certain bailments that are potentially contracts of sale, the so-called contracts of sale or return and sale on approval. Both signify cases where the buyer is in receipt of goods which he has an option to purchase. According to existing law, the risk is probably on the seller until the buyer accepts the offer to sell by word or by conduct, though the buyer will have the duties of a bailee in respect of care of the goods. Section 5.26, following Article 2, draws a distinction between sale or return, which seems to connote a business transaction where the buyer acquires the goods with a view to resale, and sale on approval, which appears to contemplate a receipt of the goods with a view to personal consumption. In the case of sale or return, the risk is on the potential buyer until he decides to return the goods to the seller. Presumably, a typical sale or return buyer, such as a bookseller, will cover his inventory by insurance. In sales on approval, on the other hand, the risk remains on the seller until his offer to sell is accepted by the buyer. Again, this recognizes that parties in the business of sending out goods on approval to private individuals probably do, and certainly should, take out insurance. We think section 5.26 is a reasonable provision; its acceptance of insurance realities commends it to us.

Risk and breach. As stated above, the existing law on risk in the event of breach of contract by the seller or by the buyer is unclear. Subsection 23(2) of the Sale of Goods Act deals only with the effect of culpable delay by a buyer or seller in making or taking delivery of the goods. Where the buyer rightfully rejects non-conforming goods after taking delivery, it would seem either that the risk never passed to the buyer or that it passed

back to the seller after rejection. This ambiguity in the rule in cases of rejection could be important in a case where the goods suffer casualty unrelated to any defect in the goods after the buyer takes delivery but before rejection. As will be shown below, our courts have tended to prolong the period within which buyers are entitled to reject for non-conformity.[208] This tendency has therefore extended the period during which the ambiguity is troublesome and a clear statement of the incidence of risk in such cases would be desirable.

Section 7.9 of the OLRC bill was substantially modified by the Uniform Committee. The OLRC provision closely followed UCC 2-510 in articulating the risk rules in the event of breach. Subsection 7.9(1) of the OLRC bill stated that where a non-conforming tender gave rise to the right of rejection, the risk of loss would remain on the seller until either he cured the tender so as to deny the buyer his right of rejection or the buyer accepted the goods and thus lost that right. According to subsection 7.9(2), in cases where the buyer had accepted the goods but could yet revoke his acceptance of them, such loss as was not covered by the buyer's insurance was deemed never to have passed to him. Subsection 7.9(3) provided that, where the buyer was in breach by wrongfully rejecting goods or repudiating his obligation to take delivery of goods already identified to the contract, the seller could treat any risk of loss not covered by his insurance as resting on the buyer for a reasonable period of

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[208] The acceptance test in section 36 of the Sale of Goods Act tends to be applied less strictly against the buyer than the draftsmen of the Act can ever have intended. A particularly striking example of this is Public Utilities Commission of Waterloo v. Burroughs Business Machines Ltd. (1974), 6 O.R. (2d) 257 (C.A.).

time long enough to permit the seller to take out additional insurance coverage.

The Uniform Committee, for reasons which will be discussed below, decided to merge the two principles of rejection of goods and revocation of acceptance. The removal of the distinction was prompted among other things by the tendency of courts to prolong the period of rejection. This necessitated changes to section 7.9 of the OLRC bill. Since the first two subsections set out above had to be blended in some way, the Uniform Committee applied to all cases of non-conforming tenders by the seller the revocation of acceptance rule that only such risk as is not covered by the buyer's insurance will rest on the seller. This change can be seen in subsection 7.9(1) of the Uniform Act. Delay in breach of contract by the seller in making delivery would already be dealt with by section 7.8 of the Uniform Act which provides in effect that, regardless of breach, the risk remains on the seller before delivery.

Subsection 7.9(3) of the OLRC bill remained substantially unchanged and became subsection 7.9(2) of the Uniform Act. In the Uniform Committee however, the language of wrongful rejection was excised from this provision as it had been throughout the Uniform Act, but this did not alter the application of the rule.

Consistently with section 7.8 of the Uniform Act, the rules in section 7.9 of the Act are dominated by the realities of insurance. What matters is not so much a breaching party's guilt, but that the loss arising from an untoward event had better be laid at the door of an insurance company which has accepted premiums than with an uninsured party. This policy is

forwarded by rules which are intentionally kept as uncomplicated as possible. We support the policies in section 7.9 which we believe are a reasonable extension of those in section 7.8.

vii) The seller's right to sue for the price. We have seen that, according to section 49 of the Sale of Goods Act, the seller becomes entitled to recover the price when the property in the goods has passed to the buyer or the buyer has undertaken to pay the price on a day certain irrespective of delivery. The OLRC bill, following UCC 2-709 in severing the connection between the seller's action for the price and the transmission of title, gave the seller in section 9.11 the right to sue for the price in cases where the buyer had accepted the goods. Exceptionally, in two cases where the buyer had not accepted the goods, the seller would be able to maintain an action for the price: first, where the goods had been lost or damaged while at the buyer's risk; and secondly, where the seller, despite reasonable efforts after the buyer's failure to pay the due price, had been or would be unable to resell the goods at a reasonable price. This second exception was designed principally to meet the case of goods made to the buyer's specifications and for which there was no true market.

According to the OLRC Report, the real issue of principle in price cases is which party should have the burden of disposing of goods that neither party wants.[209] Despite arguments that UCC 2-709 was too generous with the defaulting buyer, the OLRC Report recommended its adoption on the ground that the seller, who is in the business of selling these goods, is better placed than the

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[209] OLRC Report at p. 417.

buyer to dispose efficiently of them.[210] Consequently, should be denied his action in debt for the price, though he could sue for damages for any deficiency between the contract and resale prices. In cases where the seller clearly could not dispose of the goods, then, as we have seen, the OLRC bill would permit him to sue for the price.

The Uniform Committee considered that 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.

Seeking to strike a balance between the seller's greater ability to dispose of goods and his entitlement to the fruits of his performance, the Uniform Committee substituted delivery for acceptance in the general rule of price entitlement in section 9.11 of the Uniform Act. Delivery was an easily observable event, occurring earlier than acceptance, and the amendment also simplified the law by aligning price, risk and title rules.

We have already stated our support for the separation of title from concrete issues arising under the contract of sale,

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[210] OLRC Report at pp. 416-17.

such as price entitlement. Once the right to sue for the price is freed from title, the only practical choices for determining when the seller can recover the price are among the following: the identification of the goods to the contract, the delivery of the goods, and the acceptance of the goods by the buyer. We have already said that the test of acceptance does not give due consideration to the seller's interests and rights and is too lenient towards the defaulting buyer. The question arises, however, whether section 9.11 of the Uniform Act redresses the balance sufficiently in the seller's favour or whether it should have opted for identification. The choice of identification seems hard to justify. If goods have merely been identified, the seller can normally switch them to another contract with little difficulty; if he is unable to dispose of them, section 9.11 would, as we have seen, allow him to sue for the price notwithstanding the absence of delivery. The section as it stands, moreover, is roughly in accordance with the practical consequences of the present rules, by which the passing of property in unascertained goods normally occurs on delivery. There has been no clamour for a change to the practical operation of the price rules. We therefore accept section 9.11 of the Uniform Act.

viii) Rejection of non-conforming goods. As stated above, the buyer's right to reject goods under present law depends on whether the contract is for specific or unascertained goods: the apparent presumptive rule is that the buyer never can reject specific goods. In a number of different ways, the courts have sought to diminish the distinction by an interpretation of the rules governing specific goods the practical effect of which is

to assimilate them to unascertained goods for the purpose of rejection. This has the effect of eliminating title inquiries from any discussion of the buyer's right of rejection and is consistent with our policy, stated earlier in this report, that the practical operation of the parties' rights and duties under a contract of sale should not depend upon the transfer of the invisible abstraction referred to as title in the Uniform Act. Consequently, we support the formal abolition in the Uniform Act of the distinction between specific and unascertained goods. The new rejection rules will be discussed below under a separate heading.

c. Unilateral contracts

Section 4.6 of the Uniform Act has already been considered from the viewpoint of the additional protection it affords to a party acting in reliance on an offer calling for performance. By placing a promissory interpretation on the offeree's commencement of performance, the section discards unilateral contract analysis which is of considerable academic interest but unhelpful as a guide to the solution of practical problems.

d. Extended warranties

Section 5.18 of the Uniform Act provides that the express and implied warranties given by a seller to his buyer enure in favour of a remote buyer who is not in privity of contract with the seller. This seller will in most cases be a manufacturer but he could also be a wholesaler, and quite possibly a retailer if the consumer buyer has in turn disposed of the goods. Before assessing section 5.18, we will review the law affecting the

rights of a remote buyer against a manufacturer or other distant seller.

The doctrine of privity. For more than a hundred years, it has been a settled principle of our law that only parties to a contract may sue or be sued on it.[211] This principle developed at a time when the implied terms of merchantable quality and fitness for purpose were still at a formative stage and just as the famous decision in Hadley v. Baxendale[212] was paving the way for the award of expectation damages in contract cases. In effect, the doctrine of privity limited the impact of this enhanced contractual liability on manufacturers once they began to market their products through middlemen to the consuming public.

The implied terms of merchantable quality[213] and fitness for purpose[214] in the Sale of Goods Act impose strict liability on the retail seller. Furthermore, following developments in damages law occurring around the time of the codification of sales law,[215] this strict liability became capable of supporting extensive awards for consequential damages. But this strict liability is of no assistance to those who are not parties to the contract of sale: a buyer may not mount an implied warranty action against anyone other than the party immediately above him

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211 Winterbottom v. Wright (1842), 10 M. & W. 109, 152 E.R. 402 (Exch.).

212 (1854), 9 Ex. 341, 156 E.R. 145 (Exch.).

213 Sale of Goods Act, subsection 17(4).

214 Sale of Goods Act, subsection 17(2).

215 See Randall v. Newson (1877), 2 Q.B.D. 102 (C.A.).

in the distribution chain. Consequently, a consumer buyer who suffers injury caused by unmerchantable goods must sue his retail seller and not the wholesaler or manufacturer, unless he can establish a collateral express warranty addressed to him by one of these latter parties.[216] Likewise the retail seller may not recover an indemnity for his liability to the consumer buyer from the manufacturer if he acquired the goods from a wholesaler. As regards persons outside the distribution chain altogether, such as the individual injured by the defective mower he borrowed from his neighbour or the pedestrian injured by the car whose brakes have failed, these persons are in privity of contract with no one and so cannot maintain a contractual action against any seller of the goods. If they are to assert any claim for their injuries, it will have to be in the tort of negligence and based on the negligent design, manufacture, distribution or maintenance of the goods.

Although manufacturers may not be reached directly by consumer buyers complaining that the goods are unmerchantable or unfit for their purpose, this does not mean that they are immune from contractual liability. A chain of contractual indemnity arises whereby the consumer buyer sues the retail seller, who claims over against the wholesaler, who in turn claims over against the manufacturer.[217] It is the policy of the courts to aid this process whenever they can so that liability ultimately comes to rest with the manufacturer, who was responsible for the

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[216] See for example Murray v. Sperry Rand Corp. (1979), 23 O.R. (2d) 456.

[217] This process is explained and rationalized in Young & Marten Ltd. v. McManus Childs Ltd., [1969] 1 A.C. 454 (H.L.).

defect in the goods.[218]

This process of indemnification is, however, costly and cumbersome. Furthermore, since its operation depends on each buyer in the chain bringing action against his seller, it can break down before the manufacturer is reached for any one of a number of different reasons: an intervening bankruptcy, the presence of an exception clause in any one of the contracts in the chain, the expiry of a limitation period[219] or even the inability of a retail seller to identify the particular wholesaler from whom he bought the goods.[220] In the last case, there is recent authority showing a judicial willingness to relax the restrictions on economic loss recovery in negligence so that the retailer can recover his loss directly from the manufacturer in tort,[221] which testifies to the strength of the judicial policy referred to above.

Tortious liability. The chain of contractual indemnity is not the only method of imposing liability on manufacturers for defective products. So far, there have been few signs in our common law of the development of principles of strict tortious liability. But Donoghue v. Stevenson[222] established that a remote consumer, who will be outside the distribution chain if he is not a buyer of the goods, may sue a manufacturer directly in the tort of negligence for physical injuries caused by a

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[218] Id.

[219] Id.

[220] Lambert v. Lewis, [1981] 1 All E.R. 1185 (H.L.).

[221] Id.

[222] [1932] A.C. 562 (H.L. (Sc.)).

defective product. The manufacturer's negligence could lie either in the defective design or in the defective production of goods. In the latter case it is possible for an injured party to be aided by a presumption of negligence so strong as to make it difficult to distinguish between negligence and strict liability.[223] The manufacturer's liability in negligence is capable of extending beyond cases of defective products. Thus liability can arise for failure to warn the ultimate user that a product must be used with care or in a particular way.[224]

Express warranty. In addition to his liability for negligence, there is also the possibility of a manufacturer's liability for breach of a collateral express warranty. This type of liability will aid remote buyers who cannot rely on the implied warranties to bring action against distant sellers such as manufacturers. Express collateral warranties may be found in advertising material or promotional literature. Where an express collateral warranty is given to a remote buyer, the related problems of privity and consideration can in some cases be solved by constructing a collateral contract between the remote buyer and the manufacturer in which the buyer's entry into the contract of sale constitutes both the act of acceptance and consideration for the manufacturer's promise. In one recent case, liability was imposed on a manufacturer for a tractor's failure to achieve the level of performance set out in its sales brochure,[225] which was

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[223] See for example Grant v. Australian Knitting Mills Ltd., [1936] A.C. 85 (P.C.).

[224] See for example Lavoie v. Poitras Gas & Oil Ltd. (1979), 28 N.B.R. (2d) 541 (App. Div.).

[225] Murray v. Sperry Rand Corp., supra, note 216.

described by the court as "strongly promotional" and as "a sales tool". This means of imposing liability is unlikely, however, to assist the remote buyer who does not act in response to the manufacturer's promise, so whilst it may well expand in scope in the coming years, it will not catch all cases where manufacturers make false statements or unfulfilled promises about their products.

Statutory developments. There are some statutory inroads into the doctrine of privity in Canada. Alberta has long had legislation imposing on manufacturers and remote distributors of farm implements liability for the breach of certain express and implied statutory warranties.[226] Similar legislation is to be found in Saskatchewan,[227] Manitoba[228] and Prince Edward Island.[229] More recently, The Consumer Products Warranties Act[230] of Saskatchewan gave to persons "who may reasonably be expected to use, consume or be affected by a consumer product" recourse in the event of personal injury against the retail seller or manufacturer for breach of various implied warranties set out in the Act.[231] An extensive departure from the privity rule can also be seen in the extended warranty rights given by New Brunswick's Consumer Product Warranty and Liability Act,[232]

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[226] Farm Implement Act, R.S.A. 1980, c. F-4.

[227] The Agricultural Implements Act, R.S.S. c. A-10.

[228] Farm Machinery and Equipment Act, S.M. 1971, c. 83.

[229] Farm Implements Act, R.S.P.E.I. 1974, c. F-3.

[230] R.S.S., c. C-30.

[231] Id., section 5.

[232] S.N.B. 1978, c. C-18.1, section 23.

which in addition contains a provision dealing with strict tortious liability.[233]

Reform. In sum, the doctrine of privity of contract has experienced some incursions but has by no means been overwhelmed. The statutory exceptions are piecemeal and confined to a minority of common law provinces while the common law has succeeded only in fostering substitutional forms of liability in collateral express warranty and negligence to cover some of the ground abandoned by its refusal to permit a party to take advantage of warranties in contracts to which he is a stranger. In actions against manufacturers, remote buyers are for the most part confined to collateral express warranty and negligence claims while parties outside the distribution chain are left to pursue claims in negligence.

In recent years, however, the reports of a number of law reform agencies have suggested that the scope of manufacturers' liability for defective products should be broadened considerably.[234] This can be done in two ways. Either the warranties given by the manufacturer under a contract with its buyer can be extended to other persons in the distribution chain, possibly even to persons outside who satisfy a proximity test; or, a regime of strict tortious liability can be established. The choice is a complex one which has divided the American judiciary. At the heart of the problem are two principal issues,

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[233] Id., section 27.

[234] Ontario, Report on Products Liability (1980); Law Commission Report No. 82, Liability for Defective Products (1977); New South Wales Law Reform Commission, Working Paper on the Sale of Goods etc. (1975).

namely what class of plaintiffs should be protected and what range of interests - personal, proprietary and economic - should the law be formulated to safeguard. We shall not be surveying the tortious approach in this Report. The subject is too large; this route was not followed in the OLRC bill and the Uniform Act; and strict tortious liability was the subject of a 1979 report by the OLRC which is currently under review by the Uniform Law Conference of Canada. In the circumstances, any intervention in the subject on our part would be precipitate. In 1972, the OLRC Report on Consumer Warranties gave a number of reasons for preferring sales law to tort law as the carrier of manufacturers' liability for defective products. These included the correspondence of the sales approach to the familiar farm machinery regime and the judicial doctrine of collateral warranties; the avoidance of serious anomalies, which can be achieved by putting a manufacturer's liability on conceptually the same footing as a retail seller's liability to a consumer buyer; and the facilitation of disclaimers of liability by manufacturers to the extent permitted by sales law.

We shall accordingly focus on the subject of warranty liability. The courts' prevailing policy of remitting contractual liability on the implied warranties back to the manufacturer through the indemnity chain has previously been referred to, and notice has already been taken of the clumsy and expensive aspects of the process, as well as its tendency to break down in some circumstances. At this point it would be instructive to look at some American developments since these are the source of most of the modern ideas invoked in the assault on the privity regime in product liability cases.

The privity barrier was decisively surmounted by the New Jersey Supreme Court in 1960 in Henningsen v. Bloomfield Motors Inc..[235] Defective steering in a new car given by a consumer buyer to his wife caused an accident in which she was injured. Though not a party to any contract at all, she was able to sue successfully both the manufacturer and the dealer on the implied warranty of reasonable fitness for purpose. Judgment was entered directly against the manufacturer for a number of reasons. It was said that the privity rule dated from a period when the buyer and manufacturer met face to face on an equal footing and bargained over an uncomplicated product; it was no longer suitable in an age when trading and marketing conditions had radically departed from that pristine model. The manufacturer did not content itself with marketing its goods to dealers; it reached out beyond them to the consuming public. Advertising was devised with them in mind and some goods, such as the "family" car, were designed solely for their consumption. In a companion case to Henningsen, the same court observed that the manufacturer was the father of the transaction while the dealer was merely a way station in the product's journey from manufacturer to consumer buyer, a statement more accurate in respect of the automobile industry than some others. A further point made in Henningsen was that the manufacturer was the party able to control the damage, and moreover he could distribute the loss equitably by costing his products in the appropriate way. Finally, the process of chain indemnification was described as wasteful.

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[235] 161 A. 2d. 69 (N.J., 1960).

A number of arguments were advanced by the same court for making the dealer directly liable to the injured wife. The cause of justice would be served by giving a warranty action to the person who, in the contemplation of the parties to the warranty, might be expected to become a user of the automobile. In reality, moreover, the members of a buyer's family could not properly be said to be outside the distribution chain. Another argument was that the dealer could implead the manufacturer to secure an indemnity. In addition, since the dealer's understanding of the expected use of the car was the same as the manufacturer's, its entitlement to the privity defence could be no higher than that of the manufacturer. Finally, since warranty was essentially a hybrid of contract and tort, the reasons for applying the privity doctrine were accordingly diminished.

Henningsen v. Bloomfield Motors Inc. was a personal injuries case. The extended warranty action has also been applied to property damage cases but its application to economic loss claims has been rather uneven. On a rather strained interpretation, Alternative C of UCC 2-318[236] is capable of applying to economic loss, but it has been adopted by a relatively small number of states. Since extended warranty liability has not been conclusively classified as either contractual or tortious, the question of economic loss liability has divided the American courts. Decisions favouring economic loss liability have noted that its imposition would discourage manufacturers from marketing inferior products, that there is no reason to exclude economic

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[236] "A seller's warranty whether express or implied extends to any person who may reasonably be expected to use, consume or be affected by the goods and who is injured by breach of the warranty ...".

loss once the principle of direct manufacturers' liability has been conceded and that manufacturers can always insulate themselves from liability by a properly drawn disclaimer clause.[237] On the other hand, it has been said that economic loss is related to bargain and the buyer's enjoyment of his bargain is an interest protected by contract law which requires privity of contract for a claim to be advanced;[238] also, that opening the doors to economic loss would lead to a proliferation of spurious and unprovable claims.[239] The American position on economic loss is therefore in the balance.

The OLRC Report was concerned primarily with economic loss claims as opposed to claims for personal injury and property damage. Extended warranty liability for the latter forms of loss had already been considered and recommended in consumer cases by the OLRC's Report on Consumer Warranties and Guarantees (1972). Furthermore, personal injury and property damage, whether framed in terms of strict tortious liability or extended warranty, were already under consideration in the OLRC's Products Liability project which later culminated in the Report on Products Liability (1979), currently under review by the Uniform Law Conference. Despite the preoccupation of the OLRC Report on Sale of Goods with economic loss claims, however, the provision it tentatively proposed, section 5.18 of the OLRC bill, is quite capable of applying to personal injury and property damage

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[237] See for example Santor v. A & M Karagheusian, Inc., 207 A. 2d 305 (N.J., 1965); Nobility Homes of Texas, Inc. v. Shivers, 557 S.W. 2d 77 (Texas, 1977).

[238] Seely v. White Motor Co., 403 P. 2d 145 (Cal., 1965).

[239] State ex. rel. Western Seed Corp. v. Campbell, 445 P. 2d 215 (Ore., 1968).

claims.

The OLRC decided in favour of economic loss liability in section 5.18 of the OLRC bill after marshalling the arguments for and against this approach. Reference should be made to the OLRC Report for the detailed arguments. arguments.[240] It can be said in outline, however, that the reasons there given for not subjecting manufacturers to economic loss claims are that the policy arguments, such as deterrence, which address themselves to physical loss claims, do not extend to economic loss;[241] that it would be anomalous to impose such liability when the tort of negligence grants relief for economic loss only in restricted circumstances; that commercial buyers at least should be able to protect their own interests by private bargain; and that economic loss liability would increase a manufacturer's enterprise risks and make it difficult for him to fix his costs and secure liability insurance coverage.

The arguments which persuaded the OLRC that there should be economic loss liability on the part of manufacturers were that manufacturers reach out to the public and there is a thin line between express and implied warranties; it can be a matter of pure chance whether a product causes physical or economic loss; since the manufacturer is already liable for economic loss to his immediate buyer, the risk of this type of liability is at least a known one; the bankruptcy of the retail seller might prevent a buyer from recovering anything if he could not recover for economic loss from a manufacturer on an extended warranty; and

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[240] OLRC Report at pp. 245-47.

[241] It is not easy to see the force of this argument.

that subjecting the manufacturer to such liability would cut out wasteful indemnity actions.

According to section 5.18 of the OLRC bill, the express and implied warranties given by a "prior seller" should extend beyond his "immediate buyer" and enure in favour of any "subsequent buyer" further down the distribution chain who suffers "injury", defined as damage to person or property or economic loss. Nevertheless, such liability would be subject to any defences which the prior seller could assert against the immediate buyer of the goods. Moreover, the prior seller's damages liability might not exceed the sum he would have to pay by way of indemnity to his immediate buyer if this latter fell victim to a successful warranty claim by the subsequent buyer. The purpose of these limitations on the prior seller's liability was to express the OLRC's policy that a subsequent buyer's claim against a prior seller, such as the manufacturer, was essentially an action which flowed from that available to the immediate buyer. In other words, the subsequent buyer's warranty rights were derivative and did not run directly to him. Finally, subsection 5.18(5) stated that the section could not be excluded by agreement of the parties.

The Uniform Committee agreed with the decision of the OLRC to pursue the warranty route and to treat the warranty action as derivative rather than direct. While the OLRC decided in its Report not to take a firm position on the principle of extended warranty liability, it thought it would be useful to insert section 5.18 on an optional basis to focus attention on the issue. After extensive deliberation, however, the Uniform

Committee decided that the provision should be firmly included in the Uniform Act.

The Committee's approval was, nevertheless, subject to certain changes. First of all, subsection 5.18(4) of the OLRC bill was redrafted for the sake of clarity. Secondly, the Committee saw no reason why the exclusion of the section 5.18 extended warranty liability should not, like other questions of exclusion, be dealt with by the general test of unconscionability; subsection 5.18(5) of the OLRC bill was therefore deleted. Finally, the definition of "prior seller" in the OLRC provision was amended so that only merchant sellers could incur liability under the section.

Before we consider whether our support should be given to section 5.18 of the Uniform Act, it would be useful to give examples of the working of the provision. Suppose that A, the manufacturer, sells an electric drill to B, a wholesaler, who sells it to C, a retailer, who sells it to D a consumer buyer. The goods are not of merchantable quality and D suffers personal injury. In addition to D's rights against C on the contract of sale, D could maintain an implied warranty action under section 5.18 against either or both of A and B, since they are prior sellers.

Suppose however that A is insulated from liability to B for breach of the merchantable quality term by an exception clause in their contract. This would have the effect of preventing D from suing A since a successful action could not be maintained against A by B, his immediate buyer. Again, suppose that D's claim is based on the fitness for purpose term since the drill failed to

perform a special function communicated by D to C, though it was capable of fulfilling its ordinary purposes. Although D could sue C on the fitness warranty, he could not maintain an action against A or B since in each case the prior seller, on these facts, would be immune from a fitness warranty claim brought by his immediate buyer.

If the drill is disposed of second-hand in a private sale by D to E and on similar terms by E to F, both E and F could maintain, on appropriate facts, actions against A, B and C. But F could not sue D under section 5.18. First of all, D is not a merchant seller. Secondly, the implied terms of merchantable quality and fitness would not apply to the private sale between D and E, and F would therefore be unable to rely on any earlier warranties. Should the drill cause injury to any member of D's, E's or F's family, or to any person who receives the drill by way of gift, that person will not have any extended warranty rights under section 5.18: he is not a subsequent buyer.

Section 5.18, therefore, is a relatively modest inroad into privity of contract. It protects only subsequent buyers of goods and does nothing for other persons who use or are foreseeably injured by a product. Because it focuses on warranty claims that are contractual in type, though privity of contract is absent between plaintiff and defendant, the section is able to grant recovery for economic loss claims which a departure from the contract model might have prevented or at least limited. The prior seller's liability cannot exceed the liability he incurs towards the immediate buyer, so it lies within his power to exclude or limit his loss by inserting a provision to that effect

in his contract with the immediate buyer. Section 5.18 merely permits a subsequent buyer to do directly what he can do indirectly in most cases by means of the indemnity chain. It is best regarded as a holding provision pending the possible future enactment of a wide-ranging system of strict tortious liability. In view of its limited range and the persuasive reasons given above for abandoning nineteenth century contractual dogma, we certainly feel that it does not go too far.

Though we have already expressed our view that the subject of strict tortious liability is beyond the scope of this report, we think that in one respect at least section 5.18 does not go far enough. Only subsequent buyers of the goods are protected: donees and persons who may reasonably be expected to use, consume or be affected by the goods are outside the section. If all of these parties were to be protected, section 5.18 would come quite close to mirroring a rule of strict tortious liability, thus undermining our decision to wait upon the deliberations of the Uniform Law Conference on strict tortious liability. It seems to us that section 5.18 is predicated on a series of contractual relationships involving dispositions of the full beneficial interest in goods. While this doctrinal approach would certainly exclude from the reach of the section users of goods and persons affected by them, we believe a strong case can be made for adding donees to subsequent buyers in section 5.18. A donee receives the full beneficial interest in the goods and so is functionally equivalent to someone who has purchased the goods. It would be anomalous, in our view, if a daughter receiving a present from her father were denied recourse under section 5.18, while one given money to buy the present were permitted to bring suit under

the section. It is therefore our belief that section 5.18 should be extended so as to include donees.

Scope of the subsequent buyer's remedy. We cannot, however, leave this subject without adverting to a major difficulty of interpretation posed by section 5.18 of the Uniform Act. The OLRC Report raises the question whether a subsequent buyer's warranty action against a prior seller should be limited to damages or should extend to the full range of remedies available to the immediate buyer, including rejection of the goods and recovery of the price. This issue would be particularly important in respect of a subsequent buyer's claim for economic loss based on the reduced value of the goods: where goods cause personal injury, the recovery of the price is rarely the major component of a buyer's claim in a conventional contract suit.

The OLRC Report took no position on the question whether the subsequent buyer should be entitled to the full range of contractual relief.[242] It decided, however, not to make the point plain in subsection 5.18(2) and to leave it to be worked out in the case law in the light of the section's policy of avoiding wasteful indemnity actions. This subject has troubled us. The rights of the subsequent buyer are derived from the immediate buyer's warranty rights against the prior seller. The subsequent buyer does not have access to the entire body of the immediate buyer's contract rights and the section 5.18 action is not a substitutive one in the sense that the immediate buyer is displaced from his contract with the prior seller. Furthermore, giving the subsequent buyer the full range of contractual rights

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[242] OLRC Report at p. 252.

and remedies against a prior seller would detract from a proposition that we support, namely that the retail seller, who will only rarely be a prior seller under section 5.18, is the party best able to dispose of unwanted goods. There are also certain areas where technical difficulties could arise if the subsequent buyer were given a fully-fledged contractual action against a prior seller, for example, the quantum of price recovery, the prior seller's right to cure a defective tender and the limits on the right of rejection with respect to a prior seller. The only significant problem that we can see arising if a subsequent buyer is limited to a damages action against a prior seller is that the subsequent buyer of useless goods, whose own seller cannot be reached, would in effect be denied the right to reject those goods: he would most often wish to exercise this right where the substance of his claim is the recovery, not of consequential damages, but of the price he paid for the goods. We are not, however, convinced that this problem is serious enough to merit a substantial restructuring of section 5.18 though we note the possibility that a court acting under section 9.19 may find a solution there.

Recommendation. For the reasons given above we make the following recommendation:

> 12. That the extended warranty rights conferred by section 5.18 of the Uniform Sale of Goods Act on subsequent buyers be given also to donees.

e. Express warranties

We have already considered this subject at length and take this

opportunity to note that rights conferred on a subsequent buyer by section 5.18 of the Uniform Act, which may be based on the breach of an express warranty given by a prior seller to his immediate buyer, are in addition to those conferred by section 5.10 of the Uniform Act. Like section 5.18, section 5.10 represents an attempt to have the law respond to modern commercial realities of manufacture and marketing.

CHAPTER VII. MODERNIZING AND STREAMLINING SALE OF GOODS LAW

This chapter of the report deals with the removal from sales law of outmoded concepts and classifications that may have responded to the conditions and problems of an earlier age but are not relevant to present commercial and marketing conditions. The elimination of this redundant material should improve the operation of sales law. This goal will also be fostered by changes, particularly in the area of remedies, that are designed to give greater effect to principles already accepted in our law.

a. Statute of Frauds[243]

The Statute of Frauds was passed for the prevention of fraud in a perjury-ridden age when litigants were not permitted to give evidence in their own cause and the jury had not acquired its modern role as an independent assessor of fact. Though the conditions engendering it have long since disappeared, the Statute of Frauds has proved surprisingly resilient and fresh arguments, not invoked in its creation, have been put forward to justify its continued existence.[244]

Section 17 of the Statute of Frauds dealt with the formalities required of sale of goods contracts. The section is substantially reproduced in the Sale of Goods Act as section 7. It does not extend to labour and materials contracts, even though they entail the transfer of the property in the materials from one party to the other. Briefly, section 7 requires as a

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243 Supra, note 60.

244 See for example Fuller, Consideration and Form, (1941) 41 Col. L. Rev. 799.

condition of enforcement[245] that contracts for the sale of goods valued at fifty dollars and upwards be evidenced in writing. By way of exception, contracts where the buyer has paid in part, given something in earnest to bind the contract or accepted[246] and taken delivery of at least part of the goods - in other words, where certain acts of part performance have occurred - are exempted from the writing requirement.

As long ago as 1885,[247] Mr. Justice Stephen launched a blistering attack on section 17 of the Statute of Frauds. He could see no practical application for it "except that of enabling a man to escape from the discussion of the question whether he has or he has not been guilty of a deliberate fraud by breaking his word".[248] Cases on section 7 of the Sale of Goods Act have been very rare in recent years. This dearth of case law, coupled with empirical evidence gathered by the OLRC showing that business parties frequently engage in informal undertakings,[249] suggests that the section is widely ignored in practice. It has been repealed in the sale of goods legislation

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245 Failure to comply with the forms prescribed by the Statute of Frauds renders a contract unenforceable rather than void: Leroux v. Brown (1852), 12 C.B. 801, 138 E.R. 1119 (C.P.).

246 Acceptance for the purpose of the writing reqirement has a different meaning from acceptance in those sections of the Sale of Goods Act dealing with the buyer's right to reject a nonconforming tender of goods: Sale of Goods Act, subsection 7(3) and Abbott & Co. v. Wolsey, [1895] 2 Q.B. 97 (C.A.).

247 Stephen and Pollock, Section Seventeen of the Statute of Frauds, (1885) 1 L.Q.R. 1. The part of the article from which the quotation is taken was written solely by Mr.Justice Stephen.

248 Id., at p. 3.

249 OLRC Report at pp. 108-09.

of New Zealand,[250] the United Kingdom[251] and British Columbia,[252] in which jurisdictions there have been no signs of an upsurge in business dishonesty or an undermining of commercial relations. A number of law reform agencies[253] have recommended the section's repeal; indeed, it is hard to find any supporters of it. The OLRC Report also advocated its abolition. It could see no reasons for retaining the section and noted that lawyers had apparently "lost the enthusiasm that they once entertained for this section as a defensive shield".[254]

Section 17 of the Statute of Frauds is, however, continued in a much attenuated form in UCC 2-205. In the United States, arguments are frequently advanced in support of the writing requirement on the ground that it diminishes contractual uncertainty and serves to impress upon parties the solemnity of their contractual undertakings. We are sceptical of the value of a writing requirement in reducing contractual uncertainty, particularly one like that in UCC 2-205 which does not need to contain all of the agreed or even the essential terms.[255] We do not believe that business parties need to be impressed with the gravity of their actions, and we note that separate statutes

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250 Contracts Enforcement Act 1956, s. 4.

251 Law Reform (Enforcement of Contracts) Act 1954, 2 & 3 Eliz. II, ch. 34, s. 2.

252 S.B.C. 1958, c. 52, s. 17.

253 See for example the Law Reform Committee, First Report (Statute of Frauds and Section 4 of the Sale of Goods Act, 1893), Cmd. 8809; Law Reform Commission of New South Wales, Working Paper on the Sale of Goods (1975), Part 4.

254 OLRC Report at p. 110.

255 The writing need merely evidence the existence of a contract of sale: UCC 2-201(1).

already exist to deal with the needs of consumers.[256] UCC 2-205 is a complicated provision which does not do enough to meet the real argument mounted against the retention of the writing requirement, namely that it positively promotes fraud and encourages parties to break their promises.

Consequently, we agree with the OLRC that the writing requirement should disappear completely and we support subsection 4.2(1) of the Uniform Act which promotes that policy. It should, however, be noted that the writing requirement in section 4 of the Statute of Frauds, which deals with contracts for the disposition of an interest in land, will continue to apply to those goods to be severed from land that are also treated as land for the purposes of land law.[257]

b. Parol evidence rule

The parol evidence rule is not set out in the Sale of Goods Act but applies to sales contracts by virtue of subsection 59(1) of the Act. Courts and writers have not always adopted a consistent view as to the meaning of the rule which has been articulated in two radically different ways: first, as a rule of evidence which prevents extrinsic evidence from being introduced once the court

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256 See for example the Credit and Loan Agreements Act, R.S.A. 1980, c. C-30; the Consumer Protection Act, R.S.O. 1980, c. 87.

257 Subsection 4.2(1) of the Uniform Act liberates only sale of goods contracts from the requirements of form. The Act contains no repeal of section 4 of the Statute of Frauds, whether implied or otherwise, though a slender argument could be mounted that subsection 2.2(4), which encourages courts to apply provisions of the Uniform Act to transactions analogous to sale of goods contracts, would justify a judicial overriding of section 4 of the Statute of Frauds.

is faced with a written document or documents presenting the semblance of a complete agreement (the "appearance" rule); and secondly, as a rule of contractual intention by which the written agreement is rebuttably or irrebuttably presumed to represent the true agreement of the parties and to have superseded anything they have previously said or transacted (an application of the merger principle). In practice, many contractual documents contain an integration clause stating that the writing constitutes the whole of the parties' agreement and that no additional representations have been made. Besides asserting the parties' intention that the written document constitutes the entire agreement, this also reinforces the document's semblance of comprehensiveness. The appearance rule represents the orthodox position adopted in England and Canada. The Supreme Court of Canada has on two occasions in the last twelve years authoritatively applied the parol evidence rule.[258]

The appearance rule points to the initial justification of the parol evidence rule, namely the need to protect juries from exercising the unenviable function of weighing the probity of extrinsic (frequently oral) evidence against a comprehensive written document. Sometimes, this evidentiary approach to the rule is applied so as to allow the introduction of the extrinsic evidence itself to see whether the written document truly does present the semblance of the whole agreement of the parties. This of course undermines the parol evidence rule and reduces it

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[258] Hawrish v. Bank of Montreal, [1969] S.C.R. 515; Greenwood Shopping Plaza Ltd. v. Beattie (1980), 111 D.L.R. (3d) 257 (S.C.C.).

to an exercise in futility. In one case,[259] the court admitted evidence of a collateral oral warranty which contradicted the terms of a bill of lading. A straightforward application of the appearance rule would have ruled out evidence of the warranty unless it could be established as a separate collateral contract, possible in these circumstances in England [260] but not in Canada.[261] Having admitted the evidence, however, a majority of the court held that the effect of the collateral warranty was to detract from the comprehensive appearance of the bill of lading so that the parties' contract was partly written and partly oral, and not exclusively in writing.

The parol evidence rule is circumscribed in Canada by a large number of exceptions too numerous to cite here, and is infrequently invoked nowadays for the relief of beleaguered jurors since juries in civil suits are a rare phenomenon. The OLRC Report wholeheartedly endorsed the abolition of the rule.[262] It accepted the values which the rule was designed to promote, namely certainty and predictability in legal transactions and the discouragement of protracted trials of evidentiary issues concerning the terms of a contract, but thought that the rule did not promote them in practice. Moreover, in the opinion of the OLRC, the rule had a number of drawbacks: it ran counter to modern trends in the law of evidence; it contained too many

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259 J. Evans & Son (Portsmouth) Ltd. v. Andrea Merzario Ltd., [1976] 1 W.L.R. 1078 (C.A.).

260 City and Westminster Properties (1934) Ltd. v. Mudd, [1959] Ch. 129: the position, however, is not free from doubt.

261 Byers v. McMillan (1889), 15 S.C.R. 194; Hawrish v. Bank of Montreal, supra, note 258.

262 OLRC Report at pp. 110-16.

exceptions, one of which - misrepresentation[263] - led to the drawing of an artificial distinction between misrepresentations and terms (a problem which could only be compounded as a result of the broadened definition of warranty in section 5.10 of the Uniform Act); the rule had failed to come to terms with the reality of standard form contracts which are not drafted by the parties at the end of the agreement process; and finally, the ambiguity in formulating the rule led to difficulties in its practical application.

As the OLRC saw it, these convincing criticisms of the parol evidence rule led to four options: a modified version of the rule like UCC 2-202 could be adopted in replacement; the rule could simply be abolished; the rule could be abolished and the onus laid on the party claiming that a written document represented the whole agreement to show that alleged extrinsic terms were not intended to be contractually binding; and finally, the courts could be given a discretion in applying the rule. Attracted by the simplicity of the second option, the OLRC favoured total abolition of the rule and the Uniform Committee agreed with it in principle.

We also favour abolishing the parol evidence rule. The arguments against the retention of the rule are compelling. Furthermore, a rule with so many exceptions can hardly be said to foster predictability and certainty and, as applied by our courts, it is by no means successful in precluding trials of evidentiary issues concerning the terms of a contract. Trial

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[263] The status of this exception is left in some doubt by the Greenwood Shopping Plaza case, supra, note 258.

judges are sophisticated in the handling of evidentiary issues and we see no reason for laying any obstacles in the way of a judge seeking to discover what exactly the parties have agreed.

We are not attracted by the other options listed in the OLRC Report. UCC 2-202 is not a clear provision; besides, it contains too much of the discredited parol evidence rule itself. The discretionary option would obviously lead to a diminution of certainty in contracts and we see nothing at all to commend it. Nor do we consider anything to be served by selecting the third option and upsetting the normal forensic rules of proof. The second option is clear and receives our support.

The question of how exactly the parol evidence rule is to be abolished is a difficult one, complicated by the fact that the rule is not an easy one to state. Section 4.6 of the OLRC bill certainly possessed the merit of being simple but, while the Uniform Committee was wholly in agreement with its aims, it felt that the language of the section was unduly compressed. We agree with this view and would also point out that the section's failure to state which version of the parol evidence rule is being abolished can only lead to confusion.

Section 4.8 of the Uniform Act and the equitable principle of merger. Section 4.8 of the Uniform Act is a more expansive statement of the repeal of the parol evidence rule than section 4.6 of the OLRC bill. It clearly asserts two important points of principle. First, the "appearance" version of the parol evidence rule may not be invoked to prevent extrinsic evidence being examined to discover the true intention of the parties. Secondly, the version of the parol evidence rule which treats the

document as the conclusive expression of the parties' agreement is to be equally ineffective in preventing access to extrinsic evidence. As the section is drafted, the court is given a free hand in establishing the intention of the parties; if it considers that the written document really does set out the contract in full and was genuinely intended to supersede previous communications, the court is perfectly free to reach this result. The court, in other words, is at liberty to give the extrinsic evidence the weight it deserves. One can anticipate that prior oral statements will be much more likely to have contractual weight if the parties later sign a standard form contract than if they reduce their agreement to an original written form which makes no reference to the earlier oral statement.

A number of interpretative points can be made here. First, the reference to equity in section 4.8 is meant to catch the merger rule. This merits a brief explanation. The equitable merger rule in its pure form states that warranties in sale of land contracts shall be of no effect if omitted from the conveyance; the contract is irrebuttably presumed to have merged in the conveyance.[264] By way of extension, courts in sale of land cases have declined to give relief for pre-contractual misrepresentations unless these latter comply with a test laid down for common law misrepresentation before the fusion of the courts of common law and the Court of Chancery: the misrepresentations merge in the contract unless they are fraudulent or induce an error in substantialibus (or fundamental

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[264] Redican v. Nesbitt, [1924] S.C.R. 135.

mistake) on the part of persons to whom they are made.[265] The doctrine of merger seems also to have extended to both the general law of contract and sale of goods law where it manifests itself as the principle supporting two propositions: first, that a contract of sale of goods which has been executed may be rescinded for misrepresentation only if there has been fraud or if the misrepresentation induced an error in substantialibus; [266] and secondly, that a misrepresentation which has become a term of the contract may no longer be treated as a misrepresentation since it has merged in the contract, so that where the misrepresentation has become a warranty, the injured party will remain contractually bound and will be confined to his remedy in damages.[267] This second application of merger has been authoritatively described as based on a rebuttable presumption of what the parties intended.[268] The latest development in the complex merger story is a recent decision of the Supreme Court of Canada dealing with a warranty in a contract for the sale of land which had been omitted from the conveyance, where the court stated that whether the warranty survived its absence from the conveyance depended on the intention of the parties, and there was not even a rebuttable presumption that the warranty had

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[265] See for example Alessio v. Jovica (1973), 42 D.L.R. (3d) 242 (Alta. S.C. App. Div.).

[266] See for example F. & B. Transport Ltd. v. White Truck Sales Manitoba Ltd. (1964), 47 D.L.R. (2d) 419; affd. 49 D.L.R. (2d) 670 (Man. C.A.). But the execution bar to rescission was not invoked in Bevan v. Anderson (1957), 12 D.L.R. (2d) 69 (Alta.).

[267] Pennsylvania Shipping Co. v. Cie. Nationale de Navigation, [1936] 2 All E.R. 1167, as explained by Zien v. Field (1963), 43 W.W.R. 577, per Tysoe J.A. at pp. 590-92 (B.C.C.A.), revd. on different grounds at [1963] S.C.R. 632.

[268] Zien v. Field, per Tysoe J.A., supra.

merged in the conveyance.[269] It remains to be seen what effect this decision will have on statements of the merger rule in other contexts.

The equitable merger rule, dealing as it does with the question whether earlier written or oral statements survive a later written document, has obvious parallels with the parol evidence rule. The reference in section 4.8 of the Uniform Act to "equity" was designed to prevent the merger rule in either of its presumptive forms - rebuttable or irrebuttable - from being applied to sale of goods contracts under the new Act. As it is drafted now, section 4.8 is in harmony with the recent decision of the Supreme Court on the merger rule cited above.

The remaining two points of interpretation are smaller. The reference to "no provision in a writing" was designed to prevent integration clauses from being used as obstacles to discovering the true intention of the parties. This is wholly consistent with the philosophy of section 4.8. Finally, the reference to evidence establishing the true identity of the parties was necessary to overrule a particular point of law produced by an adherence to the parol evidence rule, namely that an undisclosed principal may not take the benefit of a contract negotiated by his agent if the written agreement purportedly treats the agent as principal.[270]

In sum, we agree with the policy expressed by section 4.8 and are satisfied with the way it is drafted.

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[269] Fraser-Reid v. Droumtsekas, [1980] 1 S.C.R. 720.

[270] Humble v. Hunter (1848), 12 Q.B. 310, 116 E.R. 885 (Q.B.).

c. The hierarchy of contractual terms

Until about two hundred years ago, the subject of breach of contract would have been explained in terms of independent and dependent promises. A party was entitled to resist performance of his contractual obligations in the event of the other's breach provided his promise was premised on the performance of that other party's promise, which was therefore a dependent promise. If the other party's promise was independent, his failure to perform did not entitle the injured party to resist performance; he had to perform and content himself with a cross action in damages.

Until the late eighteenth century, the law tended to interpret contractual promises as independent unless the parties used express language of dependency or explicitly linked the promises.[271] The position was changed when Lord Mansfield broke through with a modern-sounding statement of the doctrine of mutual promises. He divided contractual promises into three categories: independent promises, where a failure by one party to perform his promise does not release the other from his obligation to perform but leaves him with a claim for damages; dependent promises, where a party's obligation to perform is dependent on the prior performance of the other party's promise; and concurrent dependent promises, where a party's promise is dependent on the performance of his promise by the other party, and vice versa.[272] The circularity in the last category of

[271] Pordage v. Cole (1669), 1 Wms. Saund. 319, 85 E.R. 449 (K.B.).

[272] Kingston v. Preston (1773), as related by counsel for the plantiff in Jones v. Barkley (1781), 2 Doug. 684 at pp. 689-91, 99 E.R. 434 at pp. 437-38.

concurrent promises was broken by permitting each party to aver readiness and willingness to perform as a condition precedent to recovery for the other's failure to perform.[273] Perhaps the most famous example of concurrent dependent promises is to be found in the Sale of Goods Act itself, where section 29 states that the seller's duty to deliver and the buyer's duty to pay the price are, unless otherwise agreed, concurrent conditions. The same principle is re-enacted in sections 7.6 and 7.10 of the Uniform Act.

The effect of Lord Mansfield's intervention was to encourage courts to interpret contractual promises in favour of dependence rather than independence. Whether a promise was to be regarded as independent, sounding only in damages, or dependent, so that a breach by the other party would entitle the injured party to refuse performance of his promise, was said to turn on whether the other party's promise went to a part or the whole of the consideration that the injured party bargained for. [274]

In deciding whether there had been a total or partial failure of consideration, the courts were undoubtedly influenced by the extent to which the contract had been performed. If a contract were wholly executory, a party's inability to perform his promise in full would be more likely to be regarded as going to the whole of the other party's consideration. Consequently, a party was generally entitled to refuse tender of performance by the other even if there was only a minor departure from the

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[273] Jones v. Barkley, supra.

[274] Boone v. Eyre (1777), 1 H.Bl. 273n., 126 E.R. 160n. (K.B.).

contractually agreed standard.[275] If, however, defective performance had already been tendered and accepted, the innocent party would not normally be allowed to resile from the contract and, for example, recover any money paid, unless the court was convinced that the other party's default truly went to the whole of the bargained-for consideration.[276]

This more restrictive attitude towards resiling from executed contracts is the source of the rules in the Sale of Goods Act governing the loss of the right to reject goods that have been accepted by the buyer.[277] Its influence is even more apparent in the rules of Article 2 permitting the buyer to refuse tender of goods once there has been any breach of contract by the seller, but limiting his right to revoke his acceptance of goods to cases where there has been a substantial breach.[278] Modern Anglo-Canadian sales law, by allowing buyers a generous measure of time before deeming them to have accepted sale goods, has moved some way from the classical position exemplified by Article 2, though the cases in which this has occurred all seem to involve goods which are substantially defective or unsuitable.

In the nineteenth century, the language of dependent and independent promises disappeared to be replaced by "conditions" and "warranties", a usage which became firmly entrenched in the common law shortly before the passing of the United Kingdom Sale

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[275] See for example Honck v. Muller (1881), 7 Q.B.D. 92, per Bramwell L.J. at p. 99 (C.A.).

[276] Boone v. Eyre, supra, note 274.

[277] Section 36.

[278] U.C.C. 2-601, 2-606 and 2-608.

of Goods Act in 1893.[279] In this usage, "warranties" meant terms of the contract whose breach sounded only in damages, while "conditions" were those terms whose breach permitted the injured party to treat himself as discharged and sue for damages. This approach required the terms of the contract to be identified as one or the other by a process of a priori construction;[280] consequently, there was no room for a case-by-case analysis of the consequences of a specific breach, whether trivial or severe, in the classification of the term. A breach of warranty causing severe injury would never give the injured party the right to terminate the contract; a breach of condition producing trivial consequences would never confine the injured party to an action for damages.

This hierarchical doctrine of terms became enshrined in the Sale of Goods Act, where terms are referred to either as conditions or warranties. "Warranty" is defined as "an agreement with reference to goods...collateral to the main purpose of the contract, the breach of which gives rise to a claim for damages but not a right to reject the goods and treat the contract as repudiated".[281] Conditions, on the other hand, are not defined though the remedy for their breach is the right to treat the contract as repudiated; by negative inference, they had apparently to be all promissory terms of the contract that were not warranties.

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[279] See Bentsen v. Taylor, Sons & Co., [1893] 2 Q.B. 274 (C.A.).

[280] Id.

[281] Section 1(n).

Subsection 14(2) of the Sale of Goods Act appears to treat all terms of a contract of sale as falling into the category of either conditions or warranties. Furthermore, the implied terms regarding title,[282] description,[283] fitness of purpose,[284] merchan table quality,[285] sample[286] and, by implicati on, quantity[287] are clearly treated as conditions while those dealing with quiet possession[288] and freedom from encumbrances[289] are clearly treated as warranties. Only in respect of time of delivery and payment obligations is the Act less than definitive. The Sale of Goods Act therefore appears to offer little scope for a flexible attitude to breach of contract that would pay particular regard to the injury caused by the breach: a term is classified at the outset as a condition or as a warranty and retains that character throughout. The following discussion deals with the effect of this statutory position on the case law.

On a number of occasions, the trivial breach of an implied term classified by the Sale of Goods Act as a condition has permitted the injured party to reject the goods and discharge himself from the contract. Thus, where a Toronto seller shipped a weighing scale priced at $295 to a Saskatchewan buyer, with a

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[282] Section 15(a).

[283] Section 16.

[284] Subsection 17(2).

[285] Subsection 17(4).

[286] Section 18.

[287] Section 31.

[288] Section 15(b).

[289] Section 15(c).

thirty cent glass dial on the scale broken, the buyer was held rightly to have rejected the goods and discharged himself from the contract; the goods were not of merchantable quality.[290]

Even more startling are two cases dealing with the condition requiring goods to correspond to their contractual description. In one,[291] the buyer ordered a quantity of wooden staves which it required for making cement barrels. The seller delivered the contract quantity of staves and these were perfectly fit for their required purpose, but the buyer rejected them; the dimensions of the staves departed to a small degree from the contractual sizes, a condition arising in part in the course of carriage from a Russian port. The House of Lords held that the buyer was entitled to reject the staves. In the other description case,[292] the contract called for the supply of a quantity of Australian canned fruits packed in cases of thirty tins each. The consignment tendered, which was perfectly sound, was packed partly in cases of twenty-four and partly in cases of thirty tins. The buyer's action in rejecting the goods was again held to be justified. In both of these cases the market was declining and the buyer was happy to make use of any legitimate excuse for not accepting the goods.

The doctrine of conditions and warranties was carried over into other areas of contract law until the decision of the English Court of Appeal in Hongkong Fir Shipping Co. v. Kawasaki

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290 International Business Machines Co. v. Shcherban, [1925] 1 D.L.R. 864 (Sask. C.A.).

291 Arcos Ltd. v. E.A. Ronaasen and Son, [1933] A.C. 470 (H.L.).

292 Re Moore & Co. and Landauer & Co., [1921] 2 K.B. 519 (C.A.).

Kisen Kaisha,[293] a time charterparty case, mounted a direct challenge to this binary doctrine of terms. The term in question - that the vessel be seaworthy - could be breached in circumstances as widely divergent as the presence of a rusty nail in the deck and the total breakdown of the engines. In the court's view, many such complex contractual undertakings could not be slotted into the condition - warranty scheme, as devised in the late nineteenth century and enshrined in the Sale of Goods Act. The remedy for breach of these complex undertakings depended on whether they deprived the injured party of substantially the whole of the benefit which it was intended that he should obtain from the contract, unless the parties had by agreement fixed the remedy for breach. Another way of framing the test was to ask whether the breach went to the root of the contract, a test which has been in use for more than one hundred and fifty years.[294]

The HongKong Fir doctrine betokened a return, at least in part, to the classical position established by Lord Mansfield; the charterparty in question was a partly executed one and the breach did not go to the whole of the bargained-for consideration. In subsequent years, the decision has been followed in a number of contract cases[295] but has encountered some stern resistance, notably in three recent cases dealing respectively with the expected readiness to load clause in a

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293 [1962] 2 Q.B. 26 (C.A.).

294 Davidson v. Gwynne (1810), 12 East 381, 104 E.R. 149 (K.B.).

295 The most important of these is Cehave N.V. v. Bremer Handelsgesellschaft m.b.H., [1976] Q.B. 44 (C.A.).

voyage charterparty,[296] the timely tender of shipping documents in a documentary sale[297] and the buyer's duty under an f.o.b. contract to give notice of readiness to load,[298] which were all treated as conditions of the contract giving rise to the right of termination in the event of breach. These cases, however, all involved time obligations; by definition, therefore, they concerned tender of performance under a contract which was still executory.[299] Seen in this light, these decisions, coupled with HongKong Fir, are quite compatible with the position in Lord Mansfield's time when the application of the doctrine of failure of consideration varied according to whether the contract was executory or executed. All four decisions, despite their apparent inconsistency, therefore represent in sum a return to the law as it was applied before the imposition of the condition - warranty strait jacket. This is a point worthy of note in deciding on reform of the law governing the classification of contractual terms.

Though it is by no means yet established how far the HongKong Fir case goes, the decision has received support in

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296 Maredelanto Compania Naviera S.A. v. Bergbau Handel G.m.b.H. (The Mihalis Angelos), [1971] 1 Q.B. 164 (C.A.).

297 Toepfer v. Lenersan Poortman N.V., [1980] 1 Lloyd's Rep. 143 (C.A.).

298 Bunge Corp. v. Tradax Export S.A., [1981] 2 All E.R. 513 (Q.B.D., C.A. and H.L.).

299 Occasionally, the breach of a time obligation will not delay tender of performance, for example, where the seller is under a duty to give timely notice of an export prohibition: Bremer Handelsgesellschaft m.b.H. v. Vanden Avenne - Izagem PVGA, [1978] 2 Lloyd's Rep. 109 (H.L.).

Canada.[300] Though not itself a sale of goods case, it has also served as the impetus for an assault on the strict application of the condition - warranty doctrine in sale of goods contracts. As we have seen, the Sale of Goods Act definitively classifies terms dealing with the description, fitness and merchantable quality of goods as conditions of the contract. The description cases referred to above show there is little flexibility available to a court ruling on the question whether the term has been broken, though it is noteworthy that the recent narrowing of the scope of the description term, discussed in a previous section of this Report, is prompted to a considerable degree by judicial revulsion at the opportunistic way the term is relied on when the market has gone sour for the buyer. The fitness term, requiring as it does that goods only be reasonably fit for their purpose, has a measure of flexibility built into its very definition. The condition that goods shall be of merchantable quality, on the other hand, though difficult to define, seemed at one time to be clear cut in its application; either goods were of merchantable quality, or they were not. If the latter, they could be rejected even if the injury suffered was trivial: if the former, they had to be accepted and the buyer was entitled to no relief at all if they were defective or substandard. The merchantable quality term did not therefore seem to lend itself to flexible application taking account of trivial and severe deficiencies.

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300 Polar Refrigeration Service Ltd. v. Moldenhauer (1967), 61 D.L.R. (2d) 462 (Sask.); Table Stake Construction Ltd. v. Jones (1977), 18 O.R. (2d) 203. The reasoning is also echoed in the judgment of Judson J. in Field v. Zien, [1963] S.C.R. 632, at p. 635.

The simplicity of the merchantable quality picture has been destroyed by the recent case of Cehave N.V. v. Bremer Handelsgesellschaft m.b.H.[301] where a cargo of citrus pellets, destined for cattle food and priced at 100,000 pounds sterling, was rejected because about one-third of the consignment had suffered severe heating damage. If the buyer had accepted the goods and sued for damages, it would have been entitled to a price allowance of about 20,000 pounds sterling. It chose instead to reject the goods which, if perfect, would have been worth only 86,000 pounds sterling on the falling Rotterdam market, and, by a strange backdoor procedure, acquired the same goods for a third of the original contract price after a judicial sale. Subsequently, it used the entire consignment in compounding cattle food, though in more conservative proportions than would have been the case with perfectly sound goods.

Faced with these circumstances, the court ruled that the goods were of merchantable quality but that the seller was in breach of an express term of the contract requiring shipment to be made in good condition. Sidestepping the English equivalent of subsection 14(2) of the Sale of Goods Act, the court, following the Hongkong Fir case, held that this term was not a condition and, furthermore, that its breach did not in the circumstances go to the root of the contract. Consequently, the buyer's rejection of the goods was unlawful and it was not entitled to recover the price paid.

Admirable as Cehave was in establishing justice in the instant case, it is pertinent to ask whether the court's lenient

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[301] Supra, note 295.

attitude to the condition of merchantable quality was an ill-advised one. A substantial proportion of the goods was so severely damaged as to merit an allowance of one-fifth off the contract price. How would a future court apply this ruling to a case which did not contain an express term like the one in Cehave? The source of the problem, of course, is the condition - warranty doctrine which, in the case of a statutory condition like the merchantable quality term, admits of no intermediate possibility between a decision that the buyer is entitled to reject the goods and discharge himself from the contract, on the one hand, and a conclusion that there has been no breach of contract at all, on the other.

In sum, the doctrine of conditions and warranties has been modified in sale of goods cases in two principal ways. First, though it was once thought that subsection 14(2) required all terms of a contract of sale to be classified as conditions or warranties, this has been denied in the case of express terms. Consequently, express terms may be analyzed in the light of the consequences of their breach to determine the appropriate remedy. Secondly, in response to their invariable treatment as conditions in the Sale of Goods Act, the description and merchantable quality terms have been subjected in recent years to a restrictive interpretation.

The complex pattern of case law discussed above argues in favour of a reform of the law of breach of contract in sale of goods cases. A further argument is posed by the difficulty of establishing the status of some sales obligations. According to subsection 13(1) of the Sale of Goods Act, stipulations as to

time of payment are not, in the absence of a contrary agreement, of the essence of a contract of sale. This provision is hard to reconcile with section 29, which as we have seen makes the seller's delivery and buyer's payment duties concurrent conditions, since the authoritative view is that the seller's duty of timely delivery is a condition of the contract,[302] at least in commercial cases.[303] Besides being under an obligation to pay, the buyer incurs another major duty under the contract of sale: he must take delivery of the goods. The status of this obligation is still unsettled.[304]

It remains now to consider how the law relating to the classification of contractual terms should be reformed. The subject cannot be investigated in full here because it is complicated by the principle of cure, adopted on a general basis by the Uniform Act[305] and discussed in a later section of this Report. The following discussion takes place without reference to an operative cure principle.

The OLRC Report proposed that all "express or implied terms relating to goods" be classified as warranties with a "unitary conception of substantial breach" being introduced to ascertain when a party was entitled to treat himself as discharged from the contract, or to "cancel" the contract in the language of the OLRC

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302 Bowes v. Shand (1877), 2 App. Cas. 455 (H.L.).

303 It may not be so in consumer contracts: Allen v. Danforth Motors Ltd. (1957), 12 D.L.R. (2d) 572 (Ont. C.A.).

304 OLRC Report at p. 391.

305 Section 7.7.

bill and the Uniform Act.[306] The new concept of substantial breach was defined in the OLRC bill as "a breach of contract that the party in breach foresaw or ought reasonably to have foreseen as likely to impair substantially the value of the contract to the other party".[307]

We see certain difficulties in this approach. The first difficulty is that, though an evenly applied principle of substantial breach would have the benefit of conceptual simplicity, this would be purchased at the expense of certainty in the resolution of disputes in individual cases. The words of one commentator criticizing the Hongkong doctrine are particularly apt here:

> "It is of the first importance that the law be such that commercial men may take quick and sure advice about the legal consequences of the practical options open to them when something goes wrong with their transactions. Under the old dispensation, when the right to reject depended on the nature of the term in the contract which was broken, the innocent party simply had to go to the filing cabinet, consult the contractual document and then decide whether the term broken was a very serious one or not; this final step admittedly called for judgment, and there could often be two views, but at any rate the requisite data were immediately and presently available. Now that the right to resile turns on the gravity of the consequences of the breach, the necessary data are not words but events, they may be in the China Sea rather than in the head office where decisions are taken, and one will probably have to wait for them, since consequences tend to occur after their causes; nor has the difficulty of assessment been alleviated, rather the reverse. There has therefore been an undeniable loss of speed and sureness of decision-making, and the Court of Appeal is

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306 OLRC Report at p. 147.

307 Subsection 1.1(1)24.

responsible for it."[308]

Admittedly, however, subsection 3.1(1) of the OLRC bill (and the Uniform Act) would allow the parties to exclude the provisions dealing with substantial breach and agree on their own remedial regime.

The second and related difficulty is that a widespread doctrine of substantial breach pays insufficient regard to commercial usage in a statute which, taking a lead from Article 2, is supposed to pay particular heed to it. It is destructive of certainty not to treat as strict conditions terms which have traditionally been so treated in commercial practice and cases.[309]

The third difficulty with the OLRC proposal is that it does not pay regard to the distinction between executory and executed contracts which is firmly if obscurely rooted in our law. It is one thing to say that a buyer, who has accepted and used goods, should not be able to reject them because of a defect unless the value of the contract is substantially impaired to him: it is quite another to say that a buyer must accept the tender of goods, manifestly defective but in a minor respect, and content himself with an action for damages. (This criticism may be met by the principle of cure, discussed below.)

The fourth difficulty created by the OLRC proposal is that it is hard to see how far it would go in its application to the

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[308] Weir [1976] Camb. L.J. 33 at p. 35.

[309] See Bunge Corp. v. Tradax S.A., supra, note 298.

obligations of buyer and seller. It certainly would not affect the rule that the duties of delivery and payment are concurrent conditions;[310] a buyer failing to pay would not be able to demand delivery on the ground that his default did not substantially impair the value of the contract to the other party. But what would be the position if performance had been delayed or if the parties, by contrary agreement, had excluded this concurrence? Would the breach of the obligations of payment, acceptance of tender and delivery come within the substantial breach principle? The OLRC bill stated in effect that a breach of the first two obligations would be deemed substantial where performance did not occur after the seller had time of the essence.[311] Would this mean that until the seller did perform, a breach of the buyer's obligations of payment and acceptance of tender could never be substantial? The seller's obligation of timely tender, likewise his obligations with respect to the quality and attributes of the goods, would certainly fall within the substantial breach rule. This would overturn established law on the question of the seller's obligation of timely delivery.

The final difficulty produced by the substantial breach doctrine lies in its introduction of the principle of foresight. The principle is not contained in Article 2 and forms no part of our existing law on the discharge of contracts for breach. The OLRC thought that, since foresight was relevant to the question of remoteness of damage, it should also govern discharge for breach. We are not persuaded by this reason. The introduction

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[310] This rule was preserved by subsections 7.6(1) and 7.10(1) of the OLRC bill.

[311] Subsection 7.7(8).

of foresight runs counter to established principle by which discharge occurs, not because a party is at fault as such, but because the effect of the event on the other is to deprive him of the consideration he bargained for.[312] Furthermore, there is no necessary connection between discharge and damages. It is one thing to refuse damages to a party whose injury is unforeseeable: it is quite another to compel him to persevere with the contract after breach if it has lost its value to him. It might, however, be argued that the OLRC definition of substantial breach would have the merit of preventing a buyer from withdrawing from the contract by virtue of an idiosyncratic vulnerability unknown to the seller. A buyer's business, for example, might be so shaky as to be peculiarly vulnerable to delay on the seller's part. But existing law does not necessarily permit discharge as a result of idiosyncratic injury. We can find no case where this has happened though we do know of authority which holds that, whether a breach has gone to the root of a contract depends on whether, in the ordinary course of business, it has put an end to the commercial object of the contract.[313] A similar objective test has been applied to discharge from consumer contracts by The Consumer Products Warranties Act of Saskatchewan.[314] The law does not need an injection of foresight to regulate rights of discharge. Finally, foresight adds another element of uncertainty to the equation in requiring an injured party considering termination of the contract to speculate on whether

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[312] Hongkong Fir Shipping case, supra, note 293.

[313] Freeman v. Taylor (1831), 8 Bing. 124, 131 E.R. 348, per Tendal, C.J. at pp. 132 and 351-52.

[314] Supra, note 230, section 2(c).

the guilty party foresaw or ought reasonably to have foreseen the degree of injury suffered by the injured party.

It is our view that there is a need for inserting a measure of flexibility in sales law, at least where terms regarding the quality, purpose and attributes of the goods are concerned (the description term has been repealed by the Uniform Act), without upsetting established commercial expectation and usages. Consequently, we disagree with the foresight element in the definition of substantial breach, the definition's application to executory and executed contracts alike and its extension to certain obligations such as the seller's duty of timely delivery. We believe that breach provisions should make clear allowance for the strict treatment of certain obligations according to commercial usage and the intention of the parties, but should otherwise permit cancellation only in the event of substantial impairment in value, the basic test proposed in the OLRC Report. This position, however, should be subject to a rule requiring that tender of performance strictly comply with the contractual standard, except perhaps in certain cases of payment and consumer delivery.

The Uniform Committee also took exception to the concept of substantial breach as developed in the OLRC bill but, in view of the changes it made to the principle of curing defective tenders, which involved dispensing with the concept of substantial breach, it did not develop comprehensive proposals on breach of contract. The views we have just set out on breach of contract, posited on the absence of a cure principle, are overridden by our acceptance of this principle and its concomitant sanction for

non-compliance. The extent of this override will become apparent when the cure principle is discussed. We therefore leave our views on breach of contract in outline form and refrain from making any recommendations.

d. Redefining "goods"

Even before the passing of the Sale of Goods Act, the definition of "goods" posed problems, especially when it came to distinguishing goods and land for the purpose of the Statute of Frauds.[315] In principle, things attached to the land that were to be severed by the seller and delivered to the buyer were treated as goods, whereas if things attached to land were to be severed by the buyer, the contract was regarded as disposing of an interest in land with a licence being given to the buyer to enter the land. Exceptions of uncertain scope involving fructus naturales (the natural growth of the soil) and fructus industriales (yearly crops) were grafted on to the rule, and the problems of interpretation were compounded by the Sale of Goods Act, which was unclear as to the extent to which it was codifying existing law on this point and which introduced some additional and confusing terminology.[316]

A number of practical problems are posed by the distinction between land and goods. First of all, there is the question whether a contract of sale has to comply with the writing requirement of section 4 of the Statute of Frauds (land) or the different requirement of section 7 of the Sale of Goods Act.

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[315] Marshall v. Green (1875), 1 C.P.D. 35.

[316] A good examplle of a case where this caused confusion is Hingley v. Lynds (1918), 44 D.L.R. 743 (N.S.S.C.).

Secondly, a question arises as to whether the implied terms in the Sale of Goods Act apply to a transaction on the borderline between land and goods and thirdly, it may be difficult to know whether the rules applicable to land or those applicable to goods govern the passing of property in the subject matter of a particular transaction. This third problem leads in turn to a fourth, which concerns the regulation of competing claims to property that can be treated both as land and as goods. Subject to this fourth problem, which will be discussed in the following paragraphs, we support section 2.5 of the Uniform Act in its attempt to forge a credible distinction between land and goods. We see no reason to add anything to the very thorough discussion of the subject in the OLRC Report.[317]

The first two subsections of section 2.5 clarify the scope of the Uniform Act in regard to the application of certain rules, such as the title transfer rules, to those sale of goods contracts that are akin to contracts for the disposition of an interest in land. Subsections 2.5(3) and (4) recognize the possibility that a contract may dispose of property capable of treatment both as goods and as an interest in land. Since competing interests in goods and land are governed by separate priority rules, it is important to decide which priority rules, the land rules or the goods rules, should prevail when certain property is subject to both regimes. Subsections 2.5(3) and (4) favour the land priority rules and we are in agreement with this.

Nevertheless, instead of merely providing that the land priority rules shall prevail, which is what UCC 2-107(3) does,

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[317] OLRC Report at pp. 57-65.

subsections 2.5(3) and (4) attempt a rescript of these rules. Two kinds of problem flow from this technique. First, unless the rescript is accomplished accurately, conflicts between the priority rules applicable respectively to goods and interests in land are created rather than resolved. Secondly, even if the rescript is accomplished accurately, it is vulnerable to becoming obsolete if the priority rules applicable to land are altered by subsequent judicial decision or legislation.

We have identified at least four situations in which subsections 2.5(3) and (4) present these problems. First, the rights of a buyer under subsection 2.5(2) are stated by subsection 2.5(3) to be subject to the rights of any person having a "registered interest" in the real property at the time of the contract of sale. Although we believe that a prior interest in the real property protected by a caveat should and would be treated as a "registered interest" for the purpose of priority under the Land Titles Act,[318] the matter is not without ambiguity. Moreover, future drafting changes in the Land Titles Act could aggravate the problem.

Secondly, subsections 2.5(3) and (4) provide that the rights of a buyer under subsection 2.5(2) are subject to the interest of a subsequent purchaser or mortgagee for value of an interest in the real property if the subsequent purchase or mortgage was made without actual notice of the contract of sale. This is not an accurate rescript of the law of this province. Under the Land Titles Act, the buyer's prior interest would be subject to the subsequently acquired interest even if this latter interest were

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[318] R.S.A. 1980, c. L-5.

acquired with actual notice of the buyer's prior interest provided the owner of the subsequent interest were innocent of fraud and he caveated or registered his interest before the buyer caveated or registered his prior interest.[319]

Thirdly, subsection 2.5(3) provides that the rights of the buyer are subject to the interest of a creditor with a lien on the property subsequently obtained as a result of judicial process. Again, this is not an accurate rescript of the law of this province. Under the Land Titles Act, the lien of a judgment creditor attaches only to the beneficial interest of the seller in the real property.[320] Even if a prior buyer fails to register or caveat his rights, these will prevail against a subsequently obtained judgment lien.

Fourthly, the rights of an encumbrance holder in respect of subsequent advances are uncertain in this province and a clarification in the law is under active consideration by the Alberta government. Any attempt to legislate in this area along the lines of subsection 2.5(3) of the Uniform Act would be premature.

Even if subsections 2.5(3) and (4) were otherwise acceptable to us, we do not see why they should qualify subsection 2.5(2) and not subsection 2.5(1) as well. As the draftsman apparently recognized in subsection 2.5(1), it is quite possible that title transfer rules for land and for goods will arrive at different conclusions and quite possible therefore for a conflict as to

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[319] Id., sections 16, 59, 145 and 195. See Holt Renfrew & Co. v. Henry Singer Ltd., [1982] 4 W.W.R. 481 (Alta. C.A.).

[320] Id., subsection 122(2).

priority to arise between a buyer of minerals under a sale of goods contract who acquires an interest in land and the holder of a competing interest in the land. The amendment we propose in the next paragraph to subsections 2.5(3) and (4) should qualify both preceding subsections.

In view of the difficulties set out above, we recommend a simplification of subsections 2.5(3) and (4) along the lines of UCC 2-107(3). The amendment would simply state that any interest in goods acquired in accordance with section 2.5 is subject to third party rights as provided by the Land Titles Act.

Apart from the relationship of goods to land, which is dealt with by section 2.5 of the Uniform Act, a number of points are raised by the definition of goods in subsection 1.1(1)16 of the Act. First of all, the definition includes the unborn young of animals by analogy to the law governing present sale of growing crops. Secondly, the significance of the problem of defining goods is considerably reduced by other provisions in the Uniform Act abolishing the writing requirement and applying the Act by analogy to transactions resembling sale of goods contracts.[321] Finally, unlike UCC 2-105(1), subsection 1.1(1)16 does not exclude corporate securities from the definition of goods. In view of the comprehensive nature of the Business Corporations Act,[322] we believe that securities transactions should be expressly excluded from the Uniform Act.

Recommendations. For the reasons given above we make the

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[321] Subsections 4.2(1) and 2.2(4).

[322] S.A. 1981, c. B-15.

following recommendations:

> 13. That instead of seeking to reproduce in section 2.5 the priority rules relating to transactions involving land, the Uniform Sale of Goods Act should contain a simple provision designating the Land Titles Act to regulate questions of priority in respect of transactions falling within section 2.5.
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> 14. That the definition of "goods" in subsection 1.1(1)16 of the Uniform Sale of Goods Act should expressly exclude corporate securities.

e. Remedies changes

The provisions on remedies in the OLRC bill and the Uniform Act do not, for the most part, include a major departure from settled principles. Since it is not the function of this report to enter into a fundamental examination of areas of basic contract law which the OLRC and the Uniform Committee were content to leave undisturbed, or at least remit to a general contract law revision project, no attempt will be made here to give an integrated survey of the buyer's and seller's real and personal remedies in the Uniform Act. Instead, those provisions of the Act which seek to further the compensatory goal will be discussed in the limited context of how effectively they perform their assigned task.

Earlier in this report, we cited a famous passage in a Privy

Council decision[323] declaring that the general policy of the law of damages was to put the injured party in as good a position as if the contract had been performed. There are two cases where this principle is sacrificed in the Uniform Act, both of which have been discussed earlier in this report, namely section 4.3 and subsection 9.19(1)(a), the latter involving a more substantial challenge to the principle. Apart from these instances, however, the goal of compensation according to the injured party's contractual expectations is supported by the Uniform Act. In the remaining pages of this section of the report dealing with the modernization of sales law, we shall see how effectively the Uniform Act promotes that compensatory goal. In addition, we shall consider the Act's policy of furthering by clear statutory language other remedial goals, such as the recovery of money owed, the prevention of over-compensation, the circumstances in which the right of cancellation may be exercised and the securing of actual rather than substitutional performance where this is the only way a party can be adequately compensated.

i) The indexation of remedies. Little need be said about the indexation of the buyer's and seller's remedies in sections 9.4 and 9.12 of the Uniform Act. In a piece of legislation as complex as this, it can serve only to assist parties and their advisers in working their way through the Act. We are in favour of this approach.

ii) Rights of cancellation. For the same reasons as we approve the principle of indexing remedies, we support the cataloguing of circumstances in which the seller and buyer can

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[323] Sally Wertheim v. Chicoutimi Pulp Co., supra, note 29.

exercise rights of cancellation under sections 9.5 and 9.13. Work was done in the Uniform Committee to make these provisions comprehensive.

iii) Quantifying the injured party's damages. According to present law, the market price of goods is relevant in fixing the buyer's damages for the seller's failure to deliver[324] and the seller's damages for the buyer's failure to accept and pay for the goods.[325] In each case, the rules of remoteness of damage are applied, as refined through a series of cases, but they are presumptively satisfied by quantifying the difference between the contract price and market price of the goods at the date when they should have been accepted or delivered, as the case may be. The market concept has caused considerable theoretical trouble over the years,[326] though it seems not to have worked badly in practice.

In cases where the buyer actually does purchase substitute goods when the seller fails to deliver, or the seller sells goods identified to the contract when the buyer refuses to accept them, the OLRC Report recommended a departure from the market rule and the adoption of more concrete rules based on UCC 2-706 and UCC 2-712 respectively.[327] The OLRC recommendation is implemented by section 9.10 of the Uniform Act which confers on the seller the right to resell the contract goods and claim as damages the

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[324] Sale of Goods Act, subsection 51(3).

[325] Id., subsection 50(3).

[326] See Charter v. Sullivan, [1957] 2 Q.B. 117 (C.A.) and the cases there reviewed.

[327] OLRC Report at pp. 408-11, 498-502 and 523.

difference between the two contract prices if adverse to him, provided the resale was conducted in a commercially reasonable manner and was reasonably referable to the broken contract. To that end, the seller may manufacture goods not yet made and identify to the broken contract goods not yet identified before breach. Similarly, section 9.16 of the Uniform Act allows the buyer in the converse situation to "cover", that is, make a commercially reasonable substitute purchase and recover any adverse difference between the two contract prices as damages. These provisions give reasonably clear guidance to parties seeking to quantify in advance their damages and should simplify the matter of proof. They involve no departure at all in principle from the existing market test. Accordingly, they receive our support.

A more difficult question is whether a hypothetical test of commercially reasonable sale or purchase should be substituted for the market test in cases where no actual resale or cover purchase has taken place. This has been done by section 9.18 of the Uniform Act. We are less confident about making the change here than in the case of actual resales and purchases but have concluded that we can give our support to section 9.18. It is compatible with the resale and cover sections and we favour the consistency and simplicity it promotes. Moreover, some goods have no market at all. The Uniform Committee also agreed with the OLRC on this question.

Mention can also be made here of the seller's right to identify goods to a broken contract. It has been shown that the seller may do this under section 9.10 of the Uniform Act when

exercising his right of resale. The right of identification is formally conferred by section 9.6 of the Uniform Act and manifestly serves the purpose of servicing a system of rules designed to produce accurate compensatory awards. This purpose is also served, as we mentioned in an earlier section, by section 9.11 where a seller, who may have trouble disposing of unidentified or uncompleted goods, because for example they are custom-built for the buyer in breach, is permitted to identify goods so as to bring an action for the price. In both cases, the right of identification is, in our view, a reasonable device for the pursuit of the compensatory goal.

iv) Recovery of money paid on contractual breakdown. Though somewhat uncertain as to how frequently such a right would be exercised in practice, the OLRC Report recommended that a rejecting buyer be given a lien over the goods.[328] No such general right exists in our law though there is a precedent for it in consumer cases falling under the Direct Sales Cancellation Act.[329]

The advantages of this innovation are that it promotes the even-handed treatment of buyers and sellers since the buyer's lien under section 9.14 of the Uniform Act mirrors the seller's right of withholding delivery in section 9.8. Furthermore, it saves the buyer from a dilemma he faces when exercising his right to reject goods against an insolvent seller. If he rejects the goods, the property revests in the seller and the buyer is left with a generally worthless claim in bankruptcy to recover any

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[328] OLRC Report at p. 482.

[329] R.S.A. 1980, c. D-35.

monies paid. Consequently, if he suspects the seller's impending insolvency, he is driven to accept goods he does not want so as to salvage something from the wreckage.

The buyer's lien is likely to be of greater utility when he has paid a part rather than the whole of the price, since its value will be directly proportional to the amount by which the value of the goods in his hands exceeds the sum that he has paid. If, however, the goods are worthless, then so will be the lien. The new lien represents something of a departure from existing common law lien principles whereby the lienholder is not permitted to include within his security any claim for the storage or maintenance of withheld goods.[330] The extension of the lien beyond a liquidated claim for return of monies paid so as to include holding costs introduces a small measure of uncertainty, but not so much as it would have done if the lien had extended to the buyer's claim for damages.

The Uniform Committee followed the recommendation of the OLRC Report on this point and we support it as a reasonable device for securing the buyer a measure of compensation.

v) The seller's restitutionary claim for benefits received by the buyer. It seems reasonable to infer from the Sale of Goods Act that its draftsman envisaged that a buyer retaining goods for more than a short length of time would be held to have accepted them so as to be relegated to a claim for damages. Consequently, he would obtain little if any benefit from goods held for the short period between delivery and rejection. Of

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[330] Thames Iron Works Co. v. Patent Derrick Co. (1860), 1 J. & H. 93, 70 E.R. 676 (Ch.)

course, the draftsman did not anticipate the twentieth century explosion in the selling of consumer and complex manufactured goods and the way in which this persuaded courts to extend the period in which a buyer could inspect goods, or could allow a seller to iron out teething problems, without jeopardizing the buyer's right of rejection. In consequence of this protraction of the period between delivery and rejection, a buyer can more readily derive a benefit from rejected goods, though in many cases this will be reduced to negligible proportions by the problems afflicting the goods, a truth acknowledged by some Canadian courts in dealing with a seller's restitutionary claim.[331]

The question of the seller's restitutionary claim was, however, brought to a sharp focus in cases where the goods were by no means materially flawed but the seller's title was defective. The leading case of Rowland v. Divall,[332] operating on the dubious assumption that buyers purchase goods for the abstract enjoyment of title rather than personal consumption, an assumption fostered by the way in which the Sale of Goods Act insinuates title into contract issues, held that where a seller had no title to sell goods there arose a total failure of consideration. Though the seller in that case was not overtly pursuing a restitutionary claim, he was seeking to set up the buyer's enjoyment of the goods as a ground for holding that the buyer had accepted them. If the seller had been successful on

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[331] See for example Wiebe v. Butchart's Motors Ltd., [1949] 4 D.L.R. 838 (B.C.C.A.); F. & B. Transport Ltd. v. White Truck Sales Manitoba Ltd. (1964), 47 D.L.R. (2d) 419, affd. 49 D.L.R. (2d) 670 (Man. C.A.).

[332] [1923] 2 K.B. 500 (C.A.).

this point, and if the court had concluded that the failure of consideration was merely partial, the buyer would have been reduced to a claim for damages in which implicitly the seller's restitution interest would have been recognized. By holding that there had been both no acceptance and a total failure of consideration, the court thus allowed the buyer to recover the price, and the seller's restitution interest went unrecognized.

The injustice of the application of the doctrine of failure of consideration to cases of this kind was particularly apparent in two cases[333] where the buyers had full enjoyment of motor vehicles for eleven months and twenty months respectively without paying anything for them. In such cases, the seller's predicament is compounded by obstacles placed in the way of his "feeding" or curing the defective title. This issue will be referred to below but, in the meantime, we declare our support for the principle, espoused by both the OLRC Report and the Uniform Committee, that a buyer claiming a return of the purchase price should be obliged to give credit for benefits received under the contract. Section 9.15 of the Uniform Act promotes this principle and will therefore serve to prevent over-compensation of the buyer.

vi) Specific performance. This report has already discussed the seller's action for the price and no further consideration will be given to it except to observe that, though a common law and not an equitable head of relief, it bears an obvious resemblance to specific performance in that it

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[333] Butterworth v. Kingsway Motors Ltd., [1954] 1 W.L.R. 1286; McNeill v. Associated Car Markets Ltd. (1962), 35 D.L.R. (2d) 581 (B.C.C.A.).

effectively compels actual performance on the part of the buyer. A point emerging frequently in the OLRC Report is the desirability of treating the parties even-handedly, a principle which may be translated into some relaxation in the discretion which the courts currently exercise within narrow limits in the grant of specific performance to buyers.

The OLRC Report[334] did not discuss the general efficacy of specific performance as a remedy for breach of contract, presumably since this would involve too large a digression from the subject of sale of goods. It recognized the position of the common law as traditionally favouring substitutional relief rather than the enforcement of actual performance but felt that the discretion to award specific performance was too narrowly confined in practice. The Sale of Goods Act confers a discretion on the court to award specific performance in cases of "specific or ascertained" goods and the relevant provision has been interpreted as definitive of the circumstances in which the discretion may be exercised.[335] The OLRC Report favoured extending the scope of specific performance to include also unascertained goods, a development which in itself would do little to increase the number of cases in which the remedy is awarded; the decree is rarely granted and is in practice confined to unique chattels.

An example of the practical need for such an expansion was,

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[334] See pp. 436-44.

[335] Re Wait, supra, note 166.

however, given by the OLRC. It featured a decided case[336] where, in the aftermath of steeply rising oil prices and oil shortages after the 1973 war in the Middle East, the defendant supplier had repudiated its long-term obligations to provide gasoline and diesel fuel for the plaintiff company, which ran a chain of service stations. Recognizing that, unless specific relief were granted, there was a serious risk that the plaintiff company would be forced out of business, and acknowledging that what he was doing was tantamount to awarding specific performance in the interim of the supply contract, the judge granted an interlocutory injunction restraining the withholding of supplies pending trial of the main action. The contract, of course, involved unascertained goods but the court ignored the Sale of Goods Act and binding case law.

The Uniform Committee accepted the OLRC's modest proposals on specific performance but expanded the OLRC provision, which became section 9.20 of the Uniform Act, so as to include cases where a seller might legitimately but exceptionally wish to recover specific relief from the buyer though he had not earned his entitlement to the price. The two cases in the Committee's mind concerned output contracts, where the buyer has agreed to take the entire production of the seller, and decisions like Beswick v. Beswick,[337] where the buyer's obligation is to pay a third party.

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[336] Sky Petroleum Ltd. v. V.I.P. Petroleum Ltd., [1974] 1 W.L.R. 576.

[337] [1968] A.C. 58 (H.L.).

In the case of output contracts, the Uniform Committee felt that there was a real danger in some cases that a buyer's repudiation of his purchase obligations would force out of business a seller whose enterprise was geared totally to satisfying the buyer's needs. The case for specific performance here is obvious.

The Beswick v. Beswick problem arises where A agrees to sell goods to B in return for B paying a sum of money to C. In this case, A cannot sue B to recover the price since under the contract the price is not payable to him. As the law stands, A's damages for B's breach of contract may well be substantial but will not necessarily match the sum B should have paid C.[338] Moreover, should A succeed in recovering a substantial sum from B, the authoritative view is that, in the absence of a trust relationship between A and C, A does not hold the damages award on behalf of C, whether on a quasi-contractual basis or otherwise.[339] C, for his part, is in no position to sue B to recover the money owed since he is a stranger to the contract between A and B. Directing B specifically to pay C at the suit of A is, in the Committee's view, the best way to resolve this problem.

The Uniform Committee, as was shown in an earlier section, also amended the OLRC provision which became section 9.20 of the Uniform Act so as to require a court to consider in the exercise of its discretion any special property possessed by the buyer in

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[338] Id., per Lord Pearce at p. 88.

[339] Woodar Investment Development Ltd. v. Wimpey Construction Ltd., [1980] 1 W.L.R. 277 (H.L.), disapproving Jackson v. Horizon Holidays Ltd., [1975] 1 W.L.R. 1468 (C.A.).

the contract goods, a case likely to arise in the event of the seller's bankruptcy.

The various changes made by the OLRC and the Uniform Committee to the specific performance provision are not likely to have a dramatic effect on the way courts actually exercise a discretion which is only slightly affected by the Uniform Act. But section 9.20 does take away artificial obstacles to any discretion which the court may want to exercise. We are in favour of section 9.20: it involves no departure from established principles. If a departure is to be made, we agree with the OLRC that the sales project is not the place for it.

vii) Fraud and misrepresentation. These two subjects are dealt with in section 9.21 of the Uniform Act which, in subsection (1), states the general rule that entry into a contract of sale does not prejudice rights of action arising outside the contract, thereby eliminating any artificial rule that the contract is the sole source of the rights and obligations of the parties.[340] Consequently, there would be no reason in principle why in a proper case a party should not be able to sue in tort for a negligent misstatement inducing the formation of a contract of sale. This would be subject to any genuine intention of the parties that pre-existing rights and duties should merge in the contract of sale. The OLRC and the Uniform Committee were at one on this issue. We believe that this approach accurately reflects the traditional attitudes of,

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[340] See for example J. Nunes Diamonds Ltd., supra, note 76.

and present trends in, the common law[341] and see no reason for any inflexible rule of law excluding tortious rights once a contract is concluded.

Subsection 9.21(3) of the Uniform Act represents a departure from existing principles of our law. At present, the victim of a fraudulent misrepresentation is entitled to rescind the contract and recover damages assessed on a tortious basis.[342] In other words, he recovers only his reliance or out-of-pocket losses and is not entitled to receive damages assessed on an expectation basis. Furthermore, should the misrepresentation be incorporated in the contract as a mere warranty sounding only in damages, he may not combine a claim for damages on the contract with a claim that the contract be rescinded ab initio for misrepresentation; he must elect between treating the contract as extant or extinct.

The OLRC favoured adoption of the prevailing American view which permits the plaintiff suing in deceit to recover damages on an expectation basis. It seems that the impulse behind this is that the plaintiff has been induced by the fraudulent misrepresentation to enter into the contract in the expectation of receiving certain benefits. The same, however, could be said of any other misrepresentation inducing the contract, negligent or non-negligent. We are therefore not convinced that there is a need for amalgamating the contractual and tortious regimes, but it is not a point of great practical importance. Moreover, the effect of broadening the definition of warranty in section 5.10

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[341] See for example Canadian Western Natural Gas, supra, note 89.

[342] Doyle v. Olby (Ironmongers) Ltd., [1969] 2 Q.B. 158 (C.A.).

of the Uniform Act and of introducing a discretion in the award of warranty damages under section 9.19 of the Act will be to deprive the point of what little practical significance it has: it will be hard to find a fraudulent misrepresentation inducing a contract of sale which does not fit the definition of a warranty. Consequently, we are prepared to accept subsection 9.21(3).

A further point to note is that the effect of subsection 9.21(2) of the Uniform Act is to prevent a buyer's claim for rescission for fraudulent misrepresentation from being made subject to the seller's right to cure under section 7.7 of the Uniform Act. We agree with this position since the buyer will justifiably have lost confidence in the fraudulent seller.

On the subject of equitable misrepresentation, however, the Uniform Committee disagreed with the OLRC. The latter body thought that a party's claim for equitable relief should not be subject to the provisions of the OLRC bill. But the Uniform Committee, noting the width of the definition of warranty in section 5.10 of the Uniform Act and convinced that a party should not be able to sidestep the remedies regime in the Act, particularly the cure section, simply by framing his claim in equitable misrepresentation, amended section 9.20 of the OLRC bill so as in effect to merge equitable (but non-negligent) misrepresentations into warranties in those cases where they also became warranties; this amendment became subsection 9.21(2) of the Uniform Act. We agree with the views promoted by the Uniform Committee which can only secure consistency in the case-by-case application of the Act. We fail to see, however, why this was not also done in the case of negligent misrepresentations but are

not persuaded that the point is sufficiently important to justify a departure from uniformity.

CHAPTER VIII. SALVAGING BARGAINS AND PREVENTING WASTE WHEN THE CONTRACTUAL PROCESS OR CONTRACTUAL PERFORMANCE BREAKS DOWN

This heading deals with two types of case: first, where the parties have conducted contractual negotiations and have concluded an imperfect agreement; and secondly, where a binding contract breaks down in the course of performance owing either to breach by one of the parties or to a supervening event for which neither is responsible. In the former case, the Uniform Act upholds, wherever possible, those agreements to which the parties genuinely feel themselves contractually bound. In the latter case, it maintains as far as possible contracts despite adverse supervening events in the conviction that promises freely given should not lightly be dispensed with and that the enforcement of as much of the contract as is practicable will prevent economic waste.

a. Formation of the contract of sale

This subject has been referred to in earlier sections of this report. It need only be stated here that the relevant sections of the Uniform Act are designed to enforce promises where there is the substance of an agreement, notwithstanding a technical breakdown posed by a mechanical application of offer and acceptance analysis, and to salvage something from executed transactions which are too seriously vitiated to be saved.

b. Unsettled price

It is the policy of our courts, particularly in sale of goods cases, where the Sale of Goods Act is of considerable assistance in filling holes in the parties' agreement, to uphold even

incomplete agreements wherever possible so as not to "incur the reproach of being the destroyer of bargains".[343] This policy is particularly evident in sections 11 and 12 of the Sale of Goods Act which deal with the ascertainment of an unsettled price.

The Sale of Goods Act, however, does not cover every case where the price is not settled at the time the contract is made. In one major decision,[344] the House of Lords held that where the parties had not agreed upon a price but had left it to themselves to fix at some future date, there could be no contract: an agreement to agree was not something that the law could enforce. Nor could the Sale of Goods Act settle a reasonable price in such a case, for the Act applied only to transactions meeting the threshold definition of a contract of sale.[345] The decision seems unduly dogmatic and neglects any consideration of the question whether the parties themselves thought they had a binding contract at the time the agreement was initially made. We are in agreement with the OLRC and the Uniform Committee in wishing to dispense with this rule of law and we note that section 5.3 of the Uniform Act is careful to permit the parties to agree not to be bound until the price is fixed at a later date. The section gives effect to the parties' intention: it does not override it.

Subsection 5.3(3) of the Uniform Act provides that where one of the parties is to fix the price, he must do so in good faith.

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[343] Hillas & Co. v. Arcos Ltd., (1932), 43 Ll.L. Rep. 359, per Lord Tomlin at p. 364 (H.L.)

[344] May and Butcher v. R., [1934] 2 K.B. 17n. (H.L.).

[345] Id.

In view of our recommendation that good faith be excised from the Act, this provision will have to be modified. Furthermore, we cannot see that good faith has any meaning in this context except in requiring that the price be a reasonable one. We are therefore of the opinion that the subsection should be amended so as to require the price to be a reasonable one.

Subsection 5.3(4) of the Uniform Act gives us some concern. It states that where the price is to be fixed otherwise than by agreement of the parties and, through the fault of one of the parties, is not so fixed, the other has the choice of himself fixing a reasonable price or cancelling the contract. Our concern centres on two features of this provision. First, since we see the prevailing philosophy of the section as holding the parties presently bound with the price merely to be filled in later, we should prefer a simple statement in subsection 5.3(4) that the price shall be a reasonable one instead of a provision that the party not at fault fix the price. What is a reasonable price can always be ascertained by a court. Secondly, since we regard the parties as presently bound, we see no reason why one party's obstruction of the price-fixing mechanism should be singled out as automatically entitling the other to cancel the contract. It may of course be a repudiation of the contract, in which case it can be treated as such under section 8.8 of the Act. In our view, there is no need to make explicit provision for this contingency.

Recommendations. For the reasons given above we make the following recommendations:

15. That subsection 5.3(3) of the Uniform

Sale of Goods Act be amended so as to provide that, where one of the parties to a contract of sale is to fix the price, the price chosen must be a reasonable one.

16. That the reference to a right of cancellation of the contract be deleted from subsection 5.3(4) of the Uniform Sale of Goods Act.

c. Output and requirements contracts and exclusive dealing agreements

"Output" contracts are agreements, frequently arrived at after tender, whereby the seller undertakes to deliver his entire output to the buyer and "requirements" contracts are contracts whereby the buyer agrees to look to the seller to satisfy all of his requirements. Both types of contract involve continuous cooperation between the parties and both create the possibility of one of the parties putting himself in the power of an economically dominant party so that his business will fail if that party withdraws his custom.

The OLRC Report points out that, in the American experience, such agreements pose problems of consideration, certainty and degree of obligation.[346] The first two difficulties, however, should not unduly trouble our courts though the third might, especially where market fluctuations have dislocated the seller's output or the buyer's requirements. The purpose of subsection

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[346] OLRC Report at p. 181.

5.4(1) of the Uniform Act is to apply a moderating influence in such circumstances to these continuous relationships, in accordance with the underlying standard of reasonableness. Subject to two points, we are in agreement with the subsection's efforts to render such agreements reasonably workable.

First of all, the reference to good faith is, we believe, redundant in view of the remaining criteria of the subsection and can be deleted.

The second point takes us back to a problem we adverted to earlier in our discussion of section 4.4 of the Uniform Act, which deals with firm offers. It is quite possible for an output or requirements "agreement", particularly the latter, to be entered into in such a way that one party makes a standing offer to fulfil orders submitted by the other party during a particular period, while the other party does not actually commit himself to give any orders. In one case,[347] a successful tenderer offered to supply "such quantities...as you may order...". The court held that by merely accepting this tender, the offeree did not bind itself to submit any orders. It only became bound in respect of each order as and when the order was placed. There is nothing in subsection 5.4(1) of the Act, which deals only with the interpretation of what is already a binding agreement, to affect this decision. If the standing offeror were to be prevented from retracting his offer by section 4.4, the arrangement would be most one-sided. For two reasons, however, we have concluded that no action need be taken in respect of this

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[347] International Environmental Corp. v. I.T.T. Corp., 397 F. Supp. 253 (D.C. Okl., 1975).

problem. First of all, section 5.2 of the Act, the unconscionability provision, states in subsection (5) that a court's unconscionability powers extend beyond contracts so as also to include assurances of irrevocability falling under section 4.4. Secondly, we have recommended that a section 4.4 offeree be deprived of any expectation entitlement and confined to a claim based on his reasonable reliance.

Recommendation. For the reasons given above we make the following recommendation:

> 17. That the reference to good faith in subsection 5.4(1) of the Uniform Sale of Goods Act be deleted.

Exclusive dealing agreements. Subsection 5.4(2) of the Uniform Act deals with the obligations of an exclusive dealer. Like subsection 5.4(1) of the Act, it is an interpretation provision which assumes that a binding contract has been made. There is some disagreement in existing case law as to what exactly is the degree of obligation assumed by the buyer. The OLRC thought that the buyer should use his "best efforts" to promote the seller's products.[348] In the Uniform Committee, however, it was thought that this might pitch the buyer's obligation too high; accordingly, "reasonable efforts" was substituted. Not much is likely to turn on the distinction since in most cases commercial parties will have expressly provided for this obligation in the exclusive dealing contract. It is much easier to stipulate for such a matter than it is to fix in advance output or

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[348] OLRC Report at p. 185.

requirements. We do not regard this provision as likely to be important in practice. Nevertheless, in a modern sales statute some provision is desirable.

One difficulty posed by exclusive dealing agreements should be noted here. Sometimes the relationship between the parties will be one of sale and sometimes one of agency. Distinguishing sale and agency is a delicate business of construction in the course of which courts tend not to defer too much to the label that the parties themselves have chosen to pin on their contract.[349] In a well drawn agreement, it should make little difference to the rights of the parties between themselves whether one is dealing with sale or agency. Nevertheless, if the contract is one of agency, it will not be governed by subsection 5.4(2) of the Uniform Act since the Act deals with contracts of sale, not agency contracts. But such an agency contract could well have the provisions of the Act applied by analogy to it, in accordance with subsection 2.2(4) (if enacted).

In connection with exclusive dealing agreements, mention may be made here of subsections 5.7(2) and (3) of the Uniform Act. These provisions deal with the termination of contracts of indefinite duration. Exclusive dealing agreements will frequently fall into this category and, in such cases, it can be vital to a dealer to receive reasonable notice of termination from the other party if he is to restructure his business so as to ensure its survival after termination. However, the provisions will apply only to contracts of indefinite duration.

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[349] See for example W.T. Lamb and Sons v. Goring Brick Co., [1932] 1 K.B. 710 (C.A.).

They will not extend to contracts clearly intended to be of perpetual duration. Though an argument might be mounted to the effect that subsection 5.7(2) provides otherwise, a clear agreement that the contract shall be perpetual should not be caught by this provision, since subsection 5.1(1) of the Uniform Act requires above all that goods be supplied and paid for in accordance with the terms of the contract. In reality, however, an exclusive dealing agreement is most unlikely to be perpetual.

The provisions in section 5.7 of the Uniform Act dealing with reasonable notice represent existing law on interpretation of contracts where the termination notice has not been fixed by the contract. We are in agreement with the OLRC and the Uniform Committee that these provisions can usefully be stated in a modern sales statute and give them our support.

d. Strict tender, rejection and cure

In an earlier section of this Report, we considered the present law on contractual terms and concluded that it was deficient. We made there a number of tentative proposals divorced from any consideration of an operative cure principle, to which we now turn.

The Sale of Goods Act is not at all clear on the question whether a seller is entitled to make a second tender after the buyer has rejected the first. Subsection 14(2) of that Act, referring to a breach of condition, states that it "may give rise to a right to treat the contract as repudiated". It is questionable whether the draftsman intended the provision to read as tentatively as it does. It suffices, however, to say that the

Sale of Goods Act fails to relate in a clear fashion the buyer's right to reject a non-conforming tender to his right to treat himself as discharged from the contract in the event of a breach of condition. That Act contains no clear statement of the consequences of exercising the buyer's right of rejection, which leads one to conclude that, if a breach of condition inevitably entitles the injured party to put an end to the contract, the tender of defective goods in circumstances giving rise to a right of rejection may not necessarily entail a breach of condition on the seller's part, that is, he may have a right to cure. Tending against the existence of a right to cure, however, is the common assumption that, whenever the seller tenders defective goods so as to entitle the buyer to reject them, the buyer is thereby entitled to bring the contract to an end. The stock justification for thus equating rejection and termination rights is that the buyer has reasonably lost confidence in the seller's ability to perform the contract and so should be released from it. But the flaw in this reasoning is that it invites scrutiny of the circumstances of a given case, which may well produce the conclusion in some cases that no such loss of confidence is justified. The arguments supporting the total denial of a right to cure are therefore not compelling.

The prospects for a seller's right to cure look more promising where he delivers an incorrect quantity of goods. According to section 31 of the Sale of Goods Act, the seller must, subject to the de minimis rule, tender the exact quantity of goods; if he tenders too many or too few goods, then, regardless of their quality, the buyer may reject the tender. The section does not say that the buyer may put an end to the

contract, nor does it say that the seller's behaviour is tantamount to a breach of condition. Consequently, there seems to be at least an arguable case that the seller should be able to supplement or reduce his tender, as the case may be, provided he can do so within the time allotted by the contract.

It is surprising that the subject of cure is largely unfathomed, especially when the curing of defective tenders occurs regularly in the world of commercial and consumer sales. It has been shown that the Sale of Goods Act gives some indirect support to the right to cure, particularly where an incorrect quantity is tendered. But the temporal limits of such a right are most uncertain. Where time of delivery is of the essence of the contract, it would be difficult to support any right to cure involving a late tender. But if time is not of the essence, must cure take place within the time allowed for delivery by the contract or may it occur at any time before the seller's delay amounts to a breach going to the root of the contract? No confident answer can be given on the basis of the Act.

There is slender case law authority for the view that cure will be allowed in some circumstances. The leading case is Borrowman, Phillips & Co. v. Free & Hollis[350] which concerned the sale of a cargo of corn "as per bill of lading ... dated between the 15th of May and 30th of June inclusive". The sellers tendered a cargo aboard a vessel called the Charles Platt but were unable to supply the shipping documents. They later tendered the cargo of a vessel called the Maria D. whose bill of lading was dated June 24th. The buyer refused the second tender

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[350] (1878), 4 Q.B.D. 500 (C.A.).

on the ground that the seller could not substitute any cargo for that aboard the Charles Platt. The court held that the seller was entitled to make a second tender but the scope of its decision is far from clear. Only one of the three judges referred to the second tender as being within the time allotted by the contract, and there is some suggestion too that the right to cure would not arise once goods have been unconditionally appropriated to the contract. This latter limitation would, for practical purposes, confine the principle of cure to documentary sales.

There is support from the Appeal Division of the Ontario Supreme Court[351] for the principle of cure, even in the case of appropriated goods, provided the second tender is made within the contract period. The case itself, however, went off on another footing. Some eighty years ago, the fifth edition of Benjamin on Sale, in a passage not contained in the present edition, stated the principle of cure as follows:

> "But an appropriation and tender of goods, not in accordance with the contract, and in consequence rejected by the purchaser, is revocable, and the seller may afterwards, within the contract time, appropriate and tender other goods which are in accordance with the contract."

It is doubtful that one could confidently rely on that passage today as representing the law, even though it cautiously requires the seller to cure within the contract period and allows him to cure only by tendering alternative goods, and not, for example,

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[351] Scythes & Co. v. Dods Knitting Co. (1922), 52 O.L.R. 475.

by repairing or adjusting the goods originally tendered. The cure principle has, however, been adopted by recent Saskatchewan and New Brunswick consumer warranty legislation. These statutes give the seller the right to "rectify"[352] or "make good"[353] certain breaches. Besides being limited to consumer transactions, neither statute would apply in cases of "major"[354] or "substantial"[355] breaches. One could comment that it is in cases of this kind that a buyer might truly lose confidence in his seller.

The OLRC favoured the introduction of a cure principle of more general application than UCC 2-508, which has produced a number of interpretative problems.[356] It approved of cure for the following reasons: "As a concept the right to cure provides the seller with an important opportunity to remedy his breach without frustrating the reasonable expectations of the buyer, or requiring him to assume unbargained-for risks." The OLRC also noted that a contractual right to cure was commonplace in contracts entered into by Ontario manufacturers, so that the insertion of a cure provision would merely recognize existing practice. It therefore established the principle of cure in section 7.7 of the OLRC bill, but limited it so as to prevent its exercise from prejudicing the buyer. The seller would have to

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352 Consumer Product Warranty and Liability Act, supra, note 232, section 14.

353 The Consumer Products Warranties Act, supra, note 230, section 20.

354 Supra, note 232, subsection 14(1)(b).

355 Supra, note 230, subsection 20(1)(a).

356 OLRC Report at pp. 444-67.

inform the buyer seasonably of his intention to cure, the cure would have to be reasonable and it would have to take place without causing unreasonable risk, prejudice and inconvenience to the buyer. Furthermore, it would have to be carried out within a reasonable time. The seller's right, also, might not be exercised in respect of a late, as opposed to a defective, tender or delivery that amounts to a substantial breach. The seller would have the right, subject to the above limits, to effect a cure whenever the buyer could reject or revoke his acceptance of the seller's non-conforming tender, in other words, whenever the seller had committed a substantial breach. If there had been a breach which was less than substantial, the buyer would be able to demand cure on pain of the breach being converted into a substantial one. Finally, the cure itself was permitted by the OLRC bill within broad limits: it might be the tender of alternative or additional goods or of conforming documents, the remedying of any defect including a defect in title, or the granting of a money allowance or other adjustment of the terms of the contract.

The right of cure conferred by section 7.7 of the OLRC bill was therefore not confined to the tender of alternative fungible goods. It could apply even in the case of what at present we call specific goods, a concept which had no part to play in the bill. In certain cases of minor defects, the offer of a money adjustment would be appropriate, especially where the cost of correcting the defect was disproportionately large.

The Uniform Committee was in complete agreement with the OLRC as to the desirability of enacting a general cure provision.

But it believed that the OLRC's cure principle, coupled with its principle of discharge for substantial breach, produced a scheme of remedies which was unnecessarily complex to operate. Because the buyer could demand the cure of minor breaches and thus turn them into substantial breaches where the seller failed to cure, substantial breach and cure had almost completely overlapped. Since a failure to cure in effect amounted to a substantial breach, even if the breach was not substantial in the first place, there seemed little point to the Committee in having a concept of substantial breach whose operation was preliminary to that of the cure principle. The Uniform Committee therefore eliminated the concept of substantial breach on the ground that it was redundant.

The Uniform Committee favoured the elimination of substantial breach for a further reason. Though it supported the flexible way in which the exercise of the right to cure was stated in the OLRC bill (in respect of which it made some small drafting changes), it was concerned that the effect of a flexible cure provision set against the background of a flexible substantial breach principle would be to introduce an unnecessary climate of uncertainty. Moreover, the Committee felt that cure would most efficiently work against the background of a strict performance rule, whereby any nonconformity in the performance would give rise to the right of rejection. The introduction of cure had, in the Committee's view, tilted the balance of advantage in favour of a defaulting seller; the effect of introducing a strict performance rule, which the Committee accomplished by eliminating substantial breach from section 8.1 of the Uniform Act, would be to return the balance towards its

original position by giving the seller a strong incentive to effect a cure. The buyer would thus acquire leverage against the seller to persuade him to save the contract and avoid economic waste. Since relatively minor defects are rarely worth a civil suit, this would be particularly effective in consumer cases where the seller refuses satisfaction to the buyer. In the Committee's view, such a seller would not incur a real risk of sustaining a substantial loss by having goods returned to him which were only slightly defective: his right to cure was flexible in scope and the initiative and right lay with him, and not with the buyer, to devise a cure which was reasonable in the circumstances.

We support the statutory statement of cure in section 7.7 of the Uniform Act and find the Uniform Committee's reasons for simplifying the Act convincing. The section, as revised, appears to us to strike a fair balance between the buyer's and the seller's interests. The most substantial argument against it is its novelty: it may take some time for this combination of cure and strict performance to be consistently worked out in the course of the Uniform Act's implementation. That, however, is not an argument which should receive too much weight in a statute which is designed for a lengthy future and in respect of an area of law--breach of the sale of goods contract--which is far from satisfactory in its present application. We note with approval that subsection 7.7(3) of the Act prevents cure from subverting the strictness of obligations relating to the time of tender. Admittedly, the strict tender and performance rule in section 8.1 of the Act, which entitles the buyer to reject any non-conforming goods or tender, goes beyond our tentative conclusions on breach

of contract discussed in an earlier section of this report. Nevertheless, we are of the view that section 8.1 represents a step reasonably taken to strike a balance between breach of contract and cure. We are confident that section 7.7, reasonably interpreted and applied, will work well.

Rejection and revocation of acceptance of goods. Related to its amendments to cure was the Uniform Committee's decision to eliminate the distinction between rejection of goods and revocation of acceptance of goods. This subject, like cure, was linked to the concept of substantial breach.

Furthermore, just as the combination of substantial breach and cure appeared to the Uniform Committee to create a measure of redundancy, so the Committee believed that separate concepts of rejection and revocation of acceptance, each initiated by substantial breach, created unnecessary repetition.

UCC 2-601 contains a strict tender rule according to which goods may be rejected even for minor non-conformity. In practice, the provision is interpreted restrictively, most particularly in respect of the readiness with which American courts, in contrast with their Canadian counterparts, are prepared to hold that a buyer has accepted goods. Once this occurs, the buyer may yet revoke his acceptance of them if their non-conformity substantially impairs their value to him and certain other requirements are satisfied.

The OLRC, as we have seen, rejected a strict tender rule. It preferred instead a rule of substantial breach. This created, however, a state of affairs where goods could be rejected for

substantial breach but, even if accepted, their acceptance could later be revoked, again on the ground of substantial breach, provided their non-conformity was difficult to discover, an expected cure was not forthcoming, or the seller incorrectly assured the buyer that the goods were conforming. In view of this, the OLRC considered fusing the two concepts of rejection and revocation of acceptance,[357] but concluded that this could not be done in view of the role played by acceptance in section 9.11 of the OLRC bill in determining the seller's entitlement to sue for the price. Given that revocation of acceptance could take place long after the buyer had received the goods, its merger in rejection could produce an intolerably long period before the seller had earned his entitlement to the price.

The Uniform Committee, as we have seen, replaced acceptance with delivery as the event triggering the seller's price entitlement. Consequently, the only argument preventing the fusion of rejection and revocation of acceptance had disappeared. Merging the two principles, however, did create some drafting problems which necessitated a general restructuring of the opening provisions of Part VIII of the Uniform Act. The Committee felt that, by extending rejection so as in effect to absorb revocation of acceptance, it was doing what our courts are already doing (though our present law knows no concept of revocation of acceptance) when they permit rejection long after a buyer has taken delivery of the goods. One problem that troubled the Committee was that a seller might not have the presence of mind to effect a reasonable cure when the buyer rejected goods

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[357] OLRC Report at p. 475.

that had been in his possession for a long time. In the circumstances, it might well be unreasonable to require him to tender new goods by way of cure but the tender of a monetary allowance, possibly coupled with an offer to repair or adjust the goods, could well be the action required by the circumstances. Nevertheless, this possibility might not occur to the seller. The Committee's concern was directed at the particular case of a minor latent defect coming to light some considerable time after the sale. In its view, this contingency merited the addition of a provision denying the buyer a right of rejection when "the non-conformity is of a minor character and a substantial period has elapsed after delivery".[358]

We agree with the Uniform Committee that there was no need for separate concepts of rejection and revocation of acceptance especially when, in departing from the model of Article 2, the OLRC based them both on the concept of substantial breach. In our view, the rejection provisions, as redrafted, recognize that a buyer may reject goods some considerable time after the sale without imposing an unreasonable burden on the seller. The seller's right to cure by a variety of means tailored to the particular circumstances strikes a fair balance between his interests and the buyer's right of rejection.

Buyer's duty to give notice of defects. The introduction of cure also raised the following point. It is an established principle of contract law that a party may lawfully terminate a contract even though he gives no reasons or bad reasons for doing so at the time of termination, provided there existed good reasons for

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[358] Uniform Act, subsection 8.2(2)(d).

his action (of which he might not have been aware) at the date he terminated the contract.[359] A buyer who therefore rejects goods on the false ground that the contract has been discharged for impossibility will nevertheless be held not to have committed a repudiatory breach of the contract himself if it transpires that the goods were so defective as to involve a breach by the seller of the condition of merchantable quality. There is authority, however, for the view that the principle may be inapplicable in documentary sales where the buyer pays without reservation against documents whose defects are apparent on their face.[360] In such a case, the buyer who makes no protest about the irregularity of the documents may be prevented from later rejecting them by an application of the principle of waiver.[361]

The OLRC gave its support to UCC 2-605, which reverses the above mentioned principle of common law by requiring a buyer rejecting goods to state any defect ascertainable by reasonable inspection if he proposes to rely on this defect to justify his rejection. Though no firm reason is given by the OLRC, it can reasonably be surmised that such a provision is necessary if the principle of cure is to be placed on a workable footing: if the seller has the right to cure, he must know what needs to be cured.

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[359] British & Beningtons Ltd. v. North Western Cachar Tea Co., [1923] A.C. 48 (H.L.); Weil v. Collis Leather Co. (1925), 58 O.L.R. 1 at p. 19, varied [1927] S.C.R. 326.

[360] Panchaud Freres S.A. v. Etablissements General Grain Co., [1970] 1 Lloyd's Rep. 53 (C.A.).

[361] Id.

The Uniform Committee was in agreement with the need for a provision like UCC 2-605. It was concerned, however, about two problems arising in section 8.5 of the OLRC bill (which as revised became section 8.6 of the Uniform Act). First, the Committee felt that it was one thing to prevent a buyer from relying on an unstated defect to justify rejection; it was quite another to prevent him from pursuing a damages claim in respect of that defect. Subsection 8.5(1) of the OLRC bill was responsible for this problem by stating that the buyer could not rely on the defect to "establish breach". This limitation on the buyer's right would, however, occur only "in connection with a rejection". Thus the odd situation was created of a non-disclosing and rejecting buyer being denied damages, while a non-disclosing but accepting buyer would be able to pursue such a claim. This seemed anomalous to the Uniform Committee which also believed that there was no reason in damages actions for singling out this particular example of fault on the part of the buyer when no other provision in the Uniform Act dealt with the question of contributory negligence. Consequently, the reference in subsection 8.5 of the OLRC bill to establishing breach was dropped.

A second matter which troubled the Uniform Committee about section 8.5 of the OLRC bill was whether the section should be confined to cases where the buyer actually knew of the defect. To put it another way, was it the purpose of the section to facilitate the seller's right to cure or to promote decent behaviour on the buyer's part? The Committee decided in favour of the former but concluded however that there was room for a new provision, which became subsection 8.6(3) of the Uniform Act, to

protect a non-disclosing buyer whose inaction had not unduly prejudiced the seller.

We believe that section 8.6 of the Uniform Act is a necessary corollary to a general cure principle. The Uniform Committee's concerns were, in our view, genuine ones and we support the amendments it made to the section.

e. Impossibility of performance

From the point of view of salvaging contracts in the event of breakdown, the impossibility of performance sections of the Uniform Act may be divided as follows: section 8.11, which deals with the general circumstances in which a seller will be excused for his failure to perform; section 8.12, which deals with the particular case where the goods suffer casualty and which integrates the doctrine of risk; section 8.13, which applies to situations where a seller, typically a manufacturing seller, incurs a diminution in his capacity to perform, such that a number of existing and prospective contracts are affected to a degree; and section 8.14, which deals with cases where the means of delivery or the mode of payment have become impossible. In the Uniform Committee a few amendments were made to these sections on points of principle, but the greater part of the Committee's activity in this area was devoted to a substantial restructuring of the sections to improve their logical flow. Consequently, it will be convenient for us to discuss the sections of the Uniform Act directly, referring to the OLRC bill's sections when they diverge in principle from those of the Uniform Act.

Sections 8.11 to 8.14 cover much more ground than their counterpart provisions in the Sale of Goods Act. The latter provisions, sections 9 and 10, deal with cases where the goods perish before and after the contract of sale is made; the former applies to initial impossibility and the latter to subsequent impossibility. Their nearest equivalent in the Uniform Act is section 8.12. Sections 9 and 10 of the Sale of Goods Act have nothing to say about events affecting the manner rather than the substance of contractual performance, or about circumstances impairing the seller's capacity to perform. Even in their application to the particular case of goods perishing, the sections are very narrow in scope and still pose difficult problems of interpretation. The conclusion that impossibility of performance needs substantial revision in future sales legislation is irresistible, though one should observe that this body of law has not in the past produced much case law and is not likely to do so in the future.

Section 8.11 of the Uniform Act states the general circumstances in which a seller will be excused from performance by reason of legal, physical or commercial impossibility arising before or after the conclusion of the contract. It has been drafted with the conscious intention of catching the case commonly referred to as frustration of the adventure, sometimes as commercial impossibility, where the contract is still physically capable of performance but its nature has been radically altered by supervening circumstances. There is existing authority for the discharge of contracts in such

circumstances[362] but it is important to note that the courts very rarely find that such frustration has actually occurred. In practice, the law dealing with impossibility is strict and a failure by the parties to insert a force majeure or price escalation clause in a contract may well be interpreted as manifesting an implied intention to impose the risk on the party affected by the change of circumstances.

According to subsection 8.11(1) of the Uniform Act, performance must be both "impracticable" and rendered thus by an event whose non-occurrence was a "basic assumption underlying the contract". This formulation is not likely to permit the section to be used as a general dispensing agent of contractual obligations. The strict attitude of the courts to impossibility is most unlikely to alter. American experience with the analogous provisions of Article 2 has led to the denial of relief to sellers claiming its application by reason of surging increases in raw materials prices.[363]

We support the giving of statutory formulation to a general rule of impracticability. Section 8.11 of the Uniform Act does not modify existing law and will do nothing to weaken the contractual bond. If commercial parties wish to secure protection against extraordinary events, they should take steps to draft their agreements accordingly. If there is an imbalance of bargaining power sufficient to bring the principle of unconscionability into play, section 5.2 of the Act can be

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[362] Krell v. Henry, [1903] 2 K.B. 740 (C.A.); Victoria Wood Development Corp. v. Ondrey (1978), 22 O.R. (2d) 1 (C.A.).

[363] See for example Iowa Electric Light and Power Co. v. Atlas Corp., 467 F. Supp. 129 (D.C. Iowa, 1979).

applied for the protection of a disadvantaged seller. Subject to that, we are wholeheartedly in favour of a strictly-defined discharging provision like section 8.11.

In the Uniform Committee, the OLRC provision on which section 8.11 of the Uniform Act was based was amended to clarify the position of a seller failing to inform his buyer of the contingency making performance impracticable. The OLRC provision, failing to specify the sanction, raised the inference that a seller might not be able to rely on the section 8.11 defence at all. It was felt by the Committee that the buyer would be adequately protected if he were to recover damages for any detriment he incurred as a result of the seller's failure to inform him. We see no reason to disagree with this view.

Section 8.12 of the Uniform Act, which applies the principle of impracticability in section 8.11 of the Act, contains much of what is familiar under present sections 9 and 10 of the Sale of Goods Act. Where goods are non-existent or have perished, the basic rule is that the obligations of the seller to deliver and of the buyer to accept and pay for them are discharged. This rule would not apply where the risk of "such loss" has passed to the buyer; nor would it apply in the face of a contrary intention of the parties.

An innovation in the Uniform Act's treatment of casualty to goods is its explicit treatment of cases of partial impossibility. The present law is badly framed to deal with such cases. As a result of a number of House of Lords decisions around the time of the First World War dealing with supervening illegality, it became established that the effect of

impossibility was, regardless of the parties' wishes, to terminate the contract automatically.[364] The contract, therefore, stands or falls as a whole. This established attitude is open to criticism. Strong authority exists for the view that discharge for impossibility and discharge for breach are governed by the same test, namely whether the party entitled to performance has been deprived of the consideration for which he bargained.[365] There is, however, a difference between the two types of discharge in that, in the event of breach, the party seeking release from the contract can also claim damages. The argument is therefore made that, since a discharging breach does not automatically terminate a contract but entitles the injured party to elect between termination and continuance of the contract, there is no reason why, in the event of impossibility of performance, a party should not be entitled to claim such performance as the other is capable of providing.

The Uniform Act responds to the above argument by virtue of its separate treatment of the discharge of the buyer's and seller's obligations. Subsection 8.12(1) rule 2 of the Act applies to cases of partial non-existence or loss and provides that the buyer has the option of calling for such performance as remains possible. He is not obliged to take it, because that would alter the nature of the bargain made between the parties. Should he decline the option of part performance, the seller is discharged in full from his obligation of delivery. There is

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[364] These cases are considered and the approach they forward approved in Hirji Mulji v. Cheong Yue Steamship Co., [1926] A.C. 497 (P.C.).

[365] HongKong Fir Shipping case, supra, note 293.

quite recent common law authority in favour of this approach which appears to go against the established authorities referred to above. In Sainsbury, Ltd. v. Street,[366] a farmer agreed to sell "275 tons (5 per cent more or less)" of feed barley to be grown on his farm. The harvest was poor and the yield amounted only to 140 tons. Predictably, poor harvest conditions caused the market price to advance beyond the contract price. The farmer argued that the contract was automatically dissolved by supervening circumstances so that he was free to sell his barley at the best price he could command. But the court ruled against him holding that he was excused from his obligation only to the extent of his shortfall; he was nevertheless obliged to tender the actual yield to the buyer. The buyer then had the option of accepting the diminished tender, an option which it would naturally wish to exercise.

We are in favour of the approach in Sainsbury, Ltd. v. Street which seems to us to secure the laudable goal of promoting what is left of the performance potential of the contract according to the initial wishes and expectations of the parties. The rule that contracts are automatically dissolved by impossibility, while it is perfectly acceptable in cases of supervening illegality, seems to us to be something of a blunt instrument when applied to cases of commercial and physical impossibility. Section 8.12 of the Uniform Act, moreover, seems to us to be a much clearer statement of the law than we have at present and we also commend the way it explains the consequences of risk allocation in terms of the parties' obligations. We

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366 [1972] 1 W.L.R. 834.

therefore give it our support.

One amendment made to the OLRC bill equivalent of section 8.12 of the Uniform Act in the Uniform Committee merits separate mention here. The OLRC bill contained no definitions of specific and unascertained goods. One reason for its eschewal of these categories was that it followed Article 2 in "demystifying" title. UCC 2-613, the analogous section to this OLRC bill provision, did nevertheless retain the notion of "goods identified when the contract is made", a periphrastic reference to specific goods, so as to confine its discharge provisions only to these goods. A seller wishing to claim total or partial release from his obligation on the occurrence of a contingency affecting goods not yet identified would be driven to rely on other provisions of Article 2. The OLRC extended the principle in UCC 2-613 to "goods...subsequently identified to the contract". The effect of this was, for example, that if manufactured goods packed and addressed to the buyer were stolen from the seller's factory, the seller could automatically claim release from the contract, notwithstanding any capacity he might still have to fulfil the buyer's order. This extension in the OLRC bill marked a considerable departure from our existing sales law since, in such circumstances, the seller of unascertained goods would be unable at present to claim impossibility of performance.

In the Uniform Committee, it was argued that there was no good reason for extending the seller's right of discharge so far. Moreover, it was felt odd that a seller of fungible goods, which by chance had been identified before the frustrating event,

should be completely released from his obligations. It was felt too that the OLRC bill, following Article 2, had retained an unnecessary vestigial hold on the concept of specific goods. This led to the drafting of what is now subsection 8.12(3) of the Uniform Act, which prevents the seller from claiming release under the section, in respect of goods identified at the time of the contract or later, when he can without undue hardship tender goods differing in no material respect from the identified goods. Subsection 8.12(3) is likely to apply particularly in the case of manufacturer-sellers. It should not give rise to much case law in practice. In our view, it upholds the sanctity of contracts and for that reason is to be commended.

Section 8.13 of the Uniform Act follows Article 2 in dealing with cases where the seller's general capacity to perform is only partially affected by the supervening event. It will typically deal with a seller who, having a number of contracts to perform, finds that supervening events have impaired his capacity to perform them all. Present law could put this seller in a dilemma. If he diverts his resources to one contract to the exclusion of a second, he may not be able to claim that he is discharged by impossibility from the second. The reason is that his inability to perform is said to be self-induced.[367] Our present law, therefore, is not well-equipped to handle this across-the-board inability of a seller to perform. At first sight, section 8.13 might appear to be rather difficult to implement. Nevertheless, there have been few cases decided under the equivalent provision of Article 2. These have generally

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[367] See Maritime National Fish Ltd. v. Ocean Trawlers Ltd., [1935] A.C. 524 (P.C.).

involved oil supply contracts, where a good case can be made for a provision of this nature in view of the cyclical disruption of oil supplies that occurred after 1973. It does not seem that the actual mechanics of allocation have proved troublesome in practice. Moreover, section 8.13 reflects what a reasonable supplier should, and probably does, do in practice. On balance, we are prepared to give it our support.

The last provision to be discussed in this section is section 8.14 of the Uniform Act which deals with impossibility and impracticability in the agreed manner of performance. Once again, this section illustrates the Act's predilection for saving bargains. Since under present law impossibility in the mode of performance will usually lead to the discharge of the contract,[368] section 8.14 operates to preserve some contracts from this fate. Section 8.14 makes substitute performance binding on both parties rather than optional for the party who is to receive performance by a different mode. This is presumably because the substance of the obligations remains unaffected by the occurrence of the contingency. As the section was drafted in the OLRC bill, the seller had to tender alternative shipment or delivery facilities which the buyer had to accept, while the buyer had merely the option of tendering an alternative method of payment which, it seemed, the seller then had to accept. This seemed anomalous to the Uniform Committee, which decided that the buyer's obligations should be treated in the same way as those of

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[368] See for example Vancouver Milling & Grain Co. v. C.C. Ranch Co., [1924] S.C.R. 671. The contract, however, is not discharged merely because the method of performance contemplated by the parties, but not made by them a term of the contract, has become impossible: Tsakiroglou & Co. v. Noblee and Thorl G.m.b.H., [1962] A.C. 93 (H.L.).

the seller. We see no reason either for drawing a distinction between the seller's and buyer's modes of performance and we are attracted to the premise underlying section 8.14, namely the salvaging of contracts where this can be achieved without substantial prejudice to the parties.

Subsection 8.14(2) of the Uniform Act deals with the particular case where delivery has already taken place and a "foreign or domestic law" affects the buyer's obligation to pay. Provided this law is not "discriminatory, oppressive or confiscatory", the buyer's payment thereunder will discharge his obligation, even if this payment falls short of the standard of a "commercially reasonable substitute" prescribed in subsection 8.14(1) of the Act. It would seem that the justification for departure from the standard prescribed by subsection 8.14(1) lies in the impracticability of undoing a contractual performance that has already taken place. Subsection 8.14(2), in effect, amounts to a surrender to the inevitable. We feel no degree of commitment to the solution proposed by subsection 8.14(2). There seem to be no decided cases under the parent provision in Article 2. If the provision is not likely to be troublesome in practice, we should not wish our lack of conviction to be seen as opposition to the subsection.

f. Adequate assurance of due performance and anticipatory repudiation

Section 8.7 of the Uniform Act introduces a right for a party who has reasonable grounds for feeling insecure to demand adequate assurance of due performance from the other party. Official Comment number one to UCC 2-609, the parent provision, explains

the purpose of the right as follows:

> "The section rests on the recognition of the fact that the essential purpose of a contract between commercial men is actual performance and they do not bargain merely for a promise, or for a promise plus the right to win a lawsuit and that a continuing sense of reliance and security that the promised performance will be forthcoming when due, is an important feature of the bargain."

Section 8.7 is an innovation in our law, though the OLRC Report rightly observes the embyro of such a principle in the Sale of Goods Act where the seller is permitted to withhold delivery [369] and stop the transit of goods in the event of the buyer's insolvency.[370] It can also be said that the section is likely to attract a number of cases which, under the present law, are within or proximate to the doctrine of anticipatory repudiation. This is beneficial in at least one respect. At present, it can be a question of no small difficulty whether the behaviour of a party amounts to the repudiation of the contract. This is particularly so where there is a genuine disagreement between the parties as to the interpretation of the contract.[371] If a party's behaviour is repudiatory, the other may safely termina te the contract; if it is not, a purported lawful termination will in its turn constitute an unlawful repudiation of the contract. Identifying a repudiatory breach can be a dangerous and delicate matter.

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[369] Sale of Goods Act, section 41.

[370] Id., section 46.

[371] Woodar Investment, supra, note 339.

Section 8.7 of the Uniform Act gives a party placed in doubt as to the implication of the other's behaviour a course of action which does not compel him to make a hard choice between letting a possible repudiation go, in which case he may have waived his right to terminate the contract, and accepting it so as to bring the contract to an end, in which case the consequence of any wrong judgment is an unlawful repudiation on the insecure party's part.

The principle of adequate assurance, besides being innovatory, also departs from existing law in sanctioning a suspension of his obligations by the insecure party. Furthermore, he can exercise his rights to demand assurance and in the meantime suspend his obligations even in respect of obligations which we refer to today as mere warranties of the contract but which, in the language of the eighteenth century, would have been referred to as independent covenants. As Official Comment number two to UCC 2-609 put it: "The law as to 'dependence' or 'independence' of promises within a single contract does not control the application of the present section." This seems to harmonize well with the Uniform Committee's decision to reinstate the strict tender rule in section 8.1 of the Uniform Act.

The OLRC bill equivalent of section 8.7 of the Uniform Act did not state exactly what was adequate assurance of due performance. The vagueness of the principle creates some danger of it acting as a bait for litigants, though the absence of definition from UCC 2-609 has not led to any great number of cases. The American provision, however, is amplified by the

system of Official Comments. Thus Official Comment number four states:

> "[W]here the buyer can make use of defective delivery, a mere promise by a seller of good repute that he is giving the matter his attention and that the defect will not be repeated, is normally sufficient. Under the same circumstances, however, a similar statement by a known corner-cutter might well be considered insufficient without the posting of a guaranty or, if so demanded by the buyer, a speedy replacement of the delivery involved."

Of course, the example given appears to be that of an instalment contract where the buyer is seeking an assurance that a breach will not be repeated in the future. Requiring a party who has not yet definitely committed a breach to post a bond is not likely to be required by any court as compliance with the standard of adequate assurance. The Uniform Committee was concerned about the vagueness of the adequate assurance principle and felt that some guidance should be given to the court as to the required content of an adequate assurance. Nevertheless, it concluded that a true definition catching all shades of cases was impossible. Hence, it contented itself with the list in subsection 8.7(5) of the Uniform Act.

In view of present difficulties in the law of anticipatory repudiation, we see merit in the introduction of this principle of adequate assurance. It could, however, be argued that section 8.7 of the Uniform Act creates two dangers: first, that a party might be encouraged to interfere neurotically in the performance of the other party's obligation; secondly, that a court, and the parties themselves, may not know how the standard of adequate assurance is to be met in certain circumstances. The list

introduced in subsection 8.7(5) of the Act goes a long way towards meeting the second problem and the common sense of courts and parties alike should carry it the rest of the distance. If the former argument raises a real point, we are not convinced that section 8.7 adds significantly to a party's problems in dealing with a difficult partner. On balance, we believe the section deserves our support.

Anticipatory repudiation. The anticipatory repudiation provisions of the Uniform Act, sections 8.8 and 8.9, represent a considerable departure from existing principles by running counter to settled notions of waiver and election. Like section 8.7 of the Uniform Act, they are inspired by the principle that the beleaguered contract should, where reasonably possible, be brought to fruition. This policy is promoted primarily by the facility extended to the insecure or injured party as the case may be to suspend his obligations under the contract.

Subsection 8.8(1) of the Uniform Act applies only to those anticipatory breaches that amount to a repudiation of the contract. In view of the difficulty in defining repudiation, the OLRC wisely refrained from doing so. An amendment was, however, made by the Uniform Committee to the OLRC equivalent of subsection 8.8(1), consistent with existing law, to make it clear that a party could commit an anticipatory repudiation of his obligations where, though willing to perform in the future, he is manifestly unable to do so.[372] An unfortunate side effect of the amendment, however, is that section 8.8 of the Uniform Act no

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[372] See for example Universal Cargo Carriers Corpn. v. Citati, [1957] 2 Q.B. 401, affd. [1958] 2 Q.B. 254 (C.A.).

longer makes it plain that the repudiation must be unlawful for the section to apply. Though not a serious problem, we recommend that this be dealt with by a minor drafting change.

In the event of a repudiatory breach, the injured party no longer has the stark choice, discussed above in connection with section 8.7 of the Uniform Act, of accepting the repudiation, and so bringing the contract to an end, or waiving the repudiation. As in the case of insecurity, he has the additional choice of suspending the performance of his obligations under the contract. Even if he should decide to continue with the contract, whether or not he actually suspends performance, subsection 8.8(2) of the Act permits him to revoke any waiver that he may have made.

Under present law, a party who revokes a binding waiver in such circumstances will be held himself to have committed a repudiatory breach. Consequently, he could as a result of his defective judgment incur a heavy damages liability. Subsection 8.8(3) of the Uniform Act, by permitting him to retract his waiver on giving reasonable notice, subject to compensating the other party to the extent of his reliance on this waiver, further serves to blunt the principles of election and waiver. The provision does, however, have the merit of removing the pressure which existing law places on a party facing the difficult question of deciding whether the other's breach is or is not of the discharging kind. It also encourages the due performance of a contract, notwithstanding an intervening repudiatory breach, and so helps to promote the avoidance of economic waste.

The Uniform Committee was in agreement with the OLRC that the provisions in subsections 8.8(1)-(3) of the Uniform Act were

a useful addition to the law, notwithstanding their departure from established principles of binding election and waiver. The provisions, moreover, seemed to be consistent with section 8.7 of the Uniform Act in taking away from a party the need to make a very difficult choice in respect of the other's behaviour. Despite their unfamiliarity, we believe that the provisions should work well in practice. Our attitude is coloured by the fact that the existing law on anticipatory repudiation can hardly be said to work with any certainty.

Section 8.9 of the Uniform Act complements subsections 8.8(1)-(3). Just as the latter provisions, by permitting an injured party to suspend his obligations or even to retract a waiver, do not put him to an immediate and firm election, so section 8.9 permits in certain circumstances the retraction of a repudiation. The two sections, taken as a whole, appear to strike a fair balance between the rights of both parties. Consequently, we feel able to extend our support to section 8.9.

Finally, subsection 8.8(4) of the Uniform Act deals with a problem of acute difficulty. It places on an injured party in the event of an anticipatory repudiation the general duty to mitigate his loss. For reasons too complex to examine here, an anticipatory repudiation has not been regarded as a breach of contract at all unless and until it is accepted by the aggrieved party so as to bring the contract to an end.[373] Accordingly, before the aggrieved party exercises his right to terminate the contract for anticipatory repudiation, existing law does not

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[373] Nienaber, The Effect of Anticipatory Repudiation: Principle and Policy, [1962] Camb. L.J. 213.

require him to mitigate his loss since the secondary obligation of the guilty party to pay damages does not arise at all until termination. Consequently, the aggrieved party is free altogether to ignore the anticipatory repudiation and await the date of performance, even if common sense tells him that his losses can be limited by an immediate termination of the contract.[374] The application of this principle is capable of causing considerable hardship without advancing the legitimate interests of the party refusing to mitigate. We are in agreement with subsection 8.8(4) to the extent that it avoids such results.

A corollary to the principle that there is no duty to mitigate in cases of anticipatory repudiation is the rule that there is no duty to mitigate in actions based on a debt. In the controversial decision of the House of Lords in White & Carter (Councils) Ltd. v. McGregor,[375] the court held that an advertising agent, despite the anticipatory repudiation of its client, was entitled to press ahead with performance, which involved producing advertising plates and displaying them on municipally-owned litter bins, so as to earn the agreed sum for its services. There are doubts as to the true scope of the decision, which appears to be limited to cases where the plaintiff has a legitimate interest in performing and does not need the cooperation of the repudiating party to do so. But there is Canadian authority declining to follow the decision[376] and the decision has been criticized for encouraging wasteful

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[374] See for example Tredegar Iron and Coal Co. v. Hawthorne Bros. (1902), 18 T.L.R. 716 (C.A.).

[375] [1962] A.C. 413 (H.L. (Sc.)).

[376] Finelli v. Dee (1968), 67 D.L.R. (2d) 393 (Ont. C.A.).

contractual performance which the repudiating party does not want. We find this argument convincing and support subsection 8.8(4) of the Uniform Act to the extent that it meets the problem. The provision would more clearly have applied to the White & Carter problem if it had explicitly mentioned "waste" as well as "loss or damage", but we think that any difficulty in interpretation is not so great as to justify a departure from uniformity.

Finally, subsection 8.8(4) of the Uniform Act prompts the difficult question of when damages based on a market loss should be assessed in cases of anticipatory repudiation. The OLRC opted for assessment, not at the date when the anticipatory repudiation was accepted so as to bring the contract to an end, but at the time when performance would have fallen due. The Uniform Committee was in agreement and the policy was accomplished by subsection 9.18(4) of the Act which enacts a general rule of assessment of damages for the seller's failure to deliver, the buyer's wrongful rejection of goods and the buyer's refusal to accept and pay for the goods. Subsection 9.18(4) makes it clear that the assessment rule applies "at the agreed time for performance", and thus not at the date of any anticipatory repudiation. We recognize the need for a firm rule here and, in view of the presence of the mitigation principle which will prevent the injured party from watching the market rise until the original performance date is reached, we believe that the rule selected by the OLRC is a sensible one.

Recommendation. For the reasons given above we make the following recommendation:

18. That subsection 8.8(1) of the Uniform Sale of Goods Act be amended so as to make it clear that the provision applies only to unlawful repudiations of a contract.

CHAPTER IX. STATUTORY ENUNCIATION OF UNCLEAR AND UNWRITTEN LAW

An obvious deficiency of the Sale of Goods Act is that it tells us very little about the practice and performance of contracts of sale. As the quotation from Professor Sutton at the beginning of this Report reveals, a person reading the Act would obtain little idea of the operation of sale of goods contracts in the modern law. The Act, for example, tells us nothing about documentary sales which are transactions of crucial importance in the modern economy.

In a statute designed to operate into the twenty-first century, we see obvious advantages in attempting a comprehensive codification of the law which does not seek to impose on it a strait jacket. Consequently, we are in favour of a clear articulation of the meaning of "delivery" in sections 5.5, 5.6, 7.2 and 7.3 of the Uniform Act, which are more comprehensive than their equivalents in the Sale of Goods Act, sections 30 and 33. For the same reason, we support the provisions on trade terms, sections 5.19 to 5.26 of the Act, which find no place in the Sale of Goods Act, likewise the clear statement of the buyer's right of inspection in section 7.12 of the Act. The Uniform Act is valuable, too, in setting out clear rules in sections 8.3 to 8.5 dealing with the use and disposal of rejected goods. The present law in this area is most uncertain. There are numerous other provisions in the Uniform Act which seek to clarify the law. The above mentioned are merely examples.

We do not propose to describe the operation of these sections. That would be beyond the scope of a report of this size. Moreover, it is sufficient to read the relevant sections

of the Uniform Act. Nor do we see any need for offering criticism on points of detail, having accepted the formulation of the rules in principle. The detail of the sections is not controversial and a scrupulous parsing of them would be out of place in a report dealing with questions of greater substance raised by the Act.

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CHAIRMAN

ACTING DIRECTOR

October, 1982

THE UNIFORM SALE OF GOODS ACT

(Adopted by the Uniform Law Conference of Canada
as uniform legislation at Whitehorse, August, 1981)

WITH SUGGESTED AMENDMENTS

INSTITUTE OF LAW RESEARCH AND REFORM

EDMONTON, ALBERTA

October, 1982

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THE UNIFORM SALE OF GOODS ACT

Comment

Unless otherwise indicated, all of the sections of this Act are recommended for adoption by the legislature of the Province of Alberta. See recommendations 1-3 at p. 14 of this Report and the discussion at pp. 3-14.

Where we recommend changes with regard to certain sections, a comment will appear at the end of the relevant section in the Uniform Sale of Goods Act giving details of the changes we propose.

PART I

INTERPRETATION

Interpretation

1.1. -- (1) In this Act,

1. "action" means a civil proceeding commenced by writ of summons or otherwise, and includes a counterclaim;

Sources: The Judicature Act, R.S.O. 1970, c. 228, s. 1(a); SGA s. 1(1)(a); UCC 1-201(1).

2. "agreement" means the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing, usage of trade or course of performance;

Sources: UCC 1-201(3).

3. "bill of lading" means a document evidencing the receipt of goods for shipment by any mode of carriage issued by a person engaged in the business of transporting or forwarding goods;

Sources: UCC 1-201(6).

4. "buyer" means a person who buys or contracts to buy

goods;

Sources: UCC 2-103(1)(a).

5. "buyer in the ordinary course of business" means a person who in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest of a third party in the goods buys in ordinary course from a person in the business of selling goods of that kind for cash or by exchange of other property or on secured or unsecured credit, and includes a person who receives goods or documents of title under a pre-existing contract of sale, but does not include a person who receives a transfer in bulk within the meaning of [insert reference to bulk sales legislation] or as security for or in total or partial satisfaction of a money debt;

Sources: UCC 1-201(9).

6. "commercial unit" means a unit of goods that by commercial usage is a single whole for the purpose of sale and the division of which would materially impair its character or value on the market or its use; for example, a commercial unit may be a single article (as a machine), a set of articles (as a suite of furniture or an assortment of sizes), a quantity (as a bale, gross, or car-load), or any other unit treated in use or in its market as a single whole;

Sources: UCC 2-105(6).

7. "contract" means the legal obligations that result from the parties' agreement as affected by this Act and any other applicable rules of

law;

Sources: UCC 1-201(11).

8. "contract of sale" means a contract whereby the seller transfers or agrees to transfer the title in goods to the buyer for a price, and includes,

(a) a contract for the supply of goods to be made, created or produced by the seller whether or not to the buyer's order, and without regard to the relative value of the labour and materials involved;

(b) a contract in which the seller is to retain a security interest in the goods; or

(c) a contract to which section 5.12(2) applies;

Sources: SGA s. 2(1); ULIS Art. 6; new.

9. "course of dealing" means previous conduct between the parties to a transaction that may fairly be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct;

Sources: UCC 1-205(1).

10. "delivery" means the voluntary transfer of possession;

Sources: SGA s. 1(d).

11. "document of title" means a writing that,

(i) purports to be issued by or addressed to a bailee,

(ii) purports to cover goods in the bailee's possession that are identified or fungible portions of an identified mass, and

(iii) in the ordinary course of business is treated as establishing that the person in possession of the document of title is, with any necessary endorsement, entitled to receive, hold and dispose of it and the goods it covers;

Sources: PPSA s. 1(i).

12. "fault" means a wrongful act, omission or breach;

Sources: UCC 1-201(16).

13. "financing agency" means a bank, finance company or other person who in the ordinary course of business makes advances against goods or documents of title or who by arrangement with either the seller or the buyer intervenes in ordinary course to make or collect payment due or claimed under the contract of sale, as by purchasing or paying the seller's bill of exchange or making advances against it or by merely taking it for collection whether or not documents of title accompany the bill;

Sources: UCC 2-104(2).

14. "fungible goods" means goods of which any one unit is the equivalent of any other unit by nature or by usage of trade or is so treated by agreement or in a document;

Sources: UCC 1-201(17).

15. "good faith" means honesty in

fact and observance of reasonable standards of fair dealing;

Sources: UCC 1-201(19), 2-103(1)(b).

16. "goods" means movable things, and includes the unborn young of animals and such things attached to or forming part of land as provided in section 2.5, but does not include the money in which the price is to be paid or things in action;

Sources: UCC 2-105(1).

17. "insolvent" means a person who has ceased to pay his debts in the ordinary course of business, who cannot pay his debts as they become due, or who is insolvent within the meaning of the Bankruptcy Act (Canada);

Sources: UCC 1-201(23).

18. "lease" includes hire and "lessor" and "lessee" shall be construed accordingly;

Sources: New.

19. "merchant" means a person,

(a) who deals in goods of the kind involved in the transaction;

(b) who by his occupation holds himself out as having knowledge or skill appropriate to the practices or goods involved in the transaction; or

(c) to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such

knowledge or skill;

Sources: UCC 2-104(1).

20. "notify" means to take such steps as are reasonably required to give information to the person to be notified so that the information,

(a) comes to his attention; or

(b) is directed to him at the place of business or residence through which the contract or offer was made or at such other place as is held out by him as the place for receipt of such information,

and "notification" has a corresponding meaning;

Sources: PPSA s. 1(p); UCC 1-201(26).

21. "receipt" of goods means taking physical possession of them, and "to receive" has a corresponding meaning;

Sources: UCC 2-103(1)(c).

22. "security interest" means an interest in personal property, including goods, that secures payment or performance of an obligation;

Sources: PPSA s. 1(y); UCC 1-201(37) (1st sent.).

23. "seller" means a person who sells or contracts to sell goods;

Sources: UCC 2-103(1)(d).

24. "signed" includes the execution or adoption of any symbol by a party to a contract of sale with the present intention of authenticating a writing;

Sources: UCC 1-201(39).

25. "usage of trade" means any reasonable practice or method of dealing that is observed in a place, vocation or trade with such regularity as to justify an expectation that it will be observed with respect to a transaction in question;

Sources: UCC 1-205(2).

26. "value" means a consideration sufficient to support a simple contract;

Sources: PPSA s. 1(z).

27. "writing" includes any mechanical, electronic or other form of recording of information, and "written" has a corresponding meaning.

Sources: New.

(2) In this Act, in relation to a contract of sale,

Meaning of "conforming"

(a) "conforming" means that goods or conduct, including any part of a performance, are in accordance with the obligations under the contract;

"termination"

(b) "termination" occurs when a party pursuant to a power created by agreement or law puts an end to the contract otherwise than for its breach and thereupon all executory obligations are discharged but any right based on prior breach or performance survives, and "terminate" has a corresponding meaning;

"cancellation"

(c) "cancellation" occurs when a party puts an end to the contract for breach by the other and its effect is the same as that of "termination"

except that the cancelling party also retains any remedy for breach of the whole contract or any unperformed part thereof, and "cancel" has a corresponding meaning;

"reasonable time" agreed

(d) whenever any action is required to be taken within a reasonable time, any time that is not manifestly unreasonable may be fixed by agreement;

test for "reasonable time"

(e) what is a reasonable time for taking any action depends on the nature or purpose of the action and all the other surrounding circumstances;

"seasonably"

(f) an action is taken "seasonably" when it is taken at or within the time agreed or, if no time is agreed, at or within a reasonable time.

Sources: UCC 1-204, 2-106(2), (3), (4).

Comment

Delete the words appearing in definition 16 of subsection (1) after "section 2.5," and insert instead the following: "but does not include the money in which the price is to be paid, things in action or securities as defined in the Business Corporations Act;".

See recommendation 14 at p. 162 of this Report and the discussion at p. 161.

PART II

SCOPE AND APPLICATION OF ACT

Purposes of Act

2.1. The purposes of this Act are to revise, reform, and modernize the law governing the sale of goods, to promote fair dealing, to assist the continued expansion of commercial practices through custom, usage and agreement of the parties, and to seek greater uniformity with the laws of other jurisdictions.

Sources: Canada Business Corporations Act, S.C. 1974-75, c. 53, s. 4; UCC 1-102(1).

Application of Act

2.2. -- (1) This Act applies to every contract of sale of goods.

Act does not apply to secured transactions

(2) This Act does not apply to any transaction that is intended to operate only as a secured transaction, whether or not it is in the form of an unconditional contract of sale.

What constitutes a contract of sale

(3) Whether or not a contract in the form of a lease of goods, bailment, hire-purchase, consignment or otherwise is a contract of sale depends on the intention of the parties, the substantial effect of the contract and all the other surrounding circumstances.

Act applies to "near sales"

*(4) Any of the provisions of this Act, if relevant in principle and appropriate in the circumstances, may be applied by analogy to a transaction respecting goods other than a contract of sale such as a lease of goods or a contract for the supply of labour and materials.

Sources: SGA s. 57(3); UCC 2-102; new.

Crown bound

2.3. The Crown is bound by this Act.

Sources: New.

Condition of goods before interest can pass

2.4. -- (1) Goods that are the subject of a contract of sale must be both existing and identified before any interest in them can pass.

"Future" goods

(2) Goods that are not both existing and identified are "future" goods.

Purported sale of future goods

(3) A purported present sale of future goods or of any interest in future goods operates as a contract to sell.

Part interests

(4) There may be a sale of a part interest in existing identified goods.

Fungible goods

(5) 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, and 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.

Sources: SGA ss. 2(1), 6; UCC 2-105(2), (3), (4).

Sale of minerals, etc.

2.5. -- (1) A contract of sale of minerals, hydrocarbons or other substances to be extracted from land is a contract of sale of goods if they are to be severed by the seller, but until severance a purported present sale thereof that is not effective as a transfer of an interest in land is effective only as a contract to sell.

Sale of fixtures, etc.

(2) A contract of sale, apart from the land, of growing crops, timber, fixtures or other things attached to the land that are intended to be severed under the contract of sale is a contract for the sale of goods,

(a) whether the subject matter is to be severed by the buyer or by the seller; and

(b) even though the subject matter forms part of the land at the time of contracting and severance is to be at a later time;

and the parties can by identification effect a present sale before severance.

Rights of third parties

(3) The rights of a buyer under subsection 2 are subject to the interest of any person, other than the seller, who had a registered interest in the real property at the time of the contract of sale, and are subject to the interest of,

(a) a subsequent purchaser or mortgagee for value of an interest in the real property;

(b) a creditor with a lien on the real property subsequently obtained as a result of judicial process; or

(c) a creditor with a prior encumbrance of record on the real property in respect of subsequent advances,

if the subsequent purchase or mortgage was made or the lien was obtained or the subsequent advance under the prior encumbrance was made or contracted for, as the case may be, without actual notice of the contract of sale.

Registration

(4) A notice in the form prescribed by the regulations may be registered in the proper land registry office and thereupon it shall, for the purposes of subsection 3, constitute

actual notice of the buyer's rights under the contract of sale.

Sources: PPSA ss. 36, 54; UCC 2-107.

Comment

Delete subsections (3) and (4) and replace them with the following new subsection (3):

"(3) The provisions of this section are subject to any third party rights provided by the Land Titles Act."

See recommendation 13 at p. 161 of this Report and the discussion at pp. 157-61.

Price, how payable

2.6. -- (1) The price may be made payable in money or otherwise.

Price includes goods

(2) Where the price is payable in whole or in part in goods, each party is a seller of the goods that he is to transfer.

Price includes land

(3) Where the price is payable in whole or in part in an interest in land, this Act applies to the transfer of the goods and to the seller's obligations in connection therewith, but this Act does not apply to the transfer of the interest in land or to the buyer's obligations in connection therewith.

Sources: UCC 2-304.

PART III

GENERAL

Exclusion, variation of provisions of Act

3.1. -- (1) Except as otherwise provided in this Act, any provision of this Act may be varied or negatived by agreement of the parties.

Standards of performance of obligations

(2) The obligations of good faith, diligence, reasonableness and care prescribed by this Act may not be disclaimed by the parties, but they may agree upon the standards by which the performance of such obligations are to be measured so long as the standards agreed upon are not manifestly unreasonable.

Sources: SGA s. 53; UCC 1-102(3).

Obligation of good faith

3.2. Every duty that is created by a contract of sale or by this Act requires good faith in its performance whether or not it is expressly so stated.

Sources: UCC 1-203; new.

Comment

This section should be deleted entirely. See recommendation 11 at pp. 71-72 of this Report and the discussion at pp. 66-71.

Rights, etc., enforceable by action

3.3. Where any right is conferred or any duty or liability is imposed by this Act, it may, unless otherwise provided by this Act, be enforced by action.

Sources: SGA s. 55.

General principles of law applicable

3.4. -- (1) Unless inconsistent with this Act, the principles of law and equity, including the law merchant and the law of principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause, supplement the provisions of this Act.

R.S.C. 1970, c. B-5, etc.

(2) Nothing in this Act affects the rights of a holder in due course of a bill, note or cheque within the meaning of the Bills of Exchange Act (Can.), or the rights of a holder of a document of title under federal legislation, or [insert name of enacting Province] legislation other than this Act.

Sources: SGA s. 57; UCC 1-103; new.

PART IV

FORMATION, ADJUSTMENT AND ASSIGNMENT OF CONTRACTS

Meaning of necessaries

4.1. -- (1) In this section "necessaries" means goods suitable to the condition in life of the minor or other person and to his actual requirements at the time of delivery of the goods.

Capacity to buy and sell

(2) Capacity to buy and sell is regulated by the general law concerning capacity to contract and to transfer and acquire property, but where necessaries are sold and delivered to a minor or to a person who by reason of mental incapacity, drunkenness or otherwise is incompetent to contract, he must pay a reasonable price therefor.

Sources: SGA s. 3.

How contract of sale may be made

4.2. -- (1) A contract of sale may be made in any manner sufficient to show agreement, including conduct by the parties which recognizes the existence of such a contract.

Moment of making may be undetermined

(2) An agreement sufficient to constitute a contract of sale may be found even though the moment of its making is undetermined.

Effect of additional or different terms

(3) A reply to an offer purporting to be an acceptance but containing additional or different terms which do not materially alter the terms of the offer constitutes an acceptance and in such a case the terms of the contract are the terms of the offer with the modifications contained in the acceptance.

Notice of objection

(4) Subsection 3 does not apply if the offeror seasonably notifies the offeree of his objection to the additional or different terms.

Material alteration of terms of offer

(5) For the purpose of subsection 3, additional or different terms relating to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are terms which materially alter the terms of the offer.

Sources: UCC 2-204, 2-207; new.

Comment

Delete subsection (4) and insert the following new subsection (4):

"(4) Subsection 3 does not apply if the offeror seasonably notifies the offeree of his objection to the additional or different terms, in which event there is a contract on the offeror's terms unless the offeree in turn seasonably indicates an intention not to be so bound."

See recommendation 4 at p. 23 of this Report and the discussion at p. 22.

Conflicting terms

4.3 -- (1) Subject to section 4.2(3), this section applies where under the rules of offer and acceptance the parties are deemed to have concluded a contract of sale and one of them has proceeded with performance even though their communications do not show mutual assent to a single set of contractual terms.

Powers of the court

(2) When a court concludes that, having regard to all of the circumstances, the one party, by his conduct in receiving or shipping the goods or otherwise has not in fact assented to conflicting terms of the other party and that it would be unreasonable to hold such party to such terms, the court may:

(a) ignore the conflicting terms and apply this Act as if the

contract contained no such terms,

(b) substitute such terms as, in the court's view, the parties would have adopted had their attention been drawn to the conflicting terms, or, as in the court's view, represent a reasonable compromise of the conflicting terms; or

(c) find that no contract has been concluded between the parties and make such consequential order as may be appropriate.

Relevant factors

(3) In exercising its discretion under subsection 2 and in determining whether or not it would be unreasonable to hold a party to the other party's terms, the court shall have regard, among other things, to the usage of trade in the vocation or trade in which the parties are engaged, their course of dealings and course of performance, and where relevant, the extent to which one party seeks not to be bound by a term without which, as he knew or ought to have known, the other party would not have been willing to enter into the contract.

Sources: UCC 2-204, 2-207(3); new.

Firm offers

4.4. -- (1) An offer by a merchant to buy or sell goods which expressly provides that it will be held open is not revocable for lack of consideration during the time stated or, if no time is stated, for a reasonable time not to exceed three months.

Form supplied by offeree

(2) Any such assurance of irrevocability in a form supplied by the offeree is not binding unless the assurance is separately signed by the offeror.

Sources: UCC 2-205; new.

Comment

Delete subsection (1) and insert the following new subsections (1) and (1A):

"(1) This section applies where a merchant's offer to buy or sell goods expressly provides that it will be held open, whether or not for a stated time, and the offeree furnishes no consideration for the promise to keep the offer open.

"(1A) Where an offer referred to in subsection 1 is revoked within the stated time or, if no time is stated, within a reasonable period not to exceed three months, the court may grant compensation limited to the recovery of any losses incurred as a result of reliance on the offer or generally to the extent necessary to avoid injustice."

See recommendation 5 at pp. 32-33 of this Report and the discussion at pp. 31-32.

Revoked offers

4.5. -- (1) An offer to buy or sell goods which the offeror ought reasonably to expect to induce substantial action or forbearance by the offeree before acceptance and which does induce such action or forbearance will, if revoked, bind the offeror to compensate the offeree in accordance with subsection 2.

Powers of the court

(2) In such a case the court may,

(a) award damages on the same basis as if a contract had been completed between the parties, or

(b) grant compensation limited to the restoration of any benefit conferred upon the offeror or to the recovery of any losses incurred as a result of reliance on the offer or generally to the extent necessary to avoid injustice.

Sources: Restatement (Tent. Draft) s.

89B; new.

Comment

Delete paragraph (a) from subsection (2) and run the contents of paragraph (b) on from the word "may" in the opening flush of subsection (2) after deleting the comma following "may".

See recommendation 6 at p. 35 of this Report and the discussion at pp. 33-34.

Forms of acceptance

4.6. -- (1) Unless otherwise indicated by the language or the circumstances,

(a) an offer to make a contract of sale shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances including performance of a requested act; and

(b) an order or other offer to buy goods for prompt or current shipment shall be construed as inviting acceptance either by a prompt promise to ship or by the prompt or current shipment of conforming or non-conforming goods, but such a shipment of non-conforming goods does not constitute an acceptance if the seller seasonably notifies the buyer that the shipment is offered only as an accommodation to the buyer.

Acceptance by tender or beginning of performance

(2) Where an offer invites an offeree to choose between acceptance by promise and acceptance by performance, or requires acceptance by performance,

(a) the tender or beginning of the invited performance or a tender of a beginning of it is an acceptance by

performance; and

(b) such an acceptance binds the offeree to render complete performance.

Duty to notify of acceptance by performance

(3) If an offeree who accepts by performance has reason to know that the offeror has no adequate means of learning of the acceptance with reasonable promptness and certainty, the contractual duty of the offeror is discharged unless,

(a) the offeree notifies the offeror seasonably of his acceptance;

(b) the offeror learns of the performance within a reasonable time; or

(c) the circumstances of the offer indicate that notification of acceptance is not required.

Sources: Restatement (Tent. Draft) ss. 29, 56(2), 63; UCC 2-206.

Sales by auctions; lots

4.7. -- (1) Where goods are put up for sale by auction in lots, each lot is the subject of a separate sale.

When auction sale complete

(2) A sale by auction is complete when the auctioneer so announces by the fall of the hammer or in any other customary manner.

Reserve bids

(3) A sale by auction is with reserve unless the goods are put up without reserve.

Auctions with reserve

(4) In an auction with reserve, the auctioneer may withdraw the goods at any time until he announces completion of the sale.

Auctions without reserve

(5) In an 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.

Bidder's right to retract bid

(6) In an auction with or without reserve the bidder may retract his bid until the auctioneer's announcement of completion of the sale, but a bidder's retraction does not revive any previous bid.

Seller's right to bid

(7) A right to bid may be reserved expressly by or on behalf of the seller.

Wrongful bid by seller

(8) Where the seller has not reserved the right to bid, it is not lawful for a seller to bid himself or to employ a person to bid at such sale, or for the auctioneer knowingly to take any bid from the seller or any such person.

Consequences

(9) Where subsection 8 is contravened, the buyer may treat the sale as fraudulent and may avoid the sale and recover damages, or may affirm the sale and recover damages or claim an abatement in the price.

Sources: SGA s. 56; UCC 2-328.

Parol evidence rule not applicable

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

Sources: new.

Course of dealing and usage of trade

4.9. -- (1) A course of dealing between parties and any usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware give particular meaning to and supplement or qualify the terms of an agreement.

Place of performance

(2) An applicable usage of trade in the place where any part of performance is to occur may be used in interpreting the agreement as to that part of the performance.

Course of performance

(3) Where an agreement of sale involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection is relevant in determining the meaning of the agreement.

Relationship of express terms, course of performance, course of dealing and usage of trade

(4) The express terms of the agreement and any such course of performance, as well as any course of dealing and usage of trade, shall be construed whenever reasonable as consistent with each other; but when such construction is unreasonable, the express terms of the agreement control the course of performance, the course of performance controls both the course of dealing and the usage of trade, and the course of dealing controls the usage of trade.

Course of performance as waiver or variation

(5) Subject to section 4.10, such course of performance is relevant to show a waiver or variation of any term inconsistent with such course of performance.

Sources: UCC 1-205(3), (4), 2-208.

Variation or rescission of contract of sale

4.10. An agreement varying or rescinding a contract of sale needs no consideration to be binding, but a party may withdraw from an executory portion of such an agreement made without consideration and revert to the original contract by giving reasonable notice to the other party, unless the withdrawal would be unjust in view of a material change of position in reliance on the agreement.

Sources: UCC 2-209; new.

Comment

Delete the whole section and replace it with the following:

"4.10. An agreement, whether executed or not, varying or rescinding a contract of sale needs no consideration to be binding."

See recommendation 7 at pp. 44-45 of this Report and the discussion at pp. 40-42.

Delegation of performance

4.11. -- (1) A party to a contract of sale may perform his duty under it through a delegate unless the other party has a substantial interest in having his original promisor perform or control the acts required by the contract, but a delegation of performance does not relieve the party delegating of any duty to perform or of any liability for breach.

Assignment of rights

(2) The rights of a seller or buyer may be assigned except where the assignment would,

(a) change materially the duty of the other party;

(b) increase materially the burden or risk imposed on the other party by the contract; or

(c) impair materially the other party's chance of obtaining return performance.

Assignment of right to damages etc.

(3) A right to damages for breach of the whole contract or a right arising out of the assignor's due performance of his entire obligation may be assigned despite contrary agreement, but then only in its entirety, whether or not such assignment occurs before or after performance of the assignor's obligation.

Construction of term prohibiting assignment

(4) Unless the circumstances indicate the contrary, a term prohibiting assignment of a contract shall be construed as barring only the delegation to the assignee of the assignor's duty of performance.

Assignments in general terms

(5) An assignment of "the contract" or of "all my rights under the contract" or an assignment in similar general terms is,

(a) an assignment of rights; and

(b) unless the language or the circumstances indicate the contrary, a delegation of performance of the duties of the assignor, other than a duty to pay damages for a breach arising before the assignment.

Acceptance of assignment by assignee

(6) The acceptance by the assignee of an assignment under subsection 5 constitutes a promise by him to perform the duties of the assignor and this promise is enforceable by either the assignor or the other party to the original contract.

Grounds for insecurity

(7) The other party may treat an assignment that delegates performance as creating reasonable grounds for insecurity for the purposes of section 8.7.

Sources: UCC 2-210.

PART V

GENERAL OBLIGATIONS AND CONSTRUCTION OF CONTRACT

General obligations of the parties

5.1. -- (1) 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.

Meaning of buyer's obligation to pay extended

(2) The buyer's obligation to pay includes taking such steps and complying with such formalities as are required under the contract and any relevant law to enable payment to be made or to ensure that it will be made.

Sources: SGA s. 26: UNCITRAL Arts. 14, 35, 36.

Unconscionable contracts or parts of contracts

5.2. -- (1) If, with respect to a contract of sale, the court finds the contract or a part thereof, to have been unconscionable at the time it was made, the court may,

(a) refuse to enforce the contract or rescind it on such terms as may be just;

(b) enforce the remainder of the contract without the unconscionable part; or

(c) so limit the application of any unconscionable part or revise or alter the contract as to avoid any unconscionable result.

Factors to be considered in determining unconscionability

(2) In determining whether a contract of sale, or a part thereof, is unconscionable, or whether the operation of an agreement is unconscionable under section 5.7(3), the court may consider, among other factors;

(a) the commercial setting, purpose and effect of the contract, and the manner in which it is formed;

(b) the bargaining strength of the seller and the buyer relative to each other, taking into account the availability of reasonable alternative sources of supply or demand;

(c) the degree to which the natural effect of the transaction, or any party's conduct prior to, or at the time of, the transaction, is to cause or aid in causing another party to misunderstand the true nature of the transaction and of his rights and duties thereunder;

(d) whether the party seeking relief knew or ought reasonably to have known of the existence and extent of the term or terms alleged to be unconscionable;

(e) the degree to which the contract requires a party to waive rights to which he would otherwise be entitled;

(f) in the case of a provision that purports to exclude or limit a liability that would otherwise attach to the party seeking to rely on it, which party is better able to safeguard himself against loss or damages;

(g) the degree to which one party has taken advantage of the inability of the other party reasonably to protect his interests because of his physical or mental infirmity, illiteracy, inability to understand the language of an agreement, lack of education, lack of business knowledge or experience, financial distress, or similar factors;

(h) gross disparity between the price of the goods and the price at which similar goods could be readily sold or purchased by parties in similar circumstances; and

(i) knowledge by one party, when entering into the contract, that the other party will be substantially deprived of the benefit or benefits reasonably anticipated by that other party under the transaction.

Power of court

(3) The court may raise the issue of unconscionability of its own motion.

No waiver

(4) The powers conferred by this section apply notwithstanding any agreement or waiver to the contrary.

Application of section

(5) For the purposes of this section, a contract of sale includes any variation or rescission of the contract and any assurance of irrevocability under section 4.4.

Sources: The Business Practices Act, S.O. 1974, c. 131, ss. 2(b), 4(8); UCC 2-302; UK SGA s. 55(5).

Comment

Delete subsection (3) entirely.

See recommendation 10 at p. 66 of this Report and the discussion at p. 66.

Open price

5.3. -- (1) If the parties so intend, they may conclude a contract of sale even though the price is not settled.

Where reasonable price applies

(2) In such a case the price is a reasonable price at the time for delivery if,

(a) nothing is said as to price;

(b) the price is left to be agreed by the parties or a third person and they fail to agree or the third person fails to fix the price; or

(c) the price is to be fixed in terms of some agreed market or other standard as set or recorded by a third person or agency and it is not so set or recorded.

Where party to fix price

(3) Where the price is to be fixed by a party, he must do so in good faith.

Where there is failure to fix a price

(4) Where the price left to be fixed otherwise than by agreement of the parties fails to be fixed through the fault of one party, the other party may treat the contract as cancelled or may himself fix a reasonable price.

Where no price fixed

(5) Where the parties intend not to be bound unless the price is fixed or agreed and it is not fixed or agreed, there is no contract, and in such a case the buyer must return any goods already received or, if he is unable so to do, he must pay their reasonable value at the time of delivery and the seller must return any part of the price paid on account.

Sources: UCC 2-305.

Comment

Delete subsections (2) and (3) and replace them with the following subsection (2):

"(2) In such a case the price is a reasonable price at the time for delivery if,

(a) nothing is said as to price;

(b) the price is to be fixed by one of the parties;

(c) the price is left to be agreed by

the parties or a third person and they fail to agree or the third person fails to fix the price; or

(d) the price is fixed in terms of some agreed market or other standard as set or recorded by a third person or agency and it is not so set or recorded."

In subsection (4), delete the words "may treat the contract as cancelled or".

See recommendations 15-16 at pp. 178-79 of this Report and the discussion at pp. 177-78.

Output and requirements agreements

5.4. -- (1) An agreement that measures the quantity of goods to be bought or sold by the output of the seller or the requirements of the buyer means such reasonable quantity as may be required or supplied by the buyer or seller acting in good faith, having regard to any stated estimates, any previous output or requirements, and all the circumstances of the case.

Exclusive dealing agreements

(2) Where the buyer lawfully agrees to buy goods exclusively from the seller or the seller lawfully agrees to sell goods exclusively to the buyer, there is, unless the circumstances show a contrary intention, an obligation by the seller to use reasonable efforts to supply the goods and by the buyer to use reasonable efforts to promote their sale.

Sources: UCC 2-306.

Comment

In subsection (1), delete the words "acting in good faith".

See recommendation 17 at p. 181 of this Report and the discussion at p. 180.

Delivery in single lot or in lots

5.5. All goods called for by a contract of sale must be tendered in a single delivery and payment is due only on such tender, but where the circumstances give either party the right to make or demand delivery in lots, payment, if the price can be apportioned, may be demanded for each lot.

Sources: SGA s. 30(1); UCC 2-307.

Place for delivery of goods

5.6. -- (1) The place for delivery of goods under a contract of sale is governed by the following rules:

1. If the seller has only one place of business, it is the place for delivery.

2. If the seller has two or more places of business only one of which is known to the buyer, that one is the place for delivery.

3. If the seller has two or more places of business and the buyer knows two or more of them, the one at or from which the seller conducted the negotiations for the sale is the place for delivery.

4. If the seller has no place of business, his residence is the place for delivery.

5. If the seller has no place of business and two or more residences only one of which is known to the buyer, that one is the place for delivery.

6. If the seller has no place of business and two or more residences and the buyer knows two or more of them, the one at or from which the seller conducted the

negotiations for the sale is the place for delivery.

7. Where in a contract of sale of identified or unascertained goods the parties knew at the time of contracting that the goods were or were to be drawn from bulk or made, created or produced at a particular place, that place is the place for delivery.

Delivery of documents of title

(2) Documents of title may be delivered through customary banking channels.

Sources: SGA s. 28(1); UCC 2-308; UNCITRAL Art. 15(b); new.

Action to be taken within reasonable time

5.7. -- (1) Except where otherwise provided in this Act, any action that is required to be taken by either party under a contract of sale must be taken within a reasonable time.

Successive performances

(2) Subject to subsection 3, a contract of sale that provides for successive performances over an indefinite period of time may be terminated by either party at any time.

Where notice of termination required

(3) Except where such a contract of sale terminates upon the happening of an agreed event, it may be terminated only if the terminating party gives the other party reasonable notification thereof and an agreement dispensing with such notification is invalid if its operation would be unconscionable.

Sources: SGA s. 28(2); UCC 2-309.

When and where payment due

5.8. -- (1) Payment is due at the time and place at which the buyer is to receive the goods even though the place

of shipment is the place of delivery.

Inspection before payment

(2) Where the seller is authorized to send the goods, he may ship them under reservation and may tender the documents of title, but the buyer may inspect the goods after the arrival before payment is due.

Payment against documents

(3) Where delivery is authorized and made by way of documents of title otherwise than under subsection 2, payment is due at the time and place at which the buyer is to receive the documents regardless of where the goods are to be received.

When goods shipped on credit

(4) Where the seller is required or authorized to ship the goods on credit, the credit period runs from the time of shipment but post-dating the invoice or delaying its dispatch correspondingly delays the starting of the credit period.

Sources UCC 2-310.

Where particulars of performance left open

5.9. -- (1) An agreement of sale that is otherwise sufficiently definite to be a contract is not made invalid by the fact that it leaves particulars of performance to be specified by one of the parties, but any such specification must be made in good faith and within limits set by commercial reasonableness.

Specifications relating to assortment of goods and shipment

(2) Specifications relating to assortment of the goods are at the buyer's option and, except as otherwise provided in this Act, specifications or arrangements relating to shipment are at the seller's option.

Effect of failure to cooperate

(3) Where a specification mentioned in subsection 2 would materially affect the other party's performance but is not seasonably made, or, where one party's cooperation is necessary to the agreed performance of the other but is not seasonably forthcoming, the other party, in addition to all other remedies,

(a) is excused for any resulting delay in his own performance; and

(b) may, subject to sections 8.8, 8.9 and 9.6, proceed to perform in any reasonable manner.

Sources: UCC 2-311.

Meaning of statement

5.10. -- (1) In this section, "statement" means a statement in any form or language made before or at the time of the contract and includes a promise or a representation of fact or opinion, whether or not made fraudulently, negligently or with contractual intention.

Qualified statements

(2) A conditional or qualified statement may be treated as unconditional or unqualified if it would be unconscionable for the maker of the statement to rely on the condition or qualification.

Meaning of express warranty

(3) "Express warranty" means,

(a) a term of the contract;

(b) a statement made by a seller which relates to the subject matter of the contract, except where the buyer did not rely or it was unreasonable for him to rely on the statement; and

(c) a statement referred to in subsections 8 and 9.

Liability of seller for statements of manufacturer etc.

(4) A seller is deemed to make those statements of a manufacturer, distributor or other person relating to the goods which by word or conduct he has adopted.

Liability of merchant sellers

(5) Where the seller is a merchant, a statement relating to the subject matter of the contract and made by the manufacturer, distributor or

other person on the container or label of goods or in a brochure, pamphlet or other writing associated with the goods shall be deemed also to have been made by the seller, except where in all the circumstances it is apparent that the seller did not adopt the statement.

Seller's right to indemnity

(6) A seller liable under subsection 4 or 5 is entitled to be indemnified by the maker of the statement in respect of such liability.

Buyer's statements

(7) A statement relating to the subject matter of the contract and made by a buyer to a seller is an express warranty, except where the seller did not rely or it was unreasonable for him to rely on the statement.

Liability of manufacturers etc.

(8) A statement relating to the subject matter of the contract and made to a buyer by a manufacturer, distributor or other person with a direct business interest in any sale of the goods is an express warranty, except where the buyer did not rely or it was unreasonable for him to rely on the statement.

Statements made to public

(9) Where a seller or a person referred to in subsection 8 makes a statement addressed to the public or a section of the public, the buyer may treat it as an express warranty made to him if such statement has a natural tendency to induce reliance, whether or not the buyer actually relied on the statement.

Irrelevant factors

(10) The liability of the maker of a statement referred to in subsection 8 shall not be affected by the fact that,

(a) there was no privity of contract between him and the buyer; or

(b) the buyer gave no consideration in respect of the statement.

Sources: NSW Draft Bill ss. 5(5) (part), 15; USA 12; new.

Comment

Delete paragraph (b) of subsection (3) and replace it with the following paragraph (b):

> "(b) a statement made by a seller which relates to the subject matter of the contract and which is relied on by the buyer, except where such reliance is unreasonable."

Delete subsection (7) and replace it with the following subsection (7):

> "(7) A statement relating to the subject matter of the contract and made by a buyer to a seller is an express warranty if the seller relies on the statement, except where such reliance is unreasonable."

Delete subsection (8) and replace it with the following subsection (8):

> "(8) A statement relating to the subject matter of the contract and made to a buyer by a manufacturer, distributor or other person with a direct business interest in any sale of the goods is an express warranty if the buyer relies on the statement, except where such reliance is unreasonable."

See recommendation 8 at p. 57 of this Report and the discussion at pp. 56-57.

Sale by sample

5.11. -- (1) Without restricting the generality of section 5.10, in a contract of sale by sample or model there is an express warranty that the goods to be supplied will conform to the sample or model in all respects including quality .

Sources: NSW Draft Bill s. 16; SGA s. 16; UCC 2-313(c).

Implied warranty of title

5.12. -- (1) In a contract of sale, other than a contract to which subsection 2 applies, there is an implied warranty by the seller,

(a) that in the case of a present sale he has a right to sell the goods and that in the case of a contract to sell he will have a right to sell the goods at the time when the title is to pass;

(b) that the goods will be delivered free from any security interest, lien or encumbrance or rightful claim in respect of any industrial or intellectual property right not disclosed or actually known to the buyer before the contract was made, and

(c) that the buyer will be entitled to quiet possession of the goods except so far as it may be disturbed by a person entitled to the benefit of any security interest, lien, encumbrance, or industrial or intellectual property right so disclosed or known.

Qualified title

(2) Where there appears from the contract or is to be inferred from the circumstances of the contract an intention that the seller will transfer only such title as he or a third person may have, there is an implied warranty by the seller,

(a) that all defects in title and all security interest, liens and encumbrances, or industrial or intellectual property rights known to the seller and not known to the buyer were disclosed to the buyer before the contract was made; and

(b) that

(i) the seller, or

(ii) in a case where the parties to the contract intend that the seller will transfer only such title as a third person may have, the third person, or

(iii) any person claiming through or under the seller or the third person otherwise than under a security interest, lien or encumbrance, or industrial or intellectual property right disclosed or known to the buyer before the contract was made,

will not disturb the buyer's quiet possession of the goods.

Where seller retains a security interest

(3) Where the seller retains a security interest in the goods, his implied warranty of title takes effect when the goods are delivered to the buyer.

Sources: UK SGA s. 12; UCC 2-312; new.

Meaning of merchantable quality

5.13.-- (1) In this section "merchantable quality" means,

(a) that the goods, whether new or used, are as fit for the one or more purposes for which goods of that kind are commonly bought or used and are of such quality and in such condition as it is reasonable to expect having regard to any description applied to them, the price, and all other relevant circumstances;

and, without limiting the generality of clause a,

(b) that the goods,

(i) are such as pass without objection in the trade under the contract description,

(ii) in the case of fungible goods, are of fair average quality within the description,

(iii) within the variations permitted by the agreement, are of even kind, quality and quantity within each unit and among all units involved,

(iv) are adequately contained, packaged and labelled as the nature of the goods or the agreement require, and

(v) will remain fit, perform satisfactorily, and continue to be of such quality and in such condition, as the case may be, for such length of time as is reasonable having regard to all the circumstances; and

(c) in the case of new goods, unless the circumstances indicate otherwise, that spare parts and repair facilities, if relevant, will be available for a reasonable period of time.

Implied warranty of merchantability

(2) Where the seller is a person who deals in goods of the kind supplied under the contract, there is an implied warranty that the goods are of merchantable quality.

Exceptions

(3) The implied warranty of merchantable quality does not apply,

(a) as regards defects specifically drawn to the buyer's attention before the

contract was made;

(b) if the buyer examined the goods before the contract was made, with respect to any defect that such an examination ought to have revealed; or,

(c) in the case of a sale by sample or model, with respect to any defect that would have been apparent on reasonable examination of the sample or model.

Sources: NSW Draft Bill ss. 19, 20A; Ontario Bill 110, 3rd Sess., 30th Leg., ss 4(a), 5; SGA ss. 15(2), 16(2)(c); UCC 2-314(1), (2); UK SGA ss. 14(2), 62(1A); new.

Implied warranty of fitness

5.14. -- (1) Where the buyer, expressly or impliedly, makes known to the seller any particular purpose for which he is buying the goods and the seller deals in goods of that kind, there is an implied warranty that the goods supplied under the contract are reasonably fit for that purpose, whether or not that is a purpose for which goods of that kind are commonly supplied, and that the goods will so remain for such length of time as is reasonable having regard to all the circumstances.

Exception

(2) The implied warranty mentioned in subsection 1 does not apply where the circumstances show that the buyer does not rely or that it is unreasonable for him to rely on the seller to supply goods reasonably fit for the buyer's particular purpose.

Sources: UK SGA s. 14(3).

Warranties applicable to goods in contract of work and materials

5.15. -- (1) Sections 5.10 to 5.14 apply mutatis mutandis to goods supplied under a contract of work and materials.

Lease of goods

(2) Sections 5.10, 5.11 5.12(1)(a) and (c), 5.13 and 5.14 apply mutatis mutandis to a contract for the lease of goods.

Sources: Law Commission, Working Paper No. 71; Law of Contract, Implied Terms in Contracts for the Supply of Goods (1977), para. 79 at pp. 49-50.

Exclusion and modification of warranties

5.16. -- (1) Subject to subsection 2 and section 5.2,

(a) a warranty implied under this Act;

(b) the effect of a statement which would otherwise amount to an express warranty; and

(c) the remedies for breach of a warranty,

may be modified, limited or excluded by the parties.

Exclusions and limitations of damages

(2) A modification, limitation or exclusion of a warranty, or a remedy for breach of such warranty is prima facie unconscionable to the extent that it impairs a right or remedy in respect of injury to the person.

Construction of warranties

(3) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit a warranty shall, where reasonable, be construed as consistent with one another, but, to the extent that such a construction is unreasonable, the negation or limitation has no effect.

Application of subs. 1, 2, 3

(4) Subsections 1, 2 and 3 apply to a statement referred to in subsections 8 and 9 of section 5.10,

(a) where the modification, limitation or exclusion comes to the buyer's attention before he acts in reliance upon the statement; or

(b) where the statement is made to the public or a section of the public, and

(i) the buyer may reasonably be expected to learn of the modification, limitation or exclusion before relying upon the statement; or

(ii) the statement and the modification, limitation or exclusion are contained in the same document or may otherwise reasonably be expected to come to the buyer's attention at the same time.

Source: UCC 2-316(1): new.

Cumulation and conflict of warranties

5.17. -- (1) Express or implied warranties shall be construed as consistent with one another and as cumulative, but if such a construction is unreasonable, the intention of the parties determines which warranty is dominant.

Rules

(2) For the purpose of subsection 1 the following presumptions apply:

1. Exact or technical specifications displace an inconsistent sample or model or general language of description.

2. A sample from an existing bulk displaces inconsistent

general language of description.

3. Express warranties displace inconsistent implied warranties other than an implied warranty of fitness for a particular purpose.

Sources: UCC 2-317.

Interpretation

5.18. -- (1) In this section,

(a) "goods" includes goods that have been converted into, incorporated in, or attached to, other goods or that have been incorporated in or attached to land;

(b) "immediate buyer" means a buyer who buys goods from a prior seller;

(c) "injury" means injury to the person, damage to property, or any economic loss;

(d) "prior seller" means a merchant who sells goods that are subsequently resold;

(e) "subsequent buyer" means a buyer who buys goods that have previously been sold by a prior seller to an immediate buyer.

Prior seller's warranty

(2) Without prejudice to a subsequent buyer's rights under section 5.10, a prior seller's warranty, express or implied, and any remedies for breach thereof, enure in favour of any subsequent buyer of the goods who suffers injury because of a breach of the warranty.

Subsequent buyer's rights

(3) A subsequent buyer's rights under subsection 2 are subject to any defence that would have been available to such prior seller in an action against him for breach of the same

warranty by his immediate buyer.

Subsequent buyer's damages

(4) The amount of damages recoverable by a subsequent buyer for breach of warranty by a prior seller shall be no greater than the damages that the immediate buyer could have recovered from such prior seller if the immediate buyer had suffered the injury sustained by the subsequent buyer.

Sources: NSW Draft Bill ss. 20H, 20I, 20K, 20L; UCC 2-318; new.

Comment

In paragraph (e) of subsection (1), substitute a comma for the full stop after "immediate buyer" and add the words: "or a party acquiring by gratuitous transfer the title to such goods in which case the disposition by which he acquires title shall be treated as a sale for the purpose of this section".

See recommendation 12 at p. 127 of this Report and the discussion at pp. 125-26.

Interpretation

5.19. -- (1) In this section and in section 5.23, F.O.B., means "free on board" and F.A.S. means "free alongside".

Seller's obligations under F.O.B. term

(2) The term F.O.B. at a named place, even though used only in connection with the stated price, is a delivery term under which,

(a) if the term is F.O.B. the place of shipment, the seller shall at that place ship the goods in the manner provided in section 7.3 and bear the expense and risk of putting them into the possession of the carrier; or

(b) if the term is F.O.B. the place of destination, the seller shall at his own expense and risk transport the goods to that place and

there tender delivery of them in the manner provided in section 7.2.

Additional obligations

(3) If under subsection 2,

(a) the term is also F.O.B. vessel, car or other mode of carriage, the seller shall in addition, at his own expense and risk, load the goods on board; and

(b) the term is F.O.B. vessel, the buyer shall name the vessel and, in an appropriate case, the seller shall comply with section 5.23 on the form of bill of lading.

F.A.S. vessel

(4) The term F.A.S. vessel at a named port, even though used only in connection with the stated price, is a delivery term under which the seller shall,

(a) at his own expense and risk deliver the goods alongside the vessel in the manner usual in that port or on a dock designated and provided by the buyer; and

(b) obtain and tender a receipt for the goods in exchange for which the carrier is under a duty to issue a bill of lading.

Buyer's duty to give instructions

(5) In any case falling under subsection 2(a) or subsection 3 or subsection 4, the buyer shall seasonably give any necessary instructions for making delivery, including the loading berth of the vessel, and its name and sailing date.

Effect of failure to do so

(6) The seller may,

(a) treat the failure to give any necessary instructions as a failure to cooperate under section 5.9; and

(b) at his option, move the goods in any reasonable manner preparatory to delivery or shipment.

Payment against tender of documents

(7) Under the term F.O.B. vessel or F.A.S., the buyer shall make payment against tender of the required documents and the seller shall not tender and the buyer shall not demand delivery of the goods in substitution for the documents.

Sources: UCC 2-319.

Interpretation

5.20. -- (1) In this section and in sections 5.21 and 5.23,

(a) the term C.I.F. means that the price includes in a lump sum the cost of the goods and the insurance and freight to the named destination;

(b) the term C. & F. or C.F. means that the price for the goods includes cost and freight to the named destination.

Seller's obligation under C.I.F. term

(2) Even though used only in connection with the stated price and destination, the term C.I.F. destination or its equivalent requires the seller at his own expense and risk to,

(a) put the goods into the possession of a carrier at the port for shipment and obtain one or more negotiable bills of lading covering the entire transportation to the named destination;

(b) load the goods and obtain a receipt from the carrier (which may be contained in the bill of lading) showing

that the freight has been paid or provided for;

(c) obtain a policy or certificate of insurance, including any war risk insurance, of a kind and on terms then current at the port of shipment in the usual amount, in the currency of the contract, shown to cover the same goods covered by the bill of lading and providing for payment of loss to the order of the buyer or for the account of whom it may concern, but the seller may add to the price the amount of the premium for any such war risk insurance;

(d) prepare an invoice of the goods and procure any other documents required to effect shipment or to comply with the contract; and

(e) forward and tender with commercial promptness all the documents in due form and with any endorsement necessary to perfect the buyer's rights.

C. & F. term

(3) The term C. & F. or the like has the same effect and imposes upon the seller the same obligations and risks as a C.I.F. term except the obligation as to insurance.

Payment against tender of documents

(4) Under the term C.I.F. or C. & F. the buyer shall make payment against tender of the required documents and the seller shall not tender and the buyer shall not demand delivery of the goods in substitution for the documents.

Sources: UCC 2-320.

Seller's duty under "net landed weights" and similar terms

5.21. -- (1) Where under a contract containing the term C.I.F. or C. & F. the price is based on or is to be adjusted according to "net landed weights", "delivered weights", "out turn" quantity or quality or the like, the seller shall reasonably estimate the price and the payment due on tender of the documents required by the contract is the amount so estimated, but after final adjustment of the price a settlement shall be made with commercial promptness.

Risk of ordinary deterioration and the like

(2) A contract under subsection 1 or any warranty of quality or condition of the goods on arrival places upon the seller the risk of ordinary deterioration, shrinkage and the like in transportation but has no effect on the place or time of identification to the contract of sale or delivery or on the passage of the risk of loss.

Inspection before payment

(3) Where the contract provides for payment on or after arrival of the goods the seller shall before payment allow such preliminary inspection as is feasible, but if the goods are lost, delivery of the documents and payment are due when the goods should have arrived.

Sources: UCC 2-321.

Delivery "ex-ship"

5.22. -- (1) A term in a contract for delivery of goods "ex-ship" or the like is not restricted to a particular ship and requires delivery from a ship which has reached a place at the named port of destination where goods of the kind are usually discharged.

Seller's duties under

(2) Under the term "ex-ship" or the like,

(a) the seller shall discharge all liens arising out of the carriage and furnish the buyer with a direction which puts the carrier under a duty to deliver the goods; and

(b) the risk of loss does not pass to the buyer until the goods leave the ship's tackle or are otherwise properly unloaded.

Sources: UCC 2-322.

Overseas shipment; form of bill of lading

5.23. -- (1) Where a contract of sale contemplates overseas shipment and contains a term C.I.F. or C.& F. or F.O.B. vessel, the seller shall obtain a negotiable bill of lading stating that the goods have been loaded on board or, in the case of the term C.I.F. or C. & F., received for shipment.

Tender of bill of lading in parts

(2) Where in a case within subsection 1 a bill of lading has been issued in a set of parts, the buyer may demand tender of the full set of documents unless they are to be sent from abroad, in which case only part of the bill of lading is required to be tendered and even if the agreement stipulates a full set of documents, the person tendering an incomplete set may require payment upon furnishing an adequate indemnity.

Shipments by air or water

(3) For the purposes of this section, a shipment by water or by air or a contract contemplating such a shipment is "overseas" insofar as by usage of trade or agreement it is subject to the commercial, financing or shipping practices characteristics of international deep-water commerce.

Sources: UCC 2-323.

"No arrival, no sale" terms

5.24. Under the term "no arrival, no sale" or the like,

(a) the seller shall properly ship conforming goods and, if they arrive by any means, he shall tender them on arrival

but he assumes no obligation that the goods will arrive unless he has caused the non-arrival; and

(b) where, without fault of the seller, the goods suffer partial loss or arrive after the contract time, the buyer may proceed under section 8.12 as if there had been casualty to identified goods.

Sources: UCC 2-324; new.

Meaning of letter of credit, banker's credit, confirmed credit

5.25. -- (1) In a contract of sale,

(a) "letter of credit" or "banker's credit" means an irrevocable credit issued by a financing agency of good repute and, where the shipment is overseas, of good international repute;

(b) "confirmed credit" means that the credit mentioned in clause a also carries the direct obligation of an agency of the kind mentioned in clause a that does business in the seller's financial market.

Letter of credit

(2) Failure of the buyer seasonably to furnish an agreed letter of credit is a breach of the contract.

Delivery thereof suspends payment obligation

(3) The delivery to the seller of a proper letter of credit suspends the buyer's obligation to pay, but if it is dishonoured, the seller may on seasonable notification to the buyer require payment directly from him.

Sources: UCC 2-325.

Interpretation

5.26. -- (1) In this section,

(a) "sale on approval" means a contract in which the goods are delivered primarily for use and in which the buyer has the right to return delivered goods even though they conform to the contract;

(b) "sale or return" means a contract in which the goods are delivered for resale and in which the buyer has the right to return delivered goods even though they conform to the contract.

Special incidents of sale on approval

(2) In a sale on approval,

(a) although the goods are identified to the contract, the risk of loss and the title do not pass to the buyer until acceptance;

(b) use of the goods consistent with the purpose of trial is not acceptance, but failure seasonably to notify the seller of the buyer's election to return the goods or any other act adopting the transaction is acceptance, and, if the goods conform to the contract, acceptance of any part is acceptance of the whole; and

(c) after due notification of the buyer's election to return, the return is at the seller's risk and expense, but a merchant buyer must follow any reasonable instructions.

Sale or return

(3) In a sale or return,

(a) the option to return extends to the whole or any commercial unit of the goods so long as their condition remains substantially unchanged, but the option

must be exercised seasonably; and

(b) goods are at the buyer's risk until they are returned to the seller and the buyer is responsible for their return.

Sources: SGA s. 19, r. 4(i); UCC 2-326(1), 2-327.

PART VI

TRANSFER OF TITLE AND GOOD FAITH BUYERS

General irrelevance of title

6.1. -- (1) Except as otherwise provided in this Act, the provisions of this Act with respect to the rights, obligations and remedies of the seller, buyer and any third party apply without regard to the person who has title to the goods.

General rules for the transfer of title

(2) Where questions concerning title become material, title passes from the seller to the buyer at the time and in the manner agreed upon by the parties, except that,

(a) title cannot pass before goods have been identified to the contract as provided in section 7.1; and

(b) any reservation by the seller of the title in goods shipped or delivered to the buyer is limited to the reservation of a security interest.

Where no time specified for title to pass

(3) Where there is no agreement between the parties with respect to the time at which the title to the goods is to pass to the buyer, the following rules apply:

1. Title passes at the time and place at which the seller completes his performance with reference to the physical delivery of the goods despite the reservation of a security interest and even though a document of title is to be delivered at a different time or place.

2. Where delivery is to be made without moving the goods, title passes,

(a) if the seller is to deliver a document of title, at the time when, and the place where, he delivers the document;

(b) where the goods are held by a bailee other than the seller and the seller is not required to deliver a document of title, when the bailee acknowledges to the buyer his right to possession of the goods, and

(c) in any other case, on the buyer's receipt of the goods.

Where title is revested in seller

(4) A rejection or other refusal by the buyer to receive or retain the goods, whether or not justified, revests title to the goods in the seller.

Sources: UCC 2-401; new.

Interpretation

6.2. In this Part, other than in sections 6.1 and 6.5 and subject to section 3.4(2), "goods" includes a document of title.

Sources: SGA s. 25(1), (2).

Nemo dat rule

6.3. Except as otherwise provided in this Part, where goods are sold by a person who does not own them and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title than the seller had.

Sources: SGA s. 22 (part).

Exceptions

6.4. -- (1) Section 6.3 does not apply,

(a) where the owner of the goods

is by his conduct precluded from denying the seller's authority to sell;

and it does not affect

(b) The Factors Act or any other enactment enabling the apparent owner of goods to dispose of them as if he were the true owner thereof; or

(c) the validity of any contract of sale under any common law or statutory power of sale or under the order of a court of competent jurisdiction.

Owner's failure to exercise reasonable care

(2) Without limiting the generality of subsection 1(a), an owner is precluded from denying the authority to sell of the person in possession of the goods, where

(a) he has failed to exercise reasonable care with respect to the entrustment of the goods; and

(b) the buyer has exercised reasonable care in buying the goods and has received the goods in good faith, for value and without notice of the defect in the title of the transferor or his lack of authority to sell the goods.

Failure of owner and buyer to exercise reasonable care

(3) If in an action between the owner and the buyer pursuant to subsection 2 the court finds that both have failed to exercise reasonable care, the court may allocate the loss between them and make such other order with respect to the goods as is fair in the circumstances.

Registered entrustments

(4) Subsection 2 does not apply to an entrustment of goods under a transaction governed by The Personal Property Security Act or any other Act requiring the registration or filing in a public place of a document relating to the transaction.

Sources: SGA s. 22; new.

Effect of voidable title

6.5. -- (1) A person with a voidable title has power to transfer a good title to a buyer who receives the goods in good faith, for value, and without notice of the defect in the title of the transferor.

Extended meaning of voidable title

(2) A person is deemed to have a voidable title even if,

(a) the transferor was deceived as to the identity of the buyer;

(b) the goods were delivered in exchange for a cheque that is later dishonoured;

(c) it was agreed that the transaction was to be a cash sale;

(d) the transfer of title was procured by fraud; or

(e) the transaction was entered into under a mistake of such a character as to render the agreement void at common law.

Application of subs. 1

(3) Subsection 1 applies even though the owner has purported to avoid the sale to the transferor.

Sources: UCC 2-403(1); The Factors Act, R.S.O. 1970, c. 156, s. 2(1); new.

Effect of possession of goods by seller, etc.

6.6. -- (1) In the cases mentioned in subsection 2, where a seller, buyer or prospective buyer is in possession of goods such person has power to transfer all rights of the person consenting to his possession to a person who buys or leases and receives the goods from him in good

faith, for value, and without notice of the defect in the title of the transferor.

Where subs. 1 applies

(2) Subsection 1 applies,

(a) where a seller, having sold goods, continues in possession of the goods with the buyer's consent, whether in his capacity as seller or otherwise; or

(b) where a buyer or prospective buyer is in possession of the goods with the seller's or prospective seller's consent before title in the goods has been transferred to him.

Where subs. 1 does not apply

(3) Subsection 1 does not apply where,

(a) prior to the disposition of the goods by the person in possession a security interest to which [insert reference to the Personal Property Security Act or other provincial legislation] applies has been perfected by registration in favour of the buyer or seller; or

(b) in any other case, a notice in the prescribed form has been filed under [insert reference to the Personal Property Security Act or other provincial legislation] prior to the disposition of the goods by the person in possession.

Meaning of prospective buyer etc.

(4) For the purpose of this section, "prospective buyer" means a person who receives the goods,

(a) under a sale on approval or under a contract of sale or return;

(b) under an agreement containing an option to purchase; or

(c) under a contract of sale that is subject to approval by a third person or the fulfillment of any other condition,

and "prospective seller" means a person from whom a prospective buyer receives the goods.

Sources: SGA s. 25; new.

Entrustment of goods to merchant

6.7. -- (1) Any entrusting of possession of goods to a merchant who deals in goods of that kind for any purpose connected with sale or promoting sales of goods of that kind gives him power to transfer all rights of the entruster to a buyer or lessee in the ordinary course of business.

Meaning of entrusting

(2) For the purpose of subection 1, "entrusting" includes any delivery and any acquiescence in retention of possession regardless of any condition expressed between the parties to the delivery or acquiescence and regardless of whether the procurement of the entrusting or the possessor's disposition of the goods has been fraudulent.

Sources: UCC 2-403(2), (3).

Effect of avoidance of sale and revocation of consent

6.8. Unless the goods are recovered by the owner before they have been delivered by the person in possession of them to the third party, sections 6.6 and 6.7 apply even though the owner has revoked his consent to possession of the goods by the seller, buyer, prospective buyer or merchant, as the case may be.

Sources: The Factors Act, R.S.O. 1970, c. 156, s. 2(1); new.

Right of owner to recover goods

6.9. Where sections 6.4(2), 6.5, 6.6 and 6.7 apply and a court considers it fair to make such an order, the owner may recover the goods from the buyer or any person claiming from or under him on repaying the buyer or such other person, as the case may be, the price or, if the price was not in the form of money, its equivalent value in money, paid by the buyer or such other person for the goods, together with such other reliance losses as he would otherwise suffer and as the court may order to be paid.

Sources: New.

PART VII

PERFORMANCE

Buyer's special property and insurable interest

7.1. -- (1) The buyer obtains a special property and an insurable interest in goods by identification of existing goods as goods to which the contract refers even though the goods so identified are non-conforming and he has an option to return or reject them.

Identification matter of agreement

(2) Such identification can be made at any time and in any manner expressly agreed upon by the parties.

Presumptive rules

(3) In the absence of express agreement identification occurs,

(a) when the contract is made if it is for the sale of goods already existing and agreed upon by the parties as the goods to be delivered under the contract;

(b) if the contract is for the sale of future goods other than those described in clause c, when goods are shipped, marked or otherwise designated by the seller as goods to which the contract refers; or

(c) when the crops are planted or otherwise become growing crops or the young are conceived if,

(i) the contract is for the sale of crops to be harvested within twelve months or the next normal harvest season after contracting, whichever is longer, or

(ii) the contract is for the sale of unborn young to be born within twelve months after contracting.

Seller's insurable interest

(4) The seller retains an insurable interest in goods so long as title to or any security interest in the goods, or the risk of loss, remains in him.

Seller's right to substitute goods

(5) Where the identification is by the seller alone he may,

(a) until the buyer's default or insolvency; or

(b) until he has notified the buyer that the identification is final,

substitute other goods for those identified.

Other insurable interest not affected

(6) Nothing in this section impairs any insurable interest recognized under any other law of this Province.

Sources: UCC 2-501.

Manner of seller's tender of delivery

7.2. -- (1) Tender of delivery requires that the seller put and hold conforming goods at the buyer's disposition and give the buyer any notification reasonably necessary to enable him to take delivery.

Application of subs. 1

(2) The manner, time and place for tender are determined by the agreement and this Act, and in particular,

(a) tender must be at a reasonable hour and, if it is of goods, they must be kept available for the period reasonably necessary to enable the buyer to take possession; but

(b) the buyer must furnish facilities reasonably suited to the receipt of the goods.

Compliance with section 7.3

(3) Where section 7.3 applies, tender requires that the seller comply with its provisions.

Goods in possession of bailee

(4) Where goods are in the possession of a bailee and are to be delivered without being moved,

(a) tender requires that the seller either tender a negotiable document of title covering such goods or procure acknowledgement by the bailee to the buyer of his right to possession of the goods; but

(b) tender to the buyer of a non-negotiable document of title or of a written direction to the bailee to deliver is sufficient tender unless the buyer seasonably objects, and receipt by the bailee of notification of the buyer's rights fixes those rights as against the bailee and all third persons, but risk of loss of the goods and of any failure by the bailee to honour the non-negotiable document of title or to obey the direction remains on the seller until the buyer has had a reasonable time to present the document or direction, and a refusal by the bailee to honour the document or to obey the direction defeats the tender.

Tender of documents

(5) Where the contract requires the seller to deliver documents,

(a) he must tender all such documents in correct form, except as provided in section 5.23 with respect to bills of lading in a set; and

(b) tender through customary banking channels is sufficient and dishonour of a bill of exchange accompanying

the documents constitutes non-acceptance or rejection.

Sources: UCC 2-503(1), (2), (4), (5).

Shipment by seller

7.3. Where the seller is required or authorized to send the goods to the buyer and the contract does not require him to deliver them at a particular destination, then he must,

(a) put the goods in the possession of such a carrier and make such a contract for their transportation as may be reasonable having regard to the nature of the goods and other circumstances of the case; and

(b) obtain and promptly deliver or tender in due form any document necessary to enable the buyer to obtain possession of the goods or otherwise required by the agreement or by usage of trade; and

(c) promptly notify the buyer of the shipment.

Sources: UCC 2-504.

Seller's shipment under reservation

7.4. -- (1) Where the seller has identified goods to the contract by or before shipment,

(a) his procurement of a negotiable bill of lading to his own order or otherwise reserves in him a security interest in the goods;

(b) the seller's procurement of such a bill of lading to the order of a financing agency or of the buyer indicates in addition only the seller's

expectation of transferring that interest to the person named; and

(c) the procurement of a non-negotiable bill of lading to himself or his nominee also reserves a security interest in the goods but, except in the case of a conditional delivery governed by section 7.6, a non-negotiable bill of lading naming the buyer as consignee reserves no security interest even though the seller retains possession of the bill of lading.

Wrongful reservation of security interest

(2) Where shipment by the seller with reservation of a security interest violates the contract of sale it constitutes an improper contract for transportation within section 7.3 but does not impair the rights given to the buyer by shipment and identification of the goods to the contract or the seller's powers as holder of a negotiable document of title.

Sources: UCC 2-505.

Rights of financing agency

7.5. -- (1) A financing agency by paying or purchasing for value a bill of exchange that relates to a shipment of goods acquires to the extent of the payment or purchase, and in addition to its own rights under the bill of exchange and any document of title securing it, any rights of the seller in the goods, including the right to stop delivery and the seller's right to have the bill of exchange honoured by the buyer.

Defective document regular on its face

(2) The right to reimbursement of a financing agency which has in good faith honoured or purchased a bill of exchange under commitment to or authority from the buyer is not impaired by subsequent discovery of defects with reference to any relevant

document which was apparently regular on its face.

Sources: UCC 2-506.

Tender of delivery by seller

7.6. -- (1) Tender of delivery is a condition of the buyer's duty to accept and pay for the goods.

Rights of buyer conditional

(2) Where goods or documents of title are delivered to the buyer and payment is due and demanded, his rights as against the seller to retain or dispose of them is conditional upon his making the payment due.

Sources: SGA ss. 20(3), 27; UCC 2-507.

Meaning of cure

7.7. -- (1) In this section and in sections 7.9 and 8.6, "cure" means,

(a) tender or delivery of any missing part or quantity of the goods;

(b) tender or delivery of other conforming goods or documents or, in the case of a sale of identified goods, goods which differ in no material respect from those goods;

(c) the remedying of any other non-conformity in performance, including a defect in title; or

(d) a money allowance or other form of adjustment of the terms of the contract,

or any combination thereof as is consistent with subsection 2.

Seller's right to cure

(2) Where a buyer rejects a non-conforming tender or delivery, whether before or after the time for performance has expired, the seller has a reasonable time to cure the

non-conformity if,

(a) the non-conformity can be cured without unreasonable prejudice, risk or inconvenience to the buyer;

(b) after being notified of the buyer's rejection, the seller seasonably notifies the buyer of his intention to cure and of the type of cure to be provided; and

(c) the type of cure offered by the seller is reasonable in the circumstances.

Where no right to cure

(3) Notwithstanding subsection 2, the buyer may cancel the contract where the seller fails seasonably to tender, deliver or otherwise perform any other term of the contract if,

(a) in the circumstances it is unreasonable to expect the buyer to give the seller more time to perform; or

(b) the seller fails to perform within a further reasonable period of time set by the buyer.

Right to damages preserved

(4) Nothing in this section affects the buyer's right to recover damages arising out of a breach by the seller.

Sources: New.

Risk of loss in absence of breach

7.8. -- (1) Subject to sections 5.26 and 7.9, the following rules govern the transfer of risk of loss of the goods:

1. Where the contract requires or authorizes the seller to ship the goods by carrier,

(a) unless it requires him

to deliver at a particular destination, the risk passes to the buyer when they are delivered to the carrier even though the shipment is under reservation; but

(b) if it does require him to deliver them at a particular destination and they are there tendered while in the possession of the carrier, the risk passes to the buyer when they are there so tendered as to enable the buyer to take delivery; and

(c) if the seller is a merchant and the buyer is not a merchant, risk passes when the goods are tendered to the buyer at the destination.

2. Where the goods are held by a bailee other than the seller and are to be delivered without being moved, the risk passes to the buyer,

(a) on his receipt of a negotiable document of title covering them;

(b) on acknowledgment by the bailee to the buyer of the buyer's right to possession of them; or

(c) after his receipt of a non-negotiable document of title or other written direction to deliver as provided in section 7.2(4)(b).

3. Where rules 1 and 2 do not apply, the risk passes to the buyer on his receipt of the goods.

Saving

(2) Nothing in this section affects the duties or liabilities of either seller or buyer as a bailee of the goods of the other party.

Sources: UCC 2-509; new.

Effect of breach on risk of loss

7.9. -- (1) Where a tender or delivery of goods so fails to conform to the contract as to give a right of rejection, the risk of loss arising before acceptance or cure remains with the seller to the extent of any deficiency in the buyer's insurance coverage.

Where buyer in breach

(2) Subject to section 8.8(4), where the buyer as to conforming goods already identified to the contract repudiates or is responsible for any delay in delivery of the goods before risk of loss has passed to him, the seller may to the extent of any deficiency in his insurance coverage treat the risk of loss as resting on the buyer for a commercially reasonable time sufficient to enable him to insure the goods.

Sources: UCC 2-510; new.

Tender of payment by buyer

7.10. -- (1) Tender of payment is a condition of the seller's duty to tender and complete any delivery.

Manner of tender

(2) Tender of payment is sufficient when made by any means or in any manner current in the ordinary course of business unless the seller demands payment in legal tender and gives any extension of time reasonably necessary to procure it.

Payment by cheque

(3) Payment by cheque or other instrument is conditional and is defeated as between the parties if the cheque or other instrument is

dishonoured.

Sources: UCC 2-511.

Payment before inspection

7.11. -- (1) Where the contract requires payment before inspection, non-conformity of the goods does not excuse the buyer from so making payment unless,

(a) the non-conformity appears without inspection; or

(b) the seller has acted fraudulently.

Buyer's rights unimpaired

(2) Payment pursuant to subsection 1 does not constitute an acceptance of goods or impair the buyer's right to inspect or any of his remedies.

Sources: UCC 2-512.

Buyer's right to inspect goods

7.12. -- (1) Subject to subsection 4, where goods are tendered or delivered or identified to the contract, the buyer has a right before payment or acceptance to inspect them at any reasonable place and time and in any reasonable manner.

Inspection after arrival

(2) Where the seller is required or authorized to send the goods to the buyer, the inspection may be made after their arrival.

Expenses of inspection

(3) Expenses of inspection must be borne by the buyer but may be recovered from the seller if the goods do not conform and are rejected.

Inspection before payment

(4) Subject to section 5.21, the buyer is not entitled to inspect the goods before payment of the price when the contract provides,

(a) for delivery "C.O.D." or on

similar terms; or

(b) for payment against documents of title except where such payment is due only after the goods are to become available for inspection.

Place and method of inspection

(5) A place or method of inspection fixed by the parties is presumed to be exclusive but, unless otherwise expressly agreed, it does not affect the time of identification, the place of delivery, or the transfer of the risk of loss.

Where agreed place or method of inspection impossible

(6) If inspection at the place or by the method fixed by the parties becomes impossible, inspection shall be as provided in this section unless the place or method fixed was clearly intended as an indispensable condition failure of which would avoid the contract.

Sources: UCC 2-513.

When documents deliverable

7.13. Documents against which a bill of exchange is drawn are to be delivered to the drawee upon acceptance of the bill of exchange if it is payable more than three days after presentment, and in other cases, only upon payment.

Sources: UCC 2-514.

Preserving evidence of goods in dispute

7.14. -- (1) In order to facilitate the adjustment or resolution of a claim or dispute between a buyer and a seller, either party, for the purpose of ascertaining the facts and preserving evidence, has the right to inspect, test and sample the goods, but where the goods are in the possession or control of the other, such right may only be exercised on reasonable notification to the other party.

Where access refused

(2) Where a party is refused the right to inspect, test and sample the goods, he may apply to a court of competent jurisdiction and a judge of the court may, upon such terms as to notice and otherwise as he considers proper, make whatever order seems to him to be just in all the circumstances of the case.

Rights under rules of court preserved

(3) The rights conferred by subsections 1 and 2 are in addition to any rights conferred under the rules of court of the court in which proceedings relating to the contract of sale have been commenced.

Sources: UCC 2-515(a); new.

PART VIII

BREACH, REPUDIATION AND EXCUSE

Buyer's rights on improper delivery

8.1. -- (1) Subject to section 8.10, if the goods or the tender of delivery are non-conforming, the buyer may,

(a) reject the whole;

(b) accept the whole; or

(c) accept those commercial units that are conforming and reject the rest.

Payment for accepted goods

(2) The buyer shall pay at the contract rate for any goods accepted by him.

Sources: UCC 2-601, 2-606(2); new.

Loss of right to reject on acceptance

8.2. -- (1) The buyer loses the right to reject goods when he has accepted them.

What constitutes acceptance of goods

(2) The buyer accepts the goods where,

(a) he signifies to the seller that the goods are conforming or that he will take or retain them despite their non-conformity;

(b) he knew or ought reasonably to have known of their non-conformity and he fails seasonably to notify the seller of his rejection of the goods;

(c) the goods are no longer in substantially the condition in which the buyer received them and this change is due neither to any defect in the goods themselves nor to casualty suffered by them while at the seller's risk;

or

(d) the non-conformity is of a minor character and a substantial period has elapsed after delivery.

Preservation of right of rejection

(3) The buyer does not accept goods by reason only that he has kept them in the reasonable belief, induced by the seller, that they are conforming or that their non-conformity will be cured.

Commercial unit

(4) A buyer who accepts part of a commercial unit is deemed to accept the whole of that unit.

Other remedies

(5) Acceptance does not of itself impair any other remedy provided by this Act.

Sources: UCC 2-602(1), 2-606, 2-607(2), 2-608(1); UNCITRAL Art. 53; new.

Buyer's duties after rejection

8.3. Subject to sections 8.4 and 8.5,

(a) after rejection, use of the goods or other acts of ownership by the buyer does not nullify the rejection unless the seller has been materially prejudiced thereby; and

(b) if, before rejection, the buyer has taken physical possession of goods on which he does not have a lien, he must after rejection hold them with reasonable care at the seller's disposition for a time sufficient to permit the seller to remove them but the buyer has no other obligations with regard to goods rightfully rejected.

Sources: UCC 2-602; new.

Merchant buyer's duties with respect to rejected goods

8.4. -- (1) Subject to any lien of the buyer arising under section 9.14, when the seller has no agent or place of business at the market of rejection a merchant buyer is under a duty after rejection of goods in his possession or control,

(a) to follow any reasonable instructions received from the seller with respect to the goods; and

(b) in the absence of such instructions to make reasonable efforts to sell them for the seller's account if they are perishable or threaten to decline rapidly in value.

Reasonable instructions and indemnification

(2) For the purpose of subsection 1, instructions are not reasonable if on demand the buyer is not indemnified for expenses.

Buyer's right to expenses

(3) Where the buyer sells goods under subsection 1, he is entitled to reimbursement from the seller or out of the proceeds for reasonable expenses of caring for and selling them, and if the expenses do not include a selling commission then to such commission as is usual in the trade or, if there is none, to a reasonable sum not exceeding ten per cent of the gross proceeds.

Subs. 1 does not affect other rights

(4) Where the parties do not agree as to the buyer's right to reject the goods, any instructions given to or action taken by the buyer pursuant to subsection 1 do not affect any other rights of the parties, including the right of the seller to recover any payments made to the buyer under subsection 3 where the buyer has wrongfully rejected the goods.

Buyer must act in good faith

(5) In complying with this section the buyer must act in good faith and with reasonable care.

Good faith conduct not acceptance, etc.

(6) Good faith conduct by the buyer under this section shall be deemed not to be acceptance or conversion or to give rise to a claim in damages.

Sources: UCC 2-603; new.

Comment

Delete the words "in good faith and" in subsection (5). In subsection (6) substitute the words "Conduct by the buyer in accordance with" for the words "Good faith conduct by the buyer under".

See recommendation 11 at pp. 71-72 and the discussion at pp. 66-71.

Buyer's options as to salvage of rejected goods

8.5. -- (1) Subject to section 8.4 with respect to perishable goods or goods that threaten to decline rapidly in value, if the seller gives no instructions within a reasonable time after notification of rejection the buyer may,

(a) store the rejected goods for the seller's account;

(b) reship them to him; or

(c) resell them for the seller's account and claim reimbursement under subsections 3 to 6 of section 8.4.

Salvage not acceptance, etc.

(2) Any such action shall be deemed not to be acceptance or conversion of the goods or to give rise to a claim in damages.

Sources: UCC 2-604.

Waiver of buyer's objections

8.6. -- (1) If the buyer fails to state in connection with rejection a non-conformity that is ascertainable by reasonable inspection, he is precluded from relying on the unstated non-conformity to justify rejection where the seller could have cured the non-conformity if it had been stated

seasonably.

Payment against documents

(2) If the buyer makes payment against documents without reserving his rights, he is precluded from recovering his payment where the non-conformity was apparent on the face of the documents.

Seller not prejudiced

(3) Subsections 1 and 2 do not apply where the seller has not been unduly prejudiced by the buyer's failure to state a non-conformity or to reserve his rights.

Sources: UCC 2-605; new.

Right to adequate assurance of performance

8.7. -- (1) Where reasonable grounds for insecurity arise with respect to the performance of either party, the other party may in writing demand adequate assurance of due performance and until he receives such assurance may if reasonable suspend any performance for which he has not already received the agreed return.

Acceptance of improper tender

(2) Acceptance of any improper delivery or payment does not prejudice the aggrieved party's right to demand adequate assurance of further performance.

Failure to provide adequate assurance

(3) After receipt of a demand, failure to provide within a reasonable time not exceeding thirty days adequate assurance of due performance is a repudiation of the contract.

Where adequate assurance is provided

(4) Upon adequate assurance being provided, the aggrieved party's obligation to perform is restored but he is not liable for any delay occasioned by his suspension of performance.

Meaning of adequate assurance

(5) For the purpose of this section, "adequate assurance of due performance" means such assurance as is commercially reasonable in the circumstances and may include the provision, whether by a party to the contract or a third party, of

(a) a report, opinion or explanation;

(b) an affirmation of due performance;

(c) security or surety for due performance; or

(d) an undertaking respecting extension of a warranty period or respecting cure by replacement, repair, money allowance or contract adjustment.

Sources: UCC 2-609(1), (3), (4); new.

Anticipatory repudiation

8.8. -- (1) Where either party's refusal or inability to perform a future obligation amounts to a repudiation of the contract, the other party may,

(a) resort to any remedy for breach;

(b) suspend his own performance; or

(c) where the contract is repudiated by the buyer, proceed in accordance with section 9.6.

Application of subs. 1(a)

(2) Subsection 1(a) applies whether or not the aggrieved party has awaited performance after learning of the repudiation and even though he has notified the repudiating party that he would await the latter's performance or has urged him to perform in spite of his repudiation.

Where repudiating party suffers loss

(3) Where the repudiating party has suffered foreseeable detriment or loss as a result of his reliance upon a notification or urging under subsection 2, the aggrieved party,

(a) shall not exercise his remedies under this section

unless he first gives the repudiating party reasonable notice of his intention to do so; and

(b) is liable to compensate the repudiating party for such foreseeable detriment or loss as he has suffered before the notice mentioned in clause a.

Duty to mitigate loss

(4) The repudiating party is not liable in any event for loss or damage that the aggrieved party should have foreseen and could have mitigated or avoided without undue risk, expense or prejudice.

Sources: Restatement s. 280; Restatement (Tent. Draft) s. 336; UCC 2-610; new.

Comment

In the opening flush of subsection (1), delete the words "a repudiation of the contract, the other" in lines 3-4 and substitute for them the following: "an unlawful repudiation of the contract, the aggrieved party".

See recommendation 18 at pp. 213-14 of this Report and the discussion at pp. 209-10.

Retraction of repudiation

8.9. -- (1) The repudiating party may retract his repudiation at any time before his next performance is due unless the aggrieved party has since the repudiation,

(a) cancelled the contract;

(b) otherwise indicated that he considers the repudiation final; or

(c) materially changed his position.

Methods of retraction

(2) Retraction may be by any method that clearly indicates to the aggrieved party that the repudiating party intends to perform, but must include any assurance justifiably demanded under section 8.7.

Consequences of retraction

(3) Retraction reinstates the repudiating party's rights under the contract but the aggrieved party is not liable, and is entitled to be compensated, for any delay occasioned by the repudiation.

Sources: UCC 2-611.

Meaning of instalment contract

8.10. -- (1) In this Act "instalment contract" means a contract that requires or authorizes the delivery of goods in separate lots to be separately accepted, notwithstanding a provision in the contract to the effect that each delivery is a separate contract.

Remedies for breach of instalment

(2) Subject to subsecton 3, the buyer's rights and remedies with respect to a non-conforming instalment and the seller's rights and remedies with respect to breach by the buyer of his obligations in relation to an instalment are the same with respect to that instalment as if it were a separate contract.

Breach of the whole contract

(3) Subject to section 7.7, if the non-conformity or breach with respect to one or more instalments substantially impairs the value of the whole contract the aggrieved party may cancel the contract.

Sources: UCC 2-612(1), (3)(part); new.

Excuse by failure of pre-supposed conditions

8.11. -- (1) Subject to sections 8.12, 8.13 and 8.14, a seller who wholly or partly fails to perform or delays performance is excused from liability under the contract if the agreed performance has been made impracticable,

(a) by the occurrence of a contingency that was not due to his fault and the non-occurrence of which was a basic assumption underlying the contract; or

(b) by a compliance in good faith with any applicable foreign or domestic law even if such law later proves to be invalid.

Notification of excuse

(2) A seller excused from performance under subsection 1 shall seasonably notify the buyer of his inability to perform and shall be liable for any damage suffered by the buyer arising from a failure so to notify.

Buyer's performance

(3) This section applies mutatis mutandis where the buyer's agreed performance has been made impracticable.

Sources: UCC 2-615; new.

Non-existence of or casualty to identified goods

8.12. -- (1) Where the seller's performance is or becomes impracticable under section 8.11(1) because of the parties' mistaken assumption that the goods are in existence or because the goods suffer loss through casualty, including theft, the following rules apply unless either party has expressly or impliedly assumed a greater obligation:

1. If the loss or non-existence is total the seller's obligation to deliver the goods is discharged but the buyer is discharged from the obligation to pay the price only if the risk thereof has not passed to the buyer.

2. If the loss or non-existence is partial and the risk thereof has not passed to the buyer, the buyer may

(a) inspect the goods; and

(b) either treat the contract as terminated or accept the goods with due allowance from the contract price but without any other rights against the seller.

3. Where the events referred to in rule 2 occur after the risk has passed to the buyer, the seller is discharged to the extent of the loss or non-existence from the obligation to deliver conforming goods but the buyer remains liable for the price.

Application of subs. 1

(2) Subsection 1 applies,

(a) to a contract that requires for its performance goods identified when the contract is made or goods that have been subsequently identified to the contract with the consent of both parties; or

(b) to a contract that contains a "no arrival, no sale" term.

Substituted performance

(3) Except for a contract that contains a "no arrival, no sale" term, rules 1 and 2 of subsection 1 do not apply where the seller is able to tender performance that differs in no material respect from that agreed on, in which case the seller is bound to make and the buyer to accept the tender provided that each party's obligation is excused if it would cause him undue hardship.

Sources: Restatement (Tent. Draft) s. 281; UCC 2-613; new.

Prorated performance

8.13. -- (1) Where the causes mentioned in section 8.11(1) affect only a part of the seller's capacity to perform, he must allocate production and deliveries among his customers or, where there is only one customer, to that customer, but may at his option include customers not then under contract as well as his own requirements for future manufacture, and he may so allocate in any manner which is fair and reasonable.

Notification to buyer

(2) A seller allocating under subsection 1 must notify the buyer seasonably of the estimated quota thus made available to him.

Procedure on notice claiming excuse

(3) Where the buyer is notified pursuant to subsection 2 of an allocation of goods, or under section 8.11(2) of a material or indefinite delay, he may, by written notification to the seller,

(a) terminate and thereby discharge any unexecuted portion of the contract; or

(b) modify the contract by agreeing to the delay, or agreeing to take his available quota in substitution with due allowance from the contract price.

Termination of contract

(4) If after receipt of such notification the buyer fails so to modify the contract within a reasonable time not exceeding thirty days the contract is terminated with respect to any deliveries affected.

Application of subs. 3 and 4

(5) Subsections 3 and 4 apply,

(a) to a single delivery; and

(b) to all deliveries under an instalment contract where the prospective deficiency substantially impairs the value of the whole contract.

(6) This section applies mutatis

mutandis where the buyer's agreed performance has been made impracticable.

Sources: UCC 2-615; 2-616(1), (2); new.

Substituted performance: shipment, delivery or payment

8.14. -- (1) Where without fault of either party,

(a) the agreed berthing, loading or unloading facilities fail;

(b) an agreed type of carrier is unavailable;

(c) the agreed manner of delivery otherwise becomes commercially impracticable; or

(d) the agreed means or manner of payment fails because of domestic or foreign law,

but a commercially reasonable substitute is available, such substitute performance must be tendered and accepted.

Substituted performance: payment after delivery

(2) Where delivery has been made, payment by the means or in the manner provided by a law mentioned in subsection 1(d) discharges the buyer's obligation unless such law is discriminatory, oppressive or confiscatory.

Sources: UCC 2-614; new.

Application of frustrated contracts legislation

8.15. -- (1) The Frustrated Contracts Act applies,

(a) to a contract of sale that has been terminated pursuant to sections 8.11 to 8.14; and

(b) to a partial or delayed performance pursuant to

section 8.11, 8.12 or 8.13.

(2) If there is a conflict between the provisions of this Act and the provisions of The Frustrated Contracts Act, this Act prevails.

Sources: New.

PART IX

REMEDIES

Remedies for breach of non-contractual warranties

9.1. Except as otherwise provided in this Part, the remedies for breach of a warranty not constituting a term of the contract shall be the same as the remedies for breach of a contract of sale.

Sources: new.

Remedies for breach of collateral contracts

9.2. Nothing in this Act impairs any remedy of a buyer or seller for breach of any obligation or promise collateral or ancillary to the contract of sale.

Sources: UCC 2-701.

Seller's remedies on buyer's insolvency

9.3. Where the buyer is insolvent, the seller may refuse delivery as provided in section 9.8 and stop delivery under section 9.9.

Sources: SGA s. 39(1)(c).

Index of seller's remedies

9.4. Where the buyer breaches the contract, the seller may,

(a) maintain an action for damages;

(b) withhold delivery of any goods in his possession;

(c) stop delivery by any bailee;

(d) recover the price;

(e) obtain specific performance;

(f) cancel the contract;

(g) proceed under section 9.6 respecting goods still unidentified to the contract;

(h) resell and recover damages;

as provided in this Act.

Sources: UCC 2-703; new.

Seller's right to cancel

9.5. -- (1) The seller may cancel the contract where,

(a) the buyer fails to make payment or take delivery of the goods or perform any other obligation on the date or within the time provided in the contract and if in the circumstances it is unreasonable to expect the seller to give the buyer more time to perform or to remedy a defective performance;

(b) in any other case the buyer fails to perform within a further reasonable period set by the seller;

(c) the buyer repudiates the contract under section 8.8(1); or

(d) the buyer wrongfully rejects the seller's tender or delivery,

provided that goods in the buyer's possession may not be recovered by the seller unless he is otherwise entitled to reclaim them.

Meaning of failure to pay and failure to take delivery

(2) For the purpose of subsection 1,

(a) a failure to pay includes a failure to make such arrangements for payment as are required under section 5.1(1); and

(b) a failure to take delivery

includes a failure to perform such acts as are required of the buyer under the terms of the contract to enable the seller to make delivery.

Sources: UNCITRAL Arts. 45, 46(1)(b); new.

Seller's right to identify goods

9.6. -- (1) Where the seller is entitled to cancel, he may,

(a) identify to the contract conforming goods not already identified if, at the time he learned of the breach, the goods are in his possession or control; or

(b) treat as the subject of resale goods which have demonstrably been intended for the particular contract even though those goods are unfinished.

Unfinished goods

(2) Where the seller is entitled to cancel and the goods are unfinished at the time of the breach, he must exercise reasonable commercial judgment for the purposes of effective realization and avoidance of loss, and to these ends may,

(a) complete the manufacture and wholly identify the goods to the contract; or

(b) cease manufacture and resell for scrap or salvage value; or

(c) proceed in any other reasonable manner.

Sources: UCC 2-704.

Person in position of seller

9.7. In sections 9.8, 9.9 and 9.10 "seller" includes a person who is in the position of a seller such as an agent of the seller to whom the bill of lading has been endorsed, or a consignor or agent who has himself paid or is directly responsible for the price, or anyone who otherwise holds a security interest in the goods.

Sources: SGA s. 37(2).

Seller's right to withhold delivery

9.8. -- (1) The seller may withhold delivery of goods in his possession,

(a) until the buyer pays any sum due on or before delivery;

(b) until payment of the price where the buyer is insolvent;

(c) where the buyer repudiates the contract, until retraction of the repudiation as provided in section 8.9; or

(d) where the seller has requested assurance of performance under section 8.7(1), until adequate assurance of performance has been provided.

Seller's expenses

(2) The seller's right to withhold delivery under subsection 1 extends to any reasonable expenses in relation to the care and custody, transportation, and stoppage of the goods, and other incidental expenses incurred by him subsequent to the buyer's breach or insolvency.

Where seller agent or bailee

(3) The seller may exercise his right to withhold delivery notwithstanding that he is in possession of the goods as agent or bailee for the buyer.

Part delivery

(4) Where a seller has made part delivery of the goods, whether under an indivisible contract or under an instalment contract, he may withhold delivery of the remainder until payment of all amounts that are due unless the part delivery has been made under such circumstances as show an agreement to waive the right to withhold delivery.

Judgment no bar

(5) A seller who may withhold delivery or stop delivery under section 9.9 does not lose his right to do so by reason only that he has obtained judgment for the price of the goods.

Sources: SGA ss. 39(2), 40, 41(2): ULIS Art. 91; UNCITRAL Art. 60; new.

Seller's stoppage of delivery

9.9. -- (1) The seller may stop delivery of goods in the possession of a carrier or other bailee,

(a) if he discovers the buyer to be insolvent;

(b) if the buyer repudiates;

(c) if the buyer fails to make a payment due before delivery; or

(d) if for any other reason the seller has a right to withhold or reclaim the goods.

When right ceases

(2) The seller may stop delivery as against a buyer within the meaning of subsection 1 until,

(a) the buyer receives the goods;

(b) any bailee of the goods, except a carrier, acknowledges to the buyer that he holds the goods for the buyer;

(c) the course of transit of

goods in the possession of a carrier has ended; or

(d) a negotiable document of title relating to the goods has been negotiated to the buyer.

End of course of transit

(3) Where after the arrival of the goods at the appointed destination the carrier acknowledges to the buyer or his agent that he holds the goods on his behalf and continues in possession of them as bailee 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.

Effect of buyer's rejection

(4) Where the goods are rejected by the buyer and the carrier continues in possession of them, the transit shall be deemed not to be at an end even if the seller has refused to receive them back.

Carrier's refusal to deliver

(5) Where the carrier wrongfully refuses to deliver the goods to the buyer or his agent, the transit shall be deemed to be at an end.

Part delivery

(6) Where delivery of part of the goods has been made to the buyer or his agent, delivery of the remainder may be stopped unless delivery of the part has been made under such circumstances as show an agreement to give up possession of the whole of the goods.

Notification to bailee

(7) To stop delivery the seller must notify the bailee in sufficient time to enable the bailee by reasonable diligence to prevent delivery of the goods.

Bailee's duty to hold the goods

(8) After such notification the bailee shall hold and deliver the goods according to the directions of the seller, but the seller is liable to the bailee for any ensuing charges or damages.

Negotiable document of title

(9) Where a negotiable document of title has been issued for the goods, the bailee is not obliged to obey a notification to stop until surrender of

the document.

Non-negotiable bill of lading

(10) A carrier who has issued a non-negotiable bill of lading is not obliged to obey a notification, received from a person other than the consignor, to stop delivery of the goods.

Sources: SGA s. 43(3), (4), (6), (7); UCC 2-705.

Seller's right to resell

9.10. -- (1) Where the seller is entitled to cancel, he may resell the goods concerned or the undelivered balance thereof and, if the resale is made in a commercially reasonable time and manner, may recover the difference between the resale price and the contract price, less expenses saved in consequence of the buyer's breach.

Method of resale

(2) The resale may be by public or private sale and may include sale by way of one or more contracts to sell or by way of identification to an existing contract of the seller.

Sale must be commercially reasonable

(3) The sale may be as a unit or in parcels or at any time and place and on any terms, but every aspect of the sale including the method, manner, time, place and terms must be commercially reasonable.

Identification of resale to contract

(4) The resale must be reasonably identified as referring to the broken contract, but it is not necessary that the goods be in existence or that any or all of them have been identified to the contract before the breach.

Purchaser in good faith

(5) A purchaser who buys in good faith at a resale takes the goods free of any rights of the original buyer even though the seller fails to comply with one or more of the requirements of this section.

Seller not reselling properly

(6) If the seller does not resell in a commercially reasonable manner, he may not sue for damages under this section.

Seller not accountable for profit

(7) The seller is not accountable to the buyer for any profit made on a resale.

Sources: UCC 2-706(1), (2), (5), (6); new.

Seller's action for the price

9.11. -- (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 unless the buyer has rightfully rejected the goods;

(b) of conforming goods lost or damaged 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.

Anticipatory repudiation

(2) Where the buyer repudiates the contract before the seller has made delivery, section 8.8 and not subsection 1(a) shall govern the seller's rights.

Seller's obligation to hold goods

(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.

Meaning of delivery

(4) For the purposes of this section delivery takes place:

1. Where the contract requires or authorizes the seller to

ship the goods by carrier,

(a) unless it requires him to deliver at a particular destination, when the goods are delivered to the carrier even though the shipment is under reservation; but

(b) if it does require him to deliver them at a particular destination, when the goods are tendered at the destination so as to enable the buyer to take delivery; and

(c) if the seller is a merchant and the buyer is not a merchant, when the goods are tendered to the buyer at the destination.

2. Where the goods are held by a bailee other than the seller and are to be delivered without being moved,

(a) on the buyer's receipt of a negotiable document of title covering the goods;

(b) on acknowledgment by the bailee to the buyer of the buyer's right to possession of them; or

(c) on the buyer's receipt of a non-negotiable document of title or other written direction to deliver as provided in section 7.2(4)(b).

3. Where rules 1 and 2 do not apply, when the buyer receives the goods.

Sources: UCC 2-709(1)(part), (2); new.

Index of buyer's remedies

9.12. Where the seller breaches the contract, the buyer may,

(a) exercise his rights under section 8.1(1);

(b) maintain an action for damages;

(c) obtain specific performance;

(d) exercise his rights under section 9.16;

(e) cancel the contract;

(f) recover so much of the price as has been paid;

as provided in this Act.

Sources: UCC 2-711(1), (2); new.

Buyer's right to cancel

9.13. The buyer may cancel the contract and recover any portion of the purchase price paid where,

(a) he has a right to cancel under sections 7.7(3) or 8.10;

(b) the seller repudiates the contract under section 8.8(1); or

(c) subject to section 7.7(2), the buyer has rejected a non-conforming tender or delivery.

Sources: New.

Buyer's lien on rejected goods

9.14. On rightful rejection the buyer has a lien on goods in his possession or control for any payments made on their price and any expenses reasonably incurred in their inspection, receipt, transportation, care and custody, and may hold and resell them, and section 9.10 applies

mutatis mutandis.

Sources: UCC 2-711(3).

Buyer's claim for return of price

9.15. Any claim by the buyer for the return of the purchase price is subject to such reduction on account of any benefits derived by him from the use or possession of the goods as is just in the circumstances.

Sources: UNCITRAL Art. 55(2); new.

Buyer's procurement of substitute goods

9.16. -- (1) Where the buyer is entitled to cancel the contract, he may cover by making in a commercially reasonable time and manner any purchase of, or contract to purchase, goods in substitution for those due from the seller.

Measure of damages

(2) The buyer may recover from the seller as damages the difference between the cost of cover and the contract price, less expenses saved in consequence of the seller's breach.

Failure to cover

(3) Failure of the buyer to effect cover within this section does not bar him from any other remedy.

Sources: UCC 2-712.

Buyer's damages for breach respecting accepted goods

9.17. -- (1) Where there is a breach of contract by the seller and the buyer has accepted the goods, the buyer may,

(a) set up against the seller the breach of contract in diminution or extinction of the price; or

(b) maintain an action against the seller for damages for

breach of contract.

Measure of damages

(2) In the case of a breach of warranty such loss is prima facie the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted.

Right to maintain action

(3) The fact that the buyer has set up the breach of contract in diminution or extinction of the price does not prevent him from maintaining an action for the same breach of contract if he has suffered further damage.

Sources: SGA s. 51; UCC 2-714.

Right to damages

9.18. -- (1) Where the seller or buyer breaches the contract, the other party may maintain an action against him for damages.

Computation of damages

(2) The measure of damages is the estimated loss which the party in breach ought to have foreseen at the time of the contract as not unlikely to result from his breach of contract.

Mitigation of damages

(3) An aggrieved party must take reasonable steps to mitigate his damages.

Measure of damages

(4) Where at the agreed time for performance,

(a) the buyer wrongfully fails to accept and pay for the goods;

(b) the seller wrongfully fails to deliver the goods or the goods are rightfully rejected; or

(c) the buyer wrongfully rejects the goods,

the measure of damages is prima facie to be ascertained by the difference between the contract price and the price that could have been obtained by

a commercially reasonable disposition or purchase of the goods within or at a reasonable time and place after the aggrieved party learned of the breach, less any expenses saved in consequence of the breach.

Other cases

(5) Subsection 4 does not apply where,

(a) the measure of damages would be inadequate to put the seller in as good a position as performance by the buyer would have done;

(b) the seller has resold the goods as provided in section 9.10; or

(c) the buyer has bought substitutional goods as provided in section 9.16.

Incidental and consequential damages

(6) A seller's or buyer's claim for damages may include a claim for incidental or consequential damages.

Injury to person or damage to property

(7) The rules as to remoteness of damage in tort shall apply to consequential claims for injury to person or property.

Sources: SGA ss. 48, 49, 52; UCC 2-708, 2-710, 2-713, 2-715; new.

Discretionary awards for some breaches of warranty and of contract

9.19. -- (1) Where there is,

(a) a breach of contract by a non-merchant seller and it would be inequitable to award damages under section 9.18; or

(b) a breach of warranty not constituting a term of the contract of sale, whether the warranty was given by the seller or by a person referred to in subsection 8 of section 5.10,

the Court may in lieu of or in addition to any other remedy,

(i) grant rescission of the contract;

(ii) order a reduction in or return of the price of the goods;

(iii) award damages, including an amount to compensate for loss or liability incurred in reliance on the warranty or contractual undertaking; or

(iv) make an order involving any combination of the above remedies,

on such terms and conditions as it considers just.

Application of subs. 1

(2) In the exercise of its powers under subsection 1, the Court may take into consideration,

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

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

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

(d) any other relevant circumstance.

Sources: New.

Comment

In paragraph (a) of subsection (1), delete the word "inequitable" and replace it with the word "unfair".

See recommendation 9 at p. 59 of this Report and the discussion at p. 59.

Specific performance

9.20. -- (1) In any action for breach of a contract of sale, the court may direct that the contract be performed specifically, and may in connection therewith impose such terms and conditions as to damages, payment of the price, and otherwise, as seem just to the court.

Relevant factors

(2) In determining whether to make an order under subsection 1 at the suit of the buyer, the court shall take into account whether the buyer has,

(a) a special property in the goods under section 7.1; and

(b) paid the purchase price or a part thereof.

Sources: SGA s. 50; new.

Other causes of action

9.21. -- (1) Subject to subsection 2, the rights and remedies of an aggrieved party arising otherwise than in contract are not affected by the existence of a contract of sale unless the contract itself so provides.

Innocent misrepresentation

(2) Where an innocent but non-negligent misrepresentation is a warranty within the meaning of section 5.10, the aggrieved party is limited to the rights and remedies provided in this Act for breach of warranty.

Fraudulent misrepresentation

(3) The remedies available for fraudulent misrepresentation inducing the formation of a contract include a right to recover damages as provided in this Act for breach of warranty and, without prejudice to the generality of the foregoing, the aggrieved party does not have to elect between rescission of the contract and damages for breach of warranty.

Sources: UCC 2-720, 2-721; new.

PART X

MISCELLANEOUS

Transitional provision

10.1. This Act applies to contracts of sale and other transactions governed by this Act that are entered into on or after the day on which this Act comes into force.

Repeal

10.2. The Sale of Goods Act is repealed except for contracts of sale entered into before the day on which this Act comes into force.

Commencement

10.3. This Act comes into force on a day to be fixed by proclamation.

Short title

10.4. The short title of this Act is The Sale of Goods Act, 19 .