BIS | Department for Business Innovation & Skills

CONSUMER AND COMPETITION POLICY DIRECTORATE

Consolidation and Simplification of UK Consumer Law

NOVEMBER 2010

Consolidation and Simplification of UK Consumer Law

Editors
Professor Geraint Howells
Professor Christian Twigg-Flesner

Research Team:

Andrew Bell
Rick Canavan
Annette Nordhausen Scholes
Deborah Parry
Professor Chris Willett

Advisors:

Professor Hugh Beale
Professor Robert Bradgate

25/10/2010

1. EXECUTIVE SUMMARY

Introduction

1.1 This Report was commissioned because there was a belief that consumer contract law could be simplified, streamlined by separating out into a coherent package the legal provisions affecting consumers, and rationalised by adopting more appropriate terminology.

1.2 Our methodology was to divide our work into three parts covering (i) simplifying the substance of the law, (ii) streamlining the structure and separating the provisions, (iii) rationalising and simplifying the terminology. The format within each section is to first set out the current position, then to analyse the problems, before setting out the options for change and finally making recommendations. We have sought to canvass a range of options from maintaining the status quo, through reforms aimed at ameliorating the present system to a more fundamental "clean slate" approach. Account has been taken of solutions in other jurisdictions where this seemed appropriate as well as of the Draft Common Frame of Reference (DCFR) and the proposed Consumer Rights Directive (pCRD).

1.3 Our general conclusion is that consumer contract law would be improved if many of the provisions could be brought together in a single consumer contract law that so far as possible subjected all consumer supply contracts to the same rights and remedies. The rules should be informed by general principles reflecting the need for the contract to fulfil consumer reasonable expectations. Simpler modern terminology should be used that is suited to the consumer context and understandable to consumers.

Structure of the new law

1.4 In the next section we summarise our key findings on the issues we were asked to address. In this section we make some general comments about what this legislation might look like.

1.5 The first point to make is that these reforms are only one part of a package of consumer contract law reforms on the agenda at the moment. The Law Commission has already proposed reform to unfair terms law[1] and is looking into reform of misrepresentation and undue influence in the light of the Unfair Commercial Practices Directive.[2] The pCRD is, of course, still on the agenda and both the UK and EU are looking at digital services. Ideally one might foresee an omnibus consumer contract law; whether this is practically and politically feasible is, of course, a matter for government; but certainly the work on unfair terms and digital services is closely linked to the topics in this study.

1.6 Important questions also arise as to the link between this work and general sales law and general contract law. The latter is of course on the EU's agenda because of the DCFR. We foresee the present project as producing a free standing consumer contract law. This

[1] Law Commission, *Unfair Terms in Contracts* (Law Com 292 Scot Law Com 199, 2005).
[2] *A Private Right of Redress for Unfair Commercial Practices?* (Law Commission, 2008) and *Misrepresentation and Unfair Commercial Practices*.

would, of course, sit on top of the general contract law and should, so far as possible, use concepts and principles that are coherent with the general law of contract. Likewise it should adopt the concepts of the DFCR wherever possible. However, consumer law does have its own rationales distinct from general contract law. There are already distinctions between business-to-business (B2B) and business-to-consumer (B2C) sales law. This is an opportunity to simplify the law by only having the consumer provisions in the statute.

1.7 In part this is intended to make the law accessible to consumers, their lay advisers and lawyers who may not be specialists in consumer law. Our approach has been to simplify the rules both in content and concept and at the same time include as many of the rules in the law as possible to promote transparency and access. We think that there may be additional scope for using innovative drafting techniques – use of examples, guidance notes etc – to make the law more comprehensible to consumers and traders.

1.8 A further example of such a technique might be to include a series of underpinning principles at the start of the legislation. The content of these might well depend upon the exact scope of the legislation. Some might argue for the highest level principle to be that the rules should meet the consumer's legitimate expectation. This is a familiar concept in consumer law nowadays providing that consumers should have their expectations met so long as they are reasonable.[3] Common lawyers might doubt the value of such a general clause that begs the question of what is legitimate, but nevertheless it might be useful to signal this principle so long as it is concretised in the provisions of the law. Some of the other principles in the preamble might be an opportunity to express in non-legalistic language the fundamental rules found in the successive paragraphs.

Summary

Simplifying the substance of the law

1.9 This part:

1. *Explores differences between different supply transactions and considers the extent to which they necessitate separate legal provisions*. Currently three statutes govern consumer supply contacts – Sale of Goods Act 1979, (SoGA), Supply of Goods (Implied Terms) Act 1973 (SoG(IT)A) and Supply of Goods and Services Act 1982,(SGSA). This complicates the law, but for little gain as many of the statutes imply the same terms. There are differences in some issues, particularly as regards remedies but these are often arbitrary. The laws could be consolidated into one statute to make them more accessible and coherent with exceptions being rationally justified. The law would also be simplified if restricted to consumer supply contracts.

2. *Extension of implied terms/conformity with the contract requirement to all consumer transactions involving the supply of goods (irrespective of whether there is any contract).*

[3] H.Micklitz, "Principles of Justice and the Law of the European Union," Proceedings of the COST A 7 Seminar Hanasaari, Helsinki, Finland, October 17-19, 1994, University of Helsinki, Institute of International Economic Law, 1995, 259-298

1.10 Consumer rights regarding the quality and fitness of goods are provided by statute, but are implied as terms into the contract between consumer and trader. There are various supply transactions, ranging from the sale of goods to contracts of hire. In respect of all of these transactions, the law implies similar terms into the underlying contract.

1.11 The first is that the goods must correspond with their description, which relates to the essential characteristics of the goods. The second is the general standard that goods must be of satisfactory quality. This is a flexible test which is applied objectively and takes into account a range of factors specific to a particular contract, with common factors listed in the legislation. The third is that goods must be reasonably fit for any particular purpose which the consumer has made known to the seller, provided that it was not unreasonable for the consumer to rely on the seller in selecting the goods for that purpose.

1.12 However, because of the piecemeal development of the law, the implication of terms is not dealt with in one Act of Parliament, but spread across a number of different measures, each covering some types of supply transactions. In practical terms, this is not of great concern in so far as the terms implied by the various Acts essentially cover the same ground. However, the bases on which remedies for breach of these terms are available vary, depending on the type of transaction and the Act applicable to it.

1.13 The biggest concern with the current state is that whilst there is one single standard required of goods supplied to consumers, it has had to be included in separate measures to ensure that it is widely applicable. This has resulted in unnecessary fragmentation of the law. It seems preferable that there should be one Act which clearly states the legal requirement of any goods supplied to a consumer (whether as implied terms as is currently the case, or as a new statutory standard as we suggest elsewhere in this report).

1.14 Consolidation of the implied terms (or replacement with a new statutory standard) is unlikely to be controversial. It would simplify the law and make it more accessible. A good example for a successful consolidation is New Zealand's Consumer Guarantees Act 1993, as amended.

1.15 A further question to be considered is whether the opportunity should be taken to consider whether the implied terms need, and could, be extended to cover supply transactions which are not based on a contract between consumer and retailer. Such transactions include gifts, gratuitous supply transactions, and utilities.

Services

1.16 The current law of services liability includes both liability based on fault and liability determined on the basis on whether the expected outcome is achieved. The position varies depending upon whether it is a pure service or if there is also a supply of goods, with the outcome-based rule applying to some, but not necessarily all, instances where goods are also transferred. The legal position of some contracts is unclear as to whether they are treated as contracts of services or what implied terms will be implied.

1.17 The present law is too complex and uncertain. The fault standard can be problematic for consumers who may not feel they are obtaining value for money or that the law is

meeting their reasonable expectations. In particular there seems to be an unnecessary divergence from the strict liability standard adopted for goods, especially as many services are increasing standardised.

1.18 The law needs to be reformed, in a more fundamental manner than merely clarifying the standard under the different contracts. A clean slate approach is merited based on the DCFR and informed by Australasian legislation. An outcome standard should be adopted that requires service providers to achieve the stated result or one that could reasonably be expected along the model of the DCFR, with the addition, from New Zealand law, that this should also cover any product resulting form the service. This would simplify the law and be in line with reasonable consumer expectations, but suppliers would be protected by their ability to manage those expectations. There may be scope for sector specific exclusions or elaborations.

Remedies in relation to goods

1.19 The traditional English law approach is to allow rejection of goods failing to meet conditions (such as the implied quality terms) or to permit recovery of damages. Only the SoGA sets out a statutory scheme for remedies. The right to repair and replace are not provided for, but are often used on practice. European law has introduced a legal right to repair and replace as well as a right of rescission and price reduction, but currently does not provide for damages.

1.20 The current law is complicated because it treats the remedies for defective goods differently depending on the nature of the contract of supply in two distinct ways. First, in sales law the right is lost upon acceptance. Second, the additional remedies derived from European law do not apply to all transactions (i.e. not to hire and hire-purchase). In addition there are issues with the existing law that could usefully be clarified, especially as regards acceptance and what amounts to a lapse of a reasonable time.

1.21 Neither maintaining the status quo nor simply adopting the European remedies seems to be a viable way forward. Any solution would have to include the European remedies and the choice would then be between the sales or non-sale regime. Although it would mean restricting consumer rights (because of the acceptance rule), applying the sales regime to all supply contracts seems to be preferable, given that, in any event, the European remedies provide a long term right to reject; however the sales rules should themselves be modernised in order to remove uncertainties such as those surrounding the concept of acceptance. However, if feasible, it might be desirable to fashion a more systematic remedies regime as suggested in the DCFR. A coherent statement of remedies may make them more accessible to the lay public.

Remedies in Relation to Services

1.22 There is little statutory regulation of the remedies available for services. It will be desirable to place them on a statutory footing and to assimilate the remedies with the sale of goods as far as possible, although some remedies, such as the right of rescission, may be

problematic to provide for in relation to services. Again, placing the remedies within a systematic structure, as in the DCFR, may be desirable.

Streamlining the Structure and Separating the Provisions

1.23 This section starts with an analysis of the consumer supply legislation to identify those provisions common to B2B and B2C transactions, provisions specific to B2C transactions only and situations where the general rules are modified for consumers.

1.24 Consideration is then given to which aspects of the law should be included in a B2C law, leading to a discussion of the options for change. The “do nothing” approach is rejected, as this would leave the law in its present disjointed and confused state, as is the option of consolidating the provisions in a statute covering B2B, B2C and consumer-to-consumer (C2C) transactions as that would have many of the same problems found in the existing law and it would be more difficult to accommodate improvements to consumer law. The choice is then between introducing a measure for B2C contracts simply covering implied terms, consumer remedies and consumer guarantees (as is the case in Australia, New Zealand and some Canadian provinces) or one consolidating a broader range of issues covered in the existing legislation. The later is favoured and it is suggested that a clean slate approach using consumer friendly language might be adopted, but if that is too ambitious the existing measures could still be rationalized. The DCFR, whilst a source of inspiration is some respects, cannot be followed as there is no specific coverage of B2C contracts. Finally it is suggested that C2C rules should not be included as these are more similar to B2B rules.

Rationalising and Simplifying the Terminology

1.25 *Conditions and Warranties*: Key consumer rights are provided by implying terms into the contract between the trader and the consumer. In effect, therefore, consumer rights take effect as terms of the underlying contract.

1.26 The remedies for consumers depend on the type of contract term. In English law, a breach of any contract term will entitle the innocent party to claim damages. It is only permissible for the innocent party to terminate the contract if the term breached is classed as a “condition”. If the term is a “warranty”, the only remedy will be damages. Some terms are regarded as “innominate terms”, which means that the remedies available depend on the seriousness of the consequences of a breach of the term in question.

1.27 The SoGA implies several terms into a contract between a trader and a consumer. The main ones are that goods must correspond with their description (section 13(1)), be of satisfactory quality (section 14(2)) and be fit for any particular purpose made known to the seller (s.14(3)). All of these are classed by the Act as “conditions”, which means that a breach of one or more of those would entitle the consumer to terminate the contract and claim damages.

1.28 Whilst this position is reasonably easily understood by anyone with legal training, it is not particularly accessible to the average consumer. A consumer seeking to identify their legal rights might notice the implied terms in the SoGA, but will not understand the legal

technique used, nor that the remedial consequences are based on the common law rather than the Act itself. The law is therefore not as accessible and simple as it could be.

1.29 One possible approach might be to abandon the distinction between conditions and warranties altogether. This would make far too significant inroads into the common law of contract and is undesirable as well as unnecessary.

1.30 A preferred option for making consumer rights more accessible is to put them firmly on a statutory footing. Instead of implying rights into contracts and relying on contract-based remedies, consumers' rights would be enshrined in statute together with the remedies available to consumers if there is a breach. This would not be a change of substance but would make the law more comprehensible.

1.31 *Rules on the Passing of Property*: The passing of property (i.e., legal ownership) in goods is an important aspect of most supply transactions, especially contracts for the sale of goods. The only set of rules for the passing of property is found in the SoGA, and only applies to contracts within the scope of that Act.

1.32 The rules on the passing of property are based on the distinction between specific and unascertained goods. Goods are specific when they are identified and agreed on at the time of contracting, i.e., both parties know the precise items to be sold. Otherwise, goods are unascertained.

1.33 Subject to the proviso that there has to be an act of identification in the case of unascertained goods, property passes either when the parties intend, or in accordance with a number of default rules set out in the SoGA. These default rules have evolved out of mercantile dealings in the late Victorian era and are supplemented by detailed, and often complex, case-law, much of which is concerned with commercial dealings. Much of the terminology in these provisions seems ill-suited to consumer transactions, and a strong case can be made for streamlining these provisions: see the section on overclassification.

1.34 Especially since recent amendments have meant risk only passes to consumers on delivery, the rules on the passing of property rarely create cause for concern in consumer dealings. The main situation where the question of whether property has passed arises is where the seller has become insolvent, and the consumer has already paid for the goods but not yet taken delivery of them. In this situation, it matters whether property in the goods has already passed to the consumer. If it has not, the consumer is left as an unsecured creditor; if it has, the consumer can assert his proprietary claim against the retailer/administrator/liquidator and demand delivery of the goods. It should be noted that pre-payment is not a pre-condition to the passing of property under the default provisions of the SoGA, and property could pass without payment having been made.

1.35 The default provisions for the passing of property can therefore be simplified considerably. The number of default rules currently in place could be reduced, with one rule for specific goods and another for unascertained/generic goods. Some of the conditions in the default rules could be removed altogether as they no longer have any relevance in the context of consumer transactions (e.g., the requirement that goods have to be in a "deliverable state" before property can pass – this requirement only makes sense where the

passing of risk and property are linked, but in consumer transactions, risk now passes with delivery of the goods).

1.36 *Overclassification of goods*: The current Sale of Goods Act uses the terms “specific goods”, “ascertained goods”, “unascertained goods”, “existing goods” and “future goods”. These are relevant for the rules on perishing of goods, passing of property, delivery and specific performance. The importance of the terms on passing of property has reduced in the consumer context given that risk now passes on delivery. The rules on delivery and specific performance probably can be replaced in the consumer context. A new concept, possibly called “conclusive allocation,” might usefully be introduced to differentiate goods identified to the contract from those that have not yet been.

SUMMMARY OF RECOMMENDATIONS

1.37 An integrated new statute bringing together the provisions on the sale and supply of goods and services in one place should be adopted. This would remove current inconsistencies and overlaps and simplify the law, making it more accessible overall.

1.38 The implied terms regarding the quality of goods currently spread across three different statutes should be brought together in one place and apply whenever goods are supplied by a business to a consumer. At the same time, there should be a shift to a statutory standard, rather than continue reliance on the implied terms technique. This would also remove the current difficulties caused by the utilisation of conditions and warranties to determine the remedies available to consumers (ch.7). This would facilitate a clearer statement of consumers' remedies (see 1.40, below).

1.39 The current "reasonable care and skill" standard in respect of services should be replaced by an outcome-based standard. A service must either achieve a satisfactory outcome, or be reasonably fit to achieve the intended outcome. It would move from the current negligence-like standard to a stricter standard. This would not be a standard of absolute fitness, but rather one which would reflect the reasonable expectations of consumers. Such expectations can be shaped by appropriate communications between consumer and trader.

1.40 One consistent set of remedies for all supply of goods transactions should be adopted. Whilst this might result in an adjustment to the current level of consumer protection, the greater simplicity and clarity achieved by such a move would be more beneficial in that it will simplify the law and reduce costs. The remedial scheme currently applicable to sales should be adopted for all supply transactions.

1.41 There is a need to clarify the remedial scheme. Identified inconsistencies should be removed, and complex provisions (e.g., on acceptance) simplified. It would also be appropriate to provide a more comprehensive statement of remedies in a new consolidated statute. If the quality standard applicable to goods were to become a full statutory standard rather than the current implied terms approach, then all the remedies available to consumers could be included in the new consolidated statute.

1.42 With regard to remedies for services, it is also necessary to make these clearer and more accessible by incorporating them in the new consolidating statute.

1.43 Business-to-consumer contracts should be separated from business-to-business contracts. The new consolidating statute should be as comprehensive as possible and contain rules suitable for consumer transactions. To the extent that generally applicable

rules are retained (e.g., in the Sale of Goods Act), a clear reference should be included in the consolidating statute.

1.44 As part of the consolidation, the current complex rules on the passing of property could be greatly simplified. As well as using more accessible language (e.g., by replacing "property" with "ownership"), some of the current elements in the statutory rules (e.g., "deliverable state") could be removed altogether or their operation in the consumer context clarified (e.g., in respect of "unconditional appropriation"). Also, the number of default rules could be reduced significantly.

1.45 Although the focus of this report is primarily on English law, the conclusions reached are equally applicable to Scottish law. Indeed, greater simplification of the law would be achieved by moving to statutory quality standards and remedies, rather than continuing to use existing approaches which result in unnecessary differences between contracts under English and Scottish law respectively.

2. DIFFERENCES BETWEEN SUPPLY TRANSACTIONS

Current law

2.1 This chapter will explore the differences between different supply transactions, and will examine the extent to which they require separate legal provisions.
There are several different types of transactions under which goods are supplied to consumers. Currently, they are dealt with in separate pieces of legislation which imply terms as to title, description, quality and fitness and correspondence with sample into each type of contract. For England and Wales, the relevant legislation is:

Sales:	Sale of Goods Act 1979, sections12-15.
Hire purchase:	Supply of Goods (Implied Terms) Act 1973, sections 8-11.
Barter and work and materials:[4]	Supply of Goods and Services Act 1982, sections 1-5.
Hire:	Supply of Goods and Services Act 1982, sections 6-10.

2.2 The differences between the forms of supply have become less legally significant since the enactment of the SoG(IT)Act and the SGSA. The implied terms are very similar and the principal question is whether the current scattered legislation could be replaced with a single instrument containing a single set of implied terms applicable to all contracts for the supply of goods (with possibly a few variations for particular contracts if necessary). In the context of this report, the primary concern is with supply to consumers, but the arguments apply to B2B and C2C contracts also.

2.3 Various statutory amendments, such as the Sale and Supply of Goods Act 1994 and the Sale and Supply of Goods to Consumers Regulations 2002 treat sales and other types of transactions for the most part in very similar terms. The major differences relate to remedies. Sales law has a distinctive remedies regime and the European rules on non-conformity have not been applied to hire and hire purchase.

Sale, credit sale and conditional sales are governed by the SoGA

2.4 Contracts for the sale of goods are in many ways the paradigm contract under which property in goods is transferred. There are various features of the sale transaction that distinguish it from other types of transactions in which goods are supplied i.e. the commitment to transfer property and money consideration.

2.5 For a sale of goods the seller must transfer or agree to transfer the property. A “credit sale” is a straightforward sale with the buyer simply being given time to pay, whereas under a “conditional sale” the property is transferred at a future date. It remains a sale, however, as there is a commitment for property to be transferred at a future date. This commitment to

[4] SGSA ss.1-5 apply to contracts under which the property in the goods is to be transferred, other than contracts of sale or hire purchase.

transfer property prevents hire purchase being a sale of goods contract as under hire purchase it is necessary for the buyer to exercise the option to purchase even if that is a formality. However, for some purposes conditional sales are treated like hire purchase.

Barter and exchange

2.6 As sale of goods contracts require a money consideration this excludes contracts of barter and exchange. Difficult contractual analysis can be required in part-exchange transactions to determine whether traded-in goods are a sale of goods. This would seem to depend upon whether a price had been attached to the traded in goods or possibly if one could be readily ascertained.[5]

Work and materials

2.7 Sale of goods contracts must be distinguished from work and materials contracts, the latter being covered by the SGSA. Various tests have been used to distinguish between the two types of contract. At one time the approach was to treat as sales any contract under which property in goods is transferred to a consumer, but recently the distinction between the two types of contracts has been drawn on the question of "substance".[6] If the substance of a contract is work and skill of the provider, it is a work and materials contract, if the substance or main objective of the contract is the supply of goods, it is a contract for the sale of goods. The law is uncertain and arbitrary.

Hire and bailment

2.8 Where goods are bailed for hire there is a contract of hire governed by the SGSA. The delivery of goods on "sale or return" is also a bailment (as well as a contract of sale), giving the potential purchaser an option to buy the goods (or perhaps part of them) or to return the goods, but no *obligation* to buy the goods. If a quantity of goods is delivered on sale or return,[7] the bailor retains property in the goods and the bailee has to return the goods according to the agreement unless the bailee decides to buy the goods, in which case (and at which time) the contract becomes one of sale.

Hire Purchase

2.9 Hire purchase contracts and credit or conditional sale contracts are often difficult for consumers to distinguish. Legally, however, a hire purchase is a bailment unless and until the purchase option is exercised. They are regulated by the SG(IT)A.

The Problem of Classifying Transactions

2.10 On the face of it, three statutes that relate to several types of transactions may not seem to present any difficulties. However, not only does it result in significant and needless duplication in the law, it also means that a consumer seeking to identify his legal rights will

[5] *Aldridge v Johnson* [1974] IR 101, *Bull v Parker*, (1842) 2 Dowling N.S. 345.
[6] *Robinson v Graves* [1935] 1 KB 545.
[7] *Atari Corporation (UK) Ltd v Electronics Boutique Stores (UK) Ltd* [1998] QB 539.

first have to work out how the transaction he has entered would be classified – a complex and technical issue few consumers will be able to undertake.

2.11 In the majority of dealings, this will not be a practical problem - the obligations are ultimately the same (as we will show) and so if the customer can demonstrate to the seller that they have not been fulfilled a remedy will be forthcoming. However, if this informal dispute resolution fails, as it does in a small number of cases, and the consumer resorts to legal action, failure properly to classify the transaction may slow the progress of that claim or could, in principle, make it difficult to proceed at all. Furthermore, as the implied terms are the same no matter what statute applies to the transaction, this serves only to place an unnecessary obstacle between the consumer and their remedy.

2.12 As we have observed, classifying a transaction is not generally problematic. The SoGA defines a contract for sale (the most common) in some detail[8] but ultimately as it would be understood by the ordinary consumer. Similarly, the idea of a contract for hire is a clear and well defined one comprehended without difficulty by consumers. However, some transactions are more problematic and this differentiation may be a hindrance to effective consumer protection.

Contract for work and materials and contract for sale

2.13 "Pure" contracts for the sale of goods can be identified with relative ease, but this is not always the case where there is an obligation on the seller to perform some kind of service with the goods. For example, if an optician agrees to make and supply a pair of glasses is this a contract for sale or a contract for work and materials? Terms are implied into a contract for work and materials by the SGSA, not the SoGA. Drawing the distinction between the two is not straightforward and can cause unnecessary difficulty at times.

2.14 Differentiating between the contracts is made no easier by the case law. In *Lee v Griffin*,[9] a contract for a denture made for a customer was held to be a sale of goods not a contract for work and materials, despite the skill involved in making the denture. The fact that, ultimately, goods were supplied meant this should be regarded as a contract for the sale of goods. By contrast, a contract to print a book for a customer was held to be a contract for work and materials – the printing of the book and the supply of the paper, bindings, etc.[10] Here, the emphasis is on the substance on the contract, not the finished product. The Court of Appeal in *Robinson v Graves*[11] appeared to favour a test centring on the substance of the contract, holding that where the production of the goods is ancillary there is a contract for work and materials and not for goods.

2.15 The distinction is a difficult one to understand. In *Robinson v Graves* an artist was paid to paint a portrait, the difference between claiming that this is a contract to paint a portrait and to sell the canvas and claiming that it is a sale for a finished portrait on canvas is a very fine one.

[8] S.2.
[9] (1861) 1 B&S 272
[10] *Clay v Yates* (1856) 1 H&N 73.
[11] [1935] 1 KB 579.

2.16 The test adopted still leaves many difficult cases. Often neither element is obviously dominant and it could be argued that either element is more important or dominant than the other. Consider a contract to tailor a suit. The tailor uses his skill in measuring the customer, making up patterns and then in cutting and sewing the fabric and modifying and fitting it to the customer. The value of the work done might vastly exceed the cost of the fabric, etc. but the contract is still very much about the sale of a suit. In what proportion the two elements need to be present is simply never clear. If this distinction has any place at all (it could easily be removed), it must be clarified.

2.17 Very often contracts for work done in the home (building works, plumbing and electrical work, for example), often at significant cost, are contracts for work and materials. Given how frequently disputes arise out of work of this kind, consumers ought to be able to expect the law to be able to deal more readily with disputes that arise in these circumstances. The ambiguity in respect of classification is an obstacle to easy redress. Such ambiguity is not desirable, especially when the onus is on the consumer to resolve it.

Contracts for conditional sale and hire purchase

2.18 Conditional sale and hire purchase are often used when buying high value items. They represent another example where ostensibly similar transactions are legally very different. Hire purchase is a contract regulated by the SoG(IT)A, conditional sale by the SoGA. The model of both contract forms is the same – the purchase price is paid over a period of time agreed between the parties. While not a legal requirement, payments are usually fixed (rather than variable). However, legally, the transactions differ. The conditional sale involves an intention that ownership of the goods will pass at the time the contract is made, whereas the hire purchase contract is intended as a rental of the goods for a period of time with the option to purchase at the end of that period.

2.19 Generally, under a hire purchase sale, the periodic rental payments are calculated by reference to the total price of the goods divided by the period over which payments will be made - exactly the same formula usually used in a conditional sale. Hire purchase and conditional sale tend to be used when purchasing high value goods and it is not possible to determine which contract is being used by reference to the goods being bought. A seller might allow the consumer to buy the same goods either on a conditional sale basis or on hire purchase terms. Context therefore is often of no help. The only way to determine what type of contract is being entered into is by looking at the way in which the contract is drafted. The language in which this can be expressed is often complex (and can be ambiguous) and will be found in an agreement of some length and complexity, using specialist legal terminology. The reality, therefore, is that distinguishing between the two transactions is likely to be difficult for consumers.

2.20 If we consider a consumer purchasing a new car we can see the problem in context. The vast majority of manufacturers, through their dealer networks, offer a range of options for financing a new car purchase. A consumer can either pay outright for the vehicle, essentially hire the vehicle under an agreement whereby the seller agrees to maintain the vehicle, pay road fund licence, etc. or choose from a range of periodic payment options. There are four general models for this. The first and least common is the two payment model: either two payments of 50% of the cost of the car are made, one at the time the

contract is made or shortly afterwards and a second at a fixed point in the future, usually after three years. Interest may be payable but, in light of the size of the deposit being paid, often it is not. This is an example of a conditional sale, a transaction which falls under the SoGA.

2.21 The second model is the where the total cost of the car is spread over an agreed period, usually no more than five years with a deposit (usually a minimum deposit is required) being paid when the contract is made. These monthly payments are usually subject to interest. At the end of the agreement, the car is usually paid for in full and monthly payments are structured to ensure this. Where this is the case, this will also be a conditional sale – property in the goods is intended to pass but only when the goods are fully paid for. This contract would fall under the SoGA. However, it may be that to make monthly payments lower, the customer agrees to defer an amount owed and make a final 'balloon payment' if they wish to own the car. This makes this contract very similar to the third model and governed by the SoG(IT) A

2.22 The third model involves making payments based upon the difference between the new price of the car and its value after, say, three years. The consumer is usually obliged to make a deposit payment and will then make monthly payments for 3-5 years. At the end of this period they can either hand back the car and make no further payments or make a final 'balloon payment' (the future value of the car as agreed at the outset) and keep the car. This model can also be varied so that just a deposit and second optional payment is made after 3-5 years. At the outset, there is no absolute intention to that property will be transferred, although if the buyer wishes to own the car outright at the end of the repayment period they have the option to do so – this would mean the agreement was a contract for hire purchase.

2.23 In reality, the most apparent distinction is in the amount that is to be paid and when. However, as we have seen any model where the final payment is optional is essentially a contract for hire purchase; the seller is not transferring ownership in the goods but allowing use of them for a fee with an option to purchase later. Where there is no optional final payment this suggests an intention to transfer ownership from the outside and is a contract for conditional sale.

2.24 The distinction is a subtle one made more difficult to appreciate when month to month, the consumer might well pay exactly the same sum for the car whichever option they choose and the way the finance agreement is "packaged" will not necessarily indicate the legal "structure" of it. Product names such as "Options"[12] and "Agility"[13] do little more than hint at a degree of flexibility but indicate little of substance in fact adding a layer of complexity. The legal distinctions, already difficult to see, become totally lost despite being very important in the legislation – the two transactions are regulated by different Acts, the SoGA to the conditional sale, the SoG(IT)A to the hire purchase.

2.25 Under a fourth model where the two payment model is used and the second payment is optional the distinction is even more difficult. This is likely to be a contract for hire purchase with the "hire" being paid for by the first payment and the purchase being made by the

[12] A product offered by the Ford Motor Company.
[13] A product offered by Mercedes-Benz.

second but because it differs from the traditional periodic payment model this may not be clear.

2.26 We can see that the distinctions between transactions can be minimal on the face of it yet still different law will apply. Often the transaction itself is structured and packaged in such a way as to obscure its true nature which adds an additional layer of complexity. The complexity that arises from having three statutes each applying to a fixed range of transactions could easily be remedied.

Sale and Barter

2.27 In the motor trade we also see occasional examples of contracts for exchange and barter. These are very rare.[14] Unlike a sale, no money changes hands and goods are essentially swapped - the parties do not explicitly put a cash value on the goods but ownership is still transferred. The matter is probably most relevant in part-exchanges to determine whether the car traded in is a sale or barter. If the cash value of the goods is considered, even if no money changes hands (because the cash value of the goods is the same) this would be a sale. The distinction then hinges on whether the cash value of goods is overtly considered or not. Given as some nominal value must be placed on the goods, the distinction is a very fine one indeed.

2.28 Because a contract for exchange or barter it is not a sale, many consumers might instinctively believe that they are not protected at all; however, they are protected by terms implied by the SGSA.[15] Even if a consumer were aware that they had rights in this transaction, its unusual nature and similarity to a sale would be likely to make it difficult to discover the source of those rights and so make use of them.

2.29 While in most transactions classification is not problematic, there are clear borderline cases where it can be a difficult and unpredictable process. This will often only reach the courts in commercial dealings, but there are clearly a number of common consumer transactions, many of which are often high-value, where it is possible that misclassification would occur thus making it more difficult than it needs to be to obtain a remedy. It is particularly frustrating for this to be case when the outcome of the classification exercise is essentially irrelevant as the statute that it will lead to will contain substantially identical implied terms no matter under what type of contract the goods are supplied.

Gratuitous and other non-Contractual Supplies

2.30 It might be thought that sale and gift are easily distinguishable. If a gift is purely gratuitous there would be no contract and none of the above legislation would apply. An

[14] Although in 2003 a case of a contract for exchange in the motor trade did come before the House of Lords (*Lex Service plc v HM Commissioners of Customs and Excise* [2003] UKHL 67). Goods purchased using reward or loyalty points may also be contracts for exchange or barter.
[15] S.1(1).

unsolicited delivery of goods, with or without a request for payment, is under the Consumer Protection (Distance Selling) Regulations 2000,[16] treated as a gift.

2.31 The distinction between sales and gifts becomes relevant in commercial transactions including a "free" gift. In these transactions the gift can be seen as part of a wider contract (usually a sale). Depending on how the contract is construed, the free gift might be viewed as part of the sale contract or in any event would be covered by the SGSA. In other transactions, there may be a "free" supply of goods or services, however no transfer of property, i.e. in cases where a garage supplies a courtesy car while the customer's car is in repair. Assuming again this is viewed as part of the wider contract this would be a hire contract covered by the SGSA.

2.32 Equally supplies under statutory schemes, such as prescription drugs, are not contracts and hence not covered by the legislation.

Services

2.33 Where no goods are to be transferred and the consumer contract is simply to carry out a service then there will be a contract for the supply of a service regulated by the SGSA.

Problems

2.34 The existing differentiation and distinction of different types of contracts is either partially irrelevant (due to subsequent changes in legislation) or creates unnecessary complexity and is often arbitrary. In *Young & Marten Ltd v McManus Childs Ltd.*[17] the House of Lords expressed strong views about the undesirability of drawing unnecessary distinctions between different classes of contract and treated a contract for work and material like a sale with regard to implied terms. The emphasis should be a simplification of domestic law.

2.35 The need to allocate contacts to one piece of legislation or another has required fine distinctions being drawn between contracts, as exemplified by the work and materials/sale of goods distinction. This has generated litigation and debate far beyond the practical significance of the question, especially now there is legislation analogous to the SoGA for other supply transactions.

2.36 As far as the implied terms as to correspondence with description or sample and quality or fitness are concerned, the provisions applicable to the five types of contract are identical in substance, and the wording is in large measure identical. There are however some confusing discrepancies in their presentation. For example, the equivalent of SoGA section 14(2)(B) in the SGSA 1982 is not in the fitness section but in the interpretation section, section 18.

2.37 There is no difference, incidentally, in the time at or for which the goods must conform to the contract. One might have expected goods that are hired for a short period to have to

[16] S.I. 2000/2334, reg.24.
[17] [1969] 1 AC 454 ; this has been recently applied by *Rutherford v Seymour Pierce Ltd* [2010] EWHC 375 (QB) and before by *Greater Glasgow Health Board v Keppie Henderson & Partners*, 1988 SC 109; 1989 SLT 387.

remain of satisfactory quality throughout the period of hire, but this is not a legal requirement so long as they were when first hired.

2.38 Regarding the duty to pass title, there are slight differences between the different transactions. The provisions applicable to the contracts under which property in the goods is to be transferred (sale, hire purchase, barter, work and material) are identical in substance: the supplier must have the right to transfer the goods (if the contract is for immediate transfer of property in the goods, at the time the contract is made; if it is for a transfer of property in the goods at a later stage, at that time). In contrast, as one might expect, when the contract is for hire, the hirer will not expect to acquire ownership, and under section 7 of the SGSA the bailor is only obliged to transfer possession. This slight difference could easily be maintained within a combined new instrument.

2.39 Another issue is restrictions on contracting out. Each of the Acts provides that the implied terms will be disapplied by an express term only if the latter is inconsistent with the implied term. The parties are expressly permitted[18] to vary their rights and obligations, subject to the Unfair Contract Terms Act 1977. The UCTA deals with sale and hire purchase in section 6 and other contracts for the supply of goods in section 7. The two sections are almost mirror-images and there would be no difficulty in combining them so as to have a single section dealing with all types of contracts for the supply of goods.

Options for Change

(a) Do nothing

2.40 One possible option to be considered is the option to do nothing and leave the current system unchanged. Although the problems listed above may not be the most fundamental, this option would not solve the current problems characterised by the complexity of the legislative framework. This is particularly important in the consumer context where consumers may not have ready access to lawyers familiar with this area of law.

(b) DCFR Approach

2.41 The DCFR provides a possible way forward for a legislative solution. Book IV of the DCFR contains rules on specific contracts and the rights and obligations arising from them. It deals in its different parts with sales,[19] leases of goods,[20] the provision of services,[21] mandate,[22] commercial agency, franchise and distributorship,[23] loans,[24] and personal security.[25] In this, the DCFR distinguishes the different contracts generally and in some cases clarifies the classification by explicit inclusion of certain contracts into the definitions.
2.42 Consumer contracts are distinguished where necessary[26] and defined[27] as “a contract for sale in which the seller is a business and the buyer is a consumer”. Other types of

[18] Other than the SoG(IT)A.
[19] Part A.
[20] Part B.
[21] Part C.
[22] Part D.
[23] Part E.
[24] Part F.
[25] Part G.
[26] I.e. IV A, chapter 6 on consumer goods guarantees.

consumer contracts are defined in a similar way.[28] These definitions and inclusions follow the requirement of existing EU consumer protection legislation and therefore would not create any substantive change.

2.43 This is of course part of a broader integrated contract law framework under which remedies are dealt with in other sections.

Advantages

2.44 By bringing all the provisions together in one chapter the law is more transparent than if they are split amongst several statutes. They have all been treated in a coherent and consistent manner so far as this is consistent with legislative policy.

Disadvantages

2.45 Complexity remains in that consumers have to identify which category their contract falls into to differentiate the consumer from the non-consumer provisions and to relate it to other sections dealing with matters such as remedies.

Clean slate consumer statute

2.47 One could envisage a single statute governing all consumer contracts for supply. This would only include consumer rules and would, to the extent desirable, apply the same or similar rules to all contracts.

Advantages

2.48 Consumers would only have to look in one place. The substance and wording could be drafted in the light of it being intended to protect and to be used by consumers. Unless expressly highlighted they would not have to be concerned with the classification of their contract. Requirements of EU consumer law could be met without affecting general sales law. The substance of the existing law need only be changed to the limited extent that this was considered necessary for coherency or in order to improve its quality.

Disadvantages

2.49 There are few risks to consumer protection in this approach as the substance of the existing law need only be changed to the limited extent that this was considered necessary for coherency or in order to improve its quality. There will, of course, be a need to be clear about any exceptions to the general rules for particular forms of supply. The major risks are for those who are concerned about consumer sales law being separated from general sales law and general contract law.

[27] IV A – 1.204.
[28] I.e. IV B – 1.102 for the lease of goods.

Recommendation

2.50 An integrated consumer supply contract law should be adopted. This is the best way to ensure that rules geared to the consumers needs are brought together in a format that is accessible to consumers.

3. EXTENSION OF IMPLIED TERMS/CONDITIONS AND WARRANTIES

Current law

Nature of current rights

3.1 When consumers enter into a contract to acquire or rent goods in the UK they enjoy the benefit of a number of statutory rights which ensure, amongst other things, that goods reach a minimum standard of quality and provide that where they do not, the buyer has rights against the seller. These statutory rights ("the quality terms") are "implied" – i.e., "added in" – into the contract between consumer and supplier. This means that when goods fall short of that standard, the consumer does not frame their claim as a "breach of the Sale of Goods Act," *per se* but must argue that there is a breach in the contract the buyer has with the supplier.

3.2 However, it also means that there must be a contract and where there is not, for example when free gifts are given, consumers cannot rely on these statutes and must make do with more complex, less accessible legal remedies instead, despite the fact that if the goods had been sold to them they would have been protected.

3.3 The rights that consumers do have are not found in just one statute. Different statutes apply to different types of transactions and while the implied terms are essentially the same, the remedies for breach differ (see chapter 5) and this fragmentation means the consumer must determine what type of transaction they are party to, a process that can be surprisingly difficult (see chapter 2).

3.4 The law as it stands, therefore, is fragmented and consumer rights are inconsistent. In this section we will explore this problem and consider whether a single, uniform standard for all goods, that is, one not linked to an underlying contract, would be beneficial.

Contracts into which Quality Terms are Implied

Contracts for the Sale of Goods

3.5 Sections 12-15 of the SoGA imply terms into contract for the sale of goods. The SoGA therefore governs the majority of consumer dealings in goods or contracts for goods and services where the goods element is the dominant one.[29] The difficulty is that it is necessary to first ascertain that the transaction is a true sale of goods before a claim can be made. In brief, the SoGA implied terms set out that the seller must have the right to sell the goods (section 12), that the seller must transfer goods that conform with any description of them given (section 13), that the goods must be of satisfactory quality including being fit for all common purposes for which goods of that type or usually supplied (section 14(2)), that the goods must be fit the purpose specified for them by the buyer (section 14(3)) and that where the goods are sold by sample they must conform to that sample (section 15).

[29] *Robinson v Graves* [1935] 1 KB 579, *per* Greer, L.J., at 587.

Other Contracts under which Consumers Acquire an Interest in Goods

3.6 Outside of the SoGA, two further statutes, the SGSA and SoG(IT)A imply terms into all other kinds of contracts under which consumers acquire an interest in goods. As with the SoGA, the SGSA and SoG(IT)A provide that the seller must have the right to transfer the interest in the goods that is being transferred, for example the right to possession under a contract of hire, that the goods will be of a satisfactory quality, conform to the description given of them and conform to any sample of them given.

Hire Purchase

3.7 Sections 8-11 of the SoG(IT)A, implies terms as to the quality, etc. of goods into contracts for goods sold on hire purchase. The distinction between a contract for sale and hire purchase is a legal one based on whether there is an obligation to transfer property and the distinction is often not appreciated by consumers, however, the SoG(IT)A contains equivalent provisions to those in the SoGA.

Contract for Exchange and Barter and Work and Materials

3.8 The SGSA[30] implies terms as to the quality of goods into contracts not covered by either the SoGA or the SoG(IT)A. Consequently, it implies terms into contracts for exchange and barter[31] and contracts for the hire of goods.[32] The result is that in respect of non-sale transactions, the law also has a very broad scope encompassing a very wide range of transactions.

Where Quality Terms are not implied

3.9 The law as we have seen relies on implying terms into an underlying contract between buyer and seller/supplier. Where there is no contract therefore the consumer is not protected in the same way. This includes non-contractual supply agreements such as instances of 'gratuitous supply', for example a garage lending a client a replacement car.

Content of the obligations

3.10 Irrespective of the statute a transaction falls under, the level of protection – the standard that the goods supplied must reach – does not change. We will demonstrate this by comparing the implied conditions from across the statutes. Across the statutes where the seller or supplier fails to meet their obligations under the contract, the buyer will have the right to rescind the contract, reject the goods and claim for damages (see chapter 5 on remedies).[33] When selling to a consumer[34] these implied terms cannot be excluded from the contract.[35]

[30] S.1(1).
[31] Ss.1-5. A contract of exchange or barter is one where goods are essentially "swapped" or traded for other good with no overt consideration as to their relative monetary value.
[32] Ss.6-10.
[33] As it is classified as a condition by s.13(1A).
[34] "Dealing as a consumer" is defined generously and will include a commercial buyer purchasing goods that do not relate directly to the business which they carry and which are purchased only infrequently (section 12 UCTA;

The Seller/Supplier must have the right to sell the goods

3.11 The basic function of the contract of sale or supply is to pass ownership in goods. Section 12(1)[36] of the SoGA therefore obliges the seller to sell only goods they have the right to sell and which are not affected by the rights of other parties. This section of the SoGA in fact contains three obligations: the right to sell and that the goods are free of any undisclosed charge or encumbrance and the buyer will enjoy quiet possession.

3.12 The most important of the three[37] is that the seller must have the right to sell the goods, either when the contract is made if the intention is to pass property in the goods immediately, or at the point in the future if property does not pass immediately.[38] While it might seem to require that the seller owns the goods at the time the contract is made that is not entirely accurate.

3.13 The right to sell, for the purposes of section 12(1) goes beyond this. The seller must have the right to sell the goods in the sense that they cannot have been stolen or have been taken unlawfully from someone else[39] but the seller will also breach this condition if the goods cannot lawfully be sold, for example because they are prevented from doing so by an injunction.[40]

3.14 The principle set out in section 12(1) is replicated verbatim in the SoG(IT)A and SGSA with no changes to the substance at all and only minor differences in expression that simply make the sections applicable to the transactions dealt with by those statutes.

3.15 The provisions in section 8 of the SoG(IT)A requires that the seller only has the right to sell the goods at the time property is to pass. It does not require that the seller has the right to sell the goods at the time the contract is made. The SoG(IT)A, applying only to contracts for hire purchase, only requires this provision because at the time the contract for hire purchase is made there is no intention to transfer property; this only occurs if the option to own the goods is exercised at the end of the period of rental and so it is only at this point that it is a relevant concern. Aside from this, the provisions are identical.

---

see *R&B Customs Brokers* v *United Dominion Trust Finance Ltd.* [1988] 1 All ER 847 and *Feldarol Foundry Plc v Hermes Leasing (London) Ltd.* [2004] EWCA Civ 747).

[35] UCTA s.6(3).

[36] Ss.12(2)(a) and 12(2)(b) imply terms classified as warranties and so are of lesser importance and will not be considered here.

[37] S.12(1).

[38] This is a largely practical measure to cover contracts where, for example, the seller will go and purchase the goods after the customer has ordered them. Without this measure, the seller would immediately be in breach of the contract.

[39] This is subject to the exception to the *nemo dat* rule set out in the SoGA (ss. 23-26) which can, under limited circumstances, allow the innocent buyer of goods which the seller did not have the right to sell to nonetheless get a good title to those goods i.e. lawfully keep them and be regarded as owning them. However, this is never the case when the goods have been stolen (*per National Employers Mutual General Insurance Association Ltd. v Jones* [1990] 1 AC 24, [1988] 2 All ER 425).

[40] In *Niblett v Confectioners' Materials Ltd.* [1921] 3 KB 387, Nestlé had obtained an injunction to prevent the sale of condensed milk branded "Nissly" because the name Nissly was so similar to the name Nestlé that it was likely a consumer would believe it was in a fact Nestlé product when it was not.

3.16 Section 2(1) of the SGSA sets out that the 'transferor' (rather than the seller) of goods must have the right to 'transfer' (rather than sell) the property in those goods. Aside from these changes the provisions are identical and differ only because the SGSA is concerned not with sales but with a wide range of transactions under which different property interests pass. As we can see, however, in substance there is no difference at all between the provisions and they could be readily combined. We can already see from the example in the SGSA (transferor/transfer) that a form of words suitable for a range of transactions can easily be devised to take account of the different property interests that are passed by different contracts.

Goods must comply with any description given of them

3.17 Section 13 of the SoGA implies into the contract of sale a condition that where the sale is by description, the goods must conform to that description.[41] Description takes on a very narrow meaning here, referring to only to the commercial characteristics of the goods, not statements made about them by the seller or manufacturer or even aspects of the specification of the goods.[42] This is at odds with the European position where Directive 99/44/EC provides that "description" includes, "the description given by the seller,"[43] and so encompasses a far wider range of characteristics.[44]

3.18 In the SGSA[45] and SoG(IT)A[46] we see identical provisions in respect of non-sale transactions. The language, and therefore the meaning of the provisions, is identical across all the three pieces of legislation.

3.19 The use of identical terms across the statutes allows the courts to use case law, for example from cases brought under the SoGA, when considering disputes, for example, under the SGSA. This also further ensures that the standard applicable to goods is and remains the same, however they are supplied. This also suggests that if the provisions were to be combined this would present no difficulties.

Goods Must be of Satisfactory Quality

3.20 Section 14 of the SoGA establishes the statutory standard regarding the quality of goods and so forms the basis for the majority of claims for defective or inadequate goods. Section 14, like section 13 is a term (classified as a condition) implied into the contract of sale by the SoGA. It applies to sales only where the seller sells "in the course of a business". Any disposition by a business of any kind, whether or not it falls within their usual

[41] Whilst not an issue for discussion here, it is worth noting that while any sale can be a sale by description (*Grant v Australia Knitting Mills* [1936] AC 85) in this context, description means only the commercial characteristics of the goods as opposed to any claims made by or about the goods or their properties for example by a retailer or manufacturer (*Per* Lord Diplock in *Ashington Piggeries Ltd. v Christopher Hill Ltd.* [1972] AC 441 at 503) meaning that this section is often of minimal use to consumers. It can only be relied upon in any case where the description is influential on the sale i.e. the knowledge of the seller was greater than that of the buyer (*Harlingdon & Leinster Ltd. v Christopher Hull Fine Art Ltd.* [1990] 1 All ER 737).
[42] *Ashington Piggeries Ltd. v Christopher Hill Ltd.*, [*1972*] AC 441, [1971] 1 All ER 847.
[43] Art. 2(2)(a).
[44] This is also the definition adopted by the DCFR as we will see in due course.
[45] Ss.3, 8, 11C, 11I.
[46] S.9.

dealings is regarded as being, "in the course of a business".[47] Furthermore, when dealing with a consumer buyer,[48] it is not possible to exclude this section[49] and so in respect of consumer sales of goods, this standard is universally applicable.

3.21 Section 14 is composed of a number strands. Section 14(2) provides that goods must be of satisfactory quality. The test for ascertaining whether or not goods are of satisfactory quality is to ask if they would, "reach the standard that a reasonable person would regard as satisfactory, taking into account any description of the goods, the price (if relevant) and all other relevant circumstances."[50]

3.22 Sections 14(2A)-(2F) then set out a non-exhaustive list of the factors which are relevant in determining whether the goods in question reach this standard, including the durability of the goods, their freedom from minor defects, their safety, etc. The list of factors is not exhaustive and can be added to. Similarly not all criteria need to be considered in every case. The test therefore is very flexible and can readily apply to goods of all kinds: new or used, high value and low value, etc.

3.23 For consumers only, section 14 also provides protection against misleading public statements made about goods by both sellers and manufacturers, including statements made in advertisements or on the packaging of the goods.[51] Where inaccurate statements are made about the "specific characteristics" of goods by their producer or seller, this may also make the goods unsatisfactory and give the consumer the right to reject them.

3.24 The consumer is protected whether they purchase a car or a second hand book. What the implied terms provide for is an acknowledgement that the standard, whilst expressed in the same terms for all transactions, applies differently to all goods but not at the expense of excluding goods from its scope. The result is that the buyer can be confident that, in any instance where they are purchasing goods, they will enjoy some degree of protection.

3.25 The provision is replicated verbatim in the SoG(IT)A[52] and almost verbatim in the SGSA.[53] In the SGSA, however, the list of criteria, that can be used in determining whether goods are of satisfactory quality or not, is found separately to the provision itself in section 18(3). Section 18(3) reproduces SoGA section 14(2B) verbatim and so sets out that the factors to be taken into consideration when determining whether goods are of satisfactory quality or not are the same are those found in the other statutes. It is nonetheless puzzling that in the SGSA the criteria, which are central to judging whether goods are of satisfactory quality or not should be located separately to the standard itself. This separation would no doubt cause confusion for those not familiar with the statute. This can of course be easily remedied by bringing the two provisions together or at the very least making sure that they appear in sequence in the legislation.

---

[47] Following the decision in *Stevenson v Rogers* [1999] QB 1028, [1999] 1 All ER 613.
[48] "Dealing as a consumer" is defined generously and will include a commercial buyer purchasing goods that do not relate directly to the business which they carry and which are purchased only infrequently (section 12 UCTA; see *R&B Customs Brokers* v *United Dominion Trust Finance Ltd.* [1988] 1 All ER 847 and *Feldarol Foundry Plc v Hermes Leasing (London) Ltd.* [2004] EWCA Civ 747). [2004] EWCA Civ. 747).
[49] UCTA, s.6(2)(a).
[50] S.14(2A).
[51] Ss.2D, 2E, 2F.
[52] S.10.
[53] Ss.4, 9, 11D, 11J.

3.26 Having looked at the legislation, we can therefore conclude that goods must reach the same standard irrespective of how they are sold or supplied, which also means that there are no apparent obstacles to combining the provisions together into a single provision for the quality of all goods.

3.27 Finally, it is important to note that not only do the provisions give consistent standard for the quality of goods, they also judge the quality of the goods, i.e., conformity to the implied quality standard at the same point in time – when risk in the goods passes, i.e., the point at which the buyer or hirer (bailee) of the goods becomes liable for damage or deterioration to the goods. This is perhaps contrary to what consumers may believe which is that the provisions act as a guarantee of goods creating a minimum period over which they must be free of defects. The legislation requires only that goods are durable at the time risk in them passes; this means that, for example, when goods are hired, the bailor may not be liable if they break down during use, even if they have only been rented for a short period.

Fitness for particular purpose

3.28 Having set out the general standard for goods in section 14(2), including the potentially relevant factor that goods must be fit "for all common purposes", section 14(3) then makes separate provision for instances where the buyer specifies that the goods must be suitable for a particular purpose.

3.29 The consumer is protected where they clearly express to the seller that they need the goods for a specific purpose and reasonably rely upon the seller's judgement when buying those goods. The buyer may want the goods for an unusual purpose or a very specific application. This prevents the seller from escaping liability for goods simply because a consumer is not buying them to use them for their "common purpose".

3.30 There are limitations on this protection however. The buyer will only be able to prove breach of the term if they have reasonably relied on the skill and judgement of the seller. For example, a buyer of a tweed coat cannot complain that the tweed has caused an allergic skin reaction because she has not told the seller she was prone to this. In fact she herself did not know she was prone to it.[54] The seller cannot be expected to have any special knowledge of the peculiarities of the buyer's needs[55] and any knowledge beyond what someone in their position could reasonably be expected to have.

3.31 For example, a builder's merchant was found not liable for the sale of a number of boilers to a property developer. The developer had wanted to ensure that a property being converted to flats had energy efficient heating. However, the details of the flats were not given to the seller and so it was unreasonable to rely on their judgement that they would meet this criterion laid down by the buyer. [56]

[54] *Griffiths v Peter Conway Ltd.* [1939] 1 All ER 685.
[55] See also *Slater v Finning* [1997] AC 473, [1996] 3 WLR 190 where a seller was not responsible for the sale of a rapidly wearing cam shaft. The rapid wear was a result of the design of the fishing vessel it was fitted to. This aspect of the design was unknown to its owner (the buyer) and consequently to the seller.
[56] *Jewson v Kelly* [2003] EWCA Civ. 1030, [2004] 1 Lloyd's Rep 505.

3.32 The provisions in the SoG(IT)A[57] and SGSA[58] are the mirror image of section 14(3) SGA in substance. They use very slightly different language so as to make them applicable to the transactions to which they apply. Once again we can safely conclude that there is no intention to set different standards for different forms of supply, which again suggests that we could readily consolidate these provisions.

Goods must comply with any sample given of them

3.33 Section 15 is concerned with sales by sample. A sale by sample occurs when a consumer buys goods having only seen a sample of them. For example, if a customer were to order a quantity of fabric having been supplied with a swatch of the fabric by the seller, this would be a sale by sample. If the fabric that the seller in fact supplied differed from that sample, the seller would be in breach of the condition and the consumer would have the right to reject the goods. That means that where a buyer agrees to buy goods having only seen a sample of it, the actual goods the consumer receives must be the same as that sample.

3.34 Section 15 also provides that the buyer must have a reasonable opportunity to compare the goods (the bulk) that they have purchased with the sample and may still reject the goods if they contain defects that studying the sample did not reveal.

3.35 Once again, we can see in that the other Acts contain an essentially identical term that creates the same protection when goods are acquired other than by sale. The wording in both the SoG(IT)A[59] and SGSA[60] is clearly intended to have the same effect.

3.36 Across all three statutes that regulate the sale and supply of goods there is a large degree of consistency. This is entirely right and desirable. It would be wrong to hold a seller to different quality standards or allow consumers different levels of protection depending upon how the contract is classified. The law shows a clear intention to avoid this and to ensure a single consistent standard for goods. The uniform standard exists for consistent consumer protection and simplicity in the event of a dispute. Simplicity, however, is reduced because the consumer must first be clear on which statute covers their transaction.

Contracting Out

3.37 The implied terms are in principle default terms which the parties are free to either accept or exclude. Businesses may often wish to exclude them so as to shift or avoid liability or make it dependent upon more complex terms which better reflect the nature of the goods that they deal in. The three statutes each expressly allow the parties to do this.[61]

3.38 When businesses sell to consumers, however, they are not permitted to deviate from the key obligations we have set out above, although they may, in their contract, add to their

[57] S.10(3).
[58] Ss. 4(4) and 4(5) and ss. 9(4) and 9(5).
[59] S.11.
[60] Ss.5, 10, 11E, 11K.
[61] SoGA s.54, SoG(IT)A, s.12, SGSA s.11.

obligations and are permitted a degree of freedom, for example in determining when property will pass.

3.39 The option to contract out of the implied terms is curtailed by sections 6 and 7 of the Unfair Contract Terms Act 1977 (UCTA). Section 6 of UCTA sets out that, in respect of the obligations contained in the SoGA and SoG(IT)A, when selling or supplying to a consumer, any attempt to exclude liability for the obligations set out in sections 12, 13, 14 and 15 and sections 8, 9, 10, and 11 respectively are "ineffective". i.e., that no term inserted by the seller can displace them.

3.40 For contracts governed by the SGSA, section 7 of the UCTA operates in almost exactly the same way. Any attempt to exclude liability for goods that do not meet their description, are not of a satisfactory quality or fit for a specific purpose or differ from a sample of them given will be ineffective when dealing with a consumer. Any attempt whatsoever to exclude liability for the requirement in section 2, that a supplier of goods has the right to sell those goods, will fail.

3.41 The position is slightly different in respect of contracts for the hire of goods. It must be borne in mind here that the contract is only to transfer possession not ownership and so if the bailor did not have the right to give possession the consequences would be less serious – the bailee would not lose goods that they believed they owned. Bailors of goods therefore can attempt to exclude liability for the obligation only to supply goods they have the right to supply but this is subject to the test of reasonableness also found in the UCTA.

3.42 With this single exception, however, the position across all three statutes is once again uniform. Sellers and suppliers of goods are given virtually no opportunity to deviate from their statutory obligations, except in respect of one implied term relating to the hire of goods, which is still subject to the test of reasonableness. This trivial difference could readily be accommodated into a consolidated statute, although the continued need for the exception might be reviewed. A similar provision could also be easily drafted if contract based liability were not the model adopted for reform. All that would be required would be a provision that prevented derogation from the equivalent statutory guarantee. Again, this could incorporate the differing position in relation to the rental of goods, although this does appear to be an unnecessary deviation from an otherwise uniform position.

3.43 The majority of rental contracts are usually short term, lasting seldom for more than a few weeks. However, they can involve relatively large sums of money and are essentially robbed of all meaning if it transpires during the period of rental that the supplier does not have the right to transfer possession of the goods causing the bailee consequently to lose possession of them, only to find liability for this is excluded. The result for the consumer is the same as if they had bought the goods and were dispossessed of them due to a breach of section 12 of the SoGA – they have wasted their money. The UCTA, however, would guarantee them a remedy against a seller except in the case of hire. Furthermore, the bailee is no better placed than the buyer of goods to judge if the supplier has the right to transfer possession in the first place. It is therefore illogical to protect the consumer to a lesser degree in the case of rental.

3.44 Furthermore, long term rental, particularly of cars, is becoming a popular option as an alternative to ownership. Such contracts involve the payments of perhaps tens of thousands of pounds over a period of years and despite the protection that the test of unfairness *may* offer, it does not guarantee uninterrupted possession for that time, which appears to be unjustified.

3.45 Of course, a uniform provision is, any case, more desirable than one that is uniform and subject to exceptions.

Analysis of the Problems with the Current Legislation

Scope of law

3.46 As the law currently stands, in all contract based transactions, consumers enjoy statutory protection with regard to the goods they buy or acquire an interest in. However it can be difficult to be certain which statute is providing the protection. The current law also leaves consumers without statutory rights in some common, non-contractual transactions. The scope of the rights could be widened by extending the protection of the implied terms to 'non contractual supplies of goods' for example prescriptions and the supply of utilities, severing the link between consumer rights and implied terms, replacing them with a universal standard applicable to consumer goods, however they were acquired.

3.47 That said, the current position is generally unproblematic, the scope of it is already wide and the transactions where the implied terms do apply are subject to regulation and some degree of consumer protection. Consumer rights in these areas are simply and easily accessible. However, the law would be more easily understood if the connection to implied terms was severed and a simple standard that applied to all goods replaced it. This would also create a simpler and more uniform legal scheme, potentially much better understood by consumers.

Fragmentation of the law

3.48 We have also seen that the law, being divided across three statutes is unnecessarily repetitive and potentially requires consumers correctly to classify their transactions in order to obtain remedies for the failure of a supplier of goods. Yet, the exercise of classification is largely irrelevant as each statute offers the same level of protection. Again this is a problem that could readily be solved by consolidating the existing law into a single statute containing a single set of provisions as to the quality of goods; a statute where the standard that goods were required to reach did rely on an underlying contract.

Options for Change

Option 1 – the "no change" option

Advantages

3.49 In the majority of transactions, the law is likely to work acceptably well. Further, the defects highlighted are likely only very rarely to become "live" issues in disputes. There is no evidence that consumers regularly encounter difficulties with the areas highlighted, not least because sellers and suppliers usually relieve consumers of the need to classify transactions and the informal resolution of disputes means that there are issues only in a very small number of disputes. If the law works in practice, change may therefore be unnecessary. Ultimately, the standard to which consumers are protected does not differ from transaction to transaction. There is a clear intention to create a uniform standard for goods however sold or supplied. The only real defect is that this has been undertaken in a piecemeal way.

3.50 Only where a transaction is very complex is this likely ever to become an issue before a court. While these provisions that protect consumers are distributed across three statutes, they are nonetheless identical in their effect. Cumulatively they ensure that whatever goods are purchased, however they are purchased, the standard they must reach is the same. This is the intention of the law and while it could achieve this more elegantly, it could be said to achieve it all the same.

3.51 The scope of the implied terms cannot be broadened significantly and then only into areas of peripheral importance. To do nothing would recognise this. The areas highlighted where the law could usefully expand are arguably of only peripheral importance to consumers. Leaving the scope of the current rights unchanged would preserve certainty and ensure the law did not expand in a way that might later prove problematic or ill-conceived. To expand the scope of the current law would require fundamental changes to the current model. The implied terms model could not be applied to gifts; utilities and prescriptions could be regulated only if the contract based model of liability was abandoned and major changes to the current regulatory regime contemplated.

Disadvantages

3.52 The law is obviously unnecessarily fragmented. It is not clear how the fragmentation and duplication of the rules contributes to a lack of understanding of the law so that consumers avoid complaining about goods they have purchased. However, it seems not unlikely that when three pieces of law do the job of one that this does not assist consumers to understand their rights. To do nothing in respect of this problem would perpetuate complexity which could so easily be removed from the law. To do nothing also means protecting consumers only when they have a contract for goods but offering lesser protection when they are given a gift by a company, prescription drugs or buy utilities for example. To do nothing would also fail to realise the potential savings to business that a simplified law could potentially achieve. A single clearly drafted set of obligations to be found in a single statute could readily reduce the costs involved in compliance.

Option 2 – a new consolidated statute

3.53 A new consolidated statute applying to all contractual supplies of goods which created a single standard for all goods however supplied might offer some advantages.

3.54 Consolidating the implied terms into a single statute would remove one significant obstacle that consumers will inevitably face when seeking redress for defective goods.

3.55 Provided they have purchased or acquired goods under a contract of some kind they would have ready access to the rights intended for them. They would have no need to be aware of the intricacies of the law of sale and supply of goods to identify the correct legal provisions. Difficulties as to how transactions are classified would be entirely avoided. In fact, consolidation would represent the law getting in step with the common view of consumers who may only have heard of the Sale of Goods Act, if they have heard of any legislation. Any change to the law which brings it in step with the reasonable expectations or beliefs of consumers and therefore makes it more intelligible and accessible must be regarded positively.

3.56 Businesses that sell and supply goods to consumers would also benefit from this simplification. The standards which their products must reach would be unchanged, unless for other reasons, revisions of the content of the implied terms (or equivalent) were undertaken. Disputes with consumers could potentially be settled more efficiently as a result of sales staff/sellers being more easily trained about the simplified law. Consolidation is also beneficial as it protects against future development in the law which might cause the existing statutory 'islands' to drift apart. Whilst the provisions are the same it is not inconceivable that a difficult case might cause the implied terms to be interpreted differently under one statute compared to another. The result would be the current fragile equivalent treatment could be lost. Consolidation would protect against this by ensuring that all case law applied to all transactions.

3.57 A consolidated statute that applied to consumer dealings in goods would additionally present an opportunity to remove a further layer of complexity – implied terms. As we have seen protecting consumers using implied terms means that consumer can only be protected in certain transactions where terms can be implied into an underlying contract. It also adds complexity to the law when simple clear standards for goods are the most desirable. A standard for goods independent of the contract would provide clarity for the consumer by removing the unnecessary complexity of the current statutory implied terms scheme.

3.58 As we have seen, the implied terms as they currently stand are, for the most part, identical and do not differ in substance across the statutes; except for the very minor differences that we have noted thus far, which we believe could be readily accommodated in a consolidated statute.

Disadvantages

3.59 It is not easy to find a strong case against consolidation *per se*. The current law, whilst not necessarily frequently causing problems for consumers, is clearly not desirable and would be greatly and easily improved for all by consolidation. These revisions are applicable

only to consumer contracts and would leave the law relating to commercial sales undisturbed. Indeed, the law would be free more fully to accommodate the needs of commerce. It is difficult to conceive how consolidation of consumer law would damage consumer confidence or fail to make the law easier for business and consumers to apply. The other arguments that might be raised against a proposed consolidation would be that the transactions to be consolidated are in fact incompatible with that consolidation – their substance differs too greatly. The fact that the same provisions as to the quality, etc. of goods have been applied across a range of statutes dealing with these different transactions shows that this is not the case.

Option 3 – Solutions from other jurisdictions

3.60 Many commonwealth and civil law jurisdictions have legislation based upon and/or closely resembling the current position in UK law. The majority of these countries[62] have continued to treat the sale of goods separately from other transactions and so there are few examples that we can readily turn to. In the EU, the position is largely the same.

New Zealand

3.61 New Zealand has consolidated its previous SoGA derived provisions for consumer sales and supplies of goods to create the Consumer Guarantees Act (CGA). The CGA applies when a consumer[63] "acquires" goods[64] of any kind. The CGA defines a "consumer" in very similar terms to UK law as a person who acquires goods for, "household use or consumption," and not for the purpose of selling them or using them in a manufacturing process. As in UK law[65] this allows commercial buyers to be treated as consumers of goods in respect of goods which they do not normally deal in. The definition of a consumer, therefore, is entirely familiar, which is critical as all consumer protection measures are built around the definition of who is a consumer, a differing definition may make comparison of New Zealand and domestic law far less compelling.

3.62 As a consolidated statute, the CGA is addressed to all contracts of sale and supply. What the CGA does not do is simply bring together and retain all of the previous provisions relating to the different contract of sale and supply; the previous provisions are "collapsed" into one. Therefore, the CGA is simply concerned with goods that have been "acquired"[66] not just by way of sale but when they are exchanged, gifted, rented or acquired under a hire purchase agreement.

3.63 Not only does this sever the link between consumer rights and the underlying contract creating an independent standard but it also removes the need to make distinctions between transactions in order to obtain a remedy. Under the CGA the consumer has rights against the supplier because they have acquired goods, whether they are hired, purchased, etc.

[62] For example, the Australia states, Bangladesh (Sale of Goods Act 1930), the states of Canada, Malaysia (Hire Purchase Act 1967), Singapore (Hire Purchase Act (Chapter 125)) and the United States.
[63] Defined in s.2(1).
[64] S.2(1).
[65] *R&B Customs Brokers v Union Dominions Trust Finance Ltd.* [1988] 1 All ER 847.
[66] S.2(1).

Furthermore, a person who acquires goods need not be the original purchaser but can be someone who has had the goods gifted to them, which creates a clearer position from that which exists in current UK law. The combination of a contract-independent standard for goods and the lack of distinctions between transactions means the CGA offers a usefully scheme for consumer protection.

3.64 We have already seen that, in the UK, the level of protection does not vary according to the type of transaction. By bringing the law that relates to the whole spectrum of consumer dealings into one statute the NZ law makes it very clear that a single standard applies by contrast to the current position in UK law. The definition of "acquires" is also placed prominently in the statute to further emphasise the scope of the legislation.

3.65 There are some limitations on the CGA, as with UK legislation it only applies to commercial dispositions and so private gifts of goods are correctly excluded but it means that goods given as gifts by commercial bodies must reach a satisfactory standard, which it has already been said to be desirable. The only notable exclusion is for sales by auction,[67] which given the rising popularity of online auctions for both commercial and private sellers is perhaps a concern. Current UK law protects consumers who buy from auctions and this protection ought to remain, particularly given the problems that online auctions can present to consumers.

3.66 The range of goods caught by the CGA is also essentially the same as that covered by current domestic law but with the addition of electricity which, as we have already discussed, should perhaps remain outside of the regulatory framework for goods in the UK.

3.67 The key obligations on the seller/supplier are very familiar. The key difference is that CGA expresses what are currently referred to implied terms as guarantees. This is in part out of necessity, the CGA does not imply terms and so these must go by a different title but to refer to them as guarantees emphasises their importance relative to other provisions and does so in a way that is readily understandable to the consumer – the "term" guarantee has a clear and well understood meaning.

3.68 Under section 5 of the CGA the supplier must have the right to sell the goods at the time the contract is made or at the time property is to pass. The structure and language of this section is very similar to section 12 of the SoGA and its "mirror image" provisions in the SoG(IT)A and SGSA. As with section 12, there are, in fact, three obligations: to have the right to sell the goods, to supply goods free of "undisclosed security" and to ensure the consumer's "undisturbed possession" of the goods.

3.69 Given that section 5 has the status of a guarantee, it would seem that, unlike section 12, all three obligations would be treated as "conditions". In respect of consumers this would seem not unreasonable. The concept of securities interests over goods is always problematic. Such interests are essentially hidden and seldom would a consumer buying for "domestic use" wish to acquire goods that were subject to the ownership of another party. Acquiring goods encumbered in this way is likely to make them entirely undesirable, i.e., it is

[67] S.41.

likely such a failure would go to the heart of the contract and so should be treated as a condition would currently be treated.

3.70 Otherwise, section 5 expresses precisely the same concepts as the current provisions in UK law in language that is substantially identical. Section 5 also demonstrates that there is no practical difficulty in combining together the passing of property provisions for different supply transactions – the basic obligations are common, the difference is simply the property interest that is being passed.

3.71 The provisions as to the quality of goods are also very familiar. Given as the current UK provisions are the same for all contracts of sale and supply there seems to be no difficulty in principle combining them into a single statute. The standard in the CGA which applies to all contracts of sale and supply (including contract for work and materials[68]) shows that in practice this is not problematic.

3.72 Broadly speaking, the provisions are based upon those already found in the SoGA in structure, language and content, they are immediately familiar.

3.73 Sections 6 and 7 of the CGA set out that goods must be of "acceptable quality", the equivalent of the SoGA implied term that goods must be of satisfactory quality. Immediately the standard appears to be substantially the same, goods that are acceptable would seem to reach a standard that is either the same or very, very close to goods that are of a satisfactory quality. Goods are certainly not expected to reach a higher standard. We may note that the Law Commission also recommended this standard in 1987, although it was felt that "satisfactory quality" would be a more appropriate standard for consumer transactions.

3.74 Goods are acceptable when, as in domestic law, they are, "fit for all the purposes that goods of the type in question are commonly supplied,"[69] and, which would be regarded by, "a reasonable consumer fully acquainted with the state and condition of the goods, including any hidden defects," as acceptable. The standard is then further defined by reference to the same criteria used in section 14. The only difference between the two statutes is that under the CGA the reasonable consumer seems better acquainted with the goods than the reasonable consumer under UK law. The reasonable consumer under the CGA makes a judgement based upon knowledge of the goods including hidden defects, ostensibly, the UK consumer does not. However, the reasonable consumer in domestic law would surely consider the existence of hidden defects sufficient to make the goods unsatisfactory and the criteria for satisfactory quality simply require that goods be free from minor defects, it does not matter whether or not they are hidden. It seems therefore that the CGA simply clarifies the position but does not change the standard. This clearly shows that consolidation does not need to entail revolutionary change in the obligations placed upon the seller and that consolidation to ensure the same standard across all sale and supply transactions is easily achievable, primarily using the provisions of the current law.

[68] S.15.
[69] S.7(1)(a).

3.75 The CGA continues to give guarantees as to the fitness for the buyer's specified purpose,[70] compliance with description[71] and compliance with any sample of the goods given[72] in the same terms used in current UK legislation. We can see that the other obligations currently seen in UK are also compatible with consolidation and given that the CGA has not sought to depart from the language used in the SoGA, there is no need necessarily to change or modify the language used in our domestic law, even though in New Zealand it is applied to a broader range of goods.

3.76 The CGA permits contracting out only between commercial parties.[73] As in domestic law there is no scope for the commercial supplier to avoid their obligations to consumers. The "integrity" of the guarantees, their ability to protect the consumer, does not differ from the ability of the current implied terms to protect the consumer and afford them rights where suppliers of goods fail in their obligations.

3.77 The result of the New Zealand consolidation is a single statute which contains, in a clear, accessible and unambiguous language, essentially the totality of the foundations of consumer law in New Zealand. What is especially impressive is that this is achieved without any substantial departure in the form or language of the implied terms which would be familiar as being almost identical to those currently in use in the UK.

3.78There is no evidence that bringing the provisions under one statute has damaged consumer confidence or reduced knowledge or engagement with the law. What the CGA has achieved is the successful preservation of the fabric and character of the law (including the wording of the most important and well known provisions and the basic obligations) meaning that it is still familiar but that it is not duplicated or fragmented and is structured in a way that consumers expect.

3.79 Given that the law in New Zealand was previously very similar to that of the UK much can be taken from the way this consolidation has occurred. It is clear that bringing all transactions under the umbrella of statute is easily achieved, highly desirable and unproblematic.

[70] S.8.
[71] S.9.
[72] S.10.
[73] S.43.

Option 4 - *The DCFR*

3.80 The DCFR does not propose a fully consolidated scheme. In Book IV dealing with "specific contracts", agreement for exchange or barter and sales[74] are grouped together with contracts for the "lease" of goods which would include both hire and hire purchase grouped separately.[75] Contracts for exchange are relatively very rare. The only instance a consumer dealing with a commercial seller is likely to encounter this is would be if they were to trade in a car with no money changing hands or the value of the traded in vehicle being put at a figure that did not reflect its true value.[76] That said, associating sale and barter together is useful as under the current domestic law, despite their similarity, they are treated separately. The provisions that assure the quality of goods in respect of hire and sale are essentially the same but, as with the current law, they are duplicated within the DCFR rather than being an obvious single standard applicable to all goods, however sold or supplied.

3.81 As a consolidation measure, therefore, the DCFR is only a partial solution to the problem identified here. However, it is an improvement. The provisions for sale immediately precede the provisions for the hire of goods. Despite being broken down into separate provisions they do still exist within the same scheme meaning they are "closer" and more obviously associated than they are in the current law. The DCFR is obviously only an academic text, and the final CFR to be created by 2012 may offer a simplified version in this respect. The standards of conformity set out in both sections closely mirror each other and so could be readily consolidated if this was desired.

3.82 The definition of "goods" under the DCFR is also closely comparable to the definition found in the SoGA. The DCFR is concerned with "corporeal movables" i.e., physical, movable goods. Intangible goods are excluded from contracts for the sale and supply of goods and in its adoption, the scope of the provisions would remain the same, much as we have proposed here. Limiting the scope of corporeal movables creates a clear and unambiguous scope for the DCFR that is very desirable.

3.83 The scope of the DCFR is also broader in relation to gifts. It imposes liability for all gifts made by a business[77] but also gifts made privately when there is, "a contract for the donation of goods," in writing and signed by the donor.[78] This would make any "warranty" by the donor essentially voluntary. It seems it would be very rare that a donor would wish to impose liability on themselves for goods they have given, but having the option is one way to resolve the problem. But, it is important that the default position remains that a private donor of goods is not personally liable for them. Similarly the imposition of liability for commercial gifts here is in line with what is proposed above. However, again, the separation of gifts from other dealings in goods does add to the relative fragmentation which we have highlighted as a problem.

3.84 The DCFR would stop short of the complete consolidation, but would bring a greater degree of unity than is currently present in the law without great upheaval or radical

[74] Book IV, Part A.
[75] Book IV, Part B.
[76] See, for example, *Lex Service plc v Customs and Excise* [2003] UKHL 67.
[77] IV:H 2-102.
[78] IV:H 2-101.

restatements of the obligations. It would also correctly partially and usefully re-define the scope of consumer protection measures, in respect of gifts of goods, which are currently excluded.

DCFR Terminology

3.85 The terminology utilised by the DCFR, however, would pose few difficulties. The DCFR sets out essentially parallel standards to those that already exist in UK law and does so with notable clarity – clear obligations set out in language that should be readily understandable for the ordinary consumer

3.86 A notable difference, however, is that the DCFR does not imply terms into contracts for the supply of goods, instead it adopts a test of contractual conformity. i.e., a standard that goods must reach that is independent of the contract and which, if breached, allows the consumer a remedy against a supplier. It therefore protects consumers in the same way as the New Zealand CGA.

3.87 This differs from the current position in UK law discussed previously where terms are implied into the contract between buyer and seller. As we have already indicated, we do not believe that this would be problematic.

3.88 The test of contractual conformity does not differ substantially in substance to the current implied terms, although it knits together the three main implied quality terms (goods must conform to description, sample and be of satisfactory quality) into one which, given the overlap that can occur between the existing terms, is likely to be beneficial. It is also useful for a consumer referring to primary legal documents to see all the strands located in one provision.

3.89 The concept of "description" is potentially wider under the DCFR than it is in domestic law. Under the DCFR, goods pass the test of contractual conformity when they meet the description of them set out in the contract for sale.[79]

3.90 The description of goods may be expressed in the contract in varying detail. Some contracts may describe the goods in great detail, others may not go beyond simply identifying the goods. Currently, "description" relates only to the identifying characteristics of the goods. The standard in this respect therefore may be raised. The current standard, as we have observed, is so narrow that it is seldom of any assistance to the consumer and a wider standard is likely to bring the requirement that goods conform to description closer to that which be expected by the consumer.

3.91 Goods must be: "fit for any particular purpose made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for the buyer to rely, on the seller's skill and judgement."[80] The substance of this provision is overtly similar to that set out in SoGA section 14(3). The basic obligation on the seller is the same and the scope of the provision is hedged in by the

[79] IV. A. – 2:301 (a).
[80] IV. A. – 2:301(a).

requirement that the buyer must have relied reasonably upon the judgement of the seller. The buyer seems to be able to make known to the seller their requirements in exactly the same way as they currently can and with this exception there are no limits on what the purposes the buyer can specify for the goods. Substantially, therefore, this provision is identical to that currently found in the UK.

3.92 As in domestic law suitability for the buyer's purpose is only one strand of the law, the other is a requirement that goods are fit for all common purposes. Once again the DCFR sets out a substantially similar provision which requires that goods: "be fit for the purposes for which goods of the same description would ordinarily be used."[81] We note here that the word "all" does not appear. However, the words used would not seem to convey a different meaning. It would seem difficult to argue that the words used would permit goods to be fit only for a single purpose. The use of the word "used" rather than "supplied" does not seem to indicate a change of meaning; it is simply more appropriate and accurate expression.

3.93 Finally, almost the mirror image of SoGA section 15, the DCFR sets out that goods conform with the contract only when they: "possess the qualities of goods which the seller held out to the buyer as a sample or model."[82] This is a very simple provision, which despite being worded differently conveys the same obligation usefully clarified (but not substantially added to), with the requirement that models of goods must also be properly representative of the finished product.

3.94 As with the CGA, we see only minimal change from the current UK law. Combining all the obligations on the seller into a single standard is very helpful for the consumer. Equally helpful is that the obligations on the seller are expressed in familiar terms making only minor changes, which generally succeed in making the obligations as simple as possible. The DCFR does not add to the obligations of the seller, it merely expresses them differently; it would, therefore, be an entirely acceptable basis for a consolidated statute if there was a willingness to depart from the wording used in the existing UK legislation.

Option 5 - The pCRD

3.95 The pCRD[83] would introduce a regime that applied a single, uniform standard both to contracts for the sale of goods and services.[84] However, in respect of goods, it would apply only in respect of contracts for the *sale* of goods thereby leaving contracts such as those for goods supplied on hire purchase to be governed by alternative regulation, although on a national level. The pCRD could be expanded to provide wider coverage and this initially limited scope need not be seen as making it incompatible with out supply transactions or an obstacle to broadening its scope. As we have seen, the model set out in the SoGA covers without any serious difficulties the full range of sale and supply transactions in the existing law, the pCRD can be regarded in precisely the same way

[81] IV. A. – 2:301(b).
[82] IV. A. – 2:301(c).
[83] COM (2008) 614 final.
[84] Art. 2(3),(4) & (5), see Annex 2.

3.96 Contracts for the sale of goods are defined much in the same way as they are under current UK law with the additional benefit that where the seller agrees to "install" the goods[85] a failure to install the goods "correctly" will mean the goods do not conform to the contract (equivalent to not being of satisfactory quality under the current law) and may be rejected. This would mean that, to some extent, contracts for a combination of goods and services would be brought under the pCRD.

3.97 The pCRD would create one set of legislation for the sale of goods and leave the current standard in place for all other transactions. This risks differing standards across different transactions and consumers having a less clear picture of their rights than they currently have and would place an even greater onus on them to ascertain the nature of the transaction to which they were party.

3.98 In its current form the pCRD does not provide a useful basis for such consolidation as it would, in fact, fragment the law further and allow the law relating to different transactions to develop independently.

Recommendations

Consolidate the three current sale and supply statutes into one

3.99 Create a new consumer law that consolidates the provisions found in the three existing pieces of legislation. The provisions of the three current pieces of legislation are practically identical; they show a clear intention to ensure a uniform standard of consumer protection. This would be realised by bringing the three provisions together into one. A single piece of legislation would also make the law far clearer for consumers and businesses and give them a single source to consult in the event of a dispute. This would eliminate the current complexity and the need for consumers to have to consider the classification of a transaction. Consolidation would create an opportunity to make changes to the language in which consumer guarantees were expressed if this were necessary. The fact that both the CGA and DCFR express consumer guarantees in such familiar terms suggest the UK model is a good one requiring minor change if any.

3.100 Partial consolidation offered by the DCFR and pCRD would be an improvement but is not really sufficient. These measures could not form the basis of a new law in their current form. However, it would be entirely plausible to adopt them and give them wider applicability – to give them the scope – or more – as the three current pieces of legislation combined. In substance, the obligations that they place on the seller are little different and should not cause any difficulties for seller or buyers. The consolidation of the various quality provisions into one under the DCFR is very useful in setting out that various strands of the seller's obligations and ought to be considered because of its simplicity and accessibility for the consumer.

[85] Art. 24(5), see Annex 2.

3.101 The CGA provides a model for consolidation which preserves almost entirely the substance of the current domestic law. The DCFR is a more substantial, but still a minimal, departure but one which may offer the opportunity of aligning UK sales law with that which may become common across Europe, the question of which is preferable is likely ultimately to rest on whether or how desirable or necessary the latter is.

3.102 There are no apparent disadvantages or compromises in undertaking a consolidation of the law for consumers and, along with the compelling reasons for it set out above and the ease with which it can be achieved, it is strongly recommended; an essential step in ensuring more effective and accessible consumer rights.

Sever the link between Consumer Rights and underlying Contracts

3.103 The implied terms should continue to address the same range of transactions as they currently do but this should be increased by replacing the current "scattered" standard with a single standard of "contractual conformity". This standard need not differ in content from the current implied terms but ought to cover protection for the consumer independent of their contractual or other relationship with the supplier of goods.

3.104 As a result of the current reliance on implied terms, a layer of complexity is added to the law which is likely to make consumers' rights more difficult to understand than they need to be. By creating standards for goods independent of an underlying agreement a wide variety of transactions, including those currently regulated to a similar standard by very different pieces of law and legislation, could be brought within the scope of a new statute and a single easily understandable sets of rights for consumers created.

3.105 Severing the link between consumer rights and underlying contracts would mean that the consumers would be able to expect a reasonable standard in goods in a broader range of dealing. As we have shown, while there is no inherent difficulty in accommodating a wider range of transactions into the law, care must be taken not to add additional complexity in areas such as utilities or to simply replicate existing consumer rights.

A further issue: The situation regarding non-contractual supplies of goods

3.106 The emphasis in the current legislation is on goods that move between parties in under a contract. It could be argued that the same standards ought reasonably to apply to goods that are given free of charge by commercial companies, particularly where those goods are given by way of a promotion or inducement, for example as a "buy one, get one free" offer.[86]

Commercial "Gifts"

3.107 What we have termed here "commercial gifts" take a number of forms but are essentially goods given without the recipient doing any act at all by way of consideration for them and so the donor takes no direct or immediate benefit, if they take one at all from the giving of the goods. Goods given as a incentive such as a set of mud flaps or over mats when a car is purchased, promotional gifts such as stationery and USB memory sticks given as promotional items and items given for free when other items are purchased such as supermarket "buy one, get one free" promotions. In all of these instances, the recipient does not pay, at least directly, for the goods, if at all.

3.108 The question arises whether a consumer should be able to complain if such "free" items are not in accordance with the statutory quality standards. After all, a buyer cannot expect second hand goods to be of the same quality as new goods. A similar argument might be made in respect of commercial gifts.

3.109 However, where goods are given as inducements to enter into a contract they can often be regarded as forming a part of the goods sold under the contract so the consumer is protected in any case. To avoid confusion, the same approach should be adopted in respect of commercial gifts given outside the context of a contract. Of course, the "implied terms" technique currently used could not be deployed for want of a contract, but if our recommended shift to a statutory standard is accepted, then the same standard could also apply to non-contractual commercial supplies.

Gratuitous Supply Transactions

3.110 Gratuitous supply transactions are a variation of the commercial gift of goods. Here, goods are supplied in connection with an underlying contract, such as a 'buy one, get one free' offer. Should the liability of the supplier be any different in respect of such free items?

3.111 The customer has apparently paid nothing for the goods, and the transaction may be primarily for marketing purposes rather than direct financial gain.[87] That said, there will be a wider commercial interest even in this context.

[86] A "two for the price of one" offer while ultimately the same would not be regarded as being a sale of one item at full price with the gift of a second one but two items being sold for cash.
[87] As acknowledged by Laddie, J., in *Kuwait Petroleum v Customs & Excise Commissioners* [2001] STC 62

3.112 If such transactions were treated as a contractual supply in respect of all the goods, then the statutory rights would apply in respect of all the goods, i.e., goods that were given on the face of it for free were in reality paid for or supplied as part of a package of goods or services and were in fact only marketed as being free of charge.

3.113 It has been seen elsewhere that 'buy one get one free' offers are often deployed as a marketing technique, but that there may also be implications for the supplier's tax liability for indirect taxation (usually VAT).

3.114 As Laddie J., asserted in *Kuwait Petroleum v Customs & Excise Commissioners*[88] in respect of 'buy one get one free' offers, "[t]here is a limit to the reasonable gullibility of ordinary members of the public. A promotion of that kind would not persuade most customers that they were really getting half of their acquisitions free. They would think that they were receiving each of the products at half price and that they were paying for both." This analysis was readily approved by the Court of Appeal[89] and appears to have become entirely accepted.[90]

3.115 A similar approach has also been approved by the Court of Appeal in respect of services given ostensibly free of charge when purchased in conjunction with goods. In *Hartwell plc v. Customs & Excise Commissioners.*[91] Hartwell considered VAT liability for MoT tests given 'free' when a car was purchased. The Court of Appeal[92] had no difficulty in finding that this and so conceivably any such arrangement was a, "single transaction."[93] As a VAT case, the issue of whether a voucher for a free MoT test should be regarded as goods or services is not considered but there seems no apparent reason to treat goods given in this any differently to services or vice versa. The reality of such transactions, as with buy one get one free promotions, seem unambiguous – nothing is in fact free at all, there is one transactions for multiple items at a discounted price.

3.116 Although these cases involved question of taxation, they do offer a useful analysis of how such transactions should be treated. It certainly seems more sensible to regard such supplies as a single transaction for one price, rather than as a sale for one item at full price under a contract of sale and a gift of the other – indeed, how would one decide which item was "free"?

3.117 A simple and brief provision could clarify that consumers enjoy the same protection when goods and services are offered at a nil or reduced price when bought in conjunction with others as when goods are purchased at their usual price. Such a provision is unlikely to be controversial. Supermarkets who are the prime 'users' of offers such as buy one get one free or buy one get one half price do not appear to seek to distinguish between the 'free' item and the paid for item.

---

[88] *Ibid* at p.74
[89] *Tesco plc v Customs and Excise Commissioners* [2003] EWCA Civ. 1367
[90] See for example its entirely uncontroversial treatment in *British Dental Association v Revenue Customs Commissioners* [2010] SFTD 757 at 768
[91] [2003] EWCA Civ. 130
[92] Per Chadwick LJ, paras 33-35
[93] *Ibid.* para. 33.

3.118 Of course, the fact that goods are effectively sold at a discount of e.g., 50% should not mean that the threshold for complying with the "satisfactory quality" standard (or its eventual replacement) should, or would, be lowered. The fact that a lower price is paid does not invariably mean that the level of quality to be expected is lower (nor, indeed, would this be the case where the goods are supplied free of charge).

Goods acquired as "private" gifts

3.119 Another difficult situation is the position of recipients of "private" gifts, i.e., goods bought from a retailer but intended as a gift for a third party. Although the Contracts (Rights of Third Parties) Act 1999 might apply in some circumstances, it will not do so always. The 1999 Act provides that a third party may enforce a term of a contract (in the case the implied terms as to quality, etc.) if the contract expressly or impliedly states that they can do so. It seems likely that a contract for the sale of goods would permit a third party to "intervene" relatively easily. Whilst there is no case law directly on this point it appears that it was contemplated that simply mentioning that the gift was for a third party would give the third party rights under the contract. This means that already, albeit it by a slightly complex route, the third party could benefit from the statutory protection usually afforded only to the buyer of goods, although the situation is not entirely clear.

3.120 Nonetheless, this position could be simplified and the position of the third party strengthened without difficulty. By giving the third party a clear right against the seller, the seller is simply meeting their statutory obligations to a different party while the standard that must be reached is unchanged.

3.121 We are not suggesting that the recipient of a private gift should have any statutory rights against the private individual who has given that gift. This would impose an unnecessary and unfair burden on private individuals and would represent an unacceptable extension of the law expanding into private relationships.

Utilities

3.122 The current law does not cover the supply of utilities (electricity, gas and water) because they are not supplied under contracts between supplier and consumer as such.[94] While there is an agreement between the supplier and consumer, the supplier supplies the consumer because they are under a duty to do so under the licence issued by the relevant regulatory authority.[95] Furthermore, the definition of goods used by the current law[96] excludes intangible things such as electricity.[97]

3.123 The supply of utilities following the privatisation of the public utilities is also highly complex. The relationship between the providers of utilities is governed in depth by existing

[94] See for example *Norweb v Dixon* [1995] 3 All ER 952, [1995] 1 WLR 636.
[95] For example, the Gas Act 1986 provides that the regulator may issue licences for suppliers of gas, the licences issued by OFGEM (in the case of gas) then set out (conditions 22-24) that the supplier must supply gas to domestic properties.
[96] SoGA.
[97] Indeed, the supply of electricity might be better classed as a service rather than goods in any case.

statutory provisions and overseen by a range of regulatory bodies (OFGEM, OFWAT, etc.). The primary function of these bodies, however, is to work with the deregulated utilities to ensure that, so far as possible, there is a functioning market for utilities and the price paid by the consumer is reasonable and fair. The regulators also seek to ensure minimum levels of service for utility consumers, providing, for example, for water customers fixed penalties where the provider fails to supply at all, cannot supply sufficient pressure, etc. There are of course also routes for consumers to bring complaints where they feel the utility provider has failed. The regulators then have the power to adjudicate on these disputes. What we have in respect of utilities therefore is a self-contained system of dispute resolution that is tailored specifically to each service.

3.124 The standard that is applied to goods could also be applied to utilities. Utilities, are not inherently incompatible with a general standard of satisfactory quality or similar. The existing standard can be modified to cover the full range of goods from conventional consumer goods to highly specialised commercial goods. While applying this standard to utilities would be a challenge, it is not impossible. A satisfactory standard for utilities would probably translate simply to the supply being interrupted only infrequently and then only when unavoidable or absolutely necessary or because of the unforeseen failure or damage to the supply equipment. In the case of electricity and gas this is likely to be the extent of the obligations along with a requirement that gas and electricity be supplied in the usual volume and voltage/current respectively. In the case of water, a satisfactory supply would also be one that was one not subject to frequent interruptions or variations in pressure or water quality.

3.125 A statutory standard for utilities, therefore, is not entirely impossible to contemplate. The question is whether it would be effective and strengthen the rights of consumers. A statutory standard for utilities as part of a piece of legislation governing the consumer supply of goods would be likely not dramatically to alter the duties already in place on utility providers, it would be likely to provide a duplicate standard to those already in place but it may be a more obvious way for consumers to seek remedies against utility providers who have failed in their duty. Given the limited impact that a second statutory measure would have, while it may be desirable from the perspective of allowing consumers to assert their rights more easily, it seems unlikely that it would add to those rights.

3.126 New Zealand made electricity supplies subject to the same consumer protection legislation as the sale of goods with their Consumer Guarantees Act 1993.[98] Where the constancy or "quality" of supply falls short of what the "reasonable consumer" would expect,[99] consumers can seek a remedy for this against their supplier. When the supplier apparently fails, what constitutes a satisfactory standard for electricity and an appropriate remedy for the consumer is unclear especially as "failures for various reasons may from time to time be inevitable or at least predictable."[100]

3.127 Apart from the practical difficulties of applying this standard to electricity and to utilities in general, the context in which the New Zealand provisions exist should also be considered.

[98] Hereinafter "the CGA".
[99] See generally, C. Hawes, *Consumer Guarantees: Remedies for Defective Goods* [2010] NZBLQ (forthcoming).
[100] *Ibid.*

Unlike in the UK suppliers are not obliged to supply customers by statute[101] and so while the relationship between consumer and supplier is not necessarily a contractual one, it is more consensual, the consumer is more of a customer than they are in the UK.

3.128 Utilities in New Zealand are also regulated very differently from those in the UK with the sort of regulatory bodies found domestically not appearing until relatively recently and well after privatisation and even then with lesser powers in a much smaller market. This meant that the New Zealand CGA added to consumer rights rather just replicating them elsewhere as a change to domestic law well might. Despite this, very few cases have seemingly arisen from electricity supply suggesting that this may simply not be an area where additional regulation is needed.

3.129 The result therefore is that, while the law is flexible enough to accommodate consumer rights in respect of utilities and so there is no compelling reason not to include them in future legislation, there is no apparently compelling reason to include them either as doing so would only replicate existing consumer rights.

Conclusion

3.130 A general set of rights that apply when goods are supplied to consumers would be useful in clarifying consumer rights. A simple set of rights independent of an underlying contract would be clearer and simpler than current consumer rights. However, some areas ought to remain outside of the scope of legislation where it would result only in duplication and so, in fact, only add to the complexity of the law or would be of little assistance to the consumer in any case.

[101] By virtue of the Electricity Act 1992.

4. SERVICES

Current law

4.1 This section deals with both

> -cases where the service *is* accompanied by the supply of goods or where the service involves the manufacture or construction of goods or other property; and
>
> -"pure services", i.e. where the service does not come along with the supply of goods and neither does it involve the manufacture or construction of goods or other property.

An important distinction in this area is between liability based on the "fault" of the service provider and liability based on failure of the service to achieve the expected outcome It is important to set out the differences in these approaches to understand the current law and proposals for reform.

Fault

4.2 When a legal standard is "fault based", the defendant is only liable where there is "negligence"; or to put it another way, a lack of "reasonable care and skill". In general, this means that a claimant must show that the defendant has not exercised the degree of care and skill that would have been exercised by a reasonably competent person in the same line of business. To avoid liability, in other words, the defendant must typically follow *standard business practice*.[102] So, if, for example, a garage has followed the normal procedures for repairing an electrical problem; it may be difficult to establish that they have failed to exercise reasonable care and skill.

4.3 Usually, "standard practice", "normal procedure" etc. is something that is determined based on the views of a reasonable body of opinion in the trade or profession. However, it is open to the court to decide that, in the circumstances, such a body of opinion as to what is sound practice is not reasonable or responsible.[103] In short, the court can impose a higher standard as to what represents "reasonable care and skill" than is accepted by a reasonable body of opinion in the trade or profession.

4.4 In determining whether there has been reasonable care and skill, the courts will also consider the *cost* of ensuring that the service is carried out correctly.[104] Again, this could make it difficult for the consumer in the case of the unsuccessful repair. This is because it might be argued by the garage that it would have been too costly to spend any more time trying to repair the problem. Consequently, notwithstanding the failure to repair the problem, the garage might be held to have exercised reasonable care and skill. But where health and safety are at risk courts can be expected to be demanding.

---

[102] *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582, McNair, J., at 586.
[103] Bolitho v City and Hackney Health Authority [1998] AC 232.
[104] *Latimer v AEC Ltd* [1953] AC 643; *Wagon Mound 1* [1967] 1 AC 617 (PC).

4.5 Thus even if a service has not achieved the expected result, this does not mean that the consumer will necessarily find it easy to show that the trader is at "fault" legally. It is true that the difficulties in establishing fault (lack of reasonable care) may sometimes be overcome via the doctrine of "*res ipsa loquitur*". Essentially, this allows the court to draw inferences that there has been negligence where the circumstances suggest that it is likely that the damage or loss in question was caused by negligence. This *may* often be the case where a service does not achieve the normal result or actually causes some other damage or loss. However, in the end, the trader will not be liable if it is shown that he did act with reasonable care. Increasingly, also, in modern business practice, there is likely to be a fairly rigorous "paper trail" that purports to establish that all best procedures were followed; and this may make it particularly difficult to establish negligence.

Failure to Achieve the Reasonably Expected Outcome

4.6 An alternative approach is to base liability on failure to achieve the outcome that is reasonably expected: whether this is the outcome normally expected from the type of service in question; or the outcome that was required in the particular circumstances. The key point is that, on this sort of approach, for liability to be established it need not be that the service provider was at fault/negligent/lacking in reasonable care etc. So, the focus is not on the factors outlined above: such as whether the provision of the service meets typical industry standards; or the cost of ensuring success. The focus, rather, is on *the quality or fitness of the end result*. So, for example, the issue is whether, to continue with the above example, it could reasonably be expected that the car repair service would successfully cure the problem.

4.7 It is important to note that "outcome" based standards do not necessarily represent "absolute" liability or that consumers can expect perfection. For services, the idea can be, for example, that the supplier achieves the result that is "reasonably expected". So, to return to the car repair example, the question would be along the lines of whether, in the circumstances, it can reasonably be expected that the electrical fault will be fixed.
Also by way of introduction to the discussion to follow, it is important to stress the focus is on the legal position when services do not achieve their expected outcome. *The focus is not on ancillary problems or losses that arise during provision of the service*. In such cases, a "fault" standard applies. To take the example of a garage that is employed to repair an electrical fault in a car. If loss or damage is caused to property that has been left in the car this is covered by normal negligence or bailment principles. There does not seem to be any case for changing the law on this. The focus is instead on the more fundamental problem of a service that does not achieve its expected outcome, e.g. the actual repair of the electrical fault does not turn out as expected. It is in these cases of failure to achieve the core expected outcome of the service that the current position varies and may cause unnecessary problems for businesses and consumers. It is, therefore, in these cases, that there may be a good case for reform given that in some situations the consumer may be considered currently to be inadequately protected.

The Current Position

4.8 Most of the important rules are those contained in legislation, i.e. the SoGA and the SGSA. These rules will be considered first. However, the common law is also relevant in some cases and will also be considered.

"Pure" Services

4.9 "Pure" services are situations in which there is a service which does not accompany a supply of goods; and neither does it involve the manufacture or construction of goods or other property. On this basis, they are referred to as "pure" services. This covers, for example, many accountancy, legal, financial and leisure services. It also covers cases in which the service is applied to the property (whether immovable or movable) of the consumer; yet no goods are actually supplied with the service. This would include work on vehicles where no components at all (i.e. no goods) are transferred, e.g. where oil and tyre checks are carried out or the engine is "tuned up". It is important to emphasise these are situations in which *no tangible goods are supplied along with the service*. The situation in which goods are supplied along with a service is dealt with below. .

4.10 In the case of pure services, section 13 of the SGSA clearly lays down a fault based standard, similar to the common law duty of care in negligence, i.e. one based on exercising reasonable care and skill. A "contract for the supply of a service" is one where the supplier "agrees to carry out a service";[105] "whether or not goods are also transferred or to be transferred".[106] It is provided that in a:

> " .. contract for the supply of a service by a supplier acting in the course of a business, there is an implied term that the supplier will carry out the service with reasonable care and skill".

So, this fault based standard will apply where the provider of a pure service does not achieve the result expected. For example, imagine a car service that does not resolve a problem that the customer has asked to be fixed; or does not spot some other problem. Consider, also, an accountancy service that does not keep a customer's tax bill as low as hoped; a medical treatment that does not cure the patient as expected; or legal advice that does not achieve the desired outcome. In all such cases the supplier will only be liable if they have failed to act with reasonable care and skill. This will be the case if the service provider in question has failed to exercise the standard of care that would have been exercised by a reasonably competent member of the trade or profession in question. As indicated above, the notion as to what represents a reasonable degree of competency is very often based on the views of a body of opinion in the trade or profession. However, as also indicated above, it is open to the court to reject such a body of opinion as not being reasonable or responsible.[107] Here, the court ends up setting its own, higher standard of competency.

---

[105] S.12(1).

[106] S.12(3)(a). In other words, the standard laid down in s.13 applies both to the pure services we are currently dealing with; and to the goods/services transactions we will deal with below, although in these latter cases we find outcome based standards may often also apply.

[107] *Bolitho v City and Hackney Health Authority* [1998] AC 232.

The Services/Goods Mix

4.11 Things become more complicated in those cases where goods and services are supplied together. The SGSA, section 13 provides that a fault standard applies to the services regardless of whether or not goods are also transferred or to be transferred. So, in cases involving goods, whatever other standard may apply, the section 13 fault based standard will apply (as a minimum) to the service element. However, in addition to the section 13 fault based standard, outcome based standards (from the implied terms applicable to goods) may apply. Various important situations need to be distinguished in turn.

Goods Defective Prior to Service Element - the General Position

4.12 It is extremely common for services and goods to be supplied together; e.g. where a trader agrees to supply and install goods in car servicing and home improvement contracts. In such circumstances, there are two possible forms of transaction that might be determined to exist. The service element might be sufficiently small relative to the goods element (so that the transaction remains a sale (see paras 2.4 – 2.5)); or the service element might be more substantial (so that the transaction as a whole is a work and materials contract).[108]

4.13 In both work and materials and sales contracts, one possible scenario is that there is a problem of quality and/or fitness with the goods that existed *prior* to any service element commencing. Here the law is straightforward. Whether the transaction is classified as a sale or as a work and materials contract, "outcome based" standards will apply. The outcome based standards in question are the implied terms as to description, satisfactory quality and fitness for particular purpose. These are provided for in sections 13-15 of the SoGA; and this will be the source where the transaction happens to be classified as a sale. The same implied terms are provided for in Part 1 of the SGSA; which applies where there is a contract for the transfer of goods (such as one for work and materials) that is not a sale.

4.14 These are "outcome based" standards in the sense that the question is simply whether the goods supplied do actually meet the description; whether they are of satisfactory quality; or whether they are reasonably fit for a particular purpose. If the goods fail any of these standards the seller/supplier is liable; and it is of no relevance that the seller/supplier acted with reasonable care and skill.

4.15 So, for example, X is contracted to repair Y's car. In the course of the repair X fits a part that contains a manufacturing defect. This part is clearly covered by the (outcome based)

[108] This reflects the generally accepted test for distinguishing between the two different forms of transaction. If the predominant element is transfer of goods, the transaction is treated as a sale; while if the predominant element is services or "work", the transaction is classified as one of work and materials. On this see *Robinson v Graves* [1935] 1 KB 679; and G.Woodroffe, *Goods and Services: The New Law*, (London: Sweet & Maxwell, 1982), at para. 3.03. Contrast *Stewart v Reavells Garage* [1952] 2 QB 545; *GH Myers and Co. v Brent Cross Service Co.* [1934] 1 KB 46; *Aced v Hobbs-Sesack Plumbing Co* 360 P 2d 897 (Cal Sup Ct, 1961) (all work and materials contracts); with *Philip Head and Sons Ltd v Showfronts Ltd* [1970] 1 Lloyd's Rep 140; *Love v Norman Wright (Builders) Ltd* [1944] KB 484; *Collins Trading Co. Pty Ltd. v Maher* [1969] VR 20 (Vict Sup Ct) (all sales contracts). See also paras. 2.13-2.17.

implied terms as to fitness and quality; either those deriving from sections 13-15 of the SoGA or those from Part 1 of the SGSA. If the defective part constitutes a breach of one of the implied terms as to description, quality or fitness, the seller/supplier is liable; and it is no defence to this liability for the seller/supplier to show that he acted with reasonable care and skill.

Materials Defective Prior to Service Element - Certain Professional Services

4.16 There are certain professional services that also involve the supply of some tangible materials, e.g. blood, drugs, legal documents etc., along with the respective medical or legal services. In such cases, there is of course no doubt that the section 13 SGSA standard applies to the element that is obviously a service, i.e. the medical diagnosis, legal advice etc. But what is the position in relation to the materials supplied. In cases where these were defective prior to any service element? One might think that such contracts would be treated as work and materials contracts. This would mean, as explained in the previous paragraph, that the (outcome based) implied terms as to description, quality and fitness from Part 1 of the SGSA would apply. However, this will often not be the case.

4.17 The common law position prior to the SGSA was somewhat confused. In a US case involving the supply of contaminated blood[109] it was found that there were no implied warranties as to the quality or fitness of the "products" in question. In other words, the liability was *not* based on failure to achieve the *outcome* as discussed above. The contract as a whole was viewed as being a contract for a service; with the blood merely being an incidental element of this contract. The only obligation on the professional supplier was, therefore, in the law of negligence, i.e. to exercise reasonable care. If such reasonable care had been exercised, then there was no liability irrespective of the defective or unfit condition of the product supplied. It seems quite likely that a similar approach would be taken by the English courts. In other words, in cases involving the supply of such "products" as defective drugs or contaminated vaccine, the courts might well not treat these products as being goods that were covered by the outcome based implied terms in Part 1 of the SGSA. Rather, the contract as a whole might simply be viewed as being one for pure services. Based on this, the only standard applied might well be the section 13 SGSA fault based one rather than the outcome based standard of the implied terms as to quality and fitness.[110]

4.18 However, in one case there *was* found to be a warranty of fitness for purpose in relation to a serum supplied for cattle by a veterinary surgeon.[111] In other words, an outcome based standard was applied, rather than a fault based standard. It has been suggested that the difference between this and the above cases may lie in the fact that "human blood for transfusion is not ordinarily thought of as the subject of commerce that is bought and sold,

[109] *Perlmutter v Beth David Hospital* 123 Ne 2d 792 (1955)
[110] For a discussion see P.Atiyah, J.Adams and H.McQueen, *Sale of Goods,* 12th edn, (Harlow: Pearson Education Ltd, 2010), pp. 23–5 and see *Roe v Minister of Health* [1954] 2 QB 66. Of course, there is always the possibility that the supplier falls within the strict liability regime under the Consumer Protection Act 1987; on which see G.Howells (ed), *Butterworths Product Liability*, 2nd edn, (London: Butterworths, 2007), Chapter 4 generally.
[111] *Dodd v Wilson* [1946] 2 All ER 691.

whereas cattle serum is ordinarily the subject of contracts of [supply]".[112] It has been further suggested that a similar approach might be taken under the SGSA.[113]

4.19 So, the key conclusion seems to be that a product (such as blood) that is not ordinarily thought of as the subject of commerce that is bought and sold might be found *not* to be "goods" under the SGSA; with the result that the "outcome" based liability under the implied terms as to description, quality and fitness will not apply. The contract, in other words, would effectively be treated as a pure services contract and the supplier would simply be bound to exercise reasonable care in fulfilment of the reasonable care and skill implied term contained in section 13 of the SGSA.[114]

4.20 On the other hand, if the product *is* ordinarily thought of as the subject of commerce that is bought and sold, then it is likely to be found to be "goods" for the purposes of the SGSA; meaning that the outcome based implied terms as to description, quality and fitness will apply to this element of the transaction.

Defective Services Affecting the Goods Supplied - Application of section 13 SGSA

4.21 What happens where the service element of the performance *actually causes the goods being supplied to be defective or unfit for purpose*? In other words, to alter the example given above about the defective part, suppose that there is no manufacturing defect; nothing at all wrong with the part prior to the time when the service element (its fitting to the car) commences. However, during the fitting (which is certainly a service) the part becomes damaged or is fitted in such a way that it is unfit for purpose in its installed state.

4.22 In such cases, the current legal position is confused. Certainly, the section 13 SGSA fault based standard applies to the service element as a minimum. Indeed, it is spelt out explicitly that this is the case where there is a contract to sell and install goods. The law was amended in 2002 to provide that in contracts for the transfer of goods, where installation of the goods forms part of the contract, goods are treated as not being in conformity with the contract if they are installed in breach of the implied term as to reasonable care and skill in section 13 of the SGSA.[115] The amendment was made to implement Art. 2(5) of the Consumer Sales Directive, which provides that where, under a contract of sale, the seller agrees to install the goods, any non-conformity resulting from the "incorrect installation" of the goods is to be treated as equivalent to the goods being non-conforming. This

[112] P.Atiyah, J.Adams and H.McQueen, *Sale of Goods,* 12th edn, (Harlow: Pearson Education Ltd, 2010), at p. 24
[113] P.Atiyah, J.Adams and H.McQueen,*Sale of Goods,* 12th edn, (Harlow: Pearson Education Ltd, 2010), at pp. 24-5.
[114] See also the discussion of blood in G.Howells (ed), *Butterworths Product Liability*, 2nd edn, (London: Butterworths, 2007), at paras**.** 4.52–4.57**.** It must also be emphasized that the whole question as to whether it is acceptable to view such contracts as involving pure services (ignoring the fact that a tangible item has been supplied) must be seen in the light of the Consumer Sales Directive (and any amendment of it in a future Consumer Rights Directive) that currently applies to contracts for the "sale" of "consumer goods" and then defines consumer goods as "any tangible movable item". If the ECJ was to insist on an "autonomous" EU interpretation of this, which included such things as blood, drugs or vaccine; then these would need to be treated as goods for the purposes of the outcome based implied terms applicable to goods. This is because the Consumer Sales Directive imposes outcome based liability for goods that are not in conformity with the contract (see 99/44/EC, art. 2).
[115] See Sale and Supply of Goods to Consumers Regulations 2002, (S.I. 2002/3045), reg. 10, inserting a new s.11S into Part 1 of the SGSA. On this, see D.Oughton and C.Willet, "Liability for Incorrect Installation and Other Services Associated with Goods", in G.Howells, A.Nordhausen, D.Parry and C.Twigg-Flesner (eds), *Yearbook of Consumer Law 2007*, (Aldershot: Ashgate, 2009) pp. 229-276.

amendment only applies in respect of contracts subject to the SGSA, and not the SoGA. Perhaps there was an assumption that a contract involving the installation of goods would always be a work and materials contracts and *not* a sale, but as we explained in chapter 2, this is not the case. The added complication is that s.13 SGSA is a fault-based standard, whereas Art.2(5) seems to impose strict liability. The difficult question, to which we turn in the next paragraph, is whether outcome based standards (i.e. those deriving from the implied terms as to the goods) *also* apply.

Defective Services Affecting the Goods Supplied - Application of Goods Implied Terms

4.23 In these cases where goods being supplied by the trader are damaged by the installation service, is there, in addition to the section 13 SGSA fault based standard, also an outcome based standard? Specifically, are the goods in breach of the implied terms as to quality and fitness if they are damaged during an installation service that is provided along with supply of the goods? There is certainly no reason that a higher standard cannot be imposed. Section 16(3) SGSA provides that the section 13 reasonable care standard does not prejudice any rule of law imposing a stricter duty.

4.24 A key question is as to when, exactly, goods need to comply with the implied terms as to quality and fitness. If the time for compliance is *prior* to any service element being carried out, e.g. prior to the goods being fitted or installed; then obviously if the goods are in compliance with these implied terms prior to the service element commencing, there is no breach of these implied terms. Any problems caused by installation would be solely a matter for the fault standard in section 13. However, it does seem that a good case can be made to the effect that goods should normally comply with the implied terms as to quality and fitness *after* a service such as installation. One view is that the time for compliance with these implied terms is the time when delivery takes place.[116] Another view is that the goods must be in compliance with the implied terms at the time when the risk passes to the buyer.[117] For the purposes of consumer sales, the position now is that goods remain at the seller's risk until the goods are delivered to the consumer.[118] So, whichever of the two views is correct, the issue as to when the goods must comply with the implied terms turns ultimately on when delivery takes place.

4.25 "Delivery" takes place at the point when the goods are "voluntarily transferred" to the consumer.[119] Where the seller has agreed to install the goods and has retained physical possession of the goods up until the point at which he installs them; then it might be argued that they have only been transferred to the buyer when installation is complete. The result of this would be that if the goods are rendered unsatisfactory or unfit by the process of installation, they will be unsatisfactory/unfit at the time of delivery and there will therefore be a breach of the relevant implied term.

4.26 The position may be the same even where goods are physically handed over to the consumer prior to the date of intended installation. It might be possible to develop an analogy with one of the requirements of the default rules for the passing of property in s.18

[116] See *Viskase Ltd v Paul Kiefel GmbH* [1991] 1 All ER (Comm) 641.
[117] R.Bradgate *Commercial Law* (3rd edn,) (Oxford: Oxford University Press, 2005), p. 275.
[118] SoGA, s.20(4).
[119] SoGA, s61.

SoGA. These require that goods must be in a "deliverable state" before property can pass, although there is no requirement that goods have to be in a "deliverable state" before they can be *delivered*. "Deliverable state" has a technical meaning (see s.61(5) SoGA , according to which goods are in a deliverable state if they are in such a state that the buyer would be bound under the contract to take delivery of them. It is possible that goods are not yet in a "deliverable state" within that meaning even if it is perfectly possible to transfer possession. In cases of installation, however, one might like to draw an analogy and say that there has not been effective delivery until the goods are in a "deliverable state" in this sense. It was held in *Philip Head & Sons Ltd. v Showfronts Ltd.*[120] that, where there was a contract to sell and fit a carpet, the carpet was not in a deliverable state until it had been fitted as agreed. The test laid down was whether, relative to the obligation to supply goods, there remained a significant other obligation in relation to the goods, in which case the goods were not in a deliverable state until this had been fulfilled as well.[121] It was said that the issue was a matter of construction on the facts of each case but that if work is still to be done there is a presumption that there was no intention for property to pass at that stage.[122]

4.27 It is true that this case was concerned with whether the buyer or seller bore the risk when the carpet was stolen while it was at the buyer's premises, but had not yet been laid. It is also true that the case was decided at a time when the presumption was that risk passed at the same time as property. As pointed out above, this is no longer the case in consumer contracts; risk not passing until actual delivery. However, the case did concern the concept of "deliverable state" and it may be plausible to suppose that if goods are not in a deliverable state then there cannot yet have been a "voluntary transfer" of these goods. If there has not yet been such a voluntary transfer, it is arguable that there has not yet been delivery. Finally, it is on delivery that the goods seem to have to comply with the implied terms as to quality, fitness, etc.

4.28 It appears, then, that goods should normally comply with the strict liability implied terms *after* a service such as installation; even where the goods have been handed over to the consumer prior to installation. However, the position is hardly crystal clear. In addition, it appears that it can indeed only be said that this is *normally* the case. The issue will often be a matter of construction on the facts of the case. There may be a presumption that the goods are not deliverable until the service element has been performed (the requirement to comply with the strict implied terms therefore arising immediately subsequent to that point); but this is a presumption that, apparently, can be overturned on a construction of the facts.

4.29 In conclusion, then, it is unclear exactly when the law imposes an outcome based standard in the case of goods affected by an installation service.

Common Law Implied Terms

4.30 Above we have considered the application of the key statutory provisions to pure services and various mixes of goods and services. However, the common law may also have a role to play.

[120] [1970] 1 Lloyd's Rep 140.
[121] [1970] 1 Lloyd's Rep 140, Mocatta J., at 144.
[122] [1970] 1 Lloyd's Rep 140, Mocatta J., at 144.

Defective Software

4.31 BIS has commissioned a separate Report on Digital Services, but some brief comment is relevant in this context. This is a category where the basic legal nature of the supply is in question. Computer hardware is clearly goods, and if hardware and software are supplied together this may be a contract for the sale or supply of goods.[123] If this is the case, then the (outcome based) statutory implied terms as to description, quality and fitness will apply.[124] There is, however, also authority to the effect that such a contract should be viewed as a contract *sui generis*.[125] If this is the case, then the courts would be likely to imply similar outcome based standards at common law to the hardware and software.

4.32 Of course the software may have been transferred into the transferee's system without any transfer of a disc. In such a case it appears that there is not a contract for the sale or supply of goods.[126] This would mean that the statutory implied terms as to the description, quality and fitness of the goods would not apply. However, equally, such a contract may not be a contract for a service either; so that the SGSA, section 13 implied term as to reasonable care may not apply. Such a contract may be treated as a contract *sui generis*. The same may be true of a contract for the transfer of a *licence* to use a particular type of software. This being the case, it is possible that the courts would imply similar outcome based terms to those applicable under statute to goods, e.g. that the software is reasonably capable of achieving its intended purpose.[127]

Design and Build Contracts

4.33 A contractor, such as an architect or civil engineer, may be engaged to design and supply an end product such as part of a building or other structure based on detailed information supplied by the client specifying his particular requirements. In these types of case the courts have been willing (depending on the facts of the specific case) to imply an outcome based term to the effect that the end product will be fit for the purpose specifically made known by the customer.[128]

4.34 These decisions were made before the SGSA and the fault based standard that it imposes. However, there is no difficulty with continuing to take such an approach after the SGSA. As noted above, section 16(3) of the SGSA provides that the section 13 reasonable care standard does not prejudice any rule of law imposing a more onerous duty.

4.35 In theory, the courts could imply an outcome based implied term on the facts of a case involving any type of service, i.e. not only "design and build" contracts. However, in practice, implication of such a term will be uncommon outside such cases. For example, it is unlikely that a *professional* service provider such as a lawyer or medical practitioner will ever be

[123] *St Albans City and District Council v International Computers Ltd.* [1996] 4 All ER 481 CA*; Toby Construction Products Pty Ltd. v Computer Bar (Sales) Pty Ltd.* [1983] 2NSWLR 48.
[124] Whether those deriving from the SoGA or from the SGSA.
[125] *Beta Computers (Europe) Ltd. v Adobe Systems (Europe) Ltd.* 1996 SLT 604, Lord Penrose.
[126] *St Albans City and District Council v International Computers Ltd.* [1996] 4 All ER 481, CA, *per* Sir Iain Glidewell at 493.
[127] See Judge Thornton QC, in *Watford Electronics Ltd. v Sanderson* [2001] 1 All ER (Comm) 696.
[128] See *Stewart v Reavell's Garage* [1952] 2 QB 545; *Greaves & Co (Contractors) Ltd. v Baynham Meikle & Partners* [1975] 1 WLR 1095; *Independent Broadcasting Authority v EMI & BICC* (1980) 14 BLR 1.

taken to have guaranteed the success of the work undertaken on behalf of a client or patient; because of the future uncertainty associated with the type of work undertaken. Indeed, even if professional negligence is established, courts may restrict the losses that are recoverable. Take, for example, a case where a couple were informed that a vasectomy had been successful and that contraception was no longer necessary. This turned out not to be correct and the woman became pregnant. The House of Lords held that if the advice was negligent, the mother would be entitled to damages for the pain, suffering and inconvenience of childbirth and the immediate medical and other expenses. However, she would not be entitled to recover the costs of actually raising the child.[129]

Problems with the Current Position

4.36 The above discussion has shown that a fault based standard applies in a significant number of situations (the main category being where there is a "pure" service supply with no associated supply of goods element). An outcome based standard, deriving from the supply of goods implied terms, certainly applies to the condition of the goods prior to any service element. The same outcome based standard may also apply where a service, such as installation, damages the goods; but the position is not entirely clear. Common law implied terms may be used to set an outcome based standard in particular types of case, in particular in the case of software and where (on the facts) there is a sufficient degree of specification of consumer requirements. This section outlines the problems caused by the current position.

Complexity and Uncertainty

4.37 There seem to be a number of interconnected ways in which the rules on services pose problems of over complexity and uncertainty. First, there are *different substantive standards for different services*. So, in some cases the standard is fault based. In other cases it is an outcome based standard of reasonable fitness for purpose. Even this second category seems to subdivide into several different situations. There are the software cases where the outcome based approach may arise as a matter of law in all cases. Then there are the cases (such as design and build) where all is dependent on the particular facts. Finally, there is the situation where an installation service is applied to goods; where the standard may sometimes be that set by the sale and supply of goods implied terms.

4.38 Second, these standards have a *variety of legislative and common law sources*; ranging across the rules in the SGSA, the SoGA; along with common law rules, both on implied terms in law and implied terms in fact.

4.39 Third, there is uncertainty as to the position where goods are supplied along with an installation service. It is clear that the installation service is subject to the fault based standard in section 13, SGSA. However, it *may* be the case that goods should also normally comply with the outcome based implied terms (as to goods) after a service such as installation. However, it can indeed only be said that this is *normally* the case; the issue will often be a matter of construction on the facts of the case.

[129] *McFarlane v Tayside Health Board* [2002] 2 AC 59.

4.40 Fourth, the standard for services is sometimes fault based and sometimes outcome based; while the standard for goods is almost always outcome based.

4.41 Finally, all of these problems are magnified by the fact that it is notoriously difficult to draw a clear line between some goods and services in the first place. In particular, we should remember that, if the goods/services line is a difficult and blurred one for lawyers, it is even more so for businesses and consumers. For example, the language of "products" is routinely used at all stages of consumer engagement with many things that lawyers would describe as services; in particular financial services. Conversely, "management speak" often dictates the use of the "service" label when the main element of any transaction would be goods according to the law.

4.42 This complexity and uncertainty arguably risks causing uncertainty for businesses, consumers and advisers. This imposes unnecessary costs on all parties. It may also undermine consumer confidence in what is a vital element of the economy. For the benefit of both traders and consumers it is desirable that legal regimes should be as clear and accessible as possible. This is of particular importance for those (with limited time and expertise) that may often advise consumers, e.g. generalist lawyers and non qualified consumer advisers. However, it is also important for business advisers; especially those advising small businesses, who will often (like those advising consumers) be small, generalist legal practitioners. It also makes it easier to provide clear, effective consumer education.

Value for Money and Reasonable Consumer Expectations

4.43 The fact that a fault based standard applies in many cases means that consumers will not have a remedy when a service is defective; unless it can be established that the trader did not act with reasonable care. This may be quite common. Some traders may fairly readily be able to produce a rigorous "paper trail" that purports to establish that all best, and generally accepted, procedures were followed; and this may make it particularly difficult to establish negligence. The result in such cases is that consumers are deprived of "value for money". They have paid for a service to achieve a certain outcome; this outcome has not been achieved; yet there is no remedy.

4.44 The unavailability of a remedy for a service that does not produce the outcome expected may also be said to be at odds with reasonable consumer expectations. The expectation of a remedy is likely to be strengthened by the fact that consumers are unlikely to see many services as very different from goods. In the case of goods, a remedy *is* usually available for failure to achieve the expected outcome. In contracts for the sale and supply of goods, as we have seen, there are implied terms to the effect that the goods will comply with their description; be of satisfactory quality; and be reasonably fit for any particular purpose expressly or impliedly made known.[130] Here, there is no need to establish lack of reasonable care on the part of the seller or supplier. What must be established is that the goods do not comply with the description, are not of satisfactory quality, are not fit for a particular purpose etc.

[130] For example, SoGA, ss.13-15.

4.45 A broadly similar approach is taken to the liability of *producers* for goods that cause injury or damage the property of the ultimate consumer. Here, the liability is based on showing that there is a "defect" in the goods;[131] and a key part of this depends on whether the goods in question have harmful characteristics that normal, "standard" goods do not have.[132] The "reasonable care" that may have been taken by the producer is not a relevant factor.[133]

4.46 It may be entirely reasonable of consumers to expect a similar legal standard that applies to goods to apply in the case of many services. Many services *are* like goods in that they are mass produced and standardised, e.g. dry cleaning, photographic development, the production of computer software etc. It is therefore – arguably – reasonable to expect that suppliers produce consistent outcomes (just as they are expected to do in the case of goods).

4.47 Indeed, it may appear particularly unjust if goods and services are supplied together and the supplier is responsible for the defective goods without any need to establish lack of reasonable care and skill; yet is not responsible for the defective service because it has not been possible to establish a lack of reasonable care and skill. This could happen, for example, in the case of a car repair. The garage would be responsible for defective parts without any need to demonstrate lack of reasonable care and skill by the garage. However, if the service failed to repair the fault or faults in question and the customer could not establish a lack of reasonable care and skill, the garage would not be responsible for this, even if, in the circumstances, it would have been reasonable to expect the fault or faults to have been repaired.

Options for Change

No Change

4.48 The first option is to leave the law entirely as it stands at present.

Advantages
4.49 On the one hand it can be argued that this option avoids the costs of legislative drafting and parliamentary time. It also avoids the potential uncertainty that can arise in relation to any new rule.

Disadvantages
4.50 However, these issues will arise in relation to virtually any law reform; and here, they seem to be heavily outweighed by arguments for at least some measure of reform. Making no change would completely ignore the problems of uncertainty and complexity outlined

[131] Consumer Protection Act 1987, Part 1, s.2(1).
[132] *A v National Blood Authority* [2001] 3 All ER 289; Burton J., at [36].
[133] *A v National Blood Authority*, at [68]. However, a "reasonable care" approach is retained, to a degree, in the case of producer liability by virtue of the "development risks" defence. This provides a defence where it can be shown that the state of scientific or technical knowledge at the relevant time (i.e. when the product was supplied) was not such that a producer of products of the same description as the product in question might be expected to have discovered the defect if it had existed in his products when they were under his control (Consumer Protection Act 1987, s.4(1)(e)).

above. As indicated above (see paras 4.37 - 4.42), these problems impose unnecessary costs on businesses, consumers and advisers. It is surely better to incur the short term costs of reform than to continue to incur the long term costs of uncertainty and complexity; especially if, as suggested above, the uncertain state of the law could damage consumer confidence and therefore affect market development.

Selective Clarification within Existing Structure

4.51 Under this option there would be no change to the overall structure of the law on consumer services. So, all the relevant provisions described above would remain in place. However, there would be clarification (for the removal of doubt) on certain key points. This could involve clarifying the position in relation to:

-services of a professional nature; where tangible materials are supplied along with the service, e.g. blood, drugs, legal documents etc. it would be made clear whether these are to be treated as services (and therefore subject to the fault standard in SGSA, section 13) *or* goods (and therefore subject to the outcome based standards contained in the implied terms on goods).

-the software situations; where, currently, it appears that there will often be considered by the courts to be a contract "*sui generis*"; giving rise to an (outcome based) implied term to the effect that the software is reasonably capable of achieving its intended purpose. The idea would be to clarify that this is indeed the position.

-the situation in which a supplier contracts to sell or supply goods and also to install them for the consumer and the goods (although initially fine) are damaged during the process of installation. The key clarification would involve stating expressly that the goods must comply with the various implied terms as to goods immediately on completion of the installation.

Advantages

4.52 This option is arguably the minimum that is required. It seeks to address the problems of uncertainty as to what standard applies in certain important situations. In this respect, it could be said to improve certainty and reduce any costs for the parties that are caused by this uncertainty. In addition, it does not involve anything more than reform of selected, specific issues.

Disadvantages

4.53 However, this option fails to address two other important issues.

First, it does not address the problem of the law being *inaccessible*. The law on this very important, everyday issue for businesses and consumers would still be "scattered" around in a variety of sources, including:

-section 13, SGSA, for pure services in general;

-the implied terms on goods in both the SGA and SGSA, for cases where installation services damage goods;

- new rules clarifying the position in relation to software cases and "design and build" services.

4.54 The second problem with restricting reform to selective clarification is that the general position in relation to services would remain as it is now. In other words, the very many pure services would continue to be subject to a fault based standard; rather than an outcome

based standard (see paras. 4.9 -4.10 above). Yet, as we have seen (see paras. 4.43 – 4.47 above), this may be unfair in that the need to establish fault may deprive consumers of value for money in those cases where an outcome has not been achieved, but fault cannot be established; and may be out of step with reasonable consumer expectations (in that consumers are unlikely to distinguish between goods and services and there may often be little real distinction, especially where services - e.g. dry-cleaning, photographic development- are mass produced).

***A* "Clean Slate" Approach**

4.55 This would involve introduction of a broadly applicable "outcome" based standard; i.e. a requirement that the service should achieve the outcome reasonably expected in the circumstances. Three possible models are provided by the DCFR and Australian law.

Draft Common Frame of Reference

4.56 One possible model for this is the DCFR, which provides that:

> "(1) The supplier of a service must achieve the specific result stated or envisaged by the client at the time of the conclusion of the contract, provided that in the case of a result envisaged but not stated:
> (a) the result envisaged was one which the client could reasonably be expected to have envisaged; and
> (b) the client had no reason to believe that there was a substantial risk that the result would not be achieved by the service."[134]

Australia

4.57 In Australia, there is a model that does not focus primarily on the outcome, but on the fitness of the service to achieve it. Currently this is dealt with by section 74 of the Trade Practices Act 1974; although it will soon be re-enacted in updated form in section 61(2) of the new Trade Practices Amendment Act 2010, which will create a new Competition and Consumer Act 2010. The essence of the position under the 2010 Act is that where a desired result has been made known (expressly or impliedly), it is guaranteed that the services and any product resulting from the services:

> ".. will be of such a nature, and quality, state or condition that they might reasonably be expected to achieve that result."[135]

New Zealand

4.58 In New Zealand it is provided, in the Consumer Guarantees Act 1983, section 29, that:

> ".. where services are supplied to a consumer there is a guarantee that the service, and any product resulting from the service, will be-

[134] IV. C.-2:106, see Annex 1.
[135] Note that the old s.74 Trade Practices Act 1974 provision made a qualification on the obligation, providing that it did not arise where the consumer did not rely, or it was not reasonable for him to rely, on the supplier's skill and judgement (See Annex 9 for this provision).

(a) reasonably fit for any particular purpose; and
(b) of such a nature and quality that it can reasonably be expected to achieve any particular result,-
that the consumer makes known to the supplier, before or at the time of making the contract for the supply of the service, as the particular purpose for which the service is required or the result that the consumer desires to achieve, as the case may be, except where the circumstances show that-
(c) the consumer does not rely on the supplier's skill and judgement; or
(d) it is unreasonable for the consumer to rely on the supplier's skill and judgement."

4.59 We can see that all of these approaches are, although in slightly different ways, focussed on the outcome of the service. Now we will weigh up the disadvantages/problems and advantages of such outcome based standards in general. After that we will make recommendations; and this will include discussion of which elements of the DCFR, Australian and New Zealand models should be adopted.

Weighing up Disadvantages/Problems and Advantages of an Outcome Based Standard

4.60 The issues arising here are so numerous that it seems best to divide up the discussion of disadvantages/problems versus advantages into various categories. First of all we deal with the basic issue of the costs and uncertainties of change versus the need for reform.

Uncertainty and Cost Disadvantages of a "clean slate" approach

4.61 The "Clean Slate" option would introduce a broadly applicable outcome based standard for services. Of course, there are drawbacks to such an approach. Clearly, such a standard would be new and would alter the general legal position in the case of many services. This could cause a degree of uncertainty. It might also impose costs on businesses. These costs might come from the need to become informed as to the implications of the different standard. They might also come from the need to insure against a different, less certain form of liability. Finally, extra costs might arise if suppliers were found liable in cases where they would not currently be liable, but of course there is the issue od whether that is justified in any case

The Need for Reform to Deal with Existing Problems

4.62 However, on balance, there seems to be a strong case for this option. A broadly applicable outcome based standard would address the problem of uncertainty that exists in many cases as to what the legal position actually is. It would also make the law more accessible as there would be a single provision covering all those cases in which an outcome based standard applies.

4.63 By dealing with the problems of uncertainty and inaccessibility there might be a reduction in costs for businesses and consumers; and there might be a boost to consumer confidence.

4.64 A broadly applicable outcome based standard would also reduce the risk of consumers being deprived of value for money in cases where the expected outcome is not achieved, yet lack of reasonable care cannot be established.
Such a standard would also reflect the reasonable consumer expectation that they will receive the same treatment when buying either goods or services.

4.65 Finally, such a standard would reflect the fact that suppliers might reasonably be expected to produce consistent outcomes (just as they are in the case of goods); on the basis that many services are similar to goods in being "mass produced". Moreover, any standard adopted could allow suppliers to limit the expectations of consumers as to the intended outcome.

Next we deal with the problem of deciding what is an acceptable outcome.

The Problem of Determining an Acceptable Outcome - a Possible Disadvantage of an Outcome Based Standard

4.66 One possible objection to imposing an outcome based standard relates to the potential difficulty in deciding what is an acceptable outcome in relation to some services. It might be said that achieving a successful outcome can be a more uncertain and "speculative" task in relation to many services than it is where goods are concerned. For example, a service operates in the context of the particular circumstances of its recipient; and these circumstances may vary considerably. For this reason it might often be difficult to decide whether there has been an acceptable outcome. This may be a particular issue where some professional services are involved. For example, how exactly do we decide when it is appropriate to hold a doctor responsible when a patient is not cured; or to hold a lawyer responsible when a client loses their case? So, when should they be liable?

Responding to the Argument that it is too difficult to determine an Acceptable Outcome

4.67 In fact, deciding what an acceptable outcome for services is may not be as difficult as is often imagined. The following points can be made.

4.68 First of all, the mass produced, standardised nature of many services means that it is not necessarily any more difficult to measure compliance than it is in the case of goods. The "mass produced" and standardised nature provides a standard measure of quality.[136]

4.69 Second, the issue of the uncertain and speculative nature of the service may often be overstated based on a misunderstanding of what it means to produce an outcome or "result" that is reasonably acceptable (whether in general or for the particular purposes of the consumer). The outcome or "result" to which we are referring here is the *direct* end result of the service in the sense of it's quality; not some other, less direct, consequence. So, for instance, to address the issue of professional services, the primary focus of an outcome based standard is on the quality of the medical advice/treatment, the legal advice or the legal education. In other words, the central issue is whether the quality of the medical

[136] See, in particular, here, P.Atiyah, J.Adams and H.MacQueen, *Atiyah's Sale of Goods* 12th edn., (Harlow: Pearson Education Ltd., 2010), at p. 78.

advice/treatment, legal advice or legal education is that which could reasonably be expected such that the patient, client or student has been put in the best position to be cured, acquitted or to pass the exam, as the case may be. The issue is *not* whether the patient is actually cured, there is an acquittal or the exam is passed. Viewed in this way, it is arguably easier to measure whether the relevant outcome has been achieved. We are not asking the very difficult questions as to when a doctor should cure a patient, a lawyer should win a case for a client or a teacher should ensure exam success. We are, rather, simply asking whether the quality of the service package matches up to what can reasonably be expected; given what is normally provided and given the particular circumstances of the case.

4.70 Next we deal with whether a more outcome based standard makes the service provider liable where this would be unfair in the circumstances.

4.71 Under a fault based standard, the supplier may be able to escape liability where, for example, normal procedures have been followed and where it would have been too costly to improve the quality of the service. These factors are not relevant under an outcome based standard. As such it might be argued that suppliers might be exposed to liability when it would not be fair in the circumstances.

Addressing the question as to the fairness of outcome based liability

4.72 The outcome based liability regimes being discussed here all contain sufficient flexibility to ensure that suppliers are only liable when this would be fair in the circumstances. A key feature of this is the scope that is provided for suppliers to control the extent of their responsibility to consumers.

4.73 The Australian and New Zealand approaches are flexible in that they do not insist on a result at all; merely that the *services* should be such that they might reasonably be expected to achieve the expected result. So, as long as the services supplied would normally achieve the result in question, the supplier will not be liable simply because the result could not be achieved due to the particular circumstances.

4.74 The New Zealand approach contains a further element of flexibility. The obligation of a supplier to provide a service that is reasonably fit for a particular purpose, or to achieve a particular result, only arises where there has been reasonable reliance on his skill and judgement. If the supplier is concerned that (due to limited expertise, particular difficulties, the speculative nature of the service or other external factors) he may not be able to provide a service reasonably fit for the purpose required or a service that can reasonably be expected to achieve the result, then he can say so. If he does this, it will often then be unreasonable for the consumer to rely on his skill and judgement; and the supplier will not be liable for failure to provide a service reasonably fit for the purpose required or that can reasonably be expected to achieve the result in question.

4.75 In other words, the New Zealand approach gives the supplier the ability to communicate with the consumer (when the contract is made) about the nature and level of service that he feels able to deliver. Through this communication, the supplier can control the extent of his responsibilities.

4.76 Unlike the Australian and New Zealand regimes, the DCFR does actually focus on whether a result has been achieved. However, the DCFR approach also contains the flexibility to ensure that liability is only imposed where this is fair in the circumstances. In particular, again, it provides scope for the supplier to control the extent of his responsibility through communication with the consumer.

4.77 In the case of the DCFR, if a result has not actually been stipulated for by the consumer but is merely "envisaged", this need only be achieved as long as this is a result that the consumer could "reasonably be expected" to have envisaged; and the consumer "had no reason to believe that there was a substantial risk that the result would not be achieved by the service."[137] This provision seems to exonerate the supplier where a service of the sort in question does not normally achieve the specific result (a consumer cannot "reasonably be expected" to have envisaged such a result). Even in the case of results that are normally achieved, it does not appear that suppliers will be in breach of the standard as long as, before entering the contract, they make known to the consumer the risk that it will not be achieved in this case.[138] If such a warning has been given the customer surely has "reason to believe that there was a substantial risk that the result would not be achieved by the service". So, once again, there is scope for the supplier to make it clear to the consumer what can, and cannot, be expected. So long as this is done, it should be a key factor in determining the responsibility of the supplier.

4.78 Managing consumer expectations (and, thereby, the scope of their own legal responsibilities) through communication with consumers is not an especially difficult or novel enterprise for suppliers of services. It is common practice for many trade and professional service providers, having assessed the circumstances, to go through with the customer the particular tasks that will be carried out and what can and cannot be expected. This often happens, for example, in the case of dry cleaning, clothing repairs, home improvements, legal services etc. Indeed, in many such instances, trade or professional codes of conduct provide rules on the way that the service provider should communicate with the customer and agree levels of service. For example, under the Solicitor's Regulatory Authority regime it is provided that the solicitor should indicate to the client the 'steps to be taken' and that the parties should 'agree the appropriate level of service'.[139]
If service suppliers follow such professional guidelines as to communicating and agreeing levels of service, it seems likely that courts will treat such communication and agreement as having a key role to play in shaping any outcome based standards that might be introduced.

[137] IV. C.-2:106, see Annex 1.
[138] E.g. due to limited expertise, particular difficulties, the speculative nature of the service or other external factors.
[139] Solicitor's Code of Conduct, 2007, Rule 2 (1)(c) and (2)(a).

Disadvantages Based on the Inability of Services Suppliers to "Pass Back Liability"

4.79 It might be said that it is fair to impose an outcome based standard on suppliers of goods because defects in goods often derive from the production process; so that sellers can pass their liability back to the producer.[140] In contrast, the supplier of a service is unable to do this; so it might be said to be unfair to impose an outcome based standard.

Responding to the Pass Back Liability Argument

4.80 It is true that sellers of goods can often pass liability back to producers, while service suppliers usually cannot. However, sellers of goods cannot do so (a) where they are the cause of the problem themselves,[141] (b) where the producer, or whoever was their seller, is insolvent or untraceable and (c) where the producer, or whoever was their seller has used a valid exemption clause.[142] These factors notwithstanding, the seller remains strictly liable to the consumer.

4.81 Further, *producers* of goods are strictly liable to consumers, at least for damage to property and personal injury; yet they are unable to pass back this liability to anyone. One justification for this is to ensure that individual consumers do not suffer unrecoverable losses in cases where their rights against their immediate seller are rendered useless by the insolvency of this seller. The cost of the extra risk borne by producers is then spread amongst consumers generally in small price increases. There seems no obvious reason that the same logic cannot be applied to imposition of outcome liability on the suppliers of services. i.e. service provider = producer

Recommendations

4.82 Our general conclusion based on the above analysis is that there is a strong case for a broadly applicable outcome based standard. Essentially, this recommendation is based on the view that, while we recognise the problems that such a standard might bring; we feel that the clear advantages of such a standard mean that there is a broad advantage to adopting this policy choice. Either these problems are taken as a reason not to adopt such a standard; or the view can be taken that these possible problems are outweighed by the advantages of an outcome based standard. We take the latter view.

Recognising the Potential Problems

4.83 It is, of course, the case that most of the arguments are very broad brush in nature. The case of professional services raises some particular difficulties. It may be true that an

[140] Just as the seller can be sued by the consumer if the goods are in breach of the implied terms as to description, quality and fitness, the seller can make a claim under these implied terms against whoever it was that he bought the goods from, whether this is the producer or some intermediate contractor in the chain.
[141] I.e. where the goods were fine when the seller bought them, but they have been rendered defective by the seller; or where the seller is also the producer.
[142] In business–to-business contracts exclusion or restriction of liability for breach of the implied terms as to description, quality and fitness of goods is possible subject to a test of reasonableness (Unfair Contract Terms Act 1977, ss.6(3) and 7(3).

outcome based standard provides ample flexibility to determine when exactly it is fair or reasonable to impose liability. Equally, there might be a danger, in practice, that such an approach could cause problems. For example, it might encourage vexatious claims. Further, it might be difficult, in practice, to determine exactly what kind of outcome it is reasonable to expect. After all, the courts are well practiced at assessing whether there has been a breach of a fault based standard in a professional context; but this is not the case in relation to an outcome based standard.

4.84 The "mass produced", standardised nature of many services argument suggests it should not be particularly problematic to apply an outcome based standard to many different types of service, such as dry-cleaning, car wash machines and many forms of software package. [143] However, many services are *not* mass produced. So, for example, some software packages are highly customised to the requirements of the customer. In addition, many professional services (including many legal, medical and accounting services, for instance) are highly customised to the particular requirements of a given customer. In these cases, there is no "typical" outcome to use as a measure.[144]

4.85 The "mass produced versus customised" scenario raises a further difficulty. It can be argued that where services are subject to mass production and distribution; any extra costs imposed on suppliers by an outcome based standard can be spread across their high volume of customers. By the same token, of course, this may not be possible for those that provide more customised services and do not have such a broad customer base.[145] Yet nevertheless setting standards will ensure that suppliers meet those levels or face having to compensate consumers. Lower standards simply allow lower quality producers to obtain a financial advantage over higher quality suppliers who are unable to signal their higher quality to consumers.

Outcome Based Liability as the Best Policy Choice

4.86 Notwithstanding these problems that might arise (in relation to professional services, software and more generally) if an outcome based standard was to be adopted, a choice then arises. These problems can be taken as a reason not to adopt a generally applicable outcome based standard. Alternatively, the view can be taken that these potential problems are outweighed by the advantages of an outcome standard that were outlined above; i.e. improving the certainty and accessibility of the law, reducing costs, boosting consumer confidence, promoting value for money and better reflecting reasonable expectations (see above).

4.87 It is submitted that the advantages of a generally applicable outcome based standard do, indeed, outweigh the drawbacks. In particular, it is unrealistic to imagine that there will not be some drawbacks to a reform such as this. However, the sort of models being suggested are strongly qualified by reference to what is "reasonable". Finally, of course, it would be possible to introduce a broadly applicable outcome based standard; while expressly excluding certain particular types of service, if it was believed that suppliers of

[143] See, in particular, here, P.Atiyah, J.Adams and H.MacQueen, *Atiyah's Sale of Goods* 12th edn., (Harlow: Pearson Education Ltd, 2010), at p. 78.
[144] At the same time, the highly customised nature of the service provides its own measure.
[145] See, in particular, here, P.Atiyah, J.Adams and H.MacQueen, *Atiyah's Sale of Goods* 12th edn.,(Harlow: Pearson Education Ltd., 2010), at p. 78.

such services would be especially prejudiced by such a standard. The DCFR expressly excludes transport, insurance and financial services; as well as contracts for the provision of a financial product or a security.[146] It seems, however, to be beyond what can be provided here to consider the arguments for exclusion of particular services.

4.88 Apart from the general recommendation to introduce a broadly based outcome based standard, there are some more specific issues as to the nature of this standard.

A Satisfactory Outcome or Simply Fitness to Achieve an Outcome

4.89 One possible approach is to base the standard squarely on the outcome itself. For example, the DCFR approach refers to achieving the "specific result" stated or envisaged by the client. An alternative approach is to focus more on the *service itself*. The New Zealand test refers to whether the *service* is reasonably fit for purpose or of such a nature or quality *that it might reasonably be expected* to achieve the desired result. The Australian test also focuses purely on the service. As with the New Zealand test, the question is whether the service is such that it can reasonably be expected to achieve the result. (Unlike the New Zealand approach, and the previous Australian approach, the new Australian approach does not refer to the fitness for purpose of the service as such).

4.90 There may often not be a great difference in practice between these two approaches. The failure to achieve the desired result will, in itself, often suggest that the service was not reasonably fit for this purpose or not of such a nature or quality that it could be expected to achieve the result. However, an approach that focuses on the fitness of the service to achieve the result (rather than focusing directly on the result) is potentially uncertain and circuitous. It seems more sensible to take the more direct approach of the DCFR; and focus squarely on whether the outcome or result has been achieved. This is what we recommend.

Normal or Only Particular Results

4.91 The Australian and New Zealand approaches only require an outcome to be achieved if it is an outcome that the consumer (expressly or impliedly) indicated was required. However, this approach risks narrowing the effect of the reform too much. The question would be whether such an approach only covered special or unusual results. It may well be that it could often be concluded that the normal, typical result is covered as well; the argument being that the consumer *impliedly* makes such a purpose known.[147] However, it is surely better to be absolutely clear that such normal, typical purposes are covered. The preferred alternative, then, is a standard that insists on the normal or typical outcome being achieved as well.

4.92 The DCFR model seems to cover both unusual and normal purposes; and therefore to be preferable. It says that the supplier must achieve the result that is "stated". This seems to

[146] IV. C. -1:102.

[147] See the Australian case *Crawford v Mayne Nickless Ltd.* (1992) ATPR (Digest) 46–091 which might be taken to have interpreted the Australian provision as covering normal purposes. It involved a burglar alarm that was found to be in breach of the previous provision in s.74(2) of the Trade Practices Act 1974, as it did not deter burglars. This might be said to be a normal purpose; or is the normal purpose no more than sitting properly in its position and going off when it should?

cover cases where the "stated" result is a particular or unusual one.[148] However, it also says that the supplier must achieve the result that the customer "could reasonably be expected to have envisaged". This seems to cover the *normal or typical* result that should be achieved by the service in question; as this is surely what we would *reasonably expect* the customer to have envisaged.[149]

Final Product also to be covered

4.93 The recommendations thus far have been to take the DCFR approach. There is, however, one feature of the New Zealand approach that might be beneficial. In New Zealand it is not only the service, but also "any product resulting from the service" must be fit for purpose and of such a nature or quality that it can reasonably be expected to achieve any particular result. This emphasises that where a product is the end result (or part of the end result) of the service, then this product must be fit for purpose, i.e. it is subject to an outcome based standard. As we saw above, there is some uncertainty as to whether this is the case under UK law at present.[150] It may well be that the DCFR test covers this anyway. It is surely arguable that achieving the "specific result stated or envisaged" in relation to a service includes ensuring that goods that result from the service are of appropriate quality and fit for purpose. However, there might be a case for amending the DCFR test to make this clear.

Sector Specific Elaboration

4.94 In addition to the general provision for an outcome based standard, it might be sensible to "unpack" how this general standard would be applied to particular types of service. One way of doing this is by specific legislative provision. This is done by the DCFR for services such as construction and the provision of information and advice. For example, it is provided that a "constructor" must ensure that the structure is of the "quality and description required by the contract".[151] It is further provided that the structure does not conform to the contract unless it is fit for "any particular purpose made known to the constructor"; and for the purposes "for which a structure of the same description would ordinarily be used".[152] Aside from *legislative* elaboration for particular services, more detailed guidance might be provided in explanatory notes and/or in codes of practice.

Retaining a Fault Based Standard

4.95 Introduction of an outcome based standard does not necessarily mean that a fault based standard should not be retained. This approach is taken by the DCFR.[153] This approach has important advantages. First of all, quite apart from whether the result is achieved, a lack of care and skill may cause other problems. For example, a builder may damage household items or leave the property unsecured, allowing it to be vandalized or

[148] As a model for UK law, it might make sense to clarify (i) that this covers what is stated by *either* of the parties and (ii) that which is made either express or that which is implied by the customer.
[149] As a model for UK law, it might be better to make it absolutely clear that the intention here is to cover "normal" or "common" results.
[150] See the discussion above about goods being damaged during installation services and whether such goods were in breach of the outcome based standards as to satisfactory quality and fitness for purpose
[151] IV.C. -3:104(1), see Annex 1.
[152] IV.C. -3:104(2), see Annex 1.
[153] IV. C. – 2:105, see Annex 1.

items to be stolen. Second, a reasonable care and skill standard spells out to suppliers how they are supposed to carry out the service; which could be important. The ultimate aim is to ensure that as many services as possible achieve their desired result; and this is less likely to happen if the service is *not* carried out with reasonable care and skill. A related point is that, because lack of care and skill will *often* lead to the desired result not being achieved, it might be desired that suppliers be responsible for a lack of care and skill even where they happen to achieve the desired result "by accident". Such a lack of care and skill may have caused losses such as distress that may justify compensation.

Exclusion or Restriction of Liability

4.96 This section deals with the rules on exclusion or restriction of liability for defective services. It shows that this is normally allowed subject to a test of reasonableness; and ultimately argues that there might be a reduction in costs and an increase in certainty if exclusion/restriction was to be made wholly ineffective as in the case of contracts for the supply of goods.

Current Position

4.97 We saw above that in the case of pure services, the relevant applicable standard is the "reasonable care and skill" standard in SGSA, section 13. In these cases, liability can be excluded or restricted as long as the term passes the "reasonableness" test under the Unfair Contract Terms Act (UCTA) 1977[154] and the "unfairness" test under the Unfair Terms in Consumer Contracts Regulations (UTCCR) 1999.[155]

4.98 We also saw above that where an installation service is provided, it may be that the goods must comply with the (outcome based) implied terms as to description, satisfactory quality and fitness for particular purpose. Exclusion or restriction of liability in relation to these implied terms is wholly ineffective.[156]

4.99 Finally, we saw that in the case of software and design and build contracts, terms may be implied at common law, broadly to the effect that the end result is reasonably fit for its purpose. However, although these are "outcome based" standards, exclusion or restriction of these liabilities is not wholly ineffective. The provisions applicable to the implied terms as to description, quality and fitness (which make exclusion or restriction of liability for these wholly ineffective) are *only* applicable to these specific implied terms. Exclusion or restriction of liability for breach of terms implied at common law are covered, instead, by section

[154] UCTA, s.2 (2), which applies a test of reasonableness to terms excluding or restricting liability for, among other things, breach of a contractual duty to exercise reasonable care (i.e. the sort of duty contained in SGSA, s.13). The test of reasonableness is set out in UCTA, s.11. Note also here that if the lack of reasonable care results in death or injury, exclusion or restriction of liability is wholly ineffective (UCTA, s.2(1)).
[155] UTCCR, reg.5(1).
[156] UCTA, ss.6(2) and 7(2).

3(2)(b)(i) of UCTA;[157] which makes such terms subject to a test of reasonableness. Such terms are also subject to the "unfairness" test under the UTCCR.[158]

Problems

4.100 One problem with the current position is that, in the majority of the above situations, services are treated differently from the general rule for goods. (As we have seen, exclusion/restriction of liability is normally allowed in the case of services, subject to reasonableness/unfairness tests; while, where supply of *goods* is concerned, exclusion/restriction of the important implied terms as to description, quality and fitness is wholly ineffective). The argument has already been made above that consumers may reasonably expect similar treatment when buying goods and services.[159] Yet, this is another difference in the approach; which may cause uncertainty, increase costs and damage consumer confidence.

4.101 This might be said to be all the worse given that the basic standard for pure services is only a fault based standard. Arguably, this makes exclusion of liability even less acceptable than it is where the supply of defective goods is concerned; in which latter context there is the higher, outcome based, basic standard.

4.102 A further problem is that uncertainty may be caused for businesses, consumers and advisers when "reasonableness" and "unfairness" tests need to be applied. These are very open textured tests which take into account a broad variety of factors.[160] This makes it difficult to predict whether an exemption clause will be effective. This may cause unpredictability both when contracts are drafted by businesses; and when a dispute arises. It may also cause unnecessary and costly litigation.

Options for Change

4.103 The first option is to leave the law entirely as it stands at present. Beyond this, what are the options?

4.104 We have seen that in cases such as software and design and build contracts, an outcome based standard can apply at present; and that one of the possible reforms discussed above would involve making this clear in legislation. Whether or not this clarification is made, one option in relation to exclusion/restriction of liability would be to provide that it is always ineffective to exclude or restrict liability for breach of the outcome based standards in software and design and build contracts. This would bring the approach to exclusion/restriction in these contracts into line with the approach taken in relation to the

[157] S.3 of UCTA covers exclusion or restriction of liability for *any* breach in a consumer or standard form contract. So, it covers exclusion or restriction of liability for breach of the common law implied terms under discussion. This is not covered by UCTA, s.2(2), which, in relation to contractual obligations, only covers exclusion or restriction of liability for breach of duties to take reasonable care.

[158] UTCCR, reg.5(1).

[159] See paragraph 18.

[160] See generally, E.MacDonald, *Exemption Clauses and Unfair Terms,* 2nd edn., (Haywards Heath: Tottel Publishing, 2006); and C.Willett, *Fairness in Consumer Contracts*, (Aldershot: Ashgate Publishing Ltd., 2007). For examples of applications of the reasonableness test, see *George Mitchell (Chesterhall) Ltd. v Finney Lock Seeds Ltd.* [1983] 2 AC 803 at 816*,* [1981] 1 Lloyd's Rep 476 at 480*; Stewart Gill Ltd. v Horatio Myer & Co. Ltd.* [1992] 2 All ER 157; *RW Green Ltd. v Cade Bros Farms* [1978] 1 Lloyd's Rep 602; and *Regus (UK) Ltd. v Epcot Solutions Ltd.* [2007] All ER (D) 93 May.

outcome based statutory implied terms as the description, quality and fitness for purpose of goods.

4.105 Aside from software and design and build situations, if we assume that the position is to continue to be that the fault based standard applies for services in general, then there are two alternatives in relation to the exclusion/restriction of liability issue. The position could remain the same, i.e. that exclusion/restriction of this standard is subject to the tests of reasonableness/unfairness. Alternatively, exclusion/restriction could be made wholly ineffective. The same options are available if a generally applicable outcome based standard was to be introduced. In other words, this could be excludable subject to a test of reasonableness/unfairness; or exclusion/restriction could be made wholly ineffective.

Policy Questions, Recommendations

4.106 Much depends on what are viewed as the key priorities. One of the problems identified above (para 4.100) is that the exclusion/restriction issue is treated differently in the services context from how it is treated in the goods context.[161] It was suggested that this may cause uncertainty, increase cost, damage consumer confidence and be out of step with reasonable consumer expectations. From this perspective, the aim should be to make exclusion/restriction of liability wholly ineffective in as many situations as possible; in order to reflect the fact that this is the position in relation to the statutory implied terms applicable to goods. So, this approach would, at the very least, be taken where software and design and build contracts are concerned. Here, the case is arguably particularly strong because the similarity with goods is strongest; there being an outcome based basic standard.

4.107 Again, if the priority is to make the law as similar as possible to that on goods, then we might also make exclusion/restriction wholly ineffective more generally in relation to services. This would be done whether or not the basic standard remained the same or moved to an outcome based standard. The logic would be that making exclusion/restriction wholly ineffective brings the treatment of services closer to the treatment of goods.

4.108 Another problem identified above is the uncertainty and risk of litigation that may be caused by the need to apply the reasonableness/unfairness tests where exclusion/restriction of liability for services is concerned. Making exclusion/restriction wholly ineffective would address these problems.

4.109 On other hand, the priority might be to strike some form of compromise as between the interests of the parties. On this basis it might make sense to make exclusion ineffective in the case of any fault based standards that are retained. The idea would be that the basic standard of responsibility on the seller may not have been increased; but, at least the consumer is protected from any exclusion or restriction of the standard. In addition, there would (at least in relation to the exclusion/restriction issue) be a reduction in uncertainty and a closer assimilation to the goods context.

[161] I.e. in relation to the statutory implied terms as the description, quality and fitness for purpose of goods; where exclusion or restriction of liability is wholly ineffective.

4.110 Again, if the priority is to strike a compromise between the interests of the parties, then if there was to be a shift to a generally applicable outcome standard, this might be said to be balanced out by retaining the supplier's right to exclude/restrict liability, subject to the tests of reasonableness/unfairness. The reasonableness/unfairness tests would provide further flexibility to determine whether it is appropriate to impose an outcome based standard in the circumstances. This could address fears that, for example, it is inappropriate to impose an outcome based standard for some professional services; or in relation to those providing customised services of any kind, especially where they may not have the volume of sales to spread the costs of being subject to an outcome based standard.

4.111 It is submitted that the preferable approach is to prioritise certainty, reduction of costs and consumer confidence by making exclusion/restriction ineffective in as many situations as possible, i.e. by assimilation with the position for supply of goods. Partly, this is because certainty, reduction of costs and consumer confidence are so important in themselves. However, in addition, it does not really appear to be necessary to protect suppliers from an outcome based standard by allowing exclusion/restriction subject to a reasonableness/ unfairness test. As was pointed out earlier, the outcome based standards that might be imposed contain flexibility through the "reasonableness" concepts that run through them (see paras 4.72 – 4.78).

4.112 There is perhaps a compromise solution that seeks to treat services as similarly as possible to goods; but still allows some scope for exclusion/restriction of liability. One possible reform in relation to remedies is to introduce "cure remedies", i.e. the right to have services repaired or replaced as appropriate (as is the case where goods are concerned). [162] If this was to be done, it could be provided that it is always ineffective to exclude or restrict these remedies. This would mean that if the expected outcome is not achieved; then, at least the responsibility to put this right would be guaranteed. At the same time, the position could remain that liability in damages for other losses flowing from the breach could be excluded/restricted subject to the tests of reasonableness/unfairness. This would provide protection to suppliers from large compensation claims in cases where it would be unfair for them to bear these losses.

4.113 On balance, however, it is recommended that exclusion/restriction of liability should be wholly ineffective not only in relation to cure remedies; but also in relation to damages. This would achieve consistency in the approach to goods and services; and avoid the uncertain application of tests of reasonableness/fairness to exclusion/restriction of liability in damages.

Full Harmonisation

4.114 A further issue here is as to the potential effect of any full harmonisation of the unfair contract terms rules that might come under a new CRD. The existing pCRD does not treat terms excluding or restricting liability for services as wholly ineffective.[163] If this continues to be the case in the finally adopted CRD, and if this is a full harmonization directive, the question would arise as to whether it would be permissible to introduce such a rule at national level.

[162] See Chapter 5, 5.15 – 5.21.
[163] See art. 34 and the list in Annex 2.

5. REMEDIES IN RELATION TO GOODS

Existing law

5.1 A supplier of goods is under a number of different obligations and the law provides a range of appropriate remedies. For the sake of clarity, the discussion that follows will concentrate on the remedies available where the supplier is in breach of the key obligations to supply goods that are of the right kind and of the required quality. These remedies have been at the heart of law reform in this country and in Europe. However, it should be borne in mind that breaches of other obligations may be subject to different rules with their own difficulties, and these will have to be accommodated within any new legislation.

Sale

5.2 The Sale of Goods Act 1979 provides the consumer buyer with two largely independent sets of remedies; the traditional sales remedies and the new additional remedies set out in Part 5A, which was inserted into the Act in 2002 in order to implement the Consumer Sales Directive. Special considerations apply, however, to conditional sales where payment is made in instalments.

Traditional sales remedies

5.3 A key remedy under traditional sales law is the right to reject non-conforming goods. Whether the buyer has such a right will depend on the classification of the contract term that has been broken: the buyer can reject if there is breach of condition or a serious breach of an innominate term. The relevant implied terms in the SoGA are all conditions of the contract[164] and the consumer buyer has a right to reject even if the breach is slight.

5.4 The classification of express terms relating to the quality of the goods will vary from one contract to another, which can create some uncertainty. There is, however, some suggestion that in the modern law such terms will generally be treated as innominate terms,[165] with the consequence that the buyer's right to reject will depend on how serious the defect is. Faced with a business seller who may well downplay the gravity of his breach, the consumer buyer may find it difficult to exercise the right to reject in relation to breach of an express term, except in extreme cases. The buyer's position is stronger if the express term relates not simply to the quality of the goods, but to what the goods are, as such a term will constitute part of the goods' description which the goods must comply with by virtue of the implied condition in section 13. But the quality/identity distinction is notoriously difficult and, if anything, is just a source of further uncertainty.

5.5 It is clear that the buyer is under no obligation to ask the seller to attempt to repair the goods before rejecting them,[166] although that is an option. What is unclear is whether the seller has the right to insist on repair or, indeed, providing replacement goods *after* rejection. The essential question is whether any breach that gives rise to a right to reject automatically gives the buyer the right to treat the contract as at an end, which would preclude the seller

[164] Ss.13(1A), 14(6) and 15(3).
[165] *Cehave N.V. v BremerHandelsgesellschaft m.b.H. (The Hansa Nord)* [1976] QB 44.
[166] *Clegg v Olle Andersson (t/a Nordic Marine)* [2003] EWCA Civ 320, *per* Hale L.J. at para.74.

from having any right to rectify his breach. Some leading commentators argue that rejection merely cancels out the original delivery of goods and that there is no immediate right to rescind the contract unless the seller's conduct indicates that he has no intention of rectifying the breach or if so much time has passed that it is now too late to make a delivery in accordance with the terms of the contract.[167] There is certainly some judicial support for the existence of a right for the seller to make a fresh tender of conforming goods provided that the time for delivery under the contract has not passed.[168] But that emphasis on the contractual delivery date has been made in the context of commercial sales, where normally time of delivery is of the essence of the contract. In consumer sales, time may well not be of the essence[169] and the buyer may therefore not be able to rescind the contract on the ground of non-delivery simply because the delivery date has passed. Arguably, therefore, if there is a seller's right to cure in the law of sale, in the consumer context it may in this respect be more extensive, extending beyond the delivery date.[170] However, at least in the case of distance contracts, the time for delivery might be regarded as being of the essence for a consumer contract in much the same way as it would be in commercial transactions. Also, there is some suggestion that a seller might not have a right to cure where the breach is such as to destroy the buyer's confidence in him,[171] and if that is the case, it is arguable that there might not be a right to cure in many consumer contracts.[172]

5.6 Where the buyer has the right to reject, that right will generally have to be exercised within a short time after the buyer takes delivery of the goods. This is because of the rules on acceptance, which are peculiar to the law of sale. Once the buyer has accepted the goods, he is no longer able to reject the goods or treat the contract as at end.[173] The SoGA identifies certain forms of conduct on the part of the buyer that are deemed to constitute acceptance,[174] and in consumer sales the commonest form of acceptance in practice is retention of the goods beyond a reasonable time without rejecting them.[175] The time allowed to the buyer includes a reasonable time to examine the goods[176] and also a reasonable time to decide how to proceed. As far as examination is concerned, the buyer is allowed such time as is appropriate simply to give the goods a general check, as opposed to the time that would be needed to discover the specific defect from which the goods actually suffer.[177] How much time is appropriate for a general check will vary according to the complexity of the goods (a computer, for example, will require longer to evaluate than a kitchen knife), but in general the right to reject is lost within a matter of "days, rather than weeks or months".[178] In

[167] E.McKendrick (ed), *Goode on Commercial Law* (4th ed.)(London: Penguin Books, 2010), pp.372-374; P.Atiyah, J.Adams and H.McQueen, *Atiyah's Sale of Goods* (12th ed.)(Harlow: Pearson Education Ltd, 2010), p. 497.
[168] See, in particular, *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corp of India* (*The Kanchenjunga)* [1990] 1 Lloyd's Rep. 391, *per* Lord Goff at 399.
[169] J.McLeod, *Consumer Sales Law* (2nd.ed.)(London: Routledge-Cavendish, 2007), para.23-18.
[170] Cf. E.McKendrick (ed), *Goode on Commercial Law* (4th ed.)(London: Penguin Books, 2010), p. 373.
[171] A.Guest (ed), *Benjamin's Sale of Goods* (7th ed.)(London: Sweet & Maxwell, 2006), para.12-031. Cf. E.McKendrick (ed), *Goode on Commercial Law* (4th ed.)(London: Penguin Books, 2010), p. 374, n.55, raising the issue, but noting that "[n]o reported English case has yet gone so far".
[172] A.Guest (ed), *Benjamin's Sale of Goods* (7th ed.)(London: Sweet & Maxwell, 2006), para.12-031; R.Bradgate, *Commercial Law* (3rd ed.) (Oxford: Oxford University Press, 2005), para.12.1.3.1.
[173] S.11(4) of the SoGA.
[174] S.35.
[175] S.35(4).
[176] S.35(5).
[177] *Bernstein v Pamson Motors* [1987] 2 All ER 220, *per* Rougier J. at 230.
[178] P.Atiyah, J.Adams and H.McQueen, *Atiyah's Sale of Goods* (12th ed.)(Harlow: Pearson Education Ltd, 2010), p. 516.

the case of latent defects, therefore, the buyer may well lose the right to reject a considerable time before the defect manifests itself. For the purposes of the rules on acceptance, it is irrelevant that the buyer did not know that the goods were defective and it is equally irrelevant that he could not be expected to have discovered the breach. It is for this reason that the right to reject is often described as being a short-term right. This restrictive approach is justified on the ground that there needs to be finality.[179]

5.7 That said, some recent cases demonstrate that there can sometimes be a long-term right, where the goods have complex problems that require lengthy analysis[180] or defy repeated attempts at repair.[181] In such cases it is not clear that the buyer is entitled to a refund of the price if there has been substantial enjoyment of the goods; it may be that the buyer must claim damages taking the use had of the goods into account.[182]

5.8 The variability of the "reasonable time", expiry of which deprives the buyer of the right to reject, makes it difficult to advise buyers and has prompted the Law Commissions on more than one occasion to consider whether a more precise time limit should be imposed.[183]

5.9 Retention beyond a reasonable time is not the only form of acceptance. The buyer will also lose the right to reject if, after having had a reasonable opportunity to examine the goods, he tells the seller that he accepts them.[184] Acceptance of this type may possibly occur if the consumer has signed a suitably worded delivery note.[185] In addition, goods will be deemed to have been accepted if, after having had a reasonable opportunity to examine the goods, the buyer does an "act inconsistent with the seller's ownership".[186] This is understood as meaning conduct in relation to the goods which is inconsistent with their being returned to the seller. Two types of conduct are considered to fall within this category: dealings with the goods and using them in such a way that they cannot be returned to the seller substantially in their original condition.[187]

5.10 The decided cases on dealings are typically commercial cases involving re-selling of the goods; in the consumer context, the dealings that might fall foul of this rule would more commonly be gifts. A difficulty with this form of acceptance is that it is not entirely clear at what point dealings cross the line and become inconsistent with the seller's ownership. The SoGA makes it clear that the right to reject is not lost "merely … because they are delivered

---

[179] *Bernstein v Pamson Motors (Golders Green) Ltd.* [1978] 2 All ER 220, *per* Rougier J. at 230.
[180] *Clegg v Olle Andersson (t/a Nordic Marine)* [2003] EWCA Civ 320.
[181] *Fiat Auto Financial Services v Connelly* 2007 SLT (Sh Ct) 111 (rescission after 8 months use of a car, used as a taxi and driven more than 40,000 miles).
[182] A.Guest (ed), *Benjamin's Sale of Goods* (7th ed.)(London: Sweet & Maxwell, 2006), para.12-068: "The mere fact that the buyer has had some enjoyment of the subject-matter should not of itself bar a claim [for a refund] upon a total failure of consideration. Such a view is, however, only maintainable so long as the right to reject must … be fairly quickly exercised".Cf. Law Com. No. 121, *Pecuniary Restitution on Breach of Contract* (1983), para.2.86, making the assumption that a refund is appropriate where goods are rejected because "the benefit to the buyer … is likely to be very trivial".
[183] Law Com. No. 160, Scot. Law Com. No.104, *Sale and Supply of Goods* (1987), paras.5.14-5.19; Law Com. No. 317, Scot. Law Com. No.216, *Consumer Remedies for Faulty Goods* (2009), paras.3.47-3.95.
[184] S.35(1)(a).
[185] R.Bradgate, *Commercial Law* (3rd ed.) (Oxford: Oxford University Press), para.12.2.1.1; but cp. P.Atiyah, J.Adams and H.McQueen, *Atiyah's Sale of Goods* (12th ed.)(Harlow: Pearson Education Ltd, 2010), p. 508, arguing that in practice such notes might well fall foul of the Unfair Contract Terms Act 1977.
[186] S.35(1)(b).
[187] A.Guest (ed), *Benjamin's Sale of Goods* (7th ed.)(London: Sweet & Maxwell, 2006), para.12-047.

to another under a sub-sale or other disposition",[188] but does not indicate what additional factors are necessary to render the disposition an acceptance of the goods. It has been argued[189] that the right to reject is lost if the disposition results in the buyer being unable to make the goods available to the seller at the appropriate place within a reasonable time (e.g., if the goods are sent as a gift to a relative abroad, so that when they are discovered to be defective, they cannot be returned to the seller within the reasonable time discussed above). While that seems an appropriate solution, it may be observed that the same result could be achieved more simply by applying the "retention beyond a reasonable time" rule rather than complicating matters by referring to acts inconsistent with the seller's ownership.

5.11 As far as the second type of act inconsistent with the seller's ownership is concerned, deliberately using the goods in a way that will affect their condition will constitute acceptance, at least where it goes beyond what is necessary for a reasonable examination.[190]

5.12 It may be added that there are older cases[191] that support a further ground for losing the right to reject, one not to be found in the SoGA, but in the common law of sale. According to this, inability to restore the goods substantially in their original condition is a bar to rejection even when not the result of an act inconsistent with the seller's ownership, as when the goods are taken or damaged by a third party or perhaps damaged unintentionally by the buyer. Benjamin argues that this is better dealt with by the rules on risk,[192] but in fact these do not offer a clear solution.

5.13 The Act does not lay down a right to a refund on rescission of the contract. This is dealt with by the general law.[193] The Act does not even contain a provision dealing specifically with the recovery of damages in this situation, and the provisions on non-delivery are pressed into service. But there is some provision for damages for breach of warranty,[194] which would apply where an express term about the quality of the goods is only a warranty or where the buyer has the right to reject and rescind for breach of condition, but chooses to keep the goods or is forced to do so because the right to reject has been lost. However, there is no provision that deals explicitly with the situation where the term is not a condition, but an innominate term (a reflection of the relatively recent recognition of this kind of contractual term).

5.14 It may be added that, unlike with the European remedies in Part 5A, the traditional remedies do not include the right of the buyer to require repair of the goods, replacement of them or a reduction in the price. In practice, however, repair and replacement are frequent occurrences and were so long before Part 5A was introduced: a buyer who has the right to reject and rescind the contract is in a good position to negotiate for these things. Moreover,

---

[188] S.35(6)(b).
[189] A.Guest (ed), *Benjamin's Sale of Goods* (7th ed.)(London: Sweet & Maxwell, 2006), para.12-051; E.McKendrick (ed), *Goode on Commercial Law* (4th ed.)(London: Penguin Books, 2010), pp.382-383.
[190] A.Guest (ed), *Benjamin's Sale of Goods* (7th ed.)(London: Sweet & Maxwell, 2006), para.12-047.
[191] Inability to make *restitution in integrum* was assumed to be a bar to rescission, e.g., by the Court of Appeal in *Rowland v Divall* [1923] 2 KB 500.
[192] A.Guest (ed), *Benjamin's Sale of Goods* (7th ed.)(London: Sweet & Maxwell, 2006), para.12-057.
[193] S.54.
[194] S.53.

while there is no formal remedy of price reduction, the SoGA achieves a similar result through the right to damages, which can be set off against the price owed.[195]

Additional remedies in Part 5A

5.15 In addition to the traditional remedies outlined above, the consumer buyer has the remedies set out in Part 5A, derived from the Consumer Sales Directive. Four remedies are laid down: the right to require the seller to repair the goods; the right to require the seller to provide replacement goods; reduction of the price; and rescission of the contract. However, neither repair nor replacement is available to the consumer if it is impossible or disproportionate.[196] Thus, the right to require repair would not be open to the buyer if the goods cannot be fixed or if, as is commonly the case with cheaper products, if it would be cheaper to replace them.

5.16 Damages are not included in the list of remedies, and these are left to be dealt with by the traditional rules.

5.17 These remedies apply to breach of the implied terms relating to description, satisfactory quality, fitness for purpose and sample, but they also apply to breach of any express term, however classified for the purposes of the traditional remedies.[197] The remedies for breach of warranty and for minor breaches of innominate terms are accordingly significantly strengthened, with rescission becoming a possibility.

5.18 A key feature of these remedies is that the buyer does not have a free choice between them. They are arranged in two tiers, the first tier comprising repair and replacement and the second rescission and price reduction. The buyer is required to exhaust the first tier remedies before resorting to those in the second.[198] In that sense, rescission is the last resort here, unlike in the traditional remedies when it can be the first.

5.19 There are other important differences between the traditional and European remedies. Unlike rejection and rescission in the traditional remedies, the remedies here are not subject to tight time limits. Under Part 5A, the consumer buyer thus has a long-term right to reject and rescind.

5.20 With the traditional remedies, there is, at least in general, a right to a full refund after rescinding the contract. Under Part 5A, it is provided that any reimbursement may be reduced to reflect the use that the consumer has had of the goods.[199] This may change, however, with the pCRD: the original draft of the proposed Directive abandoned the rule relating to the reduction of reimbursements.[200] The Law Commissions support that proposal,

[195] S.53(1).
[196] S.48B(3).
[197] S.48F.
[198] S.48C(2).
[199] S.48C(3).
[200] Recital 41. This brings the position on rescission in line with the position where the buyer requires replacement goods (in which context it has been held the buyer cannot be required to pay for use had of the original defective goods: Case C-404/06 *Quelle AG v Bundesverband der Verbraucherzentralen und Verbraucherverbände* [2008] ECR I-2685).

noting amongst other things that there are difficulties in calculating how much of a reduction should be made.[201]

5.21 To obtain a remedy, it is necessary to establish that there has been a breach of contract. Under the traditional law, the burden of proof is on the buyer. Under Part 5A, on the other hand, the consumer is assisted by a presumption that the goods were not in conformity with the contract if defects appear within six months of delivery.[202]

Conditional sales

5.22 Conditional sales where payment is made by instalments also have two sets of remedies, but the traditional remedial scheme is different in that the rules on acceptance do not apply.[203] Instead, the buyer only loses the right to reject and to rescind the contract if, with knowledge of the breach, he behaves in such a way a way as to indicate that he has elected not to reject (often referred to as affirmation). This is significantly different from the rules applicable to sales in general: if, for example, a consumer buys electrical equipment with a latent defect that only materialises after months of use, the goods can still be rejected. In this sense, the buyer here has a long-term right to reject.

5.23 The special regime for this type of sales contract reflects the modern approach to consumer credit agreements in English law, which regards conditional agreements of this type to be functionally equivalent to hire purchase agreements and accordingly subjects them to the same rules. Since the rules on acceptance do not apply to hire purchase contracts, the SoG(IT)A disapplies those rules in the case of conditional sales. Nevertheless, because the Consumer Sales Directive made no distinction between conditional sales and others, the additional remedies in Part 5A do apply to conditional sales, even though there is no counterpart for hire purchase agreements. There is, in that sense, an unfortunate lack of consistency in the remedial scheme as a whole.

5.24 In these conditional sales, the buyer accordingly has both a long-term right to reject and treat the contract as at an end and also the remedies under Part 5A, including a long-term, but second tier, right to rescind the contract.

Transfers

5.25 Transfers under the SGSA (barter, exchange of goods and services, supply of goods under work and materials contracts) are governed by the same remedial scheme as conditional sales involving payment by instalments. There are traditional remedies like those found in sales contracts generally, save that the sales rules on acceptance do not apply. In addition, the two tiered remedies found in Part 5A of the SoGA are replicated in Part 1B of the SGSA. The provisions of the Consumer Sales Directive apply to certain contracts that might qualify as transfers rather than sales in English law (contracts for the supply and installation of goods and for the manufacture and supply of goods)[204] and when the Sale and Supply of Goods to Consumers Regulations 2002 were introduced to implement the

[201] Law Com. No. 317, Scot. Law Com. No.216, *Consumer Remedies for Faulty Goods* (2009), paras.6.40-6.50.
[202] S.48A(3).
[203] S.14 of the SoG(IT)A.
[204] Arts.2(5) and 1(4), respectively, see Annex 2.

Directive, the decision was taken to go beyond what it required and extend the new remedies to all types of transfer.[205]

5.26 The right to reject goods and treat the contract as at an end[206] arises in the same way as in contracts of sale, and in that context it is to be noted that the relevant implied terms in the SGSA are all classified as conditions.[207] The right to reject is lost if the transferee, having discovered that the goods are not in conformity with the contract, elects not to reject them.[208]

5.27 The SGSA does not contain any provisions relating to the award of damages and this will be governed purely by the general law of contract. As the provisions in the SoGA broadly follow the general law, the measure of damages will largely be the same here as in sale.

Hire and hire purchase

5.28 As has been seen, the remedies applicable to conditional sales and transfers are different from those for sales generally. The remedial scheme for hire and hire purchase contracts is different again. Here the remedies derived from the Consumer Sales Directive do not apply and the remedies are instead simply governed by the general law of contract. The remedies are therefore similar to the traditional ones found in the law of sale, but the rules on acceptance do not apply and the availability of a refund on rescission is more restricted.

5.29 The observations made in relation to transfers concerning the right to reject and treat the contract as at an end[209] and how the right to reject may be lost,[210] and also concerning the award of damages, are equally applicable here and need not be repeated.

5.30 As with the other contracts, the right to recover money paid to the supplier of the goods is governed by the general law of restitution. On rescission of the contract, the consumer can only reclaim money paid if the supplier has not provided any part of the promised consideration. In contracts of hire, the consideration is, effectively, the use of the goods and if the consumer has had the use of the goods before rejecting them, that will prevent him from recovering hire payments.[211] Similar reasoning is applied to hire purchase contracts.[212]

[205] R.Bradgate and C.Twigg-Flesner, *Blackstone's Guide to Consumer Sales and Associated Guarantees* (Oxford: Oxford University Press, 2003), para.4.4.2.
[206] Cf S.11(Q)(2)(a).
[207] Ss.3(2), 4(2), 4(5) and 5(2).
[208] R.Bradgate, *Commercial Law* (3rd. ed.) (Oxford: Oxford University Press), para.12.2.4. Cf. *Farnworth Finance Facilities Ltd. v Attryde* [1971] 1 WLR 1053.
[209] The relevant implied terms are conditions in both hire contracts (ss.8(2), 9(2), 9(5) and 10(2) of the SGSA) and hire purchase agreements (ss.9(1A), 10(7) and 11(2) of the SoG(IT)A).
[210] *Farnworth Finance Facilities Ltd. v Attryde* [1971] 1 WLR 1053.
[211] R.Bradgate, *Commercial Law* (3rd. ed.) (Oxford: Oxford University Press), para.12.2.4. Cf *Yeoman Credit v Apps* [1962] 2 QB 508.
[212] *Yeoman Credit v Apps* [1962] 2 QB 508.

The problems with the existing law

Substantive differences as between the various contracts

5.31 Looking across the various contracts under which goods are supplied, the main problem is that there are two significant substantive differences: the first is of longstanding and relates to the rules on acceptance found only in sales contracts (and even then not in conditional sales involving payment by instalments). As has been seen, this has the effect of making the traditional right to reject non-conforming goods a generally short-term right, whereas the comparable right in other contracts is a potentially long-term one, lost only when the non-conformity is discovered. The second difference, of more recent origin, stems from the fact that the European remedies, which include a long-term right to rescind, apply to all consumer sales and transfers, but not to hire and hire purchase. The combined effect of these differences is that three distinct remedial schemes can be identified in the existing law:

> (i) short-term traditional right to reject with long-term European remedies (sales other than conditional sales involving payment by instalments);
> (ii) long-term traditional right to reject with long-term European remedies (conditional sales and transfers);
> (iii) long-term traditional right to reject with no European remedies (hire and hire purchase).

As a matter of principle, it is difficult to justify these distinctions. They are also a potential source of confusion for consumers.

Matters on which the existing legislation is defective or unclear

5.32 In addition to the substantive issues which divide the various contracts, there are a number of matters on which the existing legislation is either defective or unclear. Some of these are pressing, while others are minor issues which might be dealt with in new legislation, depending on how thorough an overhaul of the law is envisaged.

5.33 In those contracts where the European remedies have been introduced, the addition of this second layer of remedies on top of the traditional remedies, in a largely self-contained separate Part of the relevant Act, with little attempt to integrate the two[213] inevitably makes the law complicated and, in practice, confusing. Having two rights to rescind, for example, each with its own requirements, consequences (in terms of refunds) and even rules on the burden of proof is not a recipe for clarity and certainty. This is an area which the Law Commissions have highlighted as in need of attention.[214]

[213] S.48D(3) of the SoGA does, however, make it clear that if the buyer exercises his right under Part 5A to require the seller to repair or replace the goods, he must give the seller reasonable time before exercising the traditional right to reject the goods and rescind the contract for breach of condition. Apparently by oversight, this provision does not restrict the right to reject and rescind for breach of an express innominate term relating to the quality of the goods, to which the remedies in Part 5A also apply (s.48F). A similar provision is to be found in the SGSA (s.11Q).

[214] Law Com. No. 317, Scot. Law Com. No.216, *Consumer Remedies for Faulty Goods* (2009), paras.1.18 and 3.111-3.125.

5.34 In contracts of sale, the lack of clarity arising from the introduction of the European remedies is linked in part to problems with the rules on acceptance. The rules governing the loss of the traditional right to reject when the buyer retains the goods beyond a reasonable time are flexible, but by the same token a source of uncertainty in practice. With no fixed cut-off point for the traditional short-term right to reject, it can be unclear when the latter stops and when the European remedies take over. To address this issue, the Law Commissions have put forward proposals for a normal cut-off point of 30 days for the short-term right to rescind.[215] The co-existence of national remedies with the European remedies is, of course, an issue under discussion at EU level, in the context of the negotiations relating to the pCRD.

5.35 The rules dealing with the grounds on which a buyer loses the right to reject goods, other than by the passing of time, are also arguably unnecessarily complex and unclear. Acceptance by an "act inconsistent with the seller's ownership" is uncertain in scope and in most consumer cases adds nothing to the rules on acceptance by retention beyond a reasonable time. As has been seen, it is unsettled how far inability to restore the goods substantially in their original condition is a bar to rejection. This has not been viewed as a pressing matter, however: the Law Commissions noted the issue in 1987, but took the view that the uncertainty was not causing problems in practice and decided not to propose legislation on the matter.[216]

5.36 As has been noted, where a buyer exercises the traditional short-term right to reject goods, it is unsettled whether a seller has the right to cure his breach; and the same would appear to be true of other contracts for the supply of goods. The Law Commissions in 1987 expressed the view that there should not be a right to cure in consumer sales, as it would undermine the position of buyers who are already in a weak bargaining position.[217] There is considerable force in that argument. However, since 1987 support has grown for the existence of a right to cure in the general law of sale (and, by implication, in all other contracts for the supply of goods);[218] and there is therefore a need for a statutory declaration that, in consumer contracts for the supply of goods, the supplier has no such right.

5.37 Finally, the detail of how the European remedies have been implemented has been questioned. It will be recalled that the consumer's remedies of requiring repair or replacement are not available if disproportionate. The provisions in the SoGA and SGSA on proportionality have been criticised, as they are arguably inconsistent with the Consumer Sales Directive.[219] The Acts excludes repair or replacement not only where disproportionate in relation to the other (as in the example given earlier, where it would cost more to repair the goods than to provide a replacement) but also (controversially) when disproportionate in relation to price reduction or rescission. Since price reduction is, in practice, easy for a seller, the buyer may therefore readily be denied repair or replacement. The Directive, on the other hand, although not clearly drafted, appears only to rule out repair when

[215] Law Com. No. 317, Scot. Law Com. No.216, *Consumer Remedies for Faulty Goods* (2009), paras.3.47-3.95.
[216] Law Com. No. 160, Scot. Law Com. No.104, *Sale and Supply of Goods* (1987), paras.5.39-5.40.
[217] Law Com. No. 160, Scot. Law Com. No.104, *Sale and Supply of Goods* (1987), paras.4.9-4.15.
[218] See, in particular, *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corp of India* (*The Kanchenjunga)* [1990] 1 Lloyd's Rep. 391, *per* Lord Goff at 399.
[219] R.Bradgate and C.Twigg-Flesner, *Blackstone's Guide to Consumer Sales and Associated Guarantees* (Oxford: Oxford University Press, 2003), para.4.4.1.4; P.Atiyah, J.Adams and H.McQueen, *Atiyah's Sale of Goods* (12th ed.)(Harlow: Pearson Education Ltd, 2010), pp. 524-525.

disproportionate in relation to replacement (and vice versa).[220] It may be noted, however, that the pCRD, at least as originally drafted, adopts the broader approach found in the current UK legislation.[221]

Areas where the existing legislation is incomplete

5.38 In addition to there being substantive problems, the existing legislation is open to criticism on the ground that it is incomplete, with important aspects not being dealt with or only dealt with partially. To have a complete understanding of the applicable rules, one has to look beyond the legislation to the general law. Thus, in contracts other than sale, the traditional remedies are a matter of common law, not statute. In the case of hire and hire purchase, that means that there are no statutory provisions; in the case of transfers, it means that the SGSA misleadingly sets out only part of the remedial scheme, the European remedies.

5.39 Even the SoGA, the most detailed of the statutes, is incomplete in its coverage. As has been seen (para 5.13), it does not deal with as basic a right as the right to a refund when the traditional right to reject the goods and rescind the contract is exercised. Moreover, in relation to damages, the SoGA's provisions are limited. Not all types of breach are provided for; but where provision is made, it contains only some basic, but far from exhaustive rules, for how the damages should be calculated. The approach adopted is to make provision for standard situations, leaving non-standard cases to the general law of contract.[222] Detailed issues, such as whether the buyer can recover compensation for the trouble or disappointment caused by the seller's breach, are equally not addressed.

5.40 In principle, this should not cause problems for lawyers (though there is some evidence from the case law that suggests it can in practice).[223] But for other actors, such as businesses and, if not consumers themselves, at least those who advise them, it reduces the accessibility of the law.

Options for reform

5.41 A number of options are available, but none of them is without its difficulties.

The status quo

5.42 Continuing with different remedial schemes for different types of contract is a possibility, but not an attractive one. As already argued, a differential approach is difficult to justify in principle and may give rise to confusion.

[220] Art.3(3), see Annex 2.
[221] Art.26(3), see Annex 2.
[222] S.54.
[223] In *Jones v Gallagher* [2004] EWCA Civ 10 kitchen suppliers were held to be in breach of implied terms in the SGSA, but in determining the customer's remedies the Court of Appeal perplexingly applied the SoGA. This aspect of the case is criticised in R.Bradgate, "Remedying the unfit fitted kitchen", (2004) 120 LQR 558-563.

Exclusively European remedies

5.43 If the existing differential approach is to be abandoned, the simplest solution would be to abandon the traditional remedies (other than damages) and make the European remedies the only ones available, subject to some modification of the rules on refunds for hire (and possibly hire purchase) contracts. That was, of course, the approach adopted by the original draft of the pCRD for the contracts within its ambit, and given the strong opposition to that proposal on the part of the Law Commissions and consumer bodies, that would not appear to be a viable way forward, unless the final version of the Directive met the concerns raised by these bodies.

Extending an existing scheme

5.44 Another option would be to extend one of the existing remedial schemes to all contracts. Generalising the hire/hire purchase model, which does not include the European remedies is clearly not possible, as that would be inconsistent with the Consumer Sales Directive and the pCRD.

5.45 Extending the general sale model would have two main consequences: the application of the rules on acceptance to all contracts and making hire and hire purchase contracts subject to the European remedies, with some possible adjustment in the case of refunds. Of these, broadening the reach of the acceptance rules is the more problematic. It entails replacing a traditional long-term right to reject and rescind the contract with a short-term right; in other words, it would constitute a dilution of consumer rights. This step was in fact considered and rejected by the Law Commissions in 1987:[224] consultation had not revealed any significant problems with the traditional long-term right and there was no pressure for reform. On the other hand, those comments were made before the advent of the Consumer Sales Directive. The Law Commissions were contemplating a major change in the law, but curtailing the long-term right to reject will clearly have much less impact if the new short-term right is complemented by the long-term European remedies. Those remedies are, of course, already in place for transfers and for conditional sales; an important consideration in determining whether the rules on acceptance can be exported to *all* contracts will therefore be whether the European remedies can be successfully introduced into hire and hire purchase contracts.

5.46 It is difficult to see how a right to require repair or replacement goods or to have the consideration reduced would be incompatible with the nature of a hire or hire purchase contract, and rescission is already available as a remedy. The one area where adjustment might be required is in relation to refunds. As noted earlier, in contracts of hire the consumer cannot recover hire payments paid before the contract is terminated, and it seems entirely appropriate that, having had the promised use of the goods, the consumer should pay for it. Under the current European remedies, that result could continue to obtain, as any reimbursement “may be reduced to take account of the use [the consumer] has had of the goods”. However, as has been noted, the pCRD (in a measure supported by the Law Commissions) provides for a full refund, and if that comes to fruition, a modified version will be required for contracts of hire. As far as hire purchase is concerned, arguably the rule

[224] Law Com. No. 160, Scot. Law Com. No.104, *Sale and Supply of Goods* (1987), paras.5.43-5.49.

should in any case be the same as for sale contracts: the European rules on refunds have to be applied to conditional sales and, as outlined earlier, the policy is to treat conditional sales and hire purchase in the same way.

5.47 One fear might be that extending the European remedies in this way would increase the burdens on business. However, given the extensive nature of the consumer's existing remedies in hire and hire purchase contracts, in particular the long-term right to reject, it is not clear that a combination of a curtailed traditional right to reject and rescind and application of the European remedies would prove more onerous. It is, of course, true that the law as it stands does not recognise anything like a consumer's right to insist on repair in hire and hire purchase contracts, but the introduction of such a right would not appear to cause significant hardship, given that the consumer can currently have the goods repaired by a third party and then claim damages from the supplier to recover the cost of repair and, in any event, has the more drastic option of rejecting the goods and rescinding the contract.

5.48 It may be concluded accordingly that the European remedies can be successfully extended, with minimal adjustment, to hire and hire purchase contracts.[225]

5.50 An alternative strategy would, of course, be to apply the remedial scheme currently applicable to transfers and conditional sale involving payment by instalment to all contracts. That would involve removing the restrictions imposed in sales generally by the rules on acceptance, giving the buyer a long-term right to reject, and would therefore be more favourable to the consumer than taking the sales scheme as the model for all contracts. Such a move would, however, be certain to meet with considerable opposition. The long-standing view that, in the interests of business, in contracts of sale the right to reject must only be available for a limited period continues to hold sway. In their 2009 Report, the Law Commissions reaffirmed their support for that view.[226]

5.51 The conclusion that emerges from this discussion is that, if one of the existing remedial schemes is to be extended to the generality of contracts under which goods are supplied, that scheme should be that found in the general law of sale. That does come at a limited cost to consumers, but that will be offset to an extent by the benefits of having a simpler uniform regime.

Enhanced reform

5.52 Simply adopting an existing remedial scheme for all types of contract arguably would not go far enough, as it would have the result of exporting that scheme's limitations and difficulties. It would be preferable to rectify at least some of those problems, and indeed improving the law in this way is already part of the Law Commissions' agenda. For the sake of simplicity, in discussing the possible ways forward it will be assumed that the new scheme will be a version of the sale model.

[225] It may be noted that, in their most recent report, the Law Commissions have modified their position and now propose a short-term right to reject for transfers and, even without the application of European remedies, for hire purchase, but not for hire (the possibility of extending the European remedies to hire was not addressed): Law Com. No. 317, Scot. Law Com. No.216, *Consumer Remedies for Faulty Goods* (2009), paras.5.17-5.33.
[226] Law Com. No. 317, Scot. Law Com. No.216, *Consumer Remedies for Faulty Goods* (2009), paras.3.34-3.35.

5.53 One option would be to patch the sale model, adjusting it to deal with pressing substantive problems. Integration of the traditional and European remedies, so as to produce a single, coherent and clear scheme is an obvious priority, as the Law Commissions have recognised. As part of that exercise, it would be helpful to address the uncertainties caused by the rules on acceptance by retention beyond a reasonable time, so as to create a sharper dividing line between the short-term right to reject and rescind found in the traditional remedies and the long-term rights under the European remedies. Drafting an integrated scheme would also provide an opportunity to clarify the position on the supplier's right to cure non-conformity; and the rules on when repair or replacement are excluded on the ground of being disproportionate may need revision, depending on what the final Consumer Rights Directive provides.

5.54 One issue that would arise in attempting to draft an integrated scheme would be whether to follow the approach of Part 5A and make the integrated scheme apply to all express terms relating to the goods, irrespective of how they might be classified at present. That would effectively raise all express terms as to quality to the status of conditions, avoiding the uncertainties inherent in the process of classification and removing the importance of making the difficult distinction between identity and quality. Given the importance attached by consumers to the assurances made by business suppliers, this would not be an unreasonable step.

A more fundamental reform

5.55 The reforms outlined above would already require a measure of systematic regulation. But a further option would be to attempt a more root and branch reform, setting out the consumer's remedies in a more comprehensive fashion. Ideally this would be done in a sufficiently detailed manner to allow the statutory consumer remedies be independent of the general law of contract and restitution.

5.56 Although it is not suggested that the substantive rules in the DCFR should be adopted by the UK, it does provide an example of how remedies can be set out in a comprehensive way. Chapter 3 of Book III sets out the remedies for non-performance in a structured, systematic fashion. Following general provisions identifying what the available remedies are and how they fit together, there are detailed sections including the innocent party's right to enforce performance (including the right to repair); the right to withhold performance; termination of the contract for breach; price reduction; and damages and interest. The section on termination includes a statement of when the right to terminate arises, how it is to be exercised, what its consequences are and the recovery of money paid (or other benefits conferred).

5.57 Adopting such an approach would have a number of benefits. It has benefits in terms of the substance of the law: in addition to providing an opportunity to correct inappropriate rules in the existing law, it compels the clarification of matters that are unsettled or obscure. But it also makes the law accessible. The present law on remedies is intelligible only to a trained lawyer. A clear and complete statement of the law would make it something that consumers and businesses might consult and certainly something of use to those who provide advice to consumers.

5.58 Looking at matters specific to the nature and quality of the goods, a comprehensive codification would, following the model of the DCFR, include in its section on the right to terminate the contract provisions on how that right is lost. That would provide an opportunity not only to improve the provisions on retention beyond a reasonable time, as already discussed, but also to simplify and make more intelligible the rules on acts inconsistent with the seller's ownership. Arguably that could be done by replacing the current rules with a provision dealing with inability to restore the goods in their original condition. That would entail resolving the issues left lying by the Law Commissions in 1987 as to the effect of damage or destruction caused by third parties or unintentionally by the consumer. The United Nations Convention on Contracts for the International Supply of Goods (CISG) provides a possible solution, barring rescission where the goods cannot be returned substantially in the condition in which they were received, but recognising exceptions to that rule where the loss or damage is not the result of the buyer's act or omission, where it is the result of examination of the goods and where the buyer has consumed or transformed the goods before he discovered or could reasonably have discovered the lack of conformity.[227]

5.59 In terms of the buyer's further remedies on rescinding the contract, a comprehensive codification would, in addition to clarifying the circumstances when a full refund is available, explicitly set out the damages available on rescission, rather than those for non-delivery. That is the approach of both the CISG[228] and the DCFR.[229]

5.60 This is an attractive option. There may be disadvantages, however. To the extent that a comprehensive statement of the law would involve a codification of parts of the general law, the codified rules would become isolated from judicial innovation in the general law. To a very limited extent that did occur with the original codification of the law of sale by the Sale of Goods Act 1893. Nevertheless, the danger should not be exaggerated: the law of remedies is generally stable.

Recommendations

5.61 Across the range of goods remedies, it is apparent that it is both possible and advisable to base the future remedial scheme for all goods contracts on that applicable to sale of goods. On some limited points, special rules may be necessary for particular types of contract (as with refunds in contracts of hire), but subject to that qualification, it is recommended that extending the sale model is the approach to be adopted.

5.62 There are problems with the current sale rules and, while it would be possible simply to apply the existing sale provisions across all goods contracts, that would not be advisable. It is therefore recommended that the new legislation should not be based simply on the existing sales provisions. Instead, there should at least be an attempt to rectify some of the substantive issues, including a fuller integration of the traditional and European remedies, clarification of the time allowed for the traditional short-term right to reject and terminate, declaration of the extent to which the seller has a right to cure and bringing the rules on proportionality and the availability of first tier remedies into line with the European legislation.

[227] Art.82, omitting references to resale, see Annex 3.
[228] Arts. 75-76, see Annex 3.
[229] DCFR, III 3-706 and 3-707, see Annex 1.

5.63 However, a comprehensive codification of the law, going beyond these detailed reforms, is a possible way forward. It would be a significant undertaking and it would require confronting and resolving some controversial issues. But in terms of clarity and accessibility, this is the best solution and it is recommended that the attempt be made to draft such a comprehensive code.

Remedies relating to services

5.64 As with the supply of goods, the supplier of services is under a number of different obligations. For the sake of clarity and, in particular, to fit in with the preceding discussion, the analysis here will focus on the remedies available where the supplier is in breach of his quality obligation. Under the existing law, the basic obligation in this respect is that laid down by section 13 of the SGSA, which implies a term that "the supplier will carry out the service with reasonable care and skill". In some contracts, however, there may be a stricter duty,[230] and reform of the law might include an extension of result-orientated obligations here.[231]

The existing law

5.65 Subject to two limited exceptions, there are no statutory provisions setting out the consumer's remedies for breach of contract relating to the provision of services, whether in conjunction with the supply of goods or otherwise. Part II of the SGSA is modest in scope, concentrating on the content of key implied terms, a limitation no doubt reflecting the fact that this Part was not based on a Law Commission report.[232] The remedies are accordingly a matter of the general law of contract.

5.66 The general law provides the remedies of damages and, in appropriate cases, rescission of the contract. Unlike in contracts for the supply of goods, the quality obligation is not a condition of the contract, and rescission is only possible where the effects of the breach are serious, so serious as to substantially deprive the customer of the benefit of the contract.[233] In practice, damages appear to be the commonest remedy sought where poor quality service is rendered. Whether the right to rescind is subject to a right for the supplier of the service to rectify the breach is even more unsettled than in relation to the supply of goods, but it is possible that such a right to cure exists. As with the traditional remedies in the supply of goods, the general law does not give the consumer the right to require repair or replacement.

5.67 The exceptional cases where there are statutory provisions are two specific types of "mixed" contract involving the supply of both goods and services: contracts for the manufacture and supply of goods[234] and for the supply and installation of goods.[235] In these cases, the European remedies for non-conformity of goods apply where the goods are affected by failures in the services element, i.e. the manufacture or installation. These remedies are in addition to the remedies under the general law.

---

[230] S.16(3)(a) of the SGSA.
[231] See Chapter 4.
[232] G.Woodroffe, *Goods and Services – The New Law* (London: Sweet & Maxwell, 1982), paras.1.14-1.15.
[233] *Hong Kong Fir Shipping Co. Ltd. v Kawasaki Kisen Kaisha Ltd.* [1962] 2 QB 26.
[234] To the extent that these are not contracts of sale.
[235] As to which, see s.11S(1)(b) of the SGSA.

The problems with the existing law

5.68 The principal problem for services is the fact that, for the most part, there are no statutory provisions. This makes the law inaccessible to anyone other than a lawyer, a state of affairs that is not appropriate for consumer contracts. When the SGSA was enacted, it was envisaged that legislation on remedies would follow, and this is now long overdue.[236]

5.69 A second general issue is the difference in treatment given to different contracts involving the provision of services. As noted, in some mixed contracts, the remedies under the general law are supplemented by the European remedies. The question therefore arises as to whether there should be a uniform remedial scheme for all services, one which bring the law relating to services more into line with the law applicable to goods.

Options for reform

The status quo

5.70 It would be possible to continue with this largely uncodified position, even if some new legislation were introduced, but this would not be advisable. It would limit the utility of the legislation for mixed contracts: it would entail, for example, setting out the remedies for when a decorator uses poor quality paint, but giving no indication of the remedies where the quality of the painting is poor. Such an incomplete presentation of the law is not helpful to the consumer.

Codification of the existing law

5.71 One way of providing a statutory framework would be simply to codify the existing law, either in a basic manner or in a comprehensive statement of the law. The benefits of the latter approach have already been outlined in connection with remedies relating to the supply of goods. Ideally the degree of codification adopted for services should be the same as for goods, particularly in the interests of mixed contracts.

5.72 In drafting any new legislation, an issue would be whether the services remedies should be set out completely separately from the goods remedies. That might be seen as an aid to clarity, but it might be difficult to achieve, given the availability in certain mixed contracts of goods remedies for problems in the provision of a service (as in the case of defective installation). In any event, the DCFR provides a model where, to a very significant extent, remedies are set out in an integrated way, covering all types of contract, including contracts for the supply of goods, contracts for the provision of services and mixed contracts.

5.73 In practice, it may not be possible or advisable simply to restate the law. If, for example, the reform of the goods remedies includes a declaration that the supplier does not have the right to cure his breach in consumer contracts, the matter will need to be addressed equally in relation to services. That is a minor matter. A more significant issue, however, is whether

[236] Cf. G.Woodroffe, *Goods and Services – The New Law* (London: Sweet & Maxwell, 1982), para.1.15.

the remedies should be assimilated to those found in relating to goods, including an extension of the European remedies.

A general assimilation to the remedies for the supply of goods

5.74 Having a common remedial scheme for goods and services would have several advantages. It would provide consistency in the law. This could be seen as a benefit for the whole field of consumer transactions, but it would be particular benefit in relation to mixed contracts. Returning to the example of decorating contracts, it may be questioned why the remedies should be different according to whether a decorator uses poor quality paint or applies it badly. Common remedies would make the law simpler and more comprehensible, making it easier for consumers to understand and assert their rights.

5.75 In practical terms, it would be feasible to give the consumer a remedy equivalent to requiring goods to be repaired. A decorator could reasonably be asked to rectify blemishes in her paintwork free of charge, for example. Requiring the service to be completely redone, the equivalent of the replacing goods, would equally possibly (for example, where a laundry fails to wash clothes properly, having them re-washed). This should not be unduly onerous for businesses, particularly bearing in mind that, under the current law, the consumer could in these cases have the remedial work done by a third party and then claim the cost of doing so from the supplier of the service by way of damages. It may be noted that the DCFR provides for the "remedying free of charge of a performance which is not in conformity with [the contract]".[237] This provision applies to contracts generally, including those for the supply of services.

5.76 It may be noted, however, that such additional remedies may be of only limited value if the law relating to the supplier's quality obligation remains as it is. As has been seen, the basic obligation is simply to exercise reasonable care and skill, and the supplier does not guarantee that the desired result will be achieved. Where that basic obligation applies, the consumer can therefore only claim a remedy if there has been negligence. The supplier of the service may well deny any failure on his part, ascribe any problems to factors outside his control and insist that any extra work must be paid for. A garage that effects an unsuccessful repair on a car, for example, may blame the problem on the age of the vehicle and claim to be entitled to charge for any further attempt to repair it.

5.77 If introducing remedies such as repair would be feasible, providing a right to rescind that is similar to that found in relation to goods will be more problematical. Any attempt to extend the right to rescind will be viewed as placing burdens on business. The difficulties would be most acute if, bringing the law relating to services in line with the traditional goods remedies, the quality obligation were to be elevated to the status of a condition of the contract, so that any breach, however minor, would give rise to a right to rescind. Even if that were made a short-term right, like the short-term right to reject and rescind in contracts for the supply of goods, that would represent a significant change in the law. If that were then to be coupled with a change in the basic quality obligation to make it result-orientated, eliminating the need for negligence as a trigger for remedies, strong resistance from business is to be anticipated.

[237] DCFR, III 3-302(2), see Annex 1.

5.78 In the earlier discussion of goods remedies, it was pointed out that, for the purposes of the European remedies, there is in general a presumption that the supplier of the goods is in breach of contract where the goods are found not to be in conformity with the contract requirements at any time within six months after delivery of the goods to the consumer. Transposing that presumption into the services context would prove a challenge. Given the variety of services that are provided, it would be difficult, for instance, to draft a general definition of the types of problem that would give rise to such a presumption. Defining the starting date for the six months' period could also be problematical, given that some services are provided over a period of time (for example, decorating a house over a period of weeks) or continuously (for example, security services). But even if those hurdles could be overcome, such a reversal of the traditional onus of proof, although a benefit to consumers, would be seen as a further burden on business.

5.79 A full assimilation of the remedies in relation to both goods and services may therefore not be practical. Particular goods remedies, such as repair, might be extended, however. In making changes to the existing law that would affect the supply of services in general, it has to be borne in mind that a wide range of diverse businesses would be affected: plumbers, electricians, builders, surveyors, carriers, private doctors and hospitals, lawyers, accountants and banks, to name but a few. Wide-spread consultation will be necessary.

A limited assimilation

5.80 If it would be difficult to achieve full assimilation for services in general, the possibility might be considered of assimilating the goods and services remedies for just mixed contracts. But one significant problem here would be devising a satisfactory definition of the types of contract to be included. Simply stipulating that the common remedies would apply to any contract under which both goods and services are supplied may not be sufficient. Presumably, such a definition would be intended to exclude, for example, a solicitor sending a letter advising a client or a surveyor providing a report on a property, yet each of these services includes, in a sense, the supply of goods (the paper on which the letter or report is written). To avoid including such transactions where the provision of goods is only incidental, an attempt might, of course, be made to specify how significant the goods supplied should be; but that would create uncertainty in practice, inevitably to the detriment of consumers, it would be a recipe for litigation.

Recommendations

5.81 In relation to services, there is very little by way of legislation at present, and it is recommended that the remedies should be put on a statutory footing to a much greater extent. That should not be simply a codification of the existing law, but support is unlikely to be found for a full assimilation of the remedies to those found in relation to goods. As with goods a comprehensive codification of the law is a possible way forward. It would be a significant undertaking and it would require confronting and resolving some controversial issues. But in terms of clarity and accessibility, this is the best solution and it is recommended that the attempt be made to draft such a comprehensive code.

Streamlining the Structures and Separating the Provisions

6. STREAMLINING THE STRUCTURES AND SEPARATING THE PROVISIONS

Current position

6.1 The measures which under consideration in this Chapter are:

- Sale of Goods Act 1979 (SoGA)
- Supply of Goods and Services Act 1982 (SGSA)
- Supply of Goods (Implied Terms) Act 1973 (SoG(IT)A)
- Sale and Supply of Goods to Consumers Regulations 2002,[238] (SSGCR).

6.2 Before considering if, and how, these existing measures could be streamlined, it is first necessary to identify the types of transactions affected by them. The supplier of goods and/or services may or may not be acting in the course of a business; similarly the recipient of the goods and/or services may or may not be acting in the course of a business. The three main possible relationships between the parties are, therefore, business-to-business (B2B); business-to-consumer (B2C) or consumer-to-consumer (C2C). It is not intended to discuss consumer-to-business (C2B) as this would be the same as C2C in its effects.

6.3 The definition of "consumer" for the purposes of the measures under consideration differs in the terminology used, depending upon jurisdiction; with England, Wales and Northern Ireland having separate definitions from those used in Scotland. For England, Wales and Northern Ireland, in the SoGA, section 61(5A), "dealing as consumer" is:

> "to be construed in accordance with Part I of the Unfair Contract Terms Act 1977; and, for the purposes of this Act, it is for a seller claiming that the buyer does not deal as consumer to show that he does not."

6.4 The wording in SGSA is very similar in section 18(4), with references to "transferor or bailor" substituted for "seller" and "transferee or bailee" substituted for "buyer". In the SoG(IT)A, section 11A(4) simply states that, for the purposes of section 11A, references to "dealing as consumer" are:

> "to be construed in accordance with Part I of the Unfair Contract Terms Act 1977",

with no mention of onus of proof.[239]

6.5 All the above definitions are linked to Part I of the Unfair Contract Terms Act 1977. The definition of "dealing as consumer" can be found in section 12 which currently states:

> "(1) A party to a contract "deals as consumer" in relation to another party if—
> (a) he neither makes the contract in the course of a business nor holds himself out as doing so; and
> (b) the other party does make the contract in the course of a business; and

[238] S.I. 2002/3045.
[239] No definition of "dealing as consumer" is included for the purposes of s.10 of that Act.

(c) in the case of a contract governed by the law of sale of goods or hire purchase, or by section 7 of this Act, the goods passing under or in pursuance of the contract are of a type ordinarily supplied for private use or consumption.
(1A) But if the first party mentioned in subsection (1) is an individual paragraph (c) of that subsection must be ignored.
(2) But the buyer is not in any circumstances to be regarded as dealing as consumer—
(a) if he is an individual and the goods are second hand goods sold at public auction at which individuals have the opportunity of attending the sale in person;
(b) if he is not an individual and the goods are sold by auction or by competitive tender.
(3) Subject to this, it is for those claiming that a party does not deal as consumer to show that he does not."

It can be seen from the above that transactions between two private individuals do not fall within the definition of "dealing as consumer", therefore C2C transactions are akin to B2B transactions and may be treated differently from B2C transactions.

6.6 In Scotland, under the SoGA, section 61(1), a "consumer contract" is defined as:

> "having the same meaning as in section 25(1) of the Unfair Contract Terms Act 1977; and for the purposes of this Act the onus of proving that a contract is not to be regarded as a consumer contract shall lie on the seller."

6.7 A very similar definition occurs in SGSA, section 11F(3), with the substitution of "transferor" for "seller", and this definition is also used for section 11K. For the SoG(IT)A, section 12A(3) defines a "consumer contract" as having:

> "the same meaning as in section 25(1) of the Unfair Contract Terms Act 1977; and for the purposes of that subsection the onus of proving that a hire purchase agreement is not to be regarded as a consumer contract shall lie on the creditor."[240]

6.8 In all the Scottish definitions reference is made to section 25(1) of the Unfair Contract Terms Act 1977 which currently states:

> ""consumer contract" means subject to subsections (1A) and (1B) below a contract . . . in which —
> (a) one party to the contract deals, and the other party to the contract ("the consumer") does not deal or hold himself out as dealing, in the course of a business, and
> (b) in the case of a contract such as is mentioned in section 15(2)(a) of this Act, the goods are of a type ordinarily supplied for private use or consumption;
> and for the purposes of this Part of this Act the onus of proving that a contract is not to be regarded as a consumer contract shall lie on the party so contending;"

[240] It is interesting to note that SoG(IT)A, s.15 also has a definition of "consumer sale", which now appears to be redundant, but which has not been repealed; this refers to s.55 of the SoGA (as set out in para. 11 of Sch.1 to that Act), a provision which applies only to contracts made between 18 May 1973 and 1 February 1978.

The qualifications in sub-sections (1A) and (1B) are:

> "(1A) Where the consumer is an individual, paragraph (b) in the definition of "consumer contract" in subsection (1) must be disregarded.
> (1B) The expression of "consumer contract" does not include a contract in which—
> (a) the buyer is an individual and the goods are second hand goods sold by public auction at which individuals have the opportunity of attending in person; or
> (b) the buyer is not an individual and the goods are sold by auction or competitive tender."

6.9 The SSGCR, which apply to the whole of the United Kingdom, have a different definition of "consumer", in regulation 2(1):

> ""consumer" means any natural person who, in the contracts covered by these Regulations, is acting for purposes which are outside his trade, business or profession".

This should be read in conjunction with the definition of a "consumer guarantee", also found in regulation 2(1):

> ""consumer guarantee" means any undertaking to a consumer by a person acting in the course of his business, given without extra charge, to reimburse the price paid or to replace, repair or handle consumer goods in any way if they do not meet the specifications set out in the guarantee statement or in the relevant advertising".

Measures specific to business-to-consumer contracts

6.10 Taking first the SoGA, as will be seen from Table 1,[241] there are a few provisions of the SoGA which are confined to B2C contracts.[242] These are:

- the rule for passing of risk under section 20(4)
- delivery to a carrier under section 32(4)
- the remedies available under Part 5A, sections 48A–48F.

6.11 The SGSA also has some measures specific to B2C contracts.[243] These are:

- the remedies available under Part 1B, sections 11M–11S.

The SoG(IT)A has one measure specific to B2C contracts:[244]

- special provisions as to conditional sale agreements, sections 14(1).

6.12 Under the SSGCR, although most of the Regulations are concerned with amending other statutory measures, regulation 15, introduces specific requirements for "consumer guarantees", which, as can be seen from paragraph 6.9, are confined to B2C transactions.

Measures modified for business-to-consumer contracts

[241] See page 102.
[242] As opposed to being more general provisions which are modified for B2C transactions, see para. 6.13.
[243] See Table 2, page 107. For general provisions modified for B2C transactions, see para. 6.13.
[244] See Table 3, page 111. For general provisions which are modified for B2C transactions, see para. 6.13.

6.13 Within the SoGA there are some provisions which have been modified specifically for B2C transactions. These are:

- the effect of public statements in relation to satisfactory quality, section 14(2D) and (2E)
- in Scotland, the deeming of material breaches, section 15B(2)
- prevention of loss of right to reject by agreement, waiver or otherwise, section 35(3).

Under the SGSA the measures which are modified for B2C transactions are:

- those concerning the effect of public statements in relation to satisfactory quality:
  - for transfers of goods in England, Wales and Northern Ireland, section 4(2B) and (2C)
  - for hire of goods in England, Wales and Northern Ireland, section 9(2B) and (2C)
  - for transfers of goods in Scotland, section 11D(3A) and (3B)
  - for hire of goods in Scotland, section 11J(3A) and (3B)
- the deeming of material breaches in Scotland, section 11F(2).

The SoG(IT)A has two sections where B2C contracts have a modified provision. These are:

- the effect of public statements in relation to satisfactory quality under section 10(2D) and (2E)
- in Scotland, the deeming of material breaches under section 12A(2).

Measures applicable to both business-to-consumer and business-to-business contracts under the Sale of Goods Act 1979

6.14 As can be seen from Table 1,[245] the majority of sections under the SGA apply both to B2C and to B2B contracts. If consideration is to be given to streamlining the structure and to separating out measures specific to B2C transactions it is, therefore, necessary to consider which common provisions are: (a) of practical significance in B2C contracts, (b) of only minor importance in B2C contracts, (c) more concerned with general contract law.

Sale of Goods Act measures of practical significance in business-to-consumer contracts

6.15 The following provisions, contained in the SoGA, could be considered to be of practical significance in B2C contracts:

Ascertainment of price, section 8
Stipulations as to time, section 10
When condition to be treated as warranty, section 11
Implied terms: title, section 12
description, section 13
satisfactory quality, section 14(2)
fitness for purpose, section 14(3)
sample, section 15
Remedies for breach of contract as respects Scotland, section 15B(1)

[245] See page 102.

Passing of property: sections 16–18
Transfer of title: sections 21, 23–26
Duties of seller and buyer, section 27
Payment and delivery are concurrent conditions, section 28
Rules about delivery, section 29
Delivery of wrong quantity, for England and Wales: section 30(1), (2), (3) and (5)
for Scotland: section 30(1), (2), (2D), (2E), (3) and (5)
Instalment deliveries, section 31
Risk where goods are delivered at distant place, section 33
Buyer's right of examining the goods, section 34
Acceptance, section 35
Right of partial rejection, section 35A
Buyer not bound to return rejected goods, section 36
Buyer's liability for not taking delivery of goods, section 37
Seller's remedies: action for the price, section 49
damages for non-acceptance, section 50
Buyer's remedies:
damages for non-delivery, section 51
specific performance, section 52
remedy for breach of warranty, section 53
measure of damages as respects Scotland, section 53A
Exclusion of implied terms, section 55
Payment into court in Scotland, section 58
Reasonable time is a question of fact, section 59
Rights enforceable by action, section 60

Sale of Goods Act provisions of only minor importance in business-to-consumer contracts

6.16 The following provisions, contained in the SoGA, although applicable to B2C contracts, will rarely arise in practice in such contracts:

Agreement to sell at valuation, section 9
Reservation of right of disposal, section 19
Undivided shares in goods forming part of a bulk, section 20A
Deemed consent by co-owner to dealings in bulk goods, section 20B
Rights of unpaid seller against the goods:
Unpaid seller defined, section 38
Unpaid seller's rights, section 39
Unpaid seller's lien, section 41
Part delivery, section 42
Termination of lien, section 43
Stoppage in transit: sections 44–46
Effect of sub-sale etc by buyer, section 47
Rescission and re-sale by seller, section 48
These provisions are much more likely to arise in B2B contracts.

Sale of Goods Act provision concerned with general contractual issues

6.17 There are a few provisions in the SoGA which, although applicable to B2C contracts, appear to be more concerned with general contractual issues:

Capacity to buy and sell, section 3
How contract of sale is made, section 4
Existing or future goods, section 5
Goods which have perished, section 6
Goods perishing before sale but after agreement to sell, section 7
Interest etc, section 54
Auction sales, section 57

Measures applicable to both business-to-consumer and business-to-business contracts under the Supply of Goods and Services Act 1982

6.18 The SGSA, as can be seen from Table 2,[246] for the most part applies to both B2C and B2B contracts.[247] Because the focus of the Act is confined to statutory implied terms, it does not contain any measures concerning general contractual issues, nor does it contain any measures which are primarily of interest in B2B contracts, such as stoppage in transit. It is not, therefore, necessary to analyse the different provisions to consider which are of particular relevance to B2C contracts; almost the whole of the Act is of relevance to B2C transactions.

Measures applicable to both business-to-consumer and business-to-business contracts under the Supply of Goods (Implied Terms) Act 1982

6.19 Most of the SoG(IT)A applies to both B2C and B2B contracts.[248] As the Act is confined to issues relating to statutory implied terms (in a similar way to the SGSA), there are no measures of a general contractual nature, nor are there any which are of primary interest to B2B contracts. Almost the whole Act is, therefore, of relevance to B2C contracts.

Measures applicable to consumer-to-consumer contracts
6.20 Under the SoGA, as can be seen in Table 1,[249] the vast majority of sections under the Act apply in C2C contracts. It is perhaps easiest to highlight those provisions which *do not* apply in C2C transactions. These are:

- the implication of terms of satisfactory quality and fitness for purpose under section 14
- breach deemed to be a material breach in consumer contracts in Scotland, section 15B(2)
- the rule for passing of risk under section 20(4)
- delivery to a carrier under section 32(4)
- prevention of loss of right re examination in consumer transactions under section 35(3)
- the remedies available under Part 5A, sections 48A–48F.

[246] See page 107.
[247] For those measures which apply to B2B and C2C contracts, but not B2C contracts, see para. 6.24 below.
[248] See Table 3, page 111. Only s.11A is confined to B2B and C2C contracts, see para. 6.24 below.
[249] See page 102.

6.21 A similar pattern emerges when the SGSA is examined.[250] The majority of sections apply to C2C transactions, with only a few provisions which *do not* apply. These are the:

- implication of terms of satisfactory quality and fitness for purpose for transfers of goods under section 4
- implication of terms of satisfactory quality and fitness for purpose for hire of goods under section 9
- implication of terms of satisfactory quality and fitness for purpose for transfers of goods in Scotland under section 11D
- the deeming of material breaches in Scotland, section 11F(2)
- implication of terms of satisfactory quality and fitness for purpose for hire of goods in Scotland under section 11J
- remedies available under Part 1B, sections 11M–11S
- implied term about care and skill under section 13
- implied term about time for performance under section 14.

6.22 The SoG(IT)A again largely applies to C2C contracts, although, in practice, there are not likely to be many hire purchase contracts made between consumers. The provisions which *do not* apply to C2C transactions are the:

- implication of terms of satisfactory quality and fitness for purpose under section 10
- in Scotland, the deeming of material breaches under section 12A(2)
- special provision for conditional sale agreements under section 14.

Measures applicable to business-to-business contracts only

6.23 Within the SoGA there are no provisions which *only* apply to B2B contracts. The reason for this is that, because the definitions of "dealing as consumer" and "consumer contract" exclude both B2B contracts and C2C contracts, measures which apply to non-consumer situations are not confined to B2B but also apply to C2C transactions. The same is true for contracts falling under the SGSA and the SoG(IT)A.

Measures applicable to business-to-business and consumer-to-consumer contracts only

6.24 As a result of the situation outlined above, there are a number of provisions in the SoGA, the SGSA and the SoG(IT)A which only apply to B2B and C2C contracts i.e. where there is a non-consumer situation. Under the SoGA this occurs under:

- section 15A, modification of remedies for breach of condition in non-consumer cases
- section 20(1)(2) and (3), rules for passing of risk
- section 30(2A) , (2B), (2C), restrictions on rejection for wrong delivery for non-consumers apart from in Scotland
- section 32(1), (2) and (3), delivery to carrier for non-consumer transactions.

For contracts governed by the SGSA the following measures apply to B2B and C2C transactions only:

- For transfers of goods in England, Wales and Northern Ireland, modifications of remedies for breach of statutory condition in non-consumer cases under section 5A

[250] See Table 2, page 107.

- For hire of goods in England, Wales and Northern Ireland, modification of remedies for breach of statutory condition in non-consumer cases under section 10A.

Under the SoG(IT)A the only measure which is confined to B2B and C2C transactions is:

- Modification of remedies for breach of statutory condition in non-consumer cases, section 11A.

Analysis of the problem

6.25 Having looked at the current position under the SoGA, the SGSA, the SoG(IT)A and the SSGCR, consideration is now given to the issues raised if these measures are to be consolidated in a new measure applying only B2C transactions.

6.26 There are very few provisions confined solely to B2C transactions.[251] Even when the provisions where there are modifications specifically for B2C transactions are included,[252] this does not form a comprehensive framework to cover B2C transactions. If the law relating to B2C transactions is to be consolidated as a separate statutory measure it is, therefore, necessary to include within such a measure, many of the provisions which are common to both B2C and B2B transactions.[253] An important issue is to decide which common measures need to be included and which can be omitted. To assist in formulating proposals, it is useful to begin by looking at each of the existing measures to determine their scope and relevance to modern B2C transactions. This would not preclude the possibility of simplifying or rationalising some of the existing measures at the same time.

Issues regarding the scope and relevance of existing measures

6.27 The current SoGA, although passed in 1979 with subsequent amendments, is essentially a consolidation of the Sale of Goods Act 1893 as amended. This Act was almost entirely a codification of previous case-law which principally related to mercantile transactions. The 1979 Act covers many aspects relating to sale of goods transactions: formation of contracts, including implied terms; the effects of contracts, including issues relating to title and passing of property; performance, including delivery and acceptance; rights of unpaid seller, including stoppage in transit; and remedies of sellers and buyers including specific consumer remedies. As a result, both in its form and its content, the SoGA is neither consumer-friendly nor, in some aspects, very relevant for modern B2C transactions.

6.28 The SGSA is much narrower in its scope than the SoGA and is focused on implied terms and remedies. It was created with B2C transactions in mind as well as B2B transactions and, with the exception of minor modifications of remedies in B2B transactions,[254] is fully applicable to and relevant for B2C transactions. A consolidated B2C

[251] See paras. 6.10-6.12.
[252] See para. 6.13.
[253] It is to be noted that these provisions also usually apply to C2C transactions. Discussion of the question of whether or not C2C transactions should be included in a new B2C statute is covered at paras. 6.65-6.72.
[254] Ss. 5A and 10A, see para. 6.24. These variations also apply to C2C transactions.

measure would, therefore, need to incorporate almost the whole of the Act, subject to any decisions taken regarding the differences between supply transactions.[255]

6.29 The SGSA does contain a separate Part, Part 1A, relating to implied terms in Scotland. One issue which needs to be addressed is whether or not to include Scottish provisions within a consolidated B2C statute or whether there should be two separate statutes, one covering the law in England, Wales and Northern Ireland and one covering the law in Scotland.

6.30 The SoG(IT)A is very narrow in its scope, covering issues relating to implied terms and, to a limited extent, remedies for breach of hire purchase and conditional sale agreements. With the exception of section 11A,[256] it applies to B2C contracts and would need to be incorporated within a consolidated B2C measure.

6.31 Regulation 15 of the SSGCR is solely concerned with B2C transactions[257] and, therefore, would clearly fall to be included in a consolidated B2C measure.

Issues regarding the relevance of existing SoGA provisions

6.32 Having looked at the existing coverage of the SoGA, SGSA, SoG(IT)A and SSGCR it can been seen that a consolidated B2C measure would need to encompass almost all the provisions in the SGSA and the SoG(IT)A and regulation 15 of the SSGCR. A key area of debate which remains is the extent to which such a measure should incorporate material contained in the SoGA and the form such incorporation should take.

6.33 An analysis of the different sections of the SoGA indicated those of clear relevance to B2C transactions, those which are of only minor importance to B2C sales but which may occasionally arise in practice and those provisions of more general contractual relevance. In considering a consolidated B2C measure, it is necessary to decide whether or not to include provisions of minor significance and general contractual measures and, if they are to be included, what form such inclusion should take.

6.34 The arguments for incorporating all existing provisions include:

- making the new measure as comprehensive as possible;
- avoiding the need to refer to other statutes, in particular the remaining B2B version of the SoGA;
- enabling the simplification of areas such as rules about delivery. It is unlikely that there would, at the same time, be changes made to the remaining B2B version of the SoGA so if it had to be relied on, in part, for B2C transactions, the sections used would be in their current business-orientated state;
- giving traders, consumers and advisers a better-structured, well-ordered, fully-updated version of the core laws governing the sale and supply of goods and services to consumers.

[255] See discussion in Chapter 2.
[256] See paras. 6.19 and 6.24.
[257] See para. 6.12.

6.35 The arguments against incorporating all existing provisions include:

- increasing the length and complexity of the B2C measure;
- if measures such as those relating to buying goods from bulk and the effect of sub-sales by buyers are included unaltered, there will be parts of the B2C Act which lack transparency and comprehensibility for many users of the statute;
- it would be pointless to include some measures, such as stoppage in transit, which are going to occur so rarely in a B2C transaction;
- the existing SoGA would have to be maintained for B2B (and probably C2C[258]) transactions and could be used to fill in any gaps, by cross-referencing within the B2C Act, if wished.

Issues regarding widening the scope of a consolidated business-to-consumer statute

6.36 When considering the introduction of a consolidated B2C measure, it is necessary not only to look at the existing measures relating to the supply of goods and services, to decide how much or how little of them should be included, but also to consider the broader question of whether or not the scope of such a measure should be extended further. It can be argued that any B2C statute should be a stand-alone measure which covers all aspects of any B2C transaction involving the sale and supply of goods and services. This would avoid the need for both businesses and consumers to look to other sources (both statutory and common law[259]), to determine the legal position applicable to any dispute arising from a transaction. If the statute dealt with a transaction from "the cradle to the grave" and was expressed in clear, plain and simple language, both parties could easily determine their rights and obligations and there would be much less need for legal advice and assistance, thereby reducing transaction costs for both parties.

6.37 To achieve an all-encompassing statute there are some factors which need to be borne in mind. First, there are many aspects of the law of contract, currently only in the form of common law, which affect B2C transactions, such as rules of offer and acceptance and consideration. It would be necessary to decide whether or not to seek to codify all these into a new B2C statute. Second, the area of unfair terms and exemption clauses, although touched on within the SoGA, the SGSA etc., is largely regulated by the Unfair Contract Terms Act 1977 and the Unfair Terms in Consumer Contracts Regulations 1999.[260] There have been proposals to amalgamate these measures and rationalise them,[261] and it would be desirable to include detailed coverage of the control of unfair terms within a B2C supply of goods and services statute.[262] Third, there are many special rules affecting contracts formed in particular circumstances, which would merit inclusion within a "cradle to grave" B2C statute. Examples include distance selling and doorstep selling transactions where there are specific cancellation provisions to be found in the Consumer Protection (Distance

[258] See paras. 6.65-6.72.
[259] I.e. case law.
[260] S.I. 1999/2083.
[261] Law Commission Report No. 292, 'Unfair Terms in Contracts' (jointly with Scottish Law Commission – SLC199), (Cm 6464; SE/2005/13); White Paper, 'A Better Deal for Consumers: Delivering Real Help Now and Change for the Future', Cm 7669, para. 4.4.
[262] Detailed consideration of this aspect is outside the scope of this report.

Selling) Regulations 2000[263] and the Cancellation of Contracts made in a Consumer's Home or Place of Work etc Regulations 2008.[264]

European compatibility

6.38 Any consolidated B2C measure clearly has to be fully compatible with the Consumer Sales Directive (99/44/EC) and would be used as a vehicle for implementing any changes if the proposed Consumer Rights Directive (pCRD) is adopted. It would be necessary to use the European definition of "consumer", which, currently under article 2 of the pCRD, is:

> "any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession".

Options for change

6.39 There are a number of alternatives which present themselves when considering whether or not to streamline the structure of the present laws relating to sale and supply of goods and services, together with the question of whether or not to separate the statutory control of B2C transactions from B2B and, possibly, C2C[265] transactions.

Option 1 Do nothing

Advantages

6.40 It could be argued that, having muddled along with a variety of statutes covering different types of contracts made between differing parties for many years, there is no need to change at this point in time. All that would be necessary would be to make any changes required by the pCRD.

6.41 Another argument in support of doing nothing is that, if the statutory framework changes, traders and consumers would have to be re-educated, which would involve time and expense, adding to business costs and potentially weakening the consumer's position, at least initially. Any major structural changes would also require training for consumer advisers, trading standards officers, lawyers etc; new advice leaflets; training manuals etc., with all the associated expense and inconvenience.

Disadvantages

6.42 There are, however, many counter-arguments against leaving everything as it currently stands. The domestic situation is in such a disjointed and confused state, with traders and

[263] S.I. 2000/2334.
[264] S.I. 2008/1816.
[265] Discussed further in paras. 6.65-6.72.

consumers alike uncertain[266] about which statute applies and what the relevant legal requirements are, that simplification and rationalisation is both necessary and desirable. It is difficult to access up-to-date versions of the legislation, assuming that a person even knows that there are several different measures involved, and, once found, the language and arrangement of the measures is difficult for non-lawyers to understand. The SoGA, in particular, is very much orientated towards commercial dealings and, although in the main it covers B2C contracts, it is not at all clear which sections apply to such transactions.

6.43 Regarding future EU developments, delaying domestic change is not sensible. Since some change will be necessary to implement the pCRD, this presents an ideal opportunity to reform and reorganise the whole domestic regime at the same time, to avoid revisiting the issue at a later date. Although change would clearly necessitate money spent on training, educating and informing traders, consumers and advisers; in the longer term, if there is a clearer and more cohesive statutory measure, there is much less likelihood of traders and consumers needing professional help and advice, disputes would be resolved more speedily and cost savings could be achieved.

Option 2 Consolidate the SoGA, SGSA, SoG(IT)A and the SSGCR, covering business-to-consumer, business-to-business and consumer-to-consumer transactions

Advantages

6.44 The key advantage of this proposal would be the removal of 4 separate statutory provisions to be replaced by one, all-encompassing measure. It would enable the streamlining of the statutory implied terms for the various different types of goods contracts and the standardisation, simplification and clarification of the remedies available for breach. It would be possible for an amalgamated statute to have Parts applicable to all contracts, for example provisions relating to the contract of sale[267] and Part VI of the current SoGA;[268] Parts applicable to B2B contracts only, for example stoppage in transit; and Parts applicable to B2C contracts only, for example consumer guarantees and the additional consumer remedies in the SoGA, Part VA. The benefit of doing this would be to have all the existing provisions affecting the sale and supply of goods and services in one place, with an opportunity to fill in some current gaps by providing statutory explanations of the right to reject, affirmation etc.

6.45 It could be argued that reform of this area should be done on a step-by-step basis. First there should be an amalgamation of the existing measures to sort out the regulation of different types of goods contracts and then the amalgamated statute would form a staging post for the future separation of B2C contracts into a free-standing statutory measure.

[266] Sometimes even the courts appear to apply the wrong statute, see, for example, *Shine v General Guarantee Corporation Ltd* [1988] 1 All ER 911, where the Court of Appeal discussed s.14 of the SoGA in relation to a hire-purchase agreement, instead of s.10 of the SoG(IT)A.
[267] Ss.2-9 of the SoGA.
[268] Actions for Breach of Contract, ss.49-54.

Disadvantages

6.46 A major disadvantage of this proposal is that the new consolidated measure would contain much material which is not relevant to B2C transactions, thus failing to make the law more consumer-orientated and transparent. It would be unlikely to result in a simplified regime regarding such matters as the transfer of risk or ownership, as it could be argued that it would be wrong to interfere with these well-established rules for B2B transactions.

6.47 Where there are provisions, such as implied terms, which apply in general both to B2B and B2C contracts but with variations for B2C transactions,[269] a combined statute would either have to take the form currently adopted in the SoGA, the SGSA and the SoG(IT)A where the B2C position is not easy to identify, or it would have to incorporate two versions, one for B2B and one for B2C, thereby considerably lengthening the statute. If changes to provisions affecting B2C contracts are desired, it may be more sensible to create a separate measure only affecting B2C transactions as proposed in Options 3 and 4, rather than having two different regimes fitted into an umbrella statute.

Option 3 Introduce a new limited measure for business-to-consumer contracts only, covering implied terms, consumer remedies and consumer guarantees

Advantages

6.48 This is an option favoured by several other jurisdictions, for example, New Zealand, Australia and some Canadian provinces.[270] It has the advantage of giving clear and cohesive guidance for B2C contracts on several core matters. It would be relatively easy to achieve as, apart from differences in terminology for different forms of supply contracts, very similar terms are already implied into these contracts, the additional consumer remedies are clearly identified and regulation 15 of the SSGCR already only applies to consumers.[271]

6.49 Another advantage would be that, in consolidating this area, there would be an opportunity to check the ”fitness for purpose” of the existing measures. Steps could be taken to ensure that the Consumer Sales Directive (99/44/EC) was fully and properly implemented.[272] Proposals for change made by the Law Commissions in their report *Consumer Remedies for Faulty Goods*[273] could be considered, and, if desired, adopted. Some aspects, not currently codified, could be clarified by introducing new statutory explanations of such matters as “rejection” and “affirmation”.[274] It would not, however, require many major or complex changes and would result in a clearer, consumer-orientated measure, albeit of rather limited scope.

[269] See para. 6.13.
[270] See paras. 6.58,.6.59 and 6.60.
[271] Albeit with a different definition of ‘consumer’ employed, see para. 6.9.
[272] For arguments suggesting some incomplete/inaccurate implementation see C.Twigg-Flesner and R.Bradgate, *Blackstone’s Guide to Consumer Sales and Associated Guarantees*, (Oxford: Oxford University Press, 2003).
[273] Law Com No. 317, Scot Law Com No. 216, Cm 7725.
[274] Subject to any changes made to adopt recommendations of the Law Commissions in *Consumer Remedies for Faulty Goods*, Law Com No. 317, Scot Law Com No. 216, Cm 7725, Part 5.

Disadvantages

6.50 This proposal would only cover a few aspects of the B2C contractual relationship. It would not cover such things as the seller's rights and the transfer of risk and of ownership so these areas would not benefit from simplification and clarification. It would still require traders, consumers and advisers to refer to SoGA and the common law to resolve many transactional issues concerning B2C contracts. As a new development, it would necessitate the provision of advice and training for traders, consumers and advisers.

6.51 In common with any proposal seeking to isolate measures affecting B2C contracts, there will be the difficulty of determining where the boundaries between B2C, B2B and C2C transactions are drawn. It would obviously be necessary to maintain the original measures (with the exception of regulation 15 of the SSGCR and measures specific to, or modified for, B2C transactions[275]) so that all transactions would be governed by at least one statute and there would have to be clear definitions of "dealing as a consumer" and "in the course of a business", together with clear indications as to who has the burden of proving or disproving the status of a party. This is of particular significance as there can be administrative and criminal consequences under measures such as the Consumer Protection from Unfair Trading Regulations 2008[276] where there are B2C dealings.

6.52 This proposal would not particularly facilitate the making of any changes likely as a result of the pCRD, if adopted, as it would be unlikely that the contents of a restricted measure would cover all affected areas relating to sales contracts.[277]

Option 4 Consolidate the SoGA, SGSA, SoG(IT)A and the SSGCR, for business-to-consumer contracts only

Advantages

6.53 This option would enable there to be a clear focus on the rights and obligations of consumers, with measures tailor-made for consumer use. This ought to result in the law being considerably simplified and made much more accessible and transparent.

6.54 It would be possible to start with a clean sheet of paper, subject to the requirements of the Consumer Sales Directive (99/44/EC) and/or the pCRD, and plan a comprehensive and coherent framework for regulating B2C transactions. This would involve careful consideration of the existing measures, in particular those in the SoGA, which apply to both B2C and B2B transactions,[278] to determine which should be included within the new statute and which should remain in the existing statutes. The main advantage of this approach would be the creation of a custom-made measure which could be expressed in consumer-friendly language and which would greatly simplify matters for traders, consumers and advisers alike.

[275] See paras. 6.10-6.13.
[276] S.I. 2008/1277. See, in particular, reg.5(4)(k) re misleading a consumer as to their rights and obligations,
[277] For example it would not cover delivery and passing of risk, which were included in the 2008 draft of pCRD, Com (2008) 614 Final, 2008/0196 (COD), see Annex 2.
[278] See paras. 6.15-6.17.

6.55 If the idea of a complete fresh start was not favoured, it still would be possible to amalgamate the existing measures, by rationalising the differences between different types of contract, streamlining the implied terms as applied to B2C contracts and incorporating those parts of the SoGA which are relevant to B2C contracts, without necessarily making many changes to their form and substance. This would make it easier to access the material relevant to B2C transactions, but would not have the benefit of simplification of such aspects as the transfer of risk and ownership.

6.56 Further advantages of creating a measure covering all aspects of B2C contracts are as follows. As with Proposal 3, the "fitness for purpose" of the measures adopted could be checked and any desired recommendations of the Law Commissions could easily be incorporated.[279] Implementation of any subsequent EU changes would only affect this measure and not SoGA etc. and so would be easier to implement. The existing law would be maintained,[280] and so there would be no risk of any transactions being without statutory protection.

Disadvantages

6.57 Depending, in part, upon whether or not a clean slate scheme was adopted, this could involve a major re-write of the law covering B2C transactions. It would require detailed consultations with those affected and could lead to changes in the rights and obligations of both traders and consumers. The resulting measure would require extensive publicity, training and education for traders, consumers and advisers. It could take a long time for the new statute to become known and accepted and, if there were significant changes to terminology etc.; it could be many years before a body of case-law developed to provide guidance. Issues raised in paragraph 6.51 would also be relevant here.

Solutions in other jurisdictions

Australia

6.58 Australia is in the process of implementing a new Australian Consumer Law, part of which concerns consumer guarantees and covers implied conditions and warranties; replacing measures previously contained in sections 66-74 of the Trade Practices Act 1974. The Trade Practices Act 1974 is to be renamed the Competition and Consumer Act 2010 and a new Schedule 2 is to be substituted, entitled the Australian Consumer Law. Chapter 3-2 of Schedule 2, will cover consumer guarantees and Chapter 5-4 of Schedule 2 will contain the provisions relating to remedies in connection with guarantees.[281] Other aspects of the

[279] See para. 6.49.

[280] Apart from reg.15 of the SSGCR and measures confined to or modified for B2C transactions, see paras 6.10-6.13. S. 4 of the New Zealand Consumer Guarantees Act 1993 provides a useful example of how this might be achieved:

> '4 Act not a code
> (1) The rights and remedies provided in this Act are in addition to any other right or remedy under any other Act or rule of law unless the right or remedy is expressly or impliedly repealed or modified by this Act.
> (2) No provision of this Act shall be construed as repealing, invalidating, or superseding the provisions of any other Act unless this Act by express provision or by necessary implication clearly intends such a provision to be so construed.'

[281] See Annex 9 for contents lists of these two Chapters.

law relating to the sale of goods are to be found in Sale of Goods Acts passed by each State from 1895 onwards and based on the UK Sale of Goods Act 1893, with some updating and amendments. These do not separate out B2C transactions and do not, therefore, provide a model for future UK legislation if a separate B2C regime is to be favoured.

New Zealand

6.59 The New Zealand Consumer Guarantees Act 1993, as amended, applies only to B2C contracts and, as can be seen from its contents,[282] covers aspects of the supply of goods and services including implied terms, consumer remedies, rights of rejection etc. It is marginally more comprehensive than the Australian provisions but does not cover all aspects of B2C transactions such as the transfer of risk and ownership, suppliers' remedies etc. These are, instead covered in the Sale of Goods Act 1908, which is modelled on the UK Sale of Goods Act 1893 and covers B2B, B2C and C2C contracts.

Canada

6.60 The picture in Canada is similar to that in Australia and New Zealand. Some provinces have adopted specific B2C measures relating to implied terms, such as New Brunswick,[283] but, in the main, the regulation of sale of goods contracts is based on the UK Sale of Goods Act 1893, with many of provinces having passed their own Sale of Goods Acts[284] or included provisions about statutory implied terms in general consumer protection measures.[285]

Draft Common Frame of Reference

6.61 Book IV of the DCFR covers provisions relating to specific contracts. Of relevance to this discussion are: Part A covering Sales, Part B covering the Leasing of Goods and Part C covering Services.[286] The DCFR applies to B2B, B2C and C2C contracts, with some provisions applying specifically to B2C transactions only. The only section specifically relating to B2C contracts is Part A, Chapter 6, concerning Consumer Guarantees.

6.62 It is worth noting that the DCFR provides for separate coverage for sales and leasing. With regards to sale, the aspects covered include: the obligations of the seller, obligations of the buyer, remedies, passing of risk and consumer guarantees. Passing of title is dealt with elsewhere in the DCFR, in Book VIII. In leasing contracts the aspects covered are: the lease period, the obligations of the lessor, remedies of the lessor, obligations of the lessee, remedies of the lessee and new parties and sub-leases.

6.63 With regard to services, in addition to general rules for services, there are separate provisions for contracts for construction, processing, storage, design, information and advice and medical treatment. This is a much more detailed and complex structure compared to the current UK provisions relating to services, to be found in Part II of the SGSA, which, if adopted, would involve substantial codification of the existing common law. It is suggested

[282] See Annex 10.
[283] Consumer Product Warranty and Liability Act.
[284] For example, the Sale of Goods Act 1978, Saskatchewan.
[285] For example the Consumer Protection Act, RSM 1987, c. C200, Manitoba.
[286] Pp. 277-331. See Annex 11 for a list of provisions included in Parts A, B and C.

that reference should only be made to Chapter 2 covering the general provisions regarding services.

6.64 Whilst the DCFR does provide useful guidance on both form and content of a consolidated sale and supply of goods and services measure, the fact that there is no specific coverage of B2C contracts in isolation, prevents it from providing a clear template for designing a B2C statute.

Consideration of whether consumer-to-consumer contracts should be included with separated measures covering business-to-consumer contracts

6.65 Splitting B2C provisions off from the current legislation naturally raises the question of where C2C contracts should find a home. This section considers whether they should be dealt with in any new legislation for B2C contracts or whether they should remain alongside the B2B contracts or even be dealt with separately.

Consumer-to-consumer contracts in the consumer rights legislation

6.66 The case for including C2C contracts in any new B2C legislation might be made on a number of grounds, but none seems compelling. To begin with, it might be argued that there is a better "fit" with B2C contracts than with B2B transactions. In fact, examination of the relevant existing provisions would suggest that this is not true: there are very few provisions that apply to B2B contracts but not to C2C contracts,[287] while there are many B2C provisions that have no application to C2C transactions.[288]

6.67 It might also be argued that, as there can be some difficulty in distinguishing between B2C and C2C contracts, they should both be dealt with in the same legislation. Now, it is certainly true that there can be significant uncertainty in terms of how a B2C contract is defined and, indeed, of how that definition is interpreted. As has been seen, for English law the main definition used in the current legislation on the sale and supply of goods is that found in section 12 of the Unfair Contract Terms Act 1977, defining "dealing as a consumer".[289] If one focuses on how that applies in the context of sale, for example, it requires that the seller be acting in the course of a business, that the buyer not be acting in the course of a business (or holding himself out as acting in the course of a business) and, if the buyer is not a natural person, that the goods be "of a type ordinarily supplied for private use or consumption". Deciding whether a sale or purchase is "in the course of a business" can be problematic. According to the leading case, *R&B Customs Brokers Co Ltd. v United Dominion Trust*,[290] a person acts "in the course of a business" for these purposes if the contract is an integral part of the person's business or if he makes such transactions regularly. In that case, a company involved in shipping brokerage bought a car for the use of one its directors, and the company was held to have been dealing as a consumer because the purchase was not an integral part of its operations as shipping brokers and this was only

[287] These are the provisions which relate to the implication of terms of satisfactory quality and fitness for purpose under the SoGA, SGSA and the SoG(IT)A.
[288] See paras. 6.20-6.22.
[289] See para. 6.5.
[290] [1988] 1 WLR 321.

the second or third such purchase made by the company. What constitutes regularity[291] and, indeed, what is integral to a business and not merely incidental to it are matters of degree and can give rise to uncertainty. Additional uncertainty is created by the fact that questions have been raised as to whether the test laid down in *R&B Customs Brokers* is actually correct.[292] Difficulties can similarly arise in relation to the "type" of goods[293] and the purposes for which they are "ordinarily" supplied.[294]

6.68 In a sense, this argument that uncertainty in the definition of B2C transactions requires C2C contracts to be covered by the same legislation proves too much. In the *R&B Customs Brokers* case, the buyer was in fact a business. The uncertainty in that case was as to whether there was a B2C contract or a *B2B* transaction. This argument would therefore militate in favour of including B2B contracts together with B2C transactions, as well as C2C contracts. In any event, putting C2C contracts together with B2C contracts would not be of any great assistance in borderline cases: unless one were to extend the B2C rules to C2C transactions as well, it would remain impossible to know which provisions within the new legislation to apply without first resolving the issue of how the contract should be classified. Moreover, assimilating the rules for the two types of contract would not appear to be an option: for example, the remedies of requiring repair or replacement of the goods, applicable to B2C contracts, would generally be inappropriate where the supplier is not a business.

6.69 If there is arguably no clear advantage in including C2C contracts in any new legislation, there could actually be disadvantages. Gauging the effect on the drafting of any new legislation is difficult, as that will depend on the precise way in which it is intended to frame the B2C provisions. But it is evident that, if C2C contracts were included, it would be necessary at various points to indicate that particular provisions are for B2C transactions only. That is, of course, no different from what happens at the moment. But one objective for the new legislation would be to provide a simpler, more accessible statement of the law for B2C contracts. Following an initial definition of what constitutes a B2C contract for the purposes of this legislation, the rules could be set out more straightforwardly than at present, without the need, for example, to specify which implied terms apply to supplies in the ordinary course of business and which do not or which remedies apply where the customer acts as a consumer and which do not. The simplicity and clarity that this would produce could not be achieved if C2C contracts were to be included.

6.70 Furthermore, another objective of the legislation arguably should be to provide a statement of the consumer's remedies which coherently integrates the traditional remedies of English law with the European remedies derived from the Consumer Sales Directive[295] and the pCRD. Given that the European remedies do not apply to C2C contracts and given that some projected amendments to the traditional remedies in the context of B2C contracts may not be suitable for C2C transactions, having to make provision for the latter would be an unwelcome complication.

---

[291] R.Bradgate, *Commercial Law* (3rd ed.) (Oxford: Oxford University Press, 2005), para.2.4.6.2.
[292] E.g., M.Bridge, *Sale of Goods* (Oxford: Clarendon Press, 1997), p.385; R.Bradgate, *Commercial Law* (3rd ed.) (Oxford: Oxford University Press, 2005), para.2.4.6.2.
[293] R.Bradgate and C.Twigg-Flesner, *Blackstone's Guide to Consumer Sales and Associated Guarantees* (Oxford: Oxford University Press, 2003), para. 2.3.1.4.
[294] I.Brown, "Business and consumer contracts", [1988] *Journal of Business Law* 386-397, at 394-395.
[295] 99/44/EC.

Alternative solutions

6.71 If, therefore, it would appear inappropriate to include C2C contracts in the new B2C legislation, an obvious place for them would be in the existing legislation, along with the other non-B2C contracts. As noted above, there are very few provisions that apply to B2B transactions which do not apply equally to C2C contracts, so continuing to deal with C2C contracts here would not give rise to any great complexity.

6.72 Another option would be to have legislation dealing exclusively with commercial transactions alongside the B2C Act, together with a separate Act covering the private sale and supply of goods (C2C and C2B). However, there would seem to be little point in proliferating statutes in this way if the law for the non-B2C contracts is to remain as it is. As already said, there is only a limited difference at present between the provisions applicable to B2B and C2C contracts (and, one might add, C2B transactions). There would only be a case for such a step if it was intended to introduce significant differences between commercial and private contracts.

Recommendations

Time for Change

6.73 Although it is always possible to argue that it would be better to make changes at some other time than the present, the time is ripe for a major overhaul of the statutory control of sale and supply of goods and services contracts. It is unsatisfactory to have three major statutes, plus a regulation, governing these transactions, each with different terminology employed, but all trying to do a similar task with regards to implied terms and remedies. It is time to stop the "scissors and paste" approach and to create a consumer-orientated statute which would reflect the position in the 21st Century, rather than that, effectively, of the 19th Century. All involved in B2C transactions, be they traders, consumers or advisers, would benefit from having a consolidated measure, with clearly stated provisions, rationalised and simplified wherever possible, covering such contracts.

Territorial extent

6.74 An initial decision would have to be taken as to the territorial scope of a consolidated measure. Would it be preferable to include Scottish provisions within a measure covering England, Wales and Northern Ireland or should a separate consolidated measure be enacted for Scotland? The advantage of one measure for the whole of the United Kingdom is that in cross-border cases, there would be no need to refer to two statutes. The disadvantage would be that differences in terminology and legal approach would necessitate a more complex statute, with the risk of looking at and seeking to apply the laws of the wrong jurisdiction to a given situation.[296] It would be possible to provide separate Parts applying to Scotland, as seen in the SGSA, but this would, obviously lengthen the statute and would not prevent the possibility of conflict of laws issues arising.

Should business-to-consumer be isolated from consumer-to-consumer?

[296] This is a frequent problem for law students when applying the Unfair Contract Terms Act 1977 and the SGSA.

6.75 As discussed above it is recommended that any new measure should be confined to B2C contracts and should not include C2C transactions, in particular because the law currently applied to C2C contracts has more in common with B2B rather than B2C contracts. Unless there is a strong desire to change the law relating to C2C contracts and to align it with the law governing B2C contracts, with the associated increase in the burdens placed on private sellers, there would be few advantages in complicating a new B2C measure with a separate section for C2C contracts, when these are already covered by the "residual" B2B statutes.

Should business-to-consumer be isolated from business-to-business?

6.76 Responses to the Consumer Law Review[297] were divided on this issue, with businesses favouring a separation; LACORS[298] supporting the same protection for B2C and B2B; and Consumer Law academics feeling it was desirable to keep B2B and B2C provisions together and operating under the same principles. If the aim is to simplify, to rationalise and consolidate the law, then Option 2,[299] whereby the existing measures are merged for all types of contracts, has some advantages. If, however, ultimately the aim is to provide a "consumer charter of rights", it is more sensible to focus solely on B2C contracts and leave B2B contracts to be governed by the existing measures and to adopt either Option 3[300] or Option 4.[301] Rather than a step-by-step approach, beginning with Option 2, it would, in the long term, be less disruptive to businesses, and, indeed, apparently preferred by businesses, to separate out B2C contracts immediately.

The contents of a business-to-consumer measure

6.77 Although Option 3, with a restrictive menu of matters to be covered in a B2C statute, offers, perhaps, an easier scheme to implement, Option 4 appears preferable. It would enable more areas to be modernised and simplified, such as the transfer of ownership, which, as can be seen in the discussion of the Rules on Passing of Property,[302] merits simplification and clarification. It also makes sense, if it is considered timely and appropriate to isolate the legal regulation of B2C transactions, for the resulting statute to be as comprehensive as possible, lessening the need to re-visit the issue at a later date.

6.78 When deciding what to include within a new B2C measure, a number of core matters present themselves. These are:

- implied terms
- remedies of consumer
- remedies of seller
- transfer of ownership
- transfer of risk
- consumer guarantees

[297] http://www.bis.gov.uk/files/file52071.pdf, para. 26.
[298] Local Authorities Co-ordinators of Regulatory Services, now known as Local Government Regulation.
[299] Discussed at paras. 6.44-6.47.
[300] Paras. 6.48-6.52.
[301] See paras. 6.53-6.57.
[302] See Chapter 8.

6.79 This will effectively encompass the provisions of the SGSA, SoG(IT)A and the SSCGR. In the SoGA, it would cover the Implied Terms section of Part II, much of Part III, Part VA, Part VI and some sections in Part IV. Paragraph 6.15 suggests the main sections which might be appropriate for B2C contracts.

6.80 The areas of the SoGA where there is more debate as to whether or not they are included are the business-orientated sections in Part V, in particular, and some sections in Part III concerning risk[303] plus some of the more general contractual measures, in Part II, in particular.[304]

6.81 If the business-orientated and more general sections are not included, it would be helpful if specific reference could, at least, be made to them within the new B2C measure so that their application could be checked, in particular, by legal advisers, trading standards officers etc. It would be important to signpost measures in the "residual" B2B statutes which apply to B2C contracts; this would help to overcome the current problem in identifying which measures actually apply to B2C transactions.

6.82 If some or all of the business-orientated and general measures are to be included within the B2C statute itself, the question then raised is "how is this to be done?". Should they be included within the main body of the measure? If so, would it be better to place them in a separate part at the end, or should they be put in their "natural" place alongside other measures dealing with the various stages of a transaction from cradle to grave? Another alternative is to have a separate schedule. By including the less consumer-orientated provisions within the main body of the measure, in their "natural" places, there is a risk of over-complicating the general picture and of confusing the users of the statute. If there is a lot of very technical language (which is inevitable in the business-orientated sections) then there is a serious risk that the new measure will fail to clarify and simplify the situation. On balance, it would seem preferable, if these peripheral sections *are* to be included, that they form separate Parts or a separate schedule of the new statute.

Final conclusions

6.83 In conclusion, it is recommended that a separate B2C measure be created. The simpler, but less satisfactory, choice would be Option 3, if possible with the addition of consolidated measures on exemption clauses and unfair contract terms and any extra matters covered by the pCRD. Ideally, Option 4 should be pursued, with the inclusion of the core measures indicated above, together with reform of exemption clauses and unfair contract terms. The measure should be arranged in a "cradle to grave" order so there is a logical progression through the life of transactions, with the maximum amount of simplification and rationalisation possible. Rather than including the peripheral business-orientated and general measures within the statute, it is recommended that, listed in the B2C measure, there is specific identification of these provisions and their location in the "residual"

[303] See para. 6.16 for suggested list.
[304] See para. 6.17 for suggested list.

B2B measures, plus the inclusion of a "savings" clause such as that used in New Zealand.[305] This would provide a link to the peripheral measures, without risking the obfuscation of the principal measures affecting consumer transactions. To ensure that the B2C measure is not too lengthy and to help maintain transparency and simplicity, it is recommended that there be one measure for England, Wales and Northern Ireland and a separate measure for Scotland.

[305] See ft. nt. 290.

Table 1
Sale of Goods Act 1979

Section	B2B	B2C	C2C
Part I Contracts to which Act applies			
1 Contracts to which Act applies	Yes	Yes	Yes
Part II Formation of the Contract			
Contract of sale			
2 Contracts of sale	Yes	Yes	Yes
3 Capacity to buy and sell	Yes	Yes	Yes
Formalities of contract			
4 How contract of sale is made	Yes	Yes	Yes
Subject matter of contract			
5 Existing or future goods	Yes	Yes	Yes
6 Goods which have perished	Yes	Yes	Yes
7 Goods perishing before sale but after agreement to sell	Yes	Yes	Yes
The price			
8 Ascertainment of price	Yes	Yes	Yes
9 Agreement to sell at valuation	Yes	Yes	Yes
Implied terms etc			
10 Stipulations about time	Yes	Yes	Yes
11 When condition to be treated as warranty	Yes	Yes	Yes
12 Implied terms about title	Yes	Yes	Yes
13 Sale by description	Yes	Yes	Yes
14 Implied terms about quality or fitness			
14(1) No implied terms re quality or fitness unless provided by ss 14 or 15	Yes	Yes	Yes
14(2) Implied term of satisfactory quality	Yes	Yes	No
14(2A) Test for satisfactory quality	Yes	Yes	Yes (re s 15 (2)(c))
14(2B) Meaning of ‘quality’	Yes	Yes	Yes
14(2C) Exceptions to implication of satisfactory quality term	Yes	Yes	No
14(2D) and (2E) Further explanation of satisfactory quality test re public statements	No	Yes	No
14(2F) Public statements unaffected by sub-ss (2D) and (2E)	Yes	Yes	No

14(3) Fitness for purpose	Yes	Yes	No
14(4) Annexation of implied term to contract by usage	Yes	Yes	No
14(5) Sale by agent	Yes	Yes	Yes
14(6) Implied terms are conditions	Yes	Yes	No

Section	B2B	B2C	C2C
14(7) and (8) Application of earlier versions of s 14	Yes	Yes	Yes
Sale by sample			
15 Sale by sample	Yes	Yes	Yes
Miscellaneous			
15A Modification of remedies for breach of condition in non-consumer cases	Yes	No	Yes
15B Remedies for breach of contract as respects Scotland			
15B(1) Remedies for breach	Yes	Yes	Yes
15B(2) Breach deemed to be material in consumer contracts	No	Yes	No
Part III Effects of the contract			
Transfer of property as between seller and buyer			
16 Goods must be ascertained	Yes	Yes	Yes
17 Property passes when intended to pass	Yes	Yes	Yes
18 Rules for ascertaining intention	Yes	Yes	Yes
19 Reservation of right of disposal	Yes	Yes	Yes
20 Passing of risk			
20(1)(2) and (3) Rules for passing of risk	Yes	No	Yes
20(4) Passing of risk when dealing as consumer	No	Yes	No
20A Undivided shares in goods forming part of a bulk	Yes	Yes	Yes
20B Deemed consent by co-owner to dealings in bulk goods	Yes	Yes	Yes
Transfer of title			
21 Sale by person not the owner	Yes	Yes	Yes
22 Market overt (*obsolete*)			
23 Sale under voidable title	Yes	Yes	Yes
24 Seller in possession after sale	Yes	Yes	Yes
25 Buyer in possession after sale	Yes	Yes	Yes
26 Supplementary to ss 24 and 25	Yes	Yes	Yes
Part IV Performance of the contract			
27 Duties of seller and buyer	Yes	Yes	Yes
28 Payment and delivery are	Yes	Yes	Yes

concurrent conditions			
29 Rules about delivery	Yes	Yes	Yes
30 Delivery of wrong quantity			
30(1) and (2) consequences of wrong delivery	Yes	Yes	Yes

Section	B2B	B2C	C2C
30(2A) , (2B), (2C) Restrictions on rejection for wrong delivery for non-consumers apart from in Scotland	Yes	No	Yes
30(2D) and (2E) Restrictions on rejection for non-delivery in Scotland	Yes	Yes	Yes
30(3) Buyer's obligation on accepting excess quantity	Yes	Yes	Yes
30(5) Trade usage, special agreement, course of dealing	Yes	Yes	Yes
31 Instalment deliveries	Yes	Yes	Yes
32 Delivery to carrier			
32(1), (2) and (3) Provisions for non-consumer transactions	Yes	No	Yes
32(4) Provision for consumer transactions	No	Yes	No
33 Risk where goods are delivered at a distant place	Yes	Yes	Yes
34 Buyer's right of examining the goods	Yes	Yes	Yes
35 Acceptance			
35(1) acceptance by intimation and inconsistent acts	Yes	Yes	Yes
35(2) Examination rights after delivery	Yes	Yes	Yes
35(3) Prevention of loss of right re examination in consumer transactions	No	Yes	No
35(4)-(5) Acceptance by lapse of time	Yes	Yes	Yes
35(6) Effect of repairs, sub-sales and dispositions	Yes	Yes	Yes
35(7) Sales involving commercial units	Yes	Yes	Yes
35(8) Application of earlier version of s 35	Yes	Yes	Yes
35A Right of partial rejection	Yes	Yes	Yes
36 Buyer not bound to return rejected goods	Yes	Yes	Yes
37 Buyer's liability for not taking delivery of goods	Yes	Yes	Yes

Part V Rights of the unpaid seller against the goods			
Preliminary			
38 Unpaid seller defined	Yes	Yes	Yes
39 Unpaid seller's rights	Yes	Yes	Yes

Section	B2B	B2C	C2C
40 Attachment by seller in Scotland (*Repealed)*			
Unpaid seller's lien			
41Seller's lien	Yes	Yes	Yes
42 Part delivery	Yes	Yes	Yes
43 Termination of lien	Yes	Yes	Yes
Stoppage in transit			
44 Right of stoppage in transit	Yes	Yes	Yes
45 Duration of transit	Yes	Yes	Yes
46 How stoppage in transit is effected	Yes	Yes	Yes
Re-sale etc by buyer			
47 Effect of sub-sale etc by buyer	Yes	Yes	Yes
Rescission: and re-sale by seller			
48 Rescission: and re-sale by buyer	Yes	Yes	Yes
Part VA Additional rights of buyer in consumer cases			
48A Introductory	No	Yes	No
48B Repair or replacement of the goods	No	Yes	No
48C Reduction of purchase price or rescission of contract	No	Yes	No
48D Relation to other remedies	No	Yes	No
48E Powers of the court	No	Yes	No
48F Conformity with the contract	No	Yes	No
Part VI Actions for breach of contract			
Seller's remedies			
49 Action for the price	Yes	Yes	Yes
50 Damages for non-acceptance	Yes	Yes	Yes
Buyer's remedies			
51 Damages for non-delivery	Yes	Yes	Yes
52 Specific Performance	Yes	Yes	Yes
53 Remedy for breach of warranty	Yes	Yes	Yes
53A Measure of damages as respects Scotland	Yes	Yes	Yes
Interest etc			
54 Interest etc	Yes	Yes	Yes
Part VII Supplementary			
55 Exclusion of implied terms	Yes	Yes	Yes

56 Conflict of laws (*obsolete*)			
57 Auction sales	Yes	Yes	Yes
58 Payment into court in Scotland	Yes	Yes	Yes
59 Reasonable time is a question of fact	Yes	Yes	Yes
60 Rights etc enforceable by action	Yes	Yes	Yes
61 Interpretation	Yes	Yes	Yes
Section	**B2B**	**B2C**	**C2C**
62 Savings: rules of law etc	Yes	Yes	Yes
63 Consequential amendments, repeals and savings	N/a	N/a	N/a
64 Short title and commencement	Yes	Yes	Yes
Schedule 1 Modification of Act for certain contracts	N/a	N/a	N/a
Schedule 2 Consequential amendments	N/a	N/a	N/a
Schedule 3 Repeals	N/a	N/a	N/a
Schedule 4 Savings	N/a	N/a	N/a

Table 2
Supply of Goods and Services Act 1982

Section	B2B	B2C	C2C
Part I Supply of goods			
Contracts for the transfer of goods			
1 The contracts concerned	Yes	Yes	Yes
2 Implied terms about title etc	Yes	Yes	Yes
3 Implied terms where transfer is by description	Yes	Yes	Yes
4 Implied terms about quality or fitness			
4(1) No implied terms re quality or fitness unless under ss 4 or 5	Yes	Yes	Yes
4(2) Implied condition of satisfactory quality	Yes	Yes	No
4(2A) Test for satisfactory quality	Yes	Yes	Yes (re s 5(2)(c))
4(2B) and (2C) Further explanation of satisfactory quality test re public statements	No	Yes	No
4(2D) Public statements unaffected by sub-ss (2B) and (2C)	Yes	Yes	Yes
4(3) Exceptions to implication of satisfactory quality term	Yes	Yes	No
4(4), (5), and (6) Implied term of fitness for purpose	Yes	Yes	No
4(7) Annexation of implied term to contract by usage	Yes	Yes	No
4(8) Transfer by agent	Yes	Yes	Yes
5 Implied terms where transfer is by sample	Yes	Yes	Yes
5A Modifications of remedies for breach of statutory condition in non-consumer cases	Yes	No	Yes
Contracts for the Hire of Goods			
6 The contracts concerned	Yes	Yes	Yes
7 Implied terms about right to transfer possession etc	Yes	Yes	Yes
8 Implied terms where hire is by description	Yes	Yes	Yes
9 Implied terms about quality and fitness			

9(1) No implied terms re quality or fitness unless under ss 9 or 10	Yes	Yes	Yes
9(2) Implied condition of satisfactory quality	Yes	Yes	No
9(2A) Test for satisfactory quality	Yes	Yes	Yes (re s 10(2)(c))

Section	B2B	B2C	C2C
9(2B) and (2C) Further explanation of satisfactory quality test re public statements	No	Yes	No
9(2D) Public statements unaffected by sub-ss (2B) and (2C)	Yes	Yes	Yes
9(3) Exceptions to implication of satisfactory quality term	Yes	Yes	No
9(4), (5), and (6) Implied term of fitness for purpose	Yes	Yes	No
9(7) Annexation of implied term to contract by usage	Yes	Yes	No
9(8) Transfer by agent	Yes	Yes	Yes
10 Implied Terms where hire is by sample	Yes	Yes	Yes
10A Modification of remedies for breach of statutory condition in non-consumer cases	Yes	No	Yes
Exclusion of implied terms etc			
11 Exclusion of implied terms etc	Yes	Yes	Yes
Part 1A Supply of Goods as Respects Scotland			
Contracts for the transfer of property in goods			
11A The contracts concerned	Yes	Yes	Yes
11B Implied terms about title etc	Yes	Yes	Yes
11C Implied terms where transfer is by description	Yes	Yes	Yes
11D Implied terms about quality or fitness			
11D(1) No implied terms re quality or fitness unless under ss 11D or 11E	Yes	Yes	Yes
11D(2) Implied term of satisfactory quality	Yes	Yes	No
11D(3) Test for satisfactory quality	Yes	Yes	Yes (re s 11E(2)(c))
11D(3A) and (3B) Further explanation of satisfactory quality test re public statements	No	Yes	No
11D(3C) Public statements unaffected by sub-ss (3A) and (C)	Yes	Yes	Yes

11D(4) Exceptions to implication of satisfactory quality term	Yes	Yes	No
11D(5), (6) and (7) Implied term of fitness for purpose	Yes	Yes	No
11D(8) Annexation of implied term to contract by usage	Yes	Yes	No
Section	**B2B**	**B2C**	**C2C**
11D(9) Transfer by agent	Yes	Yes	Yes
11D (10) Meaning of 'consumer contract'	Yes	Yes	Yes
11E Implied terms where transfer is by sample	Yes	Yes	Yes
11F Remedies for breach of contract			
11F(1) remedies available	Yes	Yes	Yes
11F(2) deeming of material breaches	No	Yes	No
11F(3) Meaning of 'consumer contract'	Yes	Yes	Yes
Contracts for the hire of goods			
11G The contracts concerned	Yes	Yes	Yes
11H Implied terms about right to transfer possession etc	Yes	Yes	Yes
11I Implied terms where hire is by description	Yes	Yes	Yes
11J implied terms about quality or fitness			
11J(1) No implied terms re quality or fitness unless under ss 11J or 11K	Yes	Yes	Yes
11J(2) Implied term of satisfactory quality	Yes	Yes	No
11J(2A) Test for satisfactory quality	Yes	Yes	Yes (re s 11K(2)(c))
11J(3A) and (3B) Further explanation of satisfactory quality test re public statements	No	Yes	No
11J(3C) Public statements unaffected by sub-ss (3A) and (3B)	Yes	Yes	Yes
11J(4) Exceptions to implication of satisfactory quality term	Yes	Yes	No
11J (5), (6) and (7) Implied term of fitness for purpose	Yes	Yes	No

11J(8) Annexation of implied term to contract by usage	Yes	Yes	No
11J(9) Transfer by agent	Yes	Yes	Yes
11J(10) Meaning of ‘consumer contract’	Yes	Yes	Yes
11K Implied terms where hire is by sample	Yes	Yes	Yes
Exclusion of implied terms			
11L Exclusion on implied terms etc	Yes	Yes	Yes
Part 1B Additional rights of transferee in consumer cases			
11M Introductory	No	Yes	No
Section	**B2B**	**B2C**	**C2C**
11N Repair or replacement	No	Yes	No
11P Reduction of purchase price or rescission of contract	No	Yes	No
11Q Relation to other remedies etc	No	Yes	No
11R Powers of the court	No	Yes	No
11S Conformity with the contract	No	Yes	No
Part II Supply of services			
12 The contracts concerned	Yes	Yes	Yes
13 Implied term about care and skill	Yes	Yes	No
14 Implied term about time of performance	Yes	Yes	No
15 Implied term about consideration	Yes	Yes	Yes
16 Exclusion of implied terms etc	Yes	Yes	Yes
Part III Supplementary			
18 Interpretation: general	Yes	Yes	Yes
19 Interpretation: references to Acts	Yes	Yes	Yes
20 Citation, transitional provisions, commencement and extent	Yes	Yes	Yes

Table 3
Supply of Goods (Implied Terms) Act 1973

Section	B2B	B2C	C2C
1-7 *Repealed*			
8 Implied terms as to title	Yes	Yes	Yes
9 Bailing or hiring by description	Yes	Yes	Yes
10 Implied undertakings as to quality and fitness			
10(1) No implied terms re quality or fitness unless under ss 10 or 11	Yes	Yes	Yes
10(2) Implied term of satisfactory quality	Yes	Yes	No
10(2A) Test for satisfactory quality	Yes	Yes	Yes (re s 11(1)(c))
10(2B) Meaning of 'quality'	Yes	Yes	Yes
10(2C) Exceptions to implication of satisfactory quality term	Yes	Yes	No
10(2D) and (2E) Further explanation of satisfactory quality test re public statements	No	Yes	No
10(2F) Public statements unaffected by sub-ss (2D) and (2E)	Yes	Yes	Yes
10(3) Implied term of fitness for purpose	Yes	Yes	No
10(4) Annexation of implied term to contract by usage	Yes	Yes	No
10(5) Transfer by agent	Yes	Yes	Yes
10(6) Definitions for sub-s (3)	Yes	Yes	No
10(7) Type of term, England, Wales and Northern Ireland	Yes	Yes	No
10(8) Meaning of 'consumer contract', Scotland	Yes	Yes	Yes
11 Samples	Yes	Yes	Yes
11A Modification of remedies for breach of statutory condition in non-consumer cases	Yes	No	Yes
12 Exclusion of implied terms	Yes	Yes	Yes
12A Remedies for breach of hire-purchase agreements as respects Scotland			
12A(1) Remedies available	Yes	Yes	Yes
12A(2) Deeming of material	No	Yes	No

breaches			
12A(3) Meaning of ‘consumer contract’	Yes	Yes	Yes
12A(4) Application to Scotland only	Yes	Yes	Yes
13 Conflict of laws (*repealed)*			

Section	B2B	B2C	C2C
14 Special provisions for conditional sale agreements			
14(1) Non-application of s 11(4) Sale of Goods Act 1979 where buyer is dealing as consumer	No	Yes	No
14(2) When breach of condition treated as breach of warranty	No	Yes	No
15 Supplementary	Yes	Yes	Yes
16 Trading stamps (*repealed*)			
17 Northern Ireland	Yes	Yes	Yes
18 Short title, citation, interpretation, commencement, repeal and saving.	Yes	Yes	Yes

7. SIMPLIFICATION OF THE LAW – CONDITIONS AND WARRANTIES

7.1 Earlier in this report, we examined how the law implies several terms as to the quality and fitness of goods into the various types of contract for the sale and supply of goods. The consequence of this is that the consumer has rights against the seller not based on a statutory duty but arising from the contract under which the goods are supplied.

7.2 Consequently, the rights a consumer has depend on whether the implied term that has been breached is a condition, a warranty or an innominate term, in accordance with common law contract law rules. Some terms are classed by statute as conditions, others as warranties but may be innominate terms. The classification of some terms may depend on the individual contract between consumer and supplier, although in some instances the SoGA classifies a term as a condition to ensure more powerful remedies for consumers.

7.3 In this section, we will consider whether this contract based model is the most effective means of protecting consumers or whether utilising contract based remedies and the distinction between conditions and warranties is too difficult for consumers to understand. In the latter case, we will consider whether modifications are possible whilst ensuring compatibility with the underlying law of contract or whether useful change is only possible by abandoning contract based liability altogether in favour of statutory consumer rights.

The Current Law

Contract Based Liability

7.4 As explained elsewhere in this report, consumer rights set out in the SoGA, SoG(IT)A, etc. operate by being implied into the contract of sale or supply. The Acts set out a range of terms that that the Act "inserts" into the contract between supplier and consumer.
This method of ensuring protection for buyers of goods is not new. Before sale of goods law was put on a statutory footing, the common law implied into contracts for the sale of goods terms as to the quality, fitness for purpose, etc. The Sale of Goods Act 1893, being a codifying statute, simply took the existing common law rules, clarified them and put them into statute; it did not seek to invent an entirely new regime for the sale of goods simply to clarify the existing one and so it retained implied terms as the means of affecting protection for the buyers of goods.

7.5 The 1893 Act was addressed to merchants buying and selling goods for profit, not consumers. Dealings between merchants were inherently contractual and so a set of default provisions was appropriate. Great value was (and still is) placed on freedom of contract, particularly in commercial dealings. The implied terms "model" reflected that. The implied terms applied by default – parties were free to "exclude" the terms and draft their own to give greater, lesser or more specific protection.[306]

[306] For example, for certain goods/buyers/sellers simply being "satisfactory" is not sufficient, they may wish to define a far more stringent, measurable standard for conformity with the contract.

7.6 The scheme of the 1893 Act took root. The SoGA 1979 retains much of 1893 Act including the contractual basis for liability which was also adopted (largely copied from the SoGA) into the SoG(IT)A and SGSA meaning liability for all goods sold *and* supplied was contractually based.

7.7 When the need arose to create consumer-specific provisions, the basic approach of continuing with the implication of terms into the contract between consumer and trader was maintained. The position we now have in law therefore is that consumer rights with respect to the quality of goods and fitness for purpose exist as part of the contract with the trader, i.e. when goods are sold, rented, sold on hire purchase, etc.

Conditions and Warranties

7.8 The consequence of using implied terms as the basis for consumer protection is that the implied terms are subject to the usual rules and principles applied to contracts generally. Like all contract terms, implied terms could be one of three types: conditions, warranties, or "innominate terms". The latter are terms that may be treated as either conditions of warranties for remedial purposes, depending on the seriousness of the consequences of their breach.[307] If the consequences are minor, then the term will be treated as if it were a warranty, and the innocent party will only have the right to claim damages; however, if the consequences of the breach are far more serious, it will be treated as a condition which allows the innocent party to claim and damages *and* treat the contract as being at an end, therefore being under no further obligations. Clearly, giving an innocent party the right to "walk away" from a transaction is a powerful remedy and so it is appropriate that when a key term of the contract is broken such a remedy is available. Similarly, it would be wrong to offer this remedy for the more trivial breaches. What the law does recognise is the simple fact that some obligations are more important than others and must be treated as such.

7.9 The classification of terms reflects the fact that not all the terms in a contract are of equal importance and have differing consequences if breached. Some are absolutely essential in defining the obligations of the parties, others are far less important. A breach of the most important terms might render the entire agreement at an end, with further performance being impossible or pointless. A breach of less important terms might have little or no impact and may not even cause a loss to the "victim" of the breach.[308]

Conditions and Warranties under the SoGA

7.10 While the SoGA does not define the meaning of "condition", it describes a warranty as,

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

[307] *Hong Kong Fir Shipping Co. Ltd. v Kawasaki Kisen Kaisha* [1962] 2 QB 26, [1962] 1 All ER 474 applied to sale of goods cases in *Cehave NV v Bremer Handelsgesellschaft GmbH, The Hansa Nord* [1976] QB 44, [1975] 3 All ER 739.

[308] In this case, the victim would have a claim against the other party but it may only be for nominal damages, for example £1 which recognise that there has been a breach but nothing more.

7.11 As the SoGA is to a large extent simply a set of default rules for a specific group of contracts, the implied terms are subject to the same classification as contract terms at large – some are conditions, some warranties and others, innominate terms whose status is determined depending on the consequences of their breach.

Statutory Conditions under the SoGA

7.12 To protect the buyers of goods, the key terms of contracts for the sale and supply of goods are classified as conditions. This precludes the possibility for sellers and suppliers of drafting contracts that classify the obligations such as the duty to supply goods that are of a satisfactory quality as warranties and thereby preventing the consumer from bringing the contract to an end where that obligation is breached.

7.13 This statutory classification also removes any potential ambiguity or debate as to the effect of breach and consequently any ambiguity as to the rights of a consumer in the event of breach at least as far as the basic entitlement to a remedy is concerned. As noted elsewhere, the restrictions imposed by the rules on acceptance in the SoGA create a separate difficulty.

7.14 Two strands of the law together achieve this protection. The first is the SoGA which classifies certain implied terms as conditions[309] therefore meaning that the breach of key obligations such as the obligation to supply goods of satisfactory quality always allows the consumer to bring the contract to an end, reject the goods and claim a refund of the price.

7.15 As we have mentioned previously, however, the SoGA is largely a set of default rules which parties can deviate from if they wish. This means that even if the SoGA classifies a term as a condition, it does not prevent a party from simply excluding that term from the contract and so avoiding the obligation altogether. The second, the Unfair Contract Terms Act 1977 prevents this by rendering any attempt to exclude the protective terms implied by the SoGA ineffective when the buyer of goods is a consumer.[310] Consumer transactions regulated by the SoG(IT)A and SGSA are protected in exactly the same way. [311]

The Status of Other Implied Terms

7.16 Not all the terms implied by the SoGA are conditions, however. The majority are warranties and despite being the default position this is often far less clear – this is not likely to be terminology that consumers will readily, fully understand. In everyday language, the term “warranty” would denote an undertaking by a seller or supplier of goods as to their quality or durability. It would not ordinarily be recognised as a legal term denoting terms of relatively lesser importance in the contract.

7.17 Examples of implied warranties include the obligations on the seller to ensure that the buyer enjoys, “quiet possession,”[312] of the goods and that the goods will remain free of,

[309] SoGA ss.12(1), 13(1A), 14(6), 15(3).
[310] Ss.6(1) & (2).
[311] S.6(1)(b) for contracts of hire purchase and s.7 for sale and supply contracts governed by the SGSA.
[312] S.12(2)(a).

"encumbrances."[313] As we can see, despite being warranties, these, however, are not necessarily, in the eyes of the buyer, minor terms of the contract.

7.18 Obligations as to the time for the delivery goods may be regarded as conditions, "where time is *prima facie* of the essence,"[314] such as in contracts for the large scale sale of commodities.[315] Time is usually not of the essence in consumer contracts. Moreover, it would seem unlikely that a court would allow a consumer to reject goods that were delivered perhaps an hour or even a day later than the stipulated time as this simply does not go to the heart of the contract,[316] if the goods were otherwise satisfactory and no loss has been incurred. The result therefore is that in many situations this might be regarded as an innominate term with the remedies available dictated by the consequences of breach, which seldom amount to little more than inconvenience.

7.19 The structure of the SoGA also gives no clue as to which terms are of the greatest importance. For example, section 12 contains three obligations. The key obligation, that the seller should have the right to sell the goods, is a condition of the contract but the other two obligations, relating to quiet enjoyment of the goods, are warranties.

7.20 This is true of many obligations in the SoGA. Furthermore, some provisions only apply, for example the duty to pay a reasonable price, where the contract is silent on the issue and getting a clear picture of which implied terms are relevant, let alone how they are classified can be problematic. A breach of these terms will give rise to a claim for damages but will not allow the consumer to treat the contract as having ended.

Other Contractual Terms

7.21 A contract for the sale of goods is not usually solely composed of the default obligations implied by the SoGA. Usually, the seller and buyer will impose additional terms. There terms will usually provide for more detailed obligations or for additional obligations. For example, parties might wish to give a far more specific time and place for delivery, specifying how goods should be packaged and transported, etc. Similarly, retailers often add to their obligations by allowing customers to return goods that unsuitable despite being entirely satisfactory in terms of their quality.

7.22 The terms of the contract implied by the SoGA are therefore just one element of the contract. The rest of the contract, the terms that are found usually in the seller's standard terms, must also be classified as innominate terms, conditions or warranties.

7.23 The difficulties of classification, therefore, are not limited just to the statutorily implied terms where classification is clear, although the consequences for consumers may not be. With terms specified by the parties (or rather, put forward by the retailer), classification it is less predictable and more complex.

---

[313] S.12(2)(b).
[314] *Per* McCardie, J., in *Hartley v Hymans* [1920] 3 KB 475 at 484.
[315] *Bunge v Tradax* [1981] 2 All ER 513.
[316] We may note that the pCRD does impose a delivery period and sets out consequences for failure to deliver within that period of time. See Annex 2.

7.24 Take, for example, an undertaking to deliver to a particular place. The SoGA provides a default rule if the contract does not provide for a place of delivery.[317] Where the parties do not specify a place for delivery it is presumed to be seller's place of business, although frequently a separate place will specified. With most high-street purchases, the place of delivery will, of course, be the seller's place of business, i.e., the retail premises. However, with purchases of larger items, as well as goods bought online, delivery will have to be made to a separate place. If the parties agree that the goods are to be delivered by the seller to a particular address, but are misdelivered, instead, to a neighbour, then there could be a breach. However, this may only lead to a minor inconvenience. That is, of course, assuming that the neighbour is contactable or available to hand over the goods. Worse still there is a possibility the neighbour might take the goods and deny knowledge of them ever having been delivered making taking delivery of the goods impossible.[318] Here, the breach of the term could mean that it would be treated as a warranty or as a condition. However, without an understanding of the legal concepts that would bear on that decision, it is difficult for the buyer to know that and consequently to know the available remedies.

Analysis

7.25 The law correctly recognises that some terms are of a greater importance in contracts than others. Classifying terms in some way and attaching more potent remedies to more important terms is essential.

7.26 Given the potential inequality of bargaining power and the vagaries of the common law when identifying what is a condition and what is a warranty, by ensuring that the most powerful remedies attach to the most important implied terms and by ensuring that those terms cannot be excluded, the law ensures that consumers are afforded a relatively strong position in the event that a seller fails to meet that standard.

7.27 However, given that the status of the key implied terms is assured by the SoGA and the UCTA and so any freedom to derogate from them by the seller (and, indeed, the consumer!) is lost, there seems little sense in continuing to treat them as terms of the contract. As any freedom of contract is lost in respect of those terms and they have the status of rights, it might well be better to simply treat them as such. Doing so might also improve consumer understanding or, more accurately, bring the law closer to the consumer understanding of it. This might well go some way to ensuring that consumers have a better understanding of the law.

7.28 The difficulty is that the law only displays this rigidity in respect of a small number of provisions, namely sections 12-15. Unless stated, the rest of the SoGA implied terms are warranties and the rest of the terms in the contract between seller and buyer generally are subject to the prevailing common law rules, which require that contractual terms be classed as conditions, warranties, etc., although the key consumer rights are those provided by the statutory implied terms. This means that, while there is a partial departure from prevailing

[317] S.29(2) .

[318] For completeness, it is worth noting that there would be a separate claim against the neighbour here (as well as potential criminal charges) who has acted as bailee of the goods but bringing and proving that claim may be costly and difficult.

common law principles, contract law remains influential. This makes any substantive change to the law difficult to achieve as contract law will inevitably retain some role.

Analysis of the Problems

Conditions and Warranties

7.29 We have seen that current consumer protection regime consists of a range of protective rules, some of which allow the consumer to react decisively to bring a contract to an end, others which allow only a claim for any financial loss incurred as a result of breach and yet others where the consequences of breach are the decisive factor. This division of protective contractual terms into conditions and warranties is fundamentally unhelpful and can be unpredictable.

7.30 It seems likely that consumes believe that they have rights arising under the various pieces of legislation that govern the sale and supply of goods and not dependent on n the contracts they have with those that sell and supply them.

7.31 More importantly, if the objective is to create law that is simple and accessible, this achieves quite the opposite. Relying on terms and conditions to dictate access to remedies and indicate which terms are of greater or lesser importance simply add complexity by doing so in such a circuitous fashion. The law would be far simpler if key consumer rights were not classified as conditions but were simply given the status of more or less important obligations by the legislation that contained them. This could remove ambiguity as to their status, and would mean that consumers no longer needed a grasp of contract law concepts to have a grasp of their rights when suppliers of goods fail in their obligations, although rigid classification of all terms may be counter-productive in the longer term – the flexibility of the current law is useful in addressing disputes that arise where the consequences of what appears to be a minor, or even trivial term, result in very serious damage.

7.32 Classifying terms as either conditions or warranties, whilst not problematic for those legally trained, is likely to mean very little to the ordinary consumer. Given how important this distinction is, it seems that this distinction between more and less important obligations could be made far more simply.

7.33 However, it is self-evident that whether we call obligations conditions and warranties, or something entirely different, we must distinguish between terms that are more or less important to the contract and link these to more or less potent remedies. The fundamental distinction must therefore remain. However, undoubtedly, it is capable of being expressed far more simply.

Options for Change

No Change

Advantages
7.34 Doing nothing would preserve the historically derived fabric of the law and ensure that contract law principles still run very clearly and unaltered through consumer sales law.

Disadvantages
7.35 Almost certainly consumer understanding and awareness of key contract law concepts is minimal. It is likely that they perceive their rights as existing in statute and not in the contract of sale. To do nothing therefore would mean not to address this problem and would leave a layer of complexity in the law that simply does not need to be present. If the desire is to simplify the law and to make it more accessible to both business and consumers, then some change is necessary.

Remove the distinction between conditions and warranties altogether

Advantages
7.36 Abandoning the distinction between conditions and warranties altogether would undoubtedly simplify the law. It would make the law more straightforward and remove the current difficulties caused by the ambiguities associated with classification.

Disadvantages
7.37 In practice, while desirable for consumers, it is simply unworkable on a general scale. It would require either consumers being allowed to leave a contract on the basis of the smallest breach or having to remain as a party to the contract almost irrespective of the behaviour of the seller – classification is unavoidable. There is the possibility of a "half way house". In respect of consumer dealings all terms implied by the SoGA and related legislation could be given either a fixed or default classification by statute. This would fix a particular remedy to a particular breach unless it could be shown that the remedy was excessive or insufficient. This option, however, would not deal with the fundamental problem caused by the distinction itself, it would simply tinker with the existing undesirable classifications.

7.38 Consumer understanding of the distinction may be improved by changing the nomenclature used. However, simply changing language does not guarantee any greater understanding or engagement with the law; it can in fact lead to more confusion particularly as consumers are often less than pro-active in becoming informed about legal change. Unless properly drafted the impression could be that contract law principles apply differently to sale of goods.

Move away from contract based liability

Advantages

7.39 The final and most desirable course of action would be to remove the language of conditions and warranties from the law of implied terms entirely. This would entail abandoning implied terms as the basis for consumer rights and instead giving them the status as statutory guarantees. A decisive move away from the current law need not mean a change to the substance of the rights.

7.40 This would mean the law better accorded with consumer beliefs that the law offered protection on a statutory basis, rather than through the contract with the trader.

Disadvantages

7.41 Contract based liability provides a degree of flexibility that could potentially be lost. The ability of a court to determine that a term ought to be regarded as a condition given the loss caused by the breach is, in itself, an important protection, although such flexibility in respect of the most important rights has already been lost and the result is a higher degree of protection. Equally, it is entirely foreseeable that a new statute could build in flexibility were it required and do so using a test based upon an assessment of the consequences of a failure by the seller to meet their obligations. It would perhaps also create a sharper distinction between statutorily-provided rights, and additional rights arising from the individual contract. However, as our concern is primarily with the manner in which statutory consumer rights are provided, this is not a major area of concern.

Other Jurisdictions

The DCFR

7.42 The DCFR provides a "conformity with the contract" test, setting out the goods are not acceptable unless they conform to the contract.[319] This is clearly different from the implied terms method currently used in the UK as it is more of a statutorily-based guarantee of quality, albeit one that still uses contract-law terminology. The DCFR provides for termination only where there is fundamental non-performance of the seller's obligations.[320]

Advantages

7.43 It is interesting to note that the DCFR also favours a statutory standard of conformity, i.e., one that does not rely on a distinction between more and less important terms. It would seem that there is recognition here too that such critical terms properly belong on a statutory footing for the benefit of consumers. The DCFR proposes a workable method of establishing the quality of goods that is independent of the contract. It is also useful in that it closely accords with the standard already in place in the UK.[321]

[319] IV. A. – 2:301.
[320] III. – 3:502.
[321] See chapter 3.

Disadvantages

7.44 Disadvantages of this approach are difficult to find. While the language of the guarantee in the DCFR sets out the obligations of the seller in slightly different terms from how they are expressed by the current legislation and does not overtly classify aspects of the guarantee in the language of conditions or warranties (or equivalent), there is a clear hierarchy of obligations and so the fundamental principle is preserved, as it must be.

Recommendations

Preserve the general concept of a hierarchy of terms:

7.45 It is important that recognition continues that some terms of the contract are very important, others far less important. It is therefore necessary that some classification does continue, whether this is by reference so conditions and warranties (however they are referred to) or preferably by direct reference to the remedies for their breach.

Abandon implied terms technique in favour of statutory standards

7.46 We have set out that there are various means by which this can be achieved, from simple change in the terminology used to the effective removal of this distinction from consumer protection legislation. Simply changing the terminology does not alter the roundabout way in which terms and conditions dictate differing remedies. The most desirable course of action, therefore, is to place the current implied terms on a statutory footing, creating a consumer guarantee where the remedies are overtly connected to its breach, avoiding the intermediate step, currently required, of determining whether an implied term is 'warranty, a condition or an innominate term.'

8. RULES ON THE PASSING OF PROPERTY

Introduction

8.1 The SoGA provides a comprehensive scheme for the passing of "property" (i.e. ownership) in sale transactions.[322] The rules on the passing of property are found in sections 16-20B of the SoGA. The primary rule is that property in so called "specific or ascertained" goods passes when intended to by the parties to the contract.[323] The reference to "intention" allows for express or implied provision to be made for the precise time at which property will pass; (and it will often be the case that sellers provide themselves with a form of security against non payment by insisting in the contract that they retain property after possession of the goods has passed to the buyer).[324]

8.2 Where the contract does not indicate any intention property in specific/ascertained goods passes according to a set of default provisions (rules 1-4 in section 18).[325] In the case of so called "unascertained goods" property passes according to a separate provision in section 18 (rule 5); and section 20A applies in relation to goods forming part of a specified bulk.

8.3 First of all, problems may arise where consumers have paid for the goods but property has not yet passed; this leaving consumers in a vulnerable position if the seller becomes insolvent. Second, the regime may cause problems of complexity due to the number of rules that apply and some of the terminology used. These are the main issues discussed here.

8.4 It may be possible to make changes which address these problems at least to an extent. This would involve simplifying the rules on passing of property in specific goods by removal of rules 2 and 3 and amendment of rule 4. This would result in property passing at an earlier stage in some cases. It may also be sensible to move forward the time when property passes in unascertained goods. These changes may be made easier by the fact that the passing of risk in consumer transactions is no longer tied to the rules on passing of property.

Current Law

Types of Goods (Ascertained/Specific or Unascertained)

8.5 As noted in the introduction above, different rules apply to different types of goods. The SoGA distinguishes between ascertained/specific or unascertained goods.

8.6 Specific goods are those "identified and agreed on at the time a contract of sale is made",[326] i.e., specifically identified as the goods to be sold under a contract, for example

[322] Providing the contract is one properly classified as a sale as defined by s.2 of the Act.
[323] S.17.
[324] S.19 makes specific provision to the effect that the seller has the right to make the passing of property contingent upon some event such as the payment of moneys due in respect of the present goods or all goods supplied at any time.
[325] S.18 rules 1-4.
[326] S.61(1) SoGA.

"*this* car" as opposed to "*a* car of this type". A contract to buy "*a* car of this type" is a contract for unascertained goods.

8.7 Of course, many consumer dealings concern specific goods: goods that are identifiable, in existence and in the possession and control of the seller when the contract of sale is made. This is the position in the majority of face-to-face retail sales. Consumers choose specific items from shop floor displays and present them for payment. They are contracting to buy the actual items in their shopping basket.

8.8 Goods are "unascertained" when they are not specific. This includes instances where they are purely generic; where they are still to be manufactured or grown by the seller or someone else; or where they form an unidentified portion of a specified bulk.[327]

8.9 Sales of unascertained goods are common. For example, on-line shopping and other forms of distance selling have become more and more popular. In those situations, consumers will almost always be contracting to buy unascertained goods. At the time the order is placed, the consumer will not be contracting to buy a specific item; but simply an item of the type in question, an item still to be selected by the seller from the available stock. Even in the case of many traditional 'in shop' sales, the consumer will not be contracting to buy a specific item. For example, a type of sofa, TV etc will be selected from the display items in the shop; while it will only be later that a specific sofa or TV will be selected for the customer in question from the seller's stock.

8.10 In other instances, consumers may contract to buy goods which have still to be made or acquired by the seller. Again, as already indicated, such goods are regarded as unascertained. Again, also, pre-payment by consumers, while perhaps not invariable, is often a requirement in such instances.

Rules for Passing of Property Specific/Ascertained Goods

8.11 The SoGA provides two key provisions on the passing of property in specific/ascertained goods. The first provision, section 17, provides that property passes when intended to do so by the parties. The second provision, section 18, sets out a regime to determine when property passes if the contract shows no intention on behalf of the parties. Section 18 is essentially a default regime; but is of great practical importance. This is because many contracts do not deal explicitly with the question of when property will pass. Further, it may not be possible to discern any implied intention either. Consequently, it will be necessary to turn to the default rules in section 18.

[327] P Atiyah, J.Adams and H.MacQueen, *Atiyah's Sale of Goods*, 12th ed., (Harlow: Pearson Education Ltd, 2010), p. 82

Rules 1 - 4

8.12 Rules 1-4 set out default provisions for the passing of property in ascertained or "specific" goods.

Rule 1

8.13 Rule 1 provides that "where there is an "unconditional contract" for goods in a deliverable state the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed".

"Unconditional" here seems to mean that the passing of property has not been made subject to any condition precedent.[328] A condition precedent is one that suspends the obligations and/or their effects. The most likely condition here would be payment by the customer; it being provided in the contract that until payment is made ownership does not pass.

Goods are in a "deliverable state" when "they are in such a state that the buyer would under the contract be bound to take delivery of them".[329] Essentially, this seems to mean that the seller has not agreed to do anything to the goods (e.g. to service a car or put it through an MOT test) as a prerequisite of the buyer being required to accept delivery.

Rule 2

8.14 Rule 2 deals with converse position to Rule 1, the situation where the seller has agreed to do something with the specific goods in order to put them into a deliverable state. Rule 2 provides that, in such a case, property will not pass until the seller has done the thing that they have agreed to do.

Rule 3

8.15 Rule 3 sets outs that where the specific goods must be weighed, measured or tested by the seller for the purpose of ascertaining the price to be paid, property will not pass until the seller has done this.

Rule 4

8.16 Rule 4 sets out when property will pass when goods are sold on a sale or return basis. It is provided that,

> "when goods are delivered to the buyer on approval or on sale or return or other similar terms the property in the goods passes to the buyer:-
> (a) when he signifies his approval or acceptance to the seller or does any other act adopting the transaction;
> (b) if he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of that time, and, if no time has been fixed, on the expiration of a reasonable time."

Rules for Passing of Property in Unascertained Goods

8.17 The above rules (1-4) only apply where specific goods are concerned. Where unascertained goods are concerned, section 16 SoGA provides that property cannot pass

[328] Atiyah, Adams and MacQueen, ibid, at pp. 311-3.
[329] SoGA, s.61(5).

until goods have become "ascertained". It seems that this rule applies even if the contract expressly provides to the contrary.[330]
Rule 5 of section 18 then deals with how goods move from being unascertained to the point where they are treated as ascertained and property can pass. The key is so called "unconditional appropriation" to the contract.

8.18 Rule 5 provides that:

> "(1)Where there is a contract for the sale of unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods then passes to the buyer; and the assent may be express or implied, and may be given either before or after the appropriation is made.
> (2)Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee or custodier (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is to be taken to have unconditionally appropriated the goods to the contract."

Ascertainment/Unconditional Appropriation under Rule 5

8.19 Unconditional appropriation is the act by which the seller "commits" goods irrevocably to the contract.[331] Actual delivery to the buyer will usually be sufficient. Rule 5 (2) (above) also, of course, indicates expressly that delivery to a carrier or other bailee or custodier will also suffice.[332]
What of cases where the goods are still in the possession of the seller? In one case, property was found to have passed when the goods intended for the buyer in question were separated out from other goods by the seller.[333] If such an approach was taken generally, the result would be that there would be unconditional appropriation where the goods are set aside, labelled, packed etc. for the buyer. However, the generally accepted position is that such setting aside, labelling, packing etc for the buyer by the seller is insufficient;[334] and that the goods have not been irrevocably committed to the contract until the seller does the last act they must do before surrendering control over the goods.[335] This last act might be, for example, handing them to a courier for delivery to the customer or sending an invoice detailing the specific goods to be supplied under the contract.[336]

---

[330] *Jansz v G.M.B Imports Pty Ltd.* [1979] VR 581.
[331] *Carlos Federspiel & Co. S.A. v Charles Twigg & Co. Ltd.* [1957] 1 Lloyd's Rep. 240 *per* Pearson, J., at 255
[332] Although, this is subject to the overriding requirement in s. 16 to the effect that property can never pass in unascertained goods. So, if the goods remain mixed with goods for other customers, (e.g. because it was the carrier's responsibility to separate them out and this has not yet been done) then unconditional appropriation has not yet taken place (*Healy v Howlett* [1917] 1 KB 337)
[333] *Aldridge v Johnson* (1857) 7 E & B 885
[334] The idea is that the setting aside of the goods for the buyer does not necessarily amount to unconditional appropriation; as the seller *could* unpack the goods and use them for another contract (see *Carlos Federspiel & Co. S.A. v Charles Twigg & Co. Ltd.* [1957] 1 Lloyd's Rep. 240 *per* Pearson, J., at 255).
[335] See for example *Carlos Federspiel & Co. S.A. v Charles Twigg & Co. Ltd.* [1957] 1 Lloyd's Rep. 240 *per* Pearson, J., at 255 and *Healy v Howlett & Sons* [1917] 1KB 337.
[336] *Hendy Lennox (Industrial Engines) Ltd. v Grahame Puttick Ltd.* [1984] 2 All ER 152, [1984] 1 WLR 485.

Limited Property Interest Where Contract is for Goods that Form Part of Identified Bulk

We have just seen that in purchases of unascertained goods property does not pass until the goods have been unconditionally appropriated within the meaning of Rule 5. However, a more limited property interest can be obtained by the buyer by virtue of section 20A.

8.20 Section 20A provides that, where the buyer contracts for a specified quantity of unascertained goods from a bulk source that is identified in the contract (or later), and at least some of the payment has been made, the buyer will become a tenant in common of the bulk. The buyer will therefore have some property interest in the goods before they are separated from the bulk. Being a tenant in common of a bulk is not the same as owning a specific thing in it or part of it; it just means that, along with the other tenants in common, the buyer has a shared property interest in whatever is contained in the bulk.

8.21 Section 20A is conceived primarily to assist commercial traders in bulk commodities, not consumers. Consumer contracts will usually not meet the section 20A criteria: goods will often not form part of an "identifiable" bulk; as the location of the goods will often not be communicated to the buyer (whether by the seller or in the contract) at the time when they are ordered.

8.22 If section 20A does not apply, the passing of property in the bulk will be governed by Rule 5 and the buyer has no property interest until their goods are separated (unconditionally) from the bulk.

The Functions and Context of the Passing of Property Provisions

8.23 Before examining the potential problems with the current regime, it is useful to outline the functions and context of the property rules.

> -The Rules determine whether a buyer who has not received delivery can actually claim ownership of the goods; or whether the buyer is confined to a personal action for damages/return of money paid. This is largely of relevance to the "insolvency" problem raised in the Introduction.
>
> -Traditionally, the risk of loss, damage or deterioration passes at the same time that property passes; unless there is express or implied provision to the contrary in the contract.[337] In addition, where there is a contract for the sale of specific goods and, without fault on the part of either party, the goods subsequently perish before the risk passes to the buyer, the agreement is rendered void.
> However, in consumer sales, these rules should not be affected by any changes to the rules on passing of property. This is because the traditional rule that risk follows property was changed for consumer sales in 2003 by by the addition of a new section 20 (4) to the SoGA. This provides that risk does not pass in sales to consumers until goods are actually delivered. This means that, in considering the options for reform to the passing of property rules, we do not need to be concerned with the impact on

[337] This can be modified by agreement between the parties but the general position is stated in s.20 (1).

passing of risk. So, for example, section 7 of the SoGA provides that where there is an agreement for the sale of specific goods and subsequently the goods perish *before the risk passes to the buyer* (without fault on the part of the buyer or seller) the agreement is void. The application of this rule is not affected by any change to the property rules; because, as we have seen, these rules do not affect the position on risk (and it is the time of passing of risk that determines the operation of section 7). To take another example, one of the issues considered below is whether property in specific goods could be allowed to pass despite the facts that the goods are not yet in a "deliverable state". Again, it will be argued below that the main reason for preventing property passing until the goods are in a deliverable state is one associated with a regime in which risk passes with property; not with a regime (like the one now applicable) under which risk passes later.

- If the goods are lost, damaged or wrongfully interfered with by a third party, this third party can only be sued in tort by the party (seller or buyer) who has property in, or possession of, the goods.[338] This may place the seller in a difficult position where the goods are in transit to the consumer. In such a case, the risk is with the seller; making him liable to the buyer; and meaning that he may wish to recover his losses by suing the third party. The difficulty faced by the seller is that the property will usually have passed; whether because the goods were always specific goods and property passed under Rules 1,2 or 3 at the time of the contract or shortly after, or because, they were unascertained and the property passed (under Rule 5) when they were unconditionally appropriated to the contract, e.g. by being handed to the carrier. So, because the seller has neither possession of, nor property in, the goods, he may not be able to make a claim against the third party.
Our suggested changes to the property rules do not affect this problem. It is true that the changes may mean that property passes at an earlier stage. However, even under the current regime, as we have seen, the seller is left exposed because the property has passed before the goods are in transit. The problem is not made any worse by a change that makes the property pass at an earlier stage than this. The real question, which seems to be beyond the scope of this study, is whether the law should be changed so as to give the seller the right to sue the third party simply based on the fact that he (the seller) has the risk; even although he has neither property or possession.

[338] *Leigh & Sullivan v Aliakmon* [1986] AC 786

Problems with/Analysis of the Current Position

Problem 1 – Protecting Consumers in Insolvency

The Risk of Insolvency

8.24 Retail insolvencies are not uncommon. The insolvencies of the major retailers Woolworths and MFI, along with smaller chains such as Roseby's and The Pier, all occurred within a few months in 2008. While damaging to the economy and the fabric of the High Street, many retailer insolvencies are not directly damaging to the consumer, however, where the retailer takes payment in advance for goods the effects can be serious.[339]

8.25 The passing of property rules can cause problems in the context of trader insolvency. The problem arises in cases where the consumer has paid for the goods but the property has not yet passed. If property *has* passed, then the consumer can obviously claim ownership of the goods from the liquidator. However, if property has not yet passed, the buyer is confined to a personal action for damages/return of money paid.

8.26 The latter form of claim may be of very little help in practice. This is because consumer creditors rank very far down the preference list. As such, there are likely to be very limited funds remaining to satisfy the actions for damages or for price recovery by such creditors.

The Limited Protection in Insolvency Law

8.27 In the event of insolvency, if the consumer has paid for goods but has not yet acquired a property right, then he is in an unenviable position.[340] The lion's share, if not all, of the insolvent seller's assets are likely to be distributed between the preferred[341] and secured creditors; this usually means institutions such as banks who were prepared to lend to the seller only the basis of some security being granted. Stock may also be subject to retention of title clauses imposed by trade suppliers. The stock of course will often include unascertained goods bound for customers but in which property remains with the seller.

8.28 The law has been modified to attempt to assist unsecured creditors namely by changes made to the Insolvency Act 1986.[342] These require the party over-seeing the insolvency (e.g. the administrator) to set aside a portion of the company's assets that would otherwise go to secured creditors. The funds and assets that are ring-fenced must then be distributed amongst unsecured creditor which will include consumers who have pre-paid for goods.

8.29 On the face of it, this would seem to be a substantial improvement for the consumer and evidences a desire to improve the lot of unsecured creditors, consumers included, but when we look more closely at section 176A and the Insolvency Act 1986 (Prescribed Part) Order 2003[343] we see that this is not entirely the case.

[339] The collapse of World of Leather caused 21,000 customers to lose deposits worth up to £2,000.
[340] Unless the buyer could prove that the goods had been ascertained/appropriated before the insolvency although this may be problematic.
[341] Such as employees and employee pension schemes.
[342] S.176A.
[343] S.I. 2097/2003.

8.30 Whilst the sum reserved for unsecured creditors can be as much as 50% of the insolvent firm's assets, this applies only where the assets are less than £10,000.[344] Where the assets exceed £10,000, 50% of the first £10,000 is reserved but beyond that only 20% with the maximum value of the fund capped at £600,000 – a substantial sum on the face of it, but potentially very little when spread between both trade and consumer creditors.

8.31 It must of course be borne in mind that where a company has become insolvent, the pool of assets available will inevitably be heavily depleted and the size of the fund is likely to be small. The Insolvency Act[345] provides that, where the costs involved in the distribution of the fund would be disproportionate to its value, the requirement to create this fund does not apply.[346] The result is that, while a degree of protection from the insolvency rules is in place, it may be of little help and does not in itself change the harsh effect of the rules.

Insolvency and the Passing of Property Rules

8.32 In many retail sales, the insolvency problem will not arise. First of all, there is of course no problem where the buyer has not actually paid for the goods yet. In such cases, the buyer may be disappointed when trader insolvency results in the goods not being delivered. Here, the buyer may wish to make a claim in damages for non delivery; in an attempt to cover the costs (if any) of finding replacement goods. It is true that the depleted assets of the seller may mean that there are limited resources to satisfy such a damages claim. Nevertheless, the amounts lost by buyers in such cases are likely to be very limited; as alternative sources of supply will usually be readily available.

In cases where the buyer *has* already paid for the goods, the problem of trader insolvency arises in all cases where the property has not yet passed to the buyer.

Specific Goods

8.33 In many cases, there will be no problem. This will be the case where the property passes immediately on making the contract. This will happen (under rule 1) where the contract is for specific goods, the contract is "unconditional" and the goods are in a "deliverable state". This (as indicated above) will be the case in a very large number of traditional retail sales.

8.34 However, difficulties may arise in the case where Rules 2, 3 or 4 apply. So, property will not pass until whatever is to be done to put the goods in a deliverable state has been done (Rule 2). It will not pass until any required measuring, testing, weighing etc. has been done (Rule 3). Further, it will not pass in cases of sale or approval until the buyer has signified acceptance; or until the expiration of a contractual time period or a reasonable time (Rule 4).

In all such cases, the buyer who has already paid is at risk of seller insolvency until the relevant conditions have been satisfied.

[344] *Ibid* para.3.
[345] S.176A(5).
[346] Providing a court order to this effect is obtained. See for e.g. **Re Hydroserve Ltd.** [2008] BCC 175 where the estimated cost (£3,000) of distributing assets worth £2,000 between 122 unsecured creditors was deemed to be disproportionate.

Unascertained Goods

8.35 As we have seen, where unascertained goods are concerned, the time at which property will pass depends on when the goods are "unconditionally appropriated" to the contract within the meaning of Rule 5.

8.36 The problems might be considered to be most serious where there is a long period of time involved between payment and the time when property passes. There will be many cases where it is indeed a long time after payment before the goods become "unconditionally appropriated" to the contract. First of all, there are those cases where the goods still need to be made or acquired by the seller. However, these situations apart, it is extremely common for goods (such as large items of furniture) to be bought 'on line' or selected in a shop; but for the consumer to be required to wait some days or weeks for the particular item to be sent from a warehouse. We saw above that in such cases the goods for any given customer may not be "unconditionally appropriated" to that customer's order for some time, perhaps not until immediately prior to, or on, dispatch by the seller to the buyer.

8.37 In addition, if the "bulk" of which they formed part has never been "identified" (usually the case), then the consumer will not become an owner in common under the rule in SoGA, section 20A.

Problem 2 – Lack of Clarity and Too Many Rules

8.38 In this section, we identify two general problems: the lack of clarity in the existing default rules, as well as the fact that there are too many rules, and, indeed, that the rules may be too detailed for consumer transactions. We also note that these rules only apply to contracts for the sale of goods within the scope of the SoGA. As explained elsewhere, the passing of property is also relevant in the context of other supply transactions, but no equivalent set of rules exist for those transactions. Whilst it seems likely that, at common law, a similar approach to the SoGA rules would be taken, the lack of such rules outside the SoGA still needs to be noted.

Lack of Clarity

SoGA concept of property

8.39 The SoGA refers to the transfer or passing of "property". This is unlikely to reflect the common understanding of what it actually means, i.e. "ownership". It is possible that the average consumer would view the reference to passing of "property" as a reference to physical delivery.

"Unconditional Contract"

8.40 This is a notoriously confusing piece of terminology. As suggested above, it probably simply means that the passing of property has not been made subject to any condition precedent; the most likely such condition here being payment by the customer. However,

there has long been confusion over whether the presence of a "condition subsequent"[347] renders the contract conditional for the purposes of the passing of property rules. It probably does not have this effect,[348] but the position has certainly caused confusion for lawyers;[349] so is hardly satisfactory for legislation aimed at consumers.

8.41 There is also a risk of confusion with the concept of a "condition" as an essential term of the contract. There are many such essential terms in a contract of sale, e.g. that the seller will deliver the goods, that the buyer will accept and pay for them and that the goods conform to the terms as to description, quality and fitness for purpose. It must be the case that a contract can be "unconditional" for the purposes of the passing of property rules notwithstanding the existence of these types of conditions. However, again, it is unhelpful to have this potential for confusion.

"Deliverable State"

8.42 The concept of deliverable state (Rules 1 and 2) is also one that adds to the complexity of the rules on the passing of property. The intention, as indicated above, is to indicate that the seller has nothing more to do with the goods to prepare them for the buyer. However, it may generate confusion and uncertainty. For example, the question may often arise as to when exactly something that the seller has agreed to do prevents the goods from being in a deliverable state.

"Unconditional Appropriation"

8.43 Perhaps the most challenging concept found in the SoGA Rules is that of "unconditional appropriation". This concept has caused significant confusion over the years. As we have already set out, there has only been "unconditional appropriation" when the seller has irrevocably committed the goods in question to the contract with the particular buyer. This is generally accepted as having taken place when the seller does the last act that needs to be done.

8.44 In some commercial sales of goods the act of unconditional appropriation is very clear and widely agreed upon. Take, for example, a "free on board" contract. Here, the seller agrees that they will supply goods and deliver them to a named ship. The last act the seller must do is deliver them to the ship and, once loaded, they are unconditionally appropriated to the contract. The seller cannot get the goods back and has nothing more to do with them.

8.45 However, it is often much more difficult to predict how the unconditional appropriation concept will be interpreted. In *Carlos Federspiel v Twigg*[350] it was held that the goods had not been unconditionally appropriated despite having been packed in containers with the buyers' name and address on them. The view was that the seller's 'last act' in this case would be handing them to the shipper for carriage. Prior to this, the seller could have

[347] This is a condition providing that an otherwise unconditional contract will become void on the occurrence of certain stated events.
[348] See discussion in E.McKendrick, *Goode on Commercial Law*, 4th ed., (London: Butterworths LexisNexis, 2009) pp. 252-3 and P Atiyah, J.Adams and H.MacQueen, *Atiyah's Sale of Goods*, 12th ed., (Harlow: Pearson Education Ltd, 2010), pp. 311-3.
[349] See the discussions in McKendrick, *ibid* and Atiyah, Adams and MacQueen, *ibid*.
[350] *Carlos Federspiel & Co. S.A. v Charles Twigg & Co. Ltd.* [1957] 1 Lloyd's Rep. 240.

unpacked the containers and sold the goods initially earmarked for one buyer to another buyer. As such the packing and labelling was not an irrevocable act of appropriation by the seller. Yet, the *Aldridge v Johnson*[351] it was held that ownership had passed at the point when the seller had filled sacks supplied by the buyer with the barley intended for that buyer. However, it is hard to see how this was any more of an irrevocable act than that in the *Federspiel* case. Surely it could be said that the seller in *Aldridge* could have changed his mind and replaced the barley initially packed for the buyer with other barley.
In other cases, it may be easier to see the technical legal distinctions being made. So, in *Hendy Lennox (Industrial Engines) Ltd. v Grahame Puttick Ltd.*[352] the judge found that goods were appropriated when the seller sent to the buyer an invoice bearing their serial numbers. Here, one might say that the seller could (physically) have substituted other goods after this point. However, specific items had been identified (through the invoices) *to the buyer*; and it is possible to see how this makes for a stronger argument that the seller has irrevocably committed these particular goods to this contract.Nevertheless, the point is that there is the law is at best unpredictable; and that it is arguably unsuitable for the ownership issue in B2C cases to turn on fine distinctions that are unlikely to make much sense to the typical consumer or their adviser.

Too Many Rules
8.46 The complexity of some of the particular concepts may be compounded by the sheer number of rules. The rules address two distinct transactions: those in specific goods (Rules 1-4) and those in unascertained goods (Rule 5). Of course, it is essential that there are provisions that address the passing of property in respect of both of these types of goods. However, it may be that it is not necessary to have quite so many rules dealing with specific goods

Consequences of Complex concepts and Too Many Rules
8.47 One problem of having overly complex concepts and too many rules is that extra costs are imposed on businesses and consumers both at the time when contracts are made and when disputes arise. Another problem is that the uncertainty generated may damage consumer confidence.

Policy Options

Options for Both Specific and Unascertained Goods

Option 1 - the "no change" option

Advantages
8.48 The only obvious benefit to leaving the law in this area untouched is that it guarantees that what certainty there is in the law would be preserved. It may be felt that, where something so commercially sensitive as the passing of property is concerned, it is perhaps preferable to retain a regime with obvious but known flaws than it is to reform and risk other

[351] (1857) 26 LJQB 296.
[352] [1984] 2 All ER 152.

unknown perils. This view is not without some merit. The centrality of the passing of property to supply of goods transactions is such that it should not be readily disturbed.

Disadvantages

8.49 The disadvantages of inaction are obvious. First, it would ignore the fact that consumers may be exposed to the risk of trader insolvency more often than is really necessary. Second, it would ignore the fact that the law may be expressed in language that is overly complex; and that more rules than necessary are deployed.

Recommendation

8.50 This option is not recommended. The disadvantages of making no change are significant. Further, the only real advantage of making no change is that any potential uncertainty that might flow from change would be avoided. Yet, it has been shown above that the existing law, aside from other problems, is itself uncertain and complex in certain important respects.

Option 2-changing the language used to express the basic concept

Property/Ownership

8.51 Above, it was argued that the concept of "property" may be confusing for consumers. It may not suggest ownership, but perhaps simply transfer of possession. The DCFR does not refer to "property", but simply to "ownership".[353] "Ownership" is defined in the DCFR as:

> " .. the most comprehensive right a person, the "owner", can have over property, including the exclusive right, so far as consistent with applicable laws or rights granted by the owner, to use, enjoy, modify, destroy, dispose of and recover property."[354]

Advantages

8.52 The key advantage of the DCFR approach is that the concept of "ownership" seems simpler to understand than that of "property". Indeed, it seems to be the case that the words "property" and "goods" are often used as substitutes in an every-day context. A consumer who hears about the passing of property might therefore think that this is legalese for delivery, rather than the transfer of ownership. Using "ownership" would reflect more clearly that what is at issue is the transfer of the legal interest in the goods, rather than their physical handing-over.

Disadvantages

8.53 The disadvantage might be that the concept of "property" is well understood by lawyers and has formed the basis of the case law for over a century. A change might cause a degree of uncertainty.

[353] See VIII. – 1:101(1), see Annex 1.
[354] VIII. – 1:202, see Annex 1.

Recommendation

8.54 If this was the only reform made, it would fail to address the insolvency risk; and it would not address the various problems of complexity and lack of clarity discussed above. Nevertheless, it is preferable to taking no action at all.

In terms of further options for reform, we will deal firstly with specific goods and then with generic goods.

Specific Goods

Option 1 - DCFR model

8.55 It was argued above that the approach to passing of property in specific goods may use concepts that are too complex and uncertain; and that there may be too many rules (Rules 1-4). One option would be to replace rules 1-4 with the approach taken in the DCFR. The DCFR provides[355] that ownership can be transferred where the goods exist; are transferable;[356] the transferor has the right to transfer ownership; the transferee is entitled to the transfer of ownership; and either the conditions of any agreement as to the time of transfer have been met or, in the absence of such agreement, there has been delivery or the equivalent to delivery.

Advantages

8.56 The DCFR approach could be said to be more straightforward than the existing regime; in the sense that it does not seek to specify the sort of circumstances set down in SoGA, section 18, Rules 1-4. What it does is simply to focus on whether there has been "delivery" or an "equivalent to delivery". In one sense, this avoids the problem of 'too many rules' that was discussed above. In addition, it avoids the confusing and complex language of "unconditional/conditional contracts", "deliverable state" and "unconditional appropriation".

Disadvantages

8.57 In fact, lurking beneath the "delivery" or an "equivalent to delivery" notion, there is very significant complexity and uncertainty. "Delivery" is defined in terms of transfer of "possession" from seller to buyer.[357] '"Possession"' involves having either '"direct physical control or indirect physical control over the goods.[358] "Direct physical control" is physical control by the possessor or through an agent.[359] However, "indirect physical control" is more complicated. It is physical control exercised by a so called "limited right possessor".[360] This, of course, needs to be defined;[361] adding another level of complexity. Finally, there is a definition of the "equivalent to delivery" concept;[362] which sub-divides into four categories.

[355] VIII -2:101 see Annex 1.
[356] VIII -1:301, see Annex 1.
[357] VIII -2:104 (1) , see Annex 1
[358] VIII -2:105 (1) , see Annex 1
[359] VIII. -2:105(2), see Annex 1.
[360] VIII. -2:105(3), see Annex 1.
[361] VIII. -2:107 (1) & (2) , see Annex 1.
[362] These are provided for in VIII. -2:105, see Annex 1.

In short, the approach ends up appearing at least as complex and unclear as the current regime for specific goods.

8.58 A further problem is that it is quite possible that the DCFR approach would sometimes put back the point at which property passes; thereby increasing the exposure of consumers to trader insolvency. Currently, of course, the key trigger is the making of the contract. Property passes at this point, subject to the "deliverable state", 'unconditional contract", '"weighing, measuring, testing" etc provisions in the various Rules. By contrast, under the DCFR approach, "delivery" is the trigger. Now, it may well be that through the various complex concepts set out above, this sometimes does not actually mean physical delivery. The complexity makes this difficult to assess. However, taking delivery as the starting point must mean that there is at least a chance that property will often not pass simply on the basis of the existence of an unconditional contract for the sale of goods in a deliverable state.

Option 2 - Simplifying and Reducing the Number of Rules

8.59 Another option would be to retain the basic principle of the existing approach (i.e. that property can pass on the making of the contract); but to seek to clarify, simplify and reduce the number of rules applicable. First of all, this would involve retaining Rule 1, but clarifying what is meant by "unconditional" contract. It would be made clear that this simply refers to a condition *precedent*; e.g. payment by the customer.

8.60 Second, the confusing "deliverable state" concept could be removed from Rule 1. This seems to be a concept that is superfluous in any case in consumer sales. In B2B sales and, until several years ago in B2C sales also, the risk of loss, damage or deterioration passed at the time of passing of property, unless provision was made to the contrary. It makes sense to provide that risk stays with the seller until he has completed whatever must be done to put the goods in a deliverable state. Now, however, it is expressly and separately stated that risk does not pass in B2C sales until actual delivery.[363] So, the only significance of the "deliverable state" concept in B2C contracts is in relation to passing of property. Yet, what good reason is there for passing of property to be delayed based on this factor?

8.61 Third, obviously if the "deliverable state" concept (under Rule 1) was to be abolished as just discussed; then, logically, Rule 2 would need to be abolished. This is because the only point of Rule 2 is to address the situation in which the goods were not in a deliverable state at the time of conclusion of the contract. In other words, ownership would pass under Rule 1 so long as the contract is unconditional; and it would not matter that something was still to be done to make the goods deliverable.

8.62 Fourth, Rule 3 could also be abolished. This would seem to follow logically from the abolition of the deliverable state concept. If there is no real reason to delay passing of property until the goods are deliverable, why is there any reason to delay passing of property

[363] SoGA, s.20(4).

until the precise price is determined? In consumer cases, the degree to which the price might vary is likely to be very marginal.

8.63 It might be said that if the consumer is not satisfied with the price that emerges after weighing, measuring or testing, the consumer may wish to refuse to continue with the contract. However, neither the current law nor the proposed reform allow the consumer to do this. Rule 3 deals with a situation in which there is a binding contract. The only issue is when property passes. Currently, property does not pass until the weighing, measuring, testing etc is done; and the consumer is then bound to pay the price that finally emerges. Removal of Rule 3 simply moves back the point at which property passes; and the consumer is bound to pay whatever price emerges from a weighing, measuring or testing process, just as he is under current law.

8.64 Finally, Rule 4, as it now stands, could be abolished. It could be provided that, in cases of sale or return, property passes at the time of the contract, but re-vests in the seller if the buyer chooses not to buy the goods.

Disadvantages

8.65 As with any change, there is the possibility of causing uncertainty.

Advantages

8.66 The risk posed by insolvency would be reduced. Currently, the consumer is exposed to this risk where the requirements of Rules 2, 3 and 4 are not yet satisfied. If Rules 2 and 3 were abolished, ownership would pass notwithstanding that the goods were still to be put in a "deliverable state" (Rule 2) or were still to be weighed, measured or tested (Rule 3). Ownership would also pass to the consumer where goods were taken on sale or return terms (Rule 4) (subject to the possibility of ownership re-vesting in the seller if the consumer chooses ultimately not to buy the goods).

8.67 Of course, ownership would pass even in cases where the consumer has not yet paid for the goods. However, this is the case at present; so long as the various rules are satisfied and there is no contrary intention. It would still be open to the parties to provide that ownership would not pass until payment has been made. Even if no such provision is made, the proposed regime does not prejudice the seller. This is because if the consumer refuses to pay, then the seller (or liquidator) will not be obliged to deliver the goods.[364]

8.68 In terms of reducing complexity, the number of rules would be reduced significantly. Further, confusing concepts such as "deliverable state" would be removed.

Recommendation

8.69 We recommend Option 2. It has the advantages cited in terms of reducing the insolvency risk and reducing complexity. In these two key respects it is preferable to Option

[364] SoGA, s.28.

1 (the DCFR approach). As we saw above, Option 1 may significantly increase complexity. It may also increase, rather than reduce, the risk of the consumer losing out in cases of trader insolvency.

Generic (Unascertained) Goods - Options

Option 1 -DCFR Approach

8.70 One option for reform of the rules on unascertained/generic goods is provided by the DCFR. The DCFR makes provision for the situation where the goods have been defined only "in generic terms" by the contract or other juridical act, a court order or a rule of law. Generic goods would include goods currently classified as unascertained and governed by Rule 5 and bulk goods currently governed by section 20A.

8.71 Under the DCFR approach, property/ownership in such goods passes when the goods become "identified" to the contract.[365] This differs from the current requirement that the goods must have been "unconditionally appropriated to the contract"; which, as we have seen, is taken to mean that the seller has *irrevocably* committed the goods in question to the contract with the particular buyer. This is generally accepted as having taken place when the seller does the last act that needs to be done. This often means that there has been no unconditional appropriation until the goods are delivered to a carrier. "Identification" to the contract may well mean simply that the goods have been associated or attached in some way to a particular contract (buyer); notwithstanding that this association or attachment could, in theory, be revoked. For example, there may be "identification" when a name, address label or invoice is attached to goods. So, adoption of the DCFR "identification" approach might sometimes (even quite often) mean that property/ownership in unascertained/generic goods passes at an earlier stage.

8.72 The DCFR also deals with the particular situation of goods that form part of an "identified bulk", and transfer of the ownership of a specified quantity of this bulk has not yet passed because this specified quantity has not yet been identified. Here, a similar approach is taken as is taken in existing UK law. The idea is that the buyer obtains "co-ownership" in the bulk.[366] However, in two respects the DCFR approach seems to be different. First, under the SoGA approach the rule only applies where the goods are "of the same kind"; while under the DCFR a "bulk" simply means "a mass or mixture of fungible goods which is identified as contained in a defined space or area".[367] Second, under the SoGA approach, the buyer must have prepaid for the rule to apply; while there is no such condition under the DCFR.

8.73 It would be possible to adopt the DCFR approach to "identification" (in place of "unconditional appropriation") as the general rule; while not adopting the DCFR approach on bulk goods. Equally it would be possible to adopt the DCFR approach on bulk goods; while

[365] VIII.-2:101(3), see Annex 1.
[366] VIII. -2.305(2), see Annex 1.
[367] VIII. -2.305(1), see Annex 1.

leaving the general as it is, i.e. based on unconditional appropriation. Finally, of course, it would be possible to adopt the DCFR approach as the general rule and the DCFR approach in bulk cases also.

Advantages

8.74 It could be said that the concept of "identification" is less obscure than that of "unconditional" appropriation". (We have already set out above some of the uncertainties that exist in relation to "unconditional appropriation"). Also, we have seen that goods may often be "identified" before they are unconditionally appropriated". When this happens, the earlier transfer of ownership will reduce the risk of consumers losing out in cases of trader insolvency.

8.75 The DCFR approach to bulk goods is less restrictive than the existing approach under SoGA, section 20A. Consumers would be treated as co-owners under the DCFR approach even where the bulk in question involves a mixture of what they have bought and other types of goods. In addition, consumers would not need to have pre-paid in order to be treated as co-owners.

Disadvantages

The DCFR "Identification" Approach

8.76 The "identification" concept may not necessarily be any clearer than "unconditional appropriation". Disputes may still arise as to precisely when goods have been "identified"; as it is not necessarily clear what would be required. Up until "unconditional appropriation" of the goods to the contract, what happens to the goods and how they are treated will vary from transaction to transaction. The goods may be broadly identifiable in some contracts from the point the contract is made, for example, the seller might start work on making the goods and they may be marked up as being for a particular buyer. By contrast, there may be no indication that goods are for a particular contract until the moment they are unconditionally appropriated to it. In short, there might be considerable scope for dispute as to what degree of linkage would be required with a particular customer in order for the "identification" requirement to be satisfied.

8.77 In turn, it would remain possible that courts would interpret "identification" similarly to "unconditional appropriation". This would mean that the risk of consumer exposure to trader insolvency would not be reduced.

The DCFR Approach to Bulk Goods

8.78 The less restrictive approach to bulk goods under the DCFR might be considered to shift the balance too far in favour of consumers. In particular, as we have noted, consumers could become co-owners in a bulk even where they have not paid for the goods. However, in practice, the vast majority of consumers will already have paid.

Option 2

8.79 A more radical option would be to provide for the ownership of goods in stock (whether in the shop or a warehouse as long as the goods are owned by the seller) to pass to the consumer simply on the basis of the order in which they are purchased. This would be without any need for any act of unconditional appropriation or identification by the seller. As each purchase was made, one such item would be treated as belonging to that customer. If there were no items in stock when the purchase was made (or if the stock was all committed to earlier customers), new incoming stock purchased by the seller would be treated as owned by customers according to when their purchase had been made.

This would mean that ownership would pass at the time of the contract if the goods in question were in stock; or, if no such goods were in stock when the contract was made, as soon as the next item of these goods came into stock.

Under this approach there would be no need for a rule providing for co-ownership of a bulk. Each item would become owned by the next purchaser; and there would be nothing left to be shared.

Advantages

8.80 This approach would avoid the uncertainties of an approach based either on "unconditional appropriation" or "identification". It would also reduce the risk of consumers being exposed to trader insolvency. Once consumers had made a contract to buy goods they would own any item of such goods held in stock by sellers; or any that came in later. The only consumers to lose out would be those that were 'at the end of the queue' in cases where more sales had been made than there were items bought in.

Disadvantages

8.81 One disadvantage of this approach is that it does (as indicated immediately above) leave out some consumers altogether. Those 'at the end of the queue' would find that there are no goods left even to be where the shared out under section 20A.

A further disadvantage (at least from the point of view of other creditors) might be the quite radical shift in favour of consumers in cases of insolvency. Currently, all goods not "unconditionally appropriated" to particular customers are available to the liquidator to distribute amongst other creditors. The suggested approach would mean that a large proportion of the seller's stock would often not be available for these purposes, even although it had not yet been unconditionally appropriated to particular customer orders. There might be a risk that this would reduce significantly the value of floating charges as between banks and trade borrowers. Banks might therefore be less willing to lend to such borrowers.

Recommendation

8.82 Our inclination is to recommend adoption of Option 2. It makes for a simpler regime and protects a much more significant proportion of consumers against trader insolvency than are currently protected. It also seems that those at the 'end of the queue' are generally unlikely to be worse off than currently. Under the current regime goods will only be shared out under

section 20A if the “bulk” of which they formed part had previously been “identified”; and this is often not the case in consumer transactions.

8.83 There is one key qualification to this recommendation. It might be desirable to carry out some research to determine whether adopting Option 2 would be likely to have a significant effect on lending by banks.

9. OVERCLASSIFICATION OF GOODS

9.1 This chapter examines the way in which "goods" are classified within the Sale of Goods Act 1979 (SoGA) for the purpose of applying specific rules to different situations in sale of goods contracts. The aim is to determine if the classification system is necessary and, if it is, whether or not it can be simplified. The particular terms to be discussed are: "specific", "unascertained", "ascertained", "existing" and "future" goods.

Current position

Explanation of terms

9.2 To be able to examine the use made of the terms under discussion, it is first necessary to consider the statutory definition of each of the terms.

"Specific" goods

9.3 Section 61(1) of the SoGA, as amended, states:

> ""specific goods" means goods identified and agreed on at the time a contract of sale is made and includes an undivided share, specified as a fraction or percentage, of goods identified and agreed on as aforesaid".

This is largely concerned with individual goods which are actually singled out and decided upon when the contract is made and not at any later time. This means that if A was, for example, purchasing a television, for there to be a sale of "specific" goods, not only would the make and model have to be identified but the precise set would have to be indicated, e.g. by its unique serial number, at the time of making the contract.

9.4 The second part of the definition[368] includes within the definition of "specific" goods the undivided share of goods which are identified and agreed upon at the time of contracting, but only if the share is expressed as either a fraction (e.g. one quarter) or a percentage (e.g. 25%). This can apply both to shares in one item e.g. a boat or a racehorse or shares in a bulk collection of goods such as a quality of meat. It does not, however, apply to a specified quantity of an identified bulk e.g. 2.5 kilos of lamb from a bulk of 10 kilos. In such a case the goods are "unascertained", see below.

9.5 The key feature of "specific" goods is that only those particular items can be used to fulfil the contract; it is not possible to select or substitute any other identical but alternative items.

[368] Inserted from 19 September 1995 by the Sale of Goods (Amendment) Act 1995.

"Unascertained"

9.6 There is no actual definition of the term "unascertained" within the SoGA. The term is used as the converse of "specific" goods and refers to goods which have not been identified and agreed upon at the time the contract was made. "Unascertained", therefore, applies to goods which are defined only by description, where the precise items have not been identified and separated

9.7 There are said to be three categories of unascertained goods:

a) goods yet to be manufactured or grown by the seller or goods yet to be acquired by the seller (future goods), apart from specifically identified goods which are to be acquired by the seller;
b) generic goods e.g. a kilo of lamb;
c) an undivided share of a specified whole, e.g. 2.5 kilos of lamb from an specified bulk of 10 kilos.[369]

"Ascertained"

9.8 There is no statutory definition of "ascertained" within the SoGA. It involves the goods in question being identified and appropriated or allocated to the contract, as indicated by Atkin L.J: "identified in accordance with the agreement after the time a contract of sale is made".[370]

9.9 There are two main methods of ascertainment of goods:

a) By positive action – where some action is taken to separate the contract goods from a collection of goods and which shows the seller's intention to assign those particular goods to the contract, e.g. parcelling them up and labelling them for the buyer.
b) By negative action - by exhaustion i.e. where all the remaining part of the bulk has been taken away/delivered to other. If, having contracted to buy 6 eggs from a batch of 24 only 6 eggs remain, the other 18 having been disposed of, the final 6 become ascertained by exhaustion.

"Existing" goods

Section 5(1) of the SoGA states that "existing" goods are:

> "owned or possessed by the seller" .

9.10 Ownership and possession are alternatives here, but the seller must be able to satisfy at least one for goods to be "existing"; thus goods which the seller neither owns at the time of making the contract nor possesses cannot be "existing" goods, but instead would be "future" goods. Goods would be "existing" goods if owned by the seller but in the possession of a third party at the time of contracting.[371] Similarly, an item owned by a third party but in the possession of the seller at the time of sale would also be "existing" goods.[372]

---

[369] Unless the share is expressed as a fraction or a percentage, in which case the goods are 'specific', see para 9.7.
[370] *Re Wait* [1927] 1 Ch 606, at p. 630.
[371] For example a diamond ring owned by the seller but in the possession of a jeweller at the time of sale.
[372] For example a diamond ring owned by a third party and in the possession of a jeweller. If the jeweller intends to buy the ring from the third party and sell it on to a customer, the ring would be treated as "existing" goods.

9.11 Existing goods may be further classified as “specific” goods or “unascertained” goods, depending upon which category they fall under.

“Future”

9.12 Under section 61(1) of the SoGA “future” goods are defined as:

> “goods to be manufactured or acquired by the seller after the making of the contract of sale”.

9.13 This definition, therefore, covers goods which are yet to be made i.e. do not physically exist at the time the contract is made. It also covers goods which do actually exist at the time of contracting but which the seller has not yet acquired i.e. the seller has not yet become the owner of the goods, or is not in possession of them.

9.14 Future goods will, in most cases, be unascertained, in particular where they have not yet been manufactured. It is, however, also possible for future goods to be specific goods, where, for example, there is a contract for the sale of an individual second-hand car, which the seller neither owns nor possesses at the time of contracting, but which the seller intends to purchase to fulfil the contract.

Current use of terms in the Sale of Goods Act 1979

9.15 To be able to analyse any problems caused by the current position, it is necessary to examine each of the classification terms under consideration to investigate their current application in the SoGA. Annex 4 provides a detailed listing of each of the terms under consideration, indicating where in the SoGA these terms appear. Annex 5 contains the relevant sections of the SoGA.

9.16 When the areas in which these terms are used are analysed, it can be seen that there are only 4 main distinct situations when these classifications are relevant: the perishing of goods, the rules relating to the passing of property, a limited aspect of delivery, and specific performance for breach of contract.

9.17 It is to be noted that the SGSA and the SoG(IT)A make no use of the terminology under discussion as neither of the Acts deals with any of the situations identified above.

Analysis of the problem

9.18 The current SoGA classification system of goods into the different categories under consideration could be considered to be an over-classification, which may no longer be necessary in B2C contracts. Alternatively, some form of a classification system may be necessary but it may be appropriate to simplify the system and to replace some or all of the classifications with one or more simplified alternatives. These issues are to be explored in this section.

9.19 To assess whether or not a classification system is necessary, it is useful to look at the four areas in which the current system operates[373] to see whether or not there is a need to distinguish different types of goods.

The perishing of goods

9.20 The special rules for dealing with goods which have perished, contained in SoGA sections 6 and 7, are confined to "specific goods". This must clearly be the case as, if generic goods are involved, they cannot be said to have perished, as substitutes are always possible to fulfil the contract.[374] In addition, the laws of mistake and frustration cover contracts falling outside the ambit of sections 6 and 7. If it were decided to include sections 6 and 7 in a consolidated B2C measure,[375] it would seem necessary to decide between:

- continuing the reference to "specific goods";
- replacing the term "specific goods" with a clearer, more modern term;
- or, if there are to be no other references to "specific goods" elsewhere in the Act, to include the definition of specific goods or explicit reference to the definition within section 6. This would make it easier to read and understand the section.

Consideration would also be necessary as to whether the sections should be extended to cover contracts for the transfer of goods, which currently fall under the general law.[376]

Passing of property

9.21 The rules relating to the passing of property are contained in sections 16–19, 20A and 20B of the SoGA. The question of whether or not property has passed is important for a number of reasons. It is the core requirement for a contract of sale of goods under section 2(1) that property in the goods is to pass; it can affect the transfer of risk;[377] it is linked with the rules regarding the passing of title under sections 21–26;[378] and is significant in cases of insolvency, both that of buyers and of sellers.

9.22 When contracts other than sale of goods contracts are examined, it can be seen that contracts for the transfer of goods are similar to sale of goods contracts in that a core requirement is that property is to pass, under SGSA, section 1(1). The SGSA, however, contains no provisions detailing how and when property does pass. If a consolidated B2C statute is implemented, it would be necessary to decide if the rules for the passing of property in the SoGA (either as currently presented or in a simplified form) should also apply to contracts for the transfer of goods, with or without modifications.

9.23 In contracts for hire, there is no intention to pass property, only possession, so the issue does not arise. In hire purchase contracts, property only passes in accordance with the requirements of the SoG(IT)A, section 15, after exercising an option to purchase, the doing

[373] See para. 9.16.
[374] Based on the maxim '*genus numquam perit*' (the kind/type never dies).
[375] See discussion on streamlining the structure and separating the provisions, paras. 6.53-6.57.
[376] There is no similar issue for hire or hire purchase contracts as the contracts do not commence until the goods are delivered. See further para. 9.30.
[377] See SoGA, s.20.
[378] The basic rule is that only those with general property in the goods can pass good title to them, which is then subject to exceptions allowing those without property to pass title in some cases.

of some specified act, or after the happening of some other specified event. It does not, therefore, seem necessary for further consideration to be given to these two types of contract.

9.24 Although the link between passing of property and risk is important, for B2C sale of goods contracts the need to decide whether or not property has passed is unnecessary as section 20(4) of the SoGA prevents risk passing until the goods are delivered to the consumer, regardless of when property passes. There is, currently, no equivalent provision for transfers of goods contracts, but it would be necessary, when considering a consolidated B2C measure, to determine if section 20(4) of the SoGA should be extended to cover these contracts too.

9.25 The main area where passing of property remains of significance with regard to B2C contracts is that of insolvency.[379] This aspect is considered in more detail at paragraphs 8.24-8.37.

9.26 If the rules relating to passing of property are not restructured for B2C contracts, it would then be necessary to give consideration to the concepts of "specific" "ascertained", "unascertained" and "future" goods, all of which are referred to in relation to determining the passing of property,[380] to see if these could be rationalised or simplified.

Delivery of goods

9.27 Section 29 of the SoGA deals with rules about delivery of goods. Under sub-section (2) there is a special rule regarding the place of delivery of "specific goods" which are located elsewhere than the seller's place of business or residence.[381] There are two issues raised by this: first, is a special rule necessary and/or desirable, in particular in B2C contracts, and second, if the rule is to be maintained, need it be confined to "specific goods" or could it be broadened.

9.28 Looking first at whether such a rule is needed, unless the parties agree in their contract to do otherwise, the general assumption is that the buyer will visit the seller, at his place of business[382] to collect the goods purchased. Where there are "specific goods" which are known to be located at a place other than at the seller's place of business at the time the contract is made, the assumed place of delivery is changed to the place where the goods are located. From a consumer's point of view, it could be argued that the exception does not, particularly, improve or worsen their situation as it will always depend on the particular facts as to where is a more convenient place to take delivery: the seller's premises or the place where the goods are located. Likewise, there is no obvious benefit or detriment to the seller to have a special exception. It is likely, in practice, that there will be specific discussion and negotiation between buyer and seller as to how and where the goods are to be delivered. Many contracts are made by means of distance selling where delivery is specifically dealt

[379] For discussion of this in relation to passing of property, see J.K.Macleod, *Consumer Sales Law*, 2nd edn., (Abingdon: Routledge-Cavendish, 2007), paras. [19.12]–[19.24].
[380] See Annex 4, paras. A4.3, A4.4, A4.8, A4.9, A4.12, A4.13, A4.14 and A4.18 and Annex 5.
[381] See Annex 4, para. A4.5 and Annex 5.
[382] Or his residence, if the seller does not have a place of business. This alternative would not be needed in a B2C specific statute.

with; bulky consumer durables are stored in large warehouses, not in showrooms where the buyer and seller make their contract, with individual delivery arrangements made, etc. It may well, therefore, be considered that the exception for "specific goods" is not necessary and could be encompassed within the contractual arrangements made by the parties.

9.29 Turning now to the issue of whether the rule could be broadened if it is maintained; for the exception to operate the goods in question must clearly be identified and "allocated", otherwise their location, at the time of sale could not be known. It would not, therefore, be possible to apply the rule to goods which currently fall under the definition of "unascertained goods".[383]

9.30 The final issue regarding delivery is consideration of the position for contracts other than sale of goods contracts. Currently there are no statutory measures covering transfer of goods, hire contracts and hire purchase contracts. In hire purchase contracts, the hiring does not commence until the goods have been delivered.[384] The position is similar in a hire contract, which is also a form of bailment.[385] Contracts for the transfer of goods, in particular contracts of barter and exchange and some work and materials contracts, can be considered to be very similar to sale of goods contracts and, therefore, consideration should be given to whether to codify the rules regarding delivery to match those for sale of goods contracts in a B2C consolidation measure.

Specific performance

9.31 Section 52 of the SoGA permits a buyer to seek specific performance of a contract, at the discretion of the court, where there are "specific" or "ascertained" goods.[386] The need here is for goods to be allocated to the contract, otherwise it would not be possible for a court to order the seller to have to perform the contract, i.e. supply those goods, instead of paying damages for non-delivery.[387] One issue here is, therefore, could a less technical term be used in place of "specific" and "ascertained", in particular in B2C contracts, to make the meaning clearer and easier to understand.

9.32 It is also necessary to consider the position regarding specific performance of a contract where the contract is not one for the sale of goods. There are no statutory provisions relating to transfers of goods, hire contracts and contracts for hire purchase. It is suggested that section 52 of the SoGA would be applied by analogy.[388] When formulating a consolidated B2C measure, consideration needs to be given as to if and how section 52 could be applied to other forms of supply contracts.

9.33 An alternative option to using a less technical term would be to omit any reference to particular classes of goods in section 52 for B2C contracts and leave the issue of whether or

[383] See para. 9.7.
[384] See *National Cash Register Co. v Stanley* [1921] 3KB 292 and J.K.Macleod, *Consumer Sales Law*, 2nd edn., (Abingdon: Routledge-Cavendish, 2007), para. [15.23].
[385] J.K.Macleod, *Consumer Sales Law*, 2nd edn., (Abingdon: Routledge-Cavendish, 2007), para. [1.18].
[386] See Annex 4, paras. A4.6 and A4.10 and Annex 5.
[387] It is likely that the goods in question would have to have some unique features for specific performance to be granted.
[388] See J.K.Macleod, *Consumer Sales Law*, 2nd edn., (Abingdon: Routledge-Cavendish, 2007), para. [29.38].

not to grant specific performance for breach of contract entirely to the discretion of the court, which, it is suggested, would achieve the same result in practice.[389]

Options for change

9.34 In places it may still be necessary or desirable to draw some distinctions between different types of goods, in particular specifically identified and/or separated goods, as opposed to generic goods, for particular rules to operate. The distinctions which arise in connection with the rules relating to passing of property have much less effect in practice in B2C contracts compared with B2B contracts. This is due to the differences in the rules regarding the passing of risk. However the distinctions are currently still relevant for insolvency provisions and in relation to delivery, specific performance and the perishing of goods. This section will explore the options available regarding the classification of goods and will see if there are any solutions in other jurisdictions. It will focus on the possibilities for B2C contracts only.

Option 1 Do nothing

Advantages

9.35 The Consumer Law Review attracted very few comments on the issue of whether simplification and modernisation was needed concerning the passing of property,[390] with little evidence of problems in practice, which would support the suggestion of leaving the classification of goods unaltered.

Disadvantages

9.36 The current classifications are rooted in 19th Century case-law and are difficult to understand, with very little information included in statutory form and considerable dependency on case-law to explain, for example, the ascertainment of goods. This is not helpful for consumers, traders or advisers as the law is complex, unclear and difficult to access. If a consolidated B2C statute is created, this should aim to be transparent and easily understood. By simply importing the current terminology and distinctions these aims will not be achievable. It is unlikely that there would be further opportunities to update and clarify the terminology once a consolidated B2C measure was adopted, so action should be taken now.

Option 2 Reduce the need for classifications of goods, where possible, in B2C contracts

Advantages

9.37 Although it may not be considered possible to remove all references to the classification of goods in a consolidated B2C measure, it would help to clarify and simplify the law if some of the situations where goods are classified are either modified or removed. From

[389] Note also the availability of specific performance regarding the repair and replacement of goods under SoGA s.48E(2) and SGSA s.11R(2) which is not limited to "specific" or "ascertained" goods.
[390] See http://www.bis.gov.uk/files/file52071.pdf, para. 27.

consideration of the sections affected by the classification of goods, the two likely candidates for reform are delivery, under SoGA section 29, and specific performance, under SoGA section 52.

9.38 It is suggested that it would be possible to remove the special provision regarding delivery in SoGA, section 29(2), without causing particular problems for traders or consumers. A simplified provision could then reflect what actually happens in practice, rather than containing a statutory presumption, of which it is highly unlikely that any consumer or trader would be aware.

9.39 With regard to specific performance, there seems no need for reference to a particular class of goods in section 52 of the SoGA if this is to be included in a B2C measure as its effect would be achieved by the courts in exercising their discretion anyway.[391]

Disadvantages

9.40 This proposal, on its own, would only change things marginally and would not remove the complexities associated with the classifications of goods with regard to the passing of property and the perishing of goods.

Option 3 Replace the various classifications of goods with a single, all-embracing concept

Possible replacement concepts

9.41 It could be possible to replace the existing terms under consideration with a new single all-embracing concept.

9.42 The aspects which a new concept would need to cover are those currently encompassed by “specific goods”, “ascertained goods” and goods which have ceased to be “future” goods and have become the equivalent of existing goods. The reason for this is to distinguish goods which exist and have been clearly allocated to a contract from goods which have not been specifically allocated to a contract.

[391] See paras. 9.31-9.33.

9.43 Below is a table indicating the necessary scope of an all-embracing term and the matters which would need to fall outside the term.

Aspects to be included within the new concept	Aspects to remain outside the new concept
Specific goods identified and agreed upon at time of sale fractions and percentages of an undivided whole (25% of a racehorse etc.) Ascertained goods allocated by positive action and by negative action Goods modified to suit the contractual requirements Goods which have been manufactured since contracting Goods of which the seller has acquired ownership/possession since contracting.	Generic goods Undivided quantities of a collection of goods Goods not yet grown or manufactured Goods which the seller does not own or possess at the time of contracting

9.44 The new concept could be described by various phrases; three possibilities will be considered. If any of them were chosen it would, clearly, be necessary for an explanatory section to be included within the B2C statute to define its meaning, possibly by listing examples of what would be included within the concept.[392]

9.45 The first possibility is “unilateral appropriation”. Because this phrase includes the word “appropriation”, which is already in use in the current law, it would be preferable not to use this for a replacement concept as it is likely to cause confusion. It invites reference to previous case-law and, if the B2B residual sections remain unaltered, it would have different meanings in each type of transaction which would make it more difficult for traders and advisers to understand and apply. There is a risk that this would affect the aims of achieving clarity and simplification by introducing a consolidated B2C measure.

9.46 The second possibility is “individualisation”. This seems to cover all the required aspects and the dictionary definition refers to “to particularise” which is appropriate. It could, however, be confusing for some consumers and traders. The dictionary also refers to “stamping with individual character” and so the term “individualisation” might suggest the need to make goods unique or personalised, whereas the meaning would be much wider than this.[393]

9.47 The third possibility is “conclusive allocation”. This seems to cover all the required aspects; it encompasses the idea of finality and irrevocability and does not have any obvious alternative meanings.

[392] This could utilise the ‘for avoidance of doubt’ technique used in some statutes.
[393] It also has the disadvantage of being quite difficult to say.

9.48 There are, no doubt, other phrases which could be considered as replacement concepts. The key decision which is necessary in formulating a replacement concept is to determine the scope of its coverage, to make sure it is sufficiently comprehensive and to try to ensure that it would not generate any unplanned major shifts in the relationships between consumer and trader and, in the case of insolvency, between consumer/trader and third parties.

Advantages

9.49 The most obvious benefit of a new replacement concept for B2C contracts would be a considerable simplification of the law. If the suggestions of "individualisation" and "conclusive allocation" are used as examples, it can be seen that they could be substituted in several existing sections of the SoGA without too much difficulty, such as sections 16, 17, 19 and 20A.[394] It would, however, be necessary for some modifications to be made to other sections.[395] It would be useful if the suggested changes to delivery and specific performance[396] were adopted at the same time.

9.50 Another advantage would be the opportunity to codify the position for contracts not falling within the SoGA. Commentators often simply "assume" that similar outcomes to those provided for in the SoGA will apply in such cases. Clarification of the position for contracts for the transfer of goods would be particularly beneficial as there are many B2C transactions involving barter, exchange, coupons, work and materials etc., and these could raise very similar issues to those arising in sale of goods contracts.

Disadvantages

9.51 The introduction of a new all-embracing concept could not be a stand-alone change as it would be necessary, also, to modify, in particular, the rules in section18 of the SoGA as a new concept would apply to a wider range of goods than those currently specified in individual rules. Proposals for reform of section 18 can be found in paragraphs 8.55-8.83. Similarly a replacement concept would not work for sections 6 and 7 of the SoGA as it would be much wider than "specific goods" alone. This could be solved by defining and limiting the contracts which sections 6 and 7 apply to by including a new sub-section within section 6. In a similar vein section 5(3) of the SoGA would need to be reworded as it too is dealing with a very limited situation.[397]

9.52 Another disadvantage would be that there is a risk of changing the outcome from that achieved under the current legislation in some situations. There would need to be very detailed and careful analysis undertaken to determine this, which is beyond scope of this

[394] S.16: 'Subject to section 20A below where there is a contract for the sale of … goods [which have not been conclusively allocated/individualised], no property in the goods is transferred to the buyer unless and until the goods are [conclusively allocated to/individualised for the contract].';
S.17(1): 'Where there is a contract for the sale of [conclusively allocated/ individualised] goods etc.';
S.19(1): 'Where there is a contract for sale of [conclusively allocated/individualised goods] or where goods are subsequently [conclusively allocated/individualised] to the contract, the seller may etc.';
S.20A(1): This section applies to a contract for the sale of a specified quantity of [goods which have not been conclusively allocated/individualised] if the following etc.'.
[395] See para 9.51.
[396] See paras. 9.37-9.40.
[397] See further discussion on this point at para. 9.63.

report. It may be doubtful, however, if any resulting changes would cause great concern if the introduction of a new concept was confined to B2C transactions. This is partially because consumers and traders are, in the main, almost certainly completely unaware of the present position and so would not have strong wishes to maintain the status quo. In addition, it is very likely to be a case of “you win some, you loose some” if change is brought about, with the position improving for consumers in some situations and traders gaining an advantage in others.

Solutions in other jurisdictions

Commonwealth countries

9.53 It is apparent from an examination of the legislation operative in many Commonwealth and former Commonwealth countries that their sale of goods statutes are still based on the United Kingdom's Sale of Goods Act 1893, with some jurisdictions updating their measures to take into account subsequent UK developments. This can be seen in measures operating in Bangladesh, the Canadian provinces, the Australian states and New Zealand. These, therefore, do not provide any assistance when considering reform.

Denmark

9.54 When looking at the laws operative in some European countries, it can be seen that a much more simplified approach is taken to the passing of property and risk. For example, in Denmark there is only a distinction between "specific goods" and "generic goods", with only the latter being partially defined.[398] Risk passes when delivery has been made,[399] and for consumer contracts there is no distinction between different types of goods. There is a provision similar to section 29(2) of the SoGA regarding delivery in section 9(2) of the Danish Act,[400] although, again, the type of goods involved is not relevant.

Finland

9.55 In Finland, the Sale of Goods Act 1987 also links the passing of risk with the delivery of goods.[401] There is no mention of specific goods, generic goods or similar categorisations, although section 14 does make it clear that goods have to be "clearly identified to the contract, whether by markings on the goods, by the transport documents or otherwise" before risk can pass.

United States

9.56 In the United States the Uniform Commercial Code provides a definition of "future goods" in Article 2-105,[402] whereby goods which are not both existing and identified are "future" goods. For any interest in goods to pass, they must be both existing and identified. According to Article 2-501[403] a buyer obtains "special property and an insurable interest" by identification of existing goods and the section goes on to provide an explanation of how and when goods are "identified", covering, amongst other things, future goods, growing crops and the sale of unborn young. There is no general rule regarding the passing of property, instead there are separate sections dealing with such things as insolvency of buyers and of sellers. Article 2-613 deals with the equivalent of sections 6 and 7 of the SoGA[404] and is

[398] Danish Sale of Goods Act 2003, as amended, s.3, see Annex 6.
[399] Danish Sale of Goods Act 2003, as amended, s.17, see Annex 6.
[400] See Annex 6.
[401] Finnish Sale of Goods Act 1987, s.13, see Annex 7.
[402] See Annex 8.
[403] See Annex 8.
[404] See Annex 8.

limited to goods "identified" when the contract is made. In the case of specific performance, Article 2-716 limits its application to "unique goods or in other proper circumstances".[405]

Draft of Common Frame of Reference

9.57 The DCFR does not provide any classification of goods similar to that used in the SoGA. It does cover the passing of ownership in Chapter VIII, paragraph 2.101,[406] where a requirement is that goods have to exist, and that where there are generic goods, these have to be identified to the contract. Similarly, for the passing of risk in Book IV, para. 5:102,[407] goods must be "clearly identified to the contract, whether by markings on the goods, by shipping documents, by notice given to the buyer or otherwise".[408]

Recommendations

Time for Change

9.58 Having considered the current use of the terms "specific goods", "ascertained goods", "unascertained goods", "existing goods" and "future goods", it does not seem necessary to perpetuate the unchanged use of these terms in relation to B2C contracts, irrespective of any more major decisions regarding the rules on the passing of property. Given the opportunity afforded by a consolidation of statutory measures in relation to B2C transactions, it is recommended that changes to the classification of goods take place at the same time. It is clear from looking at other jurisdictions that it is possible for a much simpler regime to operate successfully.

Reduction in occasions when goods are classified

9.59 As suggested in Option 2,[409] it is recommended that the special exception to the rules regarding delivery in section 29(2) of the SoGA is not continued in a new B2C measure and, similarly, section 52 of the SoGA, regarding specific performance, need not refer to particular classes of goods. This would remove 2 occasions on which reference is made to "specific goods" and one reference to "ascertained goods".

Introduction of a new concept

9.60 The advantages[410] of a simplified, all-embracing concept to replace the combined effects of "specific goods", "ascertained goods" and "existing goods" appear to outweigh any disadvantages regarding the risk of altering the balance between consumer and trader and consumer/trader and third parties in B2C insolvency situations.[411] The preferred option is the concept of "conclusive allocation" as this does not have any connections with existing terms and it spells out the distinguishing features of the goods covered by the concept. It connotes

[405] See Annex 8.
[406] See Annex 1.
[407] See Annex 1.
[408] This is similar to the wording used in s.14 of the Finnish Sales of Goods Act 1987, see Annex 7.
[409] See paras. 9.37-9.40.
[410] See paras. 9.49-9.50.
[411] See para. 9.52.

more than just identification of goods; it suggests a final and irrevocable decision to apply the goods in question to the contract.

Consequences of introducing a new concept

9.61 A number of sections of the SoGA concerning the passing of property would be easily adapted to replace existing wording with a new concept,[412] without, it is suggested causing major changes to the legal outcomes. It would be useful, when inserting these amended sections into a consolidated measure, to extend their operation, where appropriate, to contracts of hire-purchase and transfer of goods.[413]

9.62 With regard to section 18 of the SoGA, it would first be necessary to decide if the current rules should continue without adopting any of simplification or rationalisation proposals put forward in Chapter 8. If this was to be the case, it is suggested that Rule 5(1)[414] could incorporate the new classification concept by replacing references to "unascertained" and "future" goods by the phrase "goods which have not been conclusively allocated" (or any other preferred alternative terminology for the new concept). Rules 1, 2 and 3 are limited to "specific goods", which is narrower than the proposed new concept and so it might be considered necessary to retain the term "specific goods" and its definition to avoid major changes to the current law. This would also prevent any need for changes to the SoGA, sections 6 and 7.[415]

9.63 Finally, with regard to "future" goods and section 5 of the SoGA, it would be necessary to decide if this classification is necessary. (The reference to "future goods" in section 18, Rule 5 has already been dealt with.[416]) It could be argued that, if there was a contract for the supply of goods which the supplier has not yet manufactured, this would no longer cause difficulties where there is a consolidated statute covering the supply of both goods and services.[417] There would be no need, therefore, for such a contract to be treated as an "agreement to sell", rather than a sale, under section 5(3). This does not, however, solve the issue with regard to the other form of future goods – those which the seller only acquires after the making of the contract of sale. It would be necessary to decide whether or not to include a provision whereby a contract for the supply of goods[418] which the supplier either did not own or did not possess at the time of making the contract should still be treated as an a agreement to sell and include an appropriately amended version section 5 of the SoGA in the new B2C measure.

[412] See para. 9.49.
[413] Hire purchase contracts involve the passing of property when the buyer exercises his option to purchase. Hire contracts are excluded here as no property passes under such contracts.
[414] See Annex 5.
[415] See para. 9.50.
[416] See para. 9.62.
[417] Currently the SoGA does not apply to work and materials and services contracts and so goods yet to be manufactured have to be treated differently from existing goods.
[418] Also covering, it is suggested, not just sale of goods contracts but also contracts for transfer for the transfer of goods etc.

ANNEXES

Electronic Links to Sources referred to

Draft Common Frame of Reference
http://ec.europa.eu/justice/policies/civil/docs/dcfr_outline_edition_en.pdf

Proposal for a Directive on Consumer Rights
http://ec.europa.eu/consumers/rights/docs/COMM_PDF_COM_2008_0614_F_EN_PROPOSITION_DE_DIRECTIVE.pdf

UN Convention on the International Sale of Goods
http://www.uncitral.org/pdf/english/texts/sales/cisg/CISG.pdf

Legislation from Other European Countries
http://www.eu-consumer-law.org/index.html

Australian Trade Practices Amendement Act 2010
http://www.comlaw.gov.au/ComLaw/Legislation/Act1.nsf/0/6F2582D6C8E9B48DCA25772F0019F9CD/$file/0442010.pdf

New Zealand Consumer Guarantees Act 1993
http://www.legislation.govt.nz/act/public/1993/0091/latest/DLM311053.html

ANNEX I: **SPECIFIC PROVISIONS OF THE DRAFT OF THE COMMON FRAME OF REFERENCE REFERRED TO**

Book III

III. – 3:302: Enforcement of non-monetary obligations
(1) The creditor is entitled to enforce specific performance of an obligation other than one to pay money.
(2) Specific performance includes the remedying free of charge of a performance which is not in conformity with the terms regulating the obligation.
…

III. – 3:706: Substitute transaction
A creditor who has terminated a contractual relationship in whole or in part under Section 5 and has made a substitute transaction within a reasonable time and in a reasonable manner may, in so far as entitled to damages, recover the difference between the value of what would have been payable under the terminated relationship and the value of what is payable under the substitute transaction, as well as damages for any further loss.

III. – 3:707: Current price
Where the creditor has terminated a contractual relationship in whole or in part under Section 5 and has not made a substitute transaction but there is a current price for the performance, the creditor may, in so far as entitled to damages, recover the difference between the contract price and the price current at the time of termination as well as damages for any further loss.

Book IV

Part A Chapter 5: Passing of risk

IV. A. – 5:101: Effect of passing of risk
Loss of, or damage to, the goods after the risk has passed to the buyer does not discharge the buyer from the obligation to pay the price, unless the loss or damage is due to an act or omission of the seller.

IV. A. – 5:102: Time when risk passes
(1) The risk passes when the buyer takes over the goods or the documents representing them.
(2) However, if the contract relates to goods not then identified, the risk does not pass to the buyer until the goods are clearly identified to the contract, whether by markings on the goods, by shipping documents, by notice given to the buyer or otherwise.
(3) The rule in paragraph (1) is subject to the Articles in Section 2 of this Chapter.

Part C Rules applying to service contracts in general

IV. C. – 2:105 Obligation of skill and care
(1) The service provider must perform the service:

(a) with the care and skill which a reasonable service provider would exercise under the circumstances; and
(b) in conformity with any statutory or other binding legal rules which are applicable to the service.
(2) If the service provider professes a higher standard of care and skill the provider must exercise that care and skill.
(3) If the service provider is, or purports to be, a member of a group of professional service providers for which standards have been set by a relevant authority or by that group itself, the service provider must exercise the care and skill expressed in those standards.
(4) In determining the care and skill the client is entitled to expect, regard is to be had, among other things, to:
(a) the nature, the magnitude, the frequency and the foreseeability of the risks involved in the performance of the service for the client;
(b) if damage has occurred, the costs of any precautions which would have prevented that damage or similar damage from occurring;
(c) whether the service provider is a business;
(d) whether a price is payable and, if one is payable, its amount; and
(e) the time reasonably available for the performance of the service.
(5) The obligations under this Article require in particular the service provider to take reasonable precautions in order to prevent the occurrence of damage as a consequence of the performance of the service.

IV. C.- 2:106 Obligation to achieve a result
(1) The supplier of a service must achieve the specific result stated or envisaged by the client at the time of the conclusion of the contract, provided that in the case of a result envisaged but not stated:
(a) the result envisaged was one which the client could reasonably be expected to have envisaged; and
(b)the client had no reason to believe that there was a substantial risk that the result would not be achieved by the service. …
IV.C. -3:104 Conformity
(1) The constructor must ensure that the structure is of the quality and description required by the contract. Where more than one structure is to be made, the quantity must also be in conformity with the contract.
(2) The structure does not conform to the contract unless it is:
(a) fit for any particular purpose expressly or impliedly made known to the constructor at the time of the conclusion of the contract or at the time of any variation ...; and
(b) fit for the particular purpose or purposes for which a structure of the same description would ordinarily be used.
(3) The client is not entitled to invoke a remedy for non-conformity if a direction provided by the client under IV.C -2:107 (Directions of the client) is the cause of the non-conformity and the constructor performed the obligation to warn pursuant to IV.C -2:108 (Contractual obligation of the service provider to warn).

Chapter 7: Information and Advice

IV.C -7:105 Conformity

(1) The provider must provide information which is of the quantity, quality and description required by the contract.
(2) The factual information provided by the information provider to the client must be a correct description of the actual situation described.

Book VIII: Acquisition and loss of ownership of goods

Chapter 1: General provisions

Section 1: Scope of application and relation to other provisions

VIII. – 1:101: Scope of application

(1) This Book applies to the acquisition, loss and protection of ownership of goods and to specific related issues.
(2) This Book does not apply to the acquisition or loss of ownership of goods by:
(a) universal succession, in particular under the law of succession and under company law;
(b) expropriation and forfeiture;
(c) separation from movable or immovable property;
(d) division of co-ownership, unless provided by VIII. – 2:306 (Delivery out of the bulk) or VIII. – 5:202 (Commingling);
(e) survivorship or accrual, unless covered by Chapter 5 of this Book;
(f) real subrogation, unless covered by Chapter 5 of this Book;
(g) occupation;
(h) finding; or
(i) abandonment.
(3) This Book applies to the acquisition and loss of ownership of goods by extrajudicial enforcement in the sense of Book IX or the equivalent. It may be applied, with appropriate adaptations, to the acquisition and loss of ownership of goods by judicial or equivalent enforcement.
(4) This Book does not apply to:
(a) company shares or documents embodying the right to an asset or to the performance of an obligation, except documents containing the undertaking to deliver goods for the purposes of VIII. – 2:105 (Equivalents to delivery) paragraph (4); or
(b) electricity.
(5) This Book applies, with appropriate adaptations, to banknotes and coins that are current legal tender.

VIII. – 1:102: Registration of goods

(1) Whether ownership and the transfer of ownership in certain categories of goods may be or have to be registered in a public register is determined by national law.
(2) The effects of such registration, as determined by national law, have priority over the respective rules of this Book.

VIII. – 1:103: Priority of other provisions

(1) In relation to a transfer, or retention, of ownership for purposes of security, the provisions of Book IX apply and have priority over the provisions in this Book.
(2) In relation to a transfer of ownership for purposes of a trust, or to or from a trust, the provisions of Book X apply and have priority over the provisions in this Book.

VIII. – 1:104: Application of rules of Books I to III
Where, under the provisions of this Book, proprietary effects are determined by an agreement, Books I to III apply, where appropriate.

Section 2:Definitions

VIII. – 1:201: Goods
"Goods" means corporeal movables. It includes ships, vessels, hovercraft or aircraft, space objects, animals, liquids and gases.

VIII. – 1:202: Ownership
"Ownership" is the most comprehensive right a person, the "owner", can have over property, including the exclusive right, so far as consistent with applicable laws or rights granted by the owner, to use, enjoy, modify, destroy, dispose of and recover the property.

VIII. – 1:203: Co-ownership
Where "co-ownership" is created under this Book, this means that two or more co-owners own undivided shares in the whole goods and each co-owner can dispose of that co-owner's share by acting alone, unless otherwise provided by the parties.

VIII. – 1:204: Limited proprietary rights
Limited proprietary rights in the sense of this Book are:
(a) security rights if characterised or treated as proprietary rights by Book IX or by national law;
(b) rights to use if characterised or treated as proprietary rights by other provisions of these model rules or by national law;
(c) rights to acquire in the sense of VIII. – 2:307 (Contingent right of transferee under retention of ownership) or if characterised or treated as proprietary rights by other provisions of these model rules or by national law;
(d) trust-related rights if characterised or treated as proprietary rights by Book X or by national law.

VIII. – 1:205: Possession
(1) Possession, in relation to goods, means having direct physical control or indirect physical control over the goods.
(2) Direct physical control is physical control which is exercised by the possessor personally or through a possession-agent exercising such control on behalf of the possessor (direct possession).
(3) Indirect physical control is physical control which is exercised by means of another person, a limited-right-possessor (indirect possession).

VIII. – 1:206: Possession by owner-possessor
An "owner-possessor" is a person who exercises direct or indirect physical control over the goods with the intention of doing so as, or as if, an owner.

VIII. – 1:207: Possession by limited-right-possessor
(1) A "limited-right-possessor" is a person who exercises physical control over the goods either:

(a) with the intention of doing so in that person's own interest, and under a specific legal relationship with the owner-possessor which gives the limited-right-possessor the right to possess the goods; or
(b) with the intention of doing so to the order of the owner-possessor, and under a specific contractual relationship with the owner-possessor which gives the limited-right-possessor a right to retain the goods until any charges or costs have been paid by the owner-possessor.
(2) A limited-right-possessor may have direct physical control or indirect physical control over the goods.

VIII. – 1:208: Possession through a possession-agent

(1) A "possession-agent" is a person:
(a) who exercises direct physical control over the goods on behalf of an owner-possessor or limited-right-possessor without the intention and specific legal relationship required under VIII. – 1:207 (Possession by limited-right-possessor) paragraph (1); and
(b) to whom the owner-possessor or limited-right-possessor may give binding instructions as to the use of the goods in the interest of the owner-possessor or limited-right-possessor.
(2) A possession-agent may, in particular, be:
(a) an employee of the owner-possessor or limited-right-possessor or a person exercising a similar function; or
(b) a person who is given physical control over the goods by the owner- possessor or limited-right-possessor for practical reasons.
(3) A person is also a possession-agent where that person is accidentally in a position to exercise, and does exercise, direct physical control over the goods for an owner-possessor or limited-right-possessor.

Section 3: Further general rules

VIII. – 1:301: Transferability
(1) All goods are transferable except where provided otherwise by law. A limitation or prohibition of the transfer of goods by a contract or other juridical act does not affect the transferability of the goods.
(2) Whether or to what extent uncollected fruits of, and accessories or appurtenances to, goods or immovable assets are transferable separately is regulated by national law. Chapter 5 remains unaffected.

Chapter 2: Transfer of ownership based on the transferor's right or authority

Section 1: Requirements for transfer under this chapter

VIII. – 2:101: Requirements for the transfer of ownership in general
(1) The transfer of ownership of goods under this Chapter requires that:
(a) the goods exist;
(b) the goods are transferable;
(c) the transferor has the right or authority to transfer the ownership;
(d) the transferee is entitled as against the transferor to the transfer of ownership by virtue of a contract or other juridical act, a court order or a rule of law; and

(e) there is an agreement as to the time ownership is to pass and the conditions of this agreement are met, or, in the absence of such agreement, delivery or an equivalent to delivery.
(2) For the purposes of paragraph (1)(e) the delivery or equivalent to delivery must be based on, or referable to, the entitlement under the contract or other juridical act, court order or rule of law.
(3) Where the contract or other juridical act, court order or rule of law defines the goods in generic terms, ownership can pass only when the goods are identified to it. Where goods form part of an identified bulk, VIII. – 2:305 (Transfer of goods forming part of a bulk) applies.
(4) Paragraph (1)(e) does not apply where ownership passes under a court order or rule of law at the time determined in it.

VIII. – 2:102: Transferor's right or authority
(1) Where the transferor lacks a right or authority to transfer ownership at the time ownership is to pass, the transfer takes place when the right is obtained or the person having the right or authority to transfer has ratified the transfer at a later time.
(2) Upon ratification the transfer produces the same effects as if it had initially been carried out with authority. However, proprietary rights acquired by other persons before ratification remain unaffected.

VIII. – 2:103: Agreement as to the time ownership is to pass
The point in time when ownership passes may be determined by party agreement, except where registration is necessary to acquire ownership under national law.

VIII. – 2:104: Delivery
(1) For the purposes of this Book, delivery of the goods takes place when the transferor gives up and the transferee obtains possession of the goods in the sense of VIII. – 1:205 (Possession).
(2) If the contract or other juridical act, court order or rule of law involves carriage of the goods by a carrier or a series of carriers, delivery of the goods takes place when the transferor's obligation to deliver is fulfilled and the carrier or the transferee obtains possession of the goods.

VIII. – 2:105: Equivalents to delivery
(1) Where the goods are already in the possession of the transferee, the retention of the goods on the coming into effect of the entitlement under the contract or other juridical act, court order or rule of law has the same effect as delivery.
(2) Where a third person possesses the goods for the transferor, the same effect as delivery is achieved when the third party receives the transferor's notice of the ownership being transferred to the transferee, or at a later time if so stated in the notice. The same applies where notice is given to a possession-agent in the sense of VIII. – 1:208 (Possession through possession-agent).
(3) The same effect as delivery of the goods is achieved when the transferor gives up and the transferee obtains possession of means enabling the transferee to obtain possession of the goods.
(4) Where a person exercising physical control over goods issues a document containing an undertaking to deliver the goods to the current holder of the document, the transfer of that document is equivalent to delivery of the goods. The document may be an electronic one.

Section 2: Effects

VIII. – 2:201: Effects of the transfer of ownership
(1) At the time determined by Section 1, ownership passes within the limits of the transferor's right or authority to dispose, with effect between the parties and with effect against third persons.
(2) The transfer of ownership does not affect rights and obligations between the parties based on the terms of a contract or other juridical act, court order or rule of law, such as:
(a) a right resulting from the passing of risk;
(b) a right to withhold performance;
(c) a right to fruits or benefits, or an obligation to cover costs and charges; or
(d) a right to use or an obligation not to use or otherwise deal with the goods.
(3) The transfer of ownership does not affect rights of or against third parties under other rules of law, such as:
(a) any right of the transferor's creditors to treat the transfer as ineffective arising from the law of insolvency or similar provisions; or
(b) a right to claim reparation under Book VI (Non-contractual liability arising out of damage caused to another) from a third party damaging the goods.
(4) Where ownership has been transferred but the transferor still has a right to withhold delivery of the goods (paragraph (2)(b)), terminating the contractual relationship while exercising the right to withhold performance has retroactive proprietary effect in the sense of the following Article.

VIII. – 2:202: Effect of initial invalidity, subsequent avoidance, withdrawal, termination and revocation
(1) Where the underlying contract or other juridical act is invalid from the beginning, a transfer of ownership does not take place.
(2) Where, after ownership has been transferred, the underlying contract or other juridical act is avoided under Book II, Chapter 7, ownership is treated as never having passed to the transferee (retroactive proprietary effect).
(3) Where ownership must be re-transferred as a consequence of withdrawal in the sense of Book II, Chapter 5, or termination in the sense of Book III, Chapter 3, or revocation of a donation in the sense of Book IV.H, there is no retroactive proprietary effect nor is ownership re-transferred immediately. VIII. – 2:201 (Effects of the transfer of ownership) paragraph (4) remains unaffected.
(4) This Article does not affect any right to recover the goods based on other provisions of these model rules.

VIII. – 2:203: Transfer subject to condition
(1) Where the parties agreed on a transfer subject to a resolutive condition, ownership is re-transferred immediately upon the fulfilment of that condition, subject to the limits of the re-transferor's right or authority to dispose at that time. A retroactive proprietary effect of the re-transfer cannot be achieved by party agreement.
(2) Where the contract or other juridical act entitling to the transfer of ownership is subject to a suspensive condition, ownership passes when the condition is fulfilled.

Section 3: Special constellations

VIII. – 2:301: Multiple transfers
(1) Where there are several purported transfers of the same goods by the transferor, ownership is acquired by the transferee who first fulfils all the requirements of Section 1 and, in the case of a later transferee, who neither knew nor could reasonably be expected to know of the earlier entitlement of the other transferee.
(2) A later transferee who first fulfils all the requirements of Section 1 but is not in good faith in the sense of paragraph (1) must restore the goods to the transferor. The transferor's entitlement to recovery of the goods from that transferee may also be exercised by the first transferee.

VIII. – 2:302: Indirect representation
(1) Where an agent acting under a mandate for indirect representation within the meaning of IV. D. – 1:102 (Definitions) acquires goods from VIII. – 2:203 Book VIII 428 a third party on behalf of the principal, the principal directly acquires the ownership of the goods (representation for acquisition).
(2) Where an agent acting under a mandate for indirect representation within the meaning of IV. D. – 1:102 (Definitions) transfers goods on behalf of the principal to a third party, the third party directly acquires the ownership of the goods (representation for alienation).
(3) The acquisition of ownership of the goods by the principal (paragraph (1)) or by the third party (paragraph (2)) takes place when:
(a) the agent has authority to transfer or receive the goods on behalf of the principal;
(b) there is an entitlement to transfer by virtue of a contract or other juridical act, a court order or a rule of law between the agent and the third party; and
(c) there has been an agreement as to the time ownership is to pass or delivery or an equivalent to delivery in the sense of VIII. – 2:101 (Requirements for the transfer of ownership in general) paragraph (1)(e) between the third party and the agent.

VIII. – 2:303: Passing of ownership in case of direct delivery in a chain of transactions
Where there is a chain of contracts or other juridical acts, court orders or entitlements based on a rule of law for the transfer of ownership of the same goods and delivery or an equivalent to delivery is effected directly between two parties within this chain, ownership passes to the recipient with effect as if it had been transferred from each preceding member of the chain to the next.

VIII. – 2:304: Passing of ownership of unsolicited goods
(1) If a business delivers unsolicited goods to a consumer, the consumer acquires ownership subject to the business's right or authority to transfer ownership. The consumer may reject the acquisition of ownership; for these purposes, II. – 4:303 (Right or benefit may be rejected) applies by way of analogy.
(2) The exceptions provided for in II. – 3:401 (No obligation arising from failure to respond) paragraphs (2) and (3) apply accordingly.
(3) For the purposes of this Article delivery occurs when the consumer obtains physical control over the goods.

VIII. – 2:305: Transfer of goods forming part of a bulk
(1) For the purposes of this Chapter, "bulk" means a mass or mixture of fungible goods which is identified as contained in a defined space or area.

(2) If the transfer of a specified quantity of an identified bulk fails to take effect because the goods have not yet been identified in the sense of VIII. – 2:101 (Requirements for the transfer of ownership in general) paragraph (3), the transferee acquires co-ownership in the bulk.
(3) The undivided share of the transferee in the bulk at any time is such share as the quantity of goods to which the transferee is entitled out of the bulk as against the transferor bears to the quantity of the goods in the bulk at that time.
(4) Where the sum of the quantities to which the transferees are entitled as against the transferor and, if relevant, of the quantity of the transferor exceeds the total quantity contained in the bulk because the bulk has diminished, the diminution of the bulk is first attributed to the transferor, before being attributed to the transferees in proportion to their individual shares.
(5) Where the transferor purports to transfer more than the total quantity contained in the bulk, the quantity in excess of the total quantity of the bulk to which a transferee is entitled as against the transferor is reflected in the transferee's undivided share in the bulk only if the transferee, acquiring for value, neither knew nor could reasonably be expected to know of this excess. Where, as a result of such purported transfer of a quantity in excess of the bulk to a transferee in good faith and for value, the sum of the quantities to which the transferees are entitled as against the transferor exceeds the total quantity contained in the bulk, the lack of quantity is attributed to the transferees in proportion to their individual shares.

VIII. – 2:306: Delivery out of the bulk
(1) Each transferee can take delivery of a quantity corresponding to the transferee's undivided share and acquires ownership of that quantity by taking delivery.
(2) Where the delivered quantity exceeds the quantity corresponding to the transferee's undivided share, the transferee acquires ownership of the excess quantity only if the transferee, acquiring for value, neither knew nor could reasonably be expected to know of possible negative consequences of this excess for the other transferees.

VIII. – 2:307: Contingent right of transferee under retention of ownership
Where the transferor retains ownership of the goods for the purposes of a "retention of ownership device" in the sense of IX. – 1:103 (Retention of ownership devices: scope), the transferee's right to pay the price under the terms of the contract and the transferee's right to acquire ownership upon payment have effect against the transferor's creditors.

ANNEX 2: PROPOSED CONSUMER RIGHTS DIRECTIVE

Chapter I Subject matter, definitions and scope

Article 1 Subject matter
The purpose of this Directive is to contribute to the proper functioning of the internal market and achieve a high level of consumer protection by approximating certain aspects of the laws, regulations and administrative provisions of the Member States concerning contracts between consumers and traders.

Article 2 Definitions
For the purpose of this Directive, the following definitions shall apply:
(1) 'consumer' means any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession;
(2) 'trader' means any natural or legal person who, in contracts covered by this Directive, is acting for purposes relating to his trade, business, craft or profession and anyone acting in the name of or on behalf of a trader;
(3) 'sales contract' means any contract for the sale of goods by the trader to the consumer including any mixed-purpose contract having as its object both goods and services;
(4) 'goods' means any tangible movable item, with the exception of:
(a) goods sold by way of execution or otherwise by authority of law,
(b) water and gas where they are not put up for sale in a limited volume or set quantity,
(c) electricity;
(5) 'service contract' means any contract other than a sales contract whereby a service is provided by the trader to the consumer;
(6) 'distance contract' means any sales or service contract where the trader, for the conclusion of the contract, makes exclusive use of one or more means of distance communication;
(7) 'means of distance communication' means any means which, without the simultaneous physical presence of the trader and the consumer, may be used for the conclusion of a contract between those parties;
(8) 'off-premises contract' means:
(a) any sales or service contract concluded away from business premises with the simultaneous physical presence of the trader and the consumer or any sales or service contract for which an offer was made by the consumer in the same circumstances, or
(b) any sales or service contract concluded on business premises but negotiated away from business premises, with the simultaneous physical presence of the trader and the consumer.
(9) 'business premises' means:
(a) any immovable or movable retail premises, including seasonal retail premises, where the trader carries on his activity on a permanent basis, or
(b) market stalls and fair stands where the trader carries on his activity on a regular or temporary basis;
(10) 'durable medium' means any instrument which enables the consumer or the trader to store information addressed personally to him in a way accessible for future reference for a period of time adequate for the purposes of the information and which allows the unchanged reproduction of the information stored;
(11) 'order form' means an instrument setting out the contract terms, to be signed by the consumer with a view to concluding an off-premises contract;

(12) 'product' means any good or service including immoveable property, rights and obligations;
(13) 'financial service' means any service of a banking, credit, insurance, personal pension, investment or payment nature;
(14) 'professional diligence' means the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers, commensurate with honest market practice and/or the general principle of good faith in the trader's field of activity;
(15) 'auction' means a method of sale where goods or services are offered by the trader through a competitive bidding procedure which may include the use of means of distance communication and where the highest bidder is bound to purchase the goods or the services. A transaction concluded on the basis of a fixed-price offer, despite the option given to the consumer to conclude it through a bidding procedure is not an auction;
(16) 'public auction' means a method of sale where goods are offered by the trader to consumers, who attend or are given the possibility to attend the auction in person, through a competitive bidding procedure run by an auctioneer and where the highest bidder is bound to purchase the goods;
(17) 'producer' means the manufacturer of goods, the importer of goods into the territory of the Community or any person purporting to be a producer by placing his name, trade mark or other distinctive sign on the goods;
(18) 'commercial guarantee' means any undertaking by the trader or producer (the 'guarantor')to the consumer to reimburse the price paid or to replace, repair or service goods in any way if they do not meet the specifications set out in the guarantee statement or in the relevant advertising available at the time of, or before the conclusion of the contract;
(19) 'intermediary' means a trader who concludes the contract in the name of or on behalf of the consumer;
(20) 'ancillary contract' means a contract by which the consumer acquires goods or services related to a distance contract or an off-premises contract and these goods or services are provided by the trader or a third party on the basis of an arrangement between that third party and the trader.

Article 3 Scope
1. This Directive shall apply, under the conditions and to the extent set out in its provisions, to sales and service contracts concluded between the trader and the consumer.
2. This Directive shall only apply to financial services as regards certain off-premises contracts as provided for by Articles 8 to 20, unfair contract terms as provided for by Articles 30 to 39 and general provisions as provided for by Articles 40 to 46, read in conjunction with Article 4 on full harmonisation.
3. Only Articles 30 to 39 on consumer rights concerning unfair contract terms, read in conjunction with Article 4 on full harmonisation, shall apply to contracts which fall within the scope of Directive 94/47/EC of the European Parliament and of the Council12 and of Council Directive 90/314/EEC.
4. Articles 5, 7, 9 and 11 shall be without prejudice to the provisions concerning information requirements contained in Directive 2006/123/EC of the European Parliament and of the Council and Directive 2000/31/EC of the European Parliament and of the Council.

Article 4 Full harmonisation

Member States may not maintain or introduce, in their national law, provisions diverging from those laid down in this Directive, including more or less stringent provisions to ensure a different level of consumer protection.

Chapter II Consumer information

Article 5 General information requirements

1. Prior to the conclusion of any sales or service contract, the trader shall provide the consumer with the following information, if not already apparent from the context:

(a) the main characteristics of the product, to an extent appropriate to the medium and the product;

(b) the geographical address and the identity of the trader, such as his trading name and, where applicable, the geographical address and the identity of the trader on whose behalf he is acting;

(c) the price inclusive of taxes, or where the nature of the product means that the price cannot reasonably be calculated in advance, the manner in which the price is calculated, as well as, where appropriate, all additional freight, delivery or postal charges or, where these charges cannot reasonably be calculated in advance, the fact that such additional charges may be payable;

(d) the arrangements for payment, delivery, performance and the complaint handling policy, if they depart from the requirements of professional diligence;

(e) the existence of a right of withdrawal, where applicable;

(f) the existence and the conditions of after-sales services and commercial guarantees, where applicable;

(g) the duration of the contract where applicable or if the contract is open-ended, the conditions for terminating the contract;

(h) the minimum duration of the consumer's obligations under the contract, where applicable;

(i) the existence and the conditions of deposits or other financial guarantees to be paid or provided by the consumer at the request of the trader.

2. In the case of a public auction, the information in paragraph 1(b) may be replaced by the geographical address and the identity of the auctioneer.

3. The information referred to in paragraph 1 shall form an integral part of the sales or service contract.

Article 6 Failure to provide information

1. If the trader has not complied with the information requirements on additional charges as referred to in Article 5(1)(c), the consumer shall not pay these additional charges.

2. Without prejudice to Articles 7(2), 13 and 42, the consequences of any breach of Article 5, shall be determined in accordance with the applicable national law.

Member States shall provide in their national laws for effective contract law remedies for any breach of Article 5.

Article 7 Specific information requirements for intermediaries

1. Prior to the conclusion of the contract, the intermediary shall disclose to the consumer, that he is acting in the name of or on behalf of another consumer and that the contract concluded, shall not be regarded as a contract between the consumer and the trader but rather as a contract between two consumers and as such falling outside the scope of this Directive.

2. The intermediary, who does not fulfil the obligation under paragraph 1, shall be deemed to have concluded the contract in his own name.

3. This Article shall not apply to public auctions.

Chapter III Consumer information and withdrawal right for distance and off-premises contracts

Article 8 Scope
This Chapter shall apply to distance and off-premises contracts.

Article 9 Information requirements for distance and off-premises contracts
As regards distance or off-premises contracts, the trader shall provide the following information which shall form an integral part of the contract:
(a) the information referred to in Articles 5 and 7 and, by way of derogation from Article 5(1)(d), the arrangements for payment, delivery and performance in all cases;
(b) where a right of withdrawal applies, the conditions and procedures for exercising that right in accordance with Annex I;
(c) if different from his geographical address, the geographical address of the place of business of the trader (and where applicable that of the trader on whose behalf he is acting) where the consumer can address any complaints;
(d) the existence of codes of conduct and how they can be obtained, where applicable;
(e) the possibility of having recourse to an amicable dispute settlement, where applicable;
(f) that the contract will be concluded with a trader and as a result that the consumer will benefit from the protection afforded by this Directive.

Article 10 Formal requirements for off-premises contracts
1. With respect to off-premises contracts, the information provided for in Article 9 shall be given in the order form in plain and intelligible language and be legible. The order form shall include the standard withdrawal form set out in Annex I(B).
2. An off-premises contract shall only be valid if the consumer signs an order form and in cases where the order form is not on paper, receives a copy of the order form on another durable medium.
3. Member States shall not impose any formal requirements other than those provided for in paragraphs 1 and 2.

Article 11 Formal requirements for distance contracts
1. With respect to distance contracts, the information provided for in Article 9(a) shall be given or made available to the consumer prior to the conclusion of the contract, in plain and intelligible language and be legible, in a way appropriate to the means of distance communication used.
2. If the trader makes a telephone call to the consumer with a view to concluding a distance contract, he shall disclose his identity and the commercial purpose of the call at the beginning of the conversation with the consumer.
3. If the contract is concluded through a medium which allows limited space or time to display the information, the trader shall provide at least the information regarding the main characteristics of the product and the total price referred to in Articles 5(1)(a) and (c) on that particular medium prior to the conclusion of such a contract. The other information referred to in Articles 5 and 7 shall be provided by the trader to the consumer in an appropriate way in accordance with paragraph 1.
4. The consumer shall receive confirmation of all the information referred to in Article 9(a) to (f), on a durable medium, in reasonable time after the conclusion of any distance contract, and at the latest at the time of the delivery of the goods or when the performance of the

service has begun, unless the information has already been given to the consumer prior to the conclusion of any distance contract on a durable medium.
5. Member States shall not impose any formal requirements other than those provided for in paragraphs 1 to 4.

Article 12 Length and starting point of the withdrawal period
1. The consumer shall have a period of fourteen days to withdraw from a distance or off-premises contract, without giving any reason.
2. In the case of an off-premises contract, the withdrawal period shall begin from the day when the consumer signs the order form or in cases where the order form is not on paper, when the consumer receives a copy of the order form on another durable medium.
In the case of a distance contract for the sale of goods, the withdrawal period shall begin from the day on which the consumer or a third party other than the carrier and indicated by the consumer acquires the material possession of each of the goods ordered.
In the case of a distance contract for the provision of services, the withdrawal period shall begin from the day of the conclusion of the contract.
3. The deadline referred to in paragraph 1 is met if the communication concerning the exercise of the right of withdrawal is sent by the consumer before the end of that deadline.
4. The Member States shall not prohibit the parties from performing their obligations under the contract during the withdrawal period.

Article 13 Omission of information on the right of withdrawal
If the trader has not provided the consumer with the information on the right of withdrawal in breach of Articles 9(b), 10(1) and 11(4), the withdrawal period shall expire three months after the trader has fully performed his other contractual obligations.

Article 14 Exercise of the right of withdrawal
1. The consumer shall inform the trader of his decision to withdraw on a durable medium either in a statement addressed to the trader drafted in his own words or using the standard withdrawal form as set out in Annex I(B).
Member States shall not provide for any other formal requirements applicable to this standard withdrawal form.
2. For distance contracts concluded on the Internet, the trader may, in addition to the possibilities referred to in paragraph 1, give the option to the consumer to electronically fill in and submit the standard withdrawal form on the trader's website.
In that case the trader shall communicate to the consumer an acknowledgement of receipt of such a withdrawal by email without delay.

Article 15 Effects of withdrawal
The exercise of the right of withdrawal shall terminate the obligations of the parties:
(a) to perform the distance or off-premises contract, or
(b) to conclude an off-premises contract, in cases where an offer was made by the consumer.

Article 16 Obligations of the trader in case of withdrawal
1. The trader shall reimburse any payment received from the consumer within thirty days from the day on which he receives the communication of withdrawal.

2. For sales contracts, the trader may withhold the reimbursement until he has received or collected the goods back, or the consumer has supplied evidence of having sent back the goods, whichever is the earliest.

Article 17 Obligations of the consumer in case of withdrawal

1. For sales contracts for which the material possession of the goods has been transferred to the consumer or at his request, to a third party before the expiration of the withdrawal period, the consumer shall send back the goods or hand them over to the trader or to a person authorised by the trader to receive them, within fourteen days from the day on which he communicates his withdrawal to the trader, unless the trader has offered to collect the goods himself.

The consumer shall only be charged for the direct cost of returning the goods unless the trader has agreed to bear that cost.

2. The consumer shall only be liable for any diminished value of the goods resulting from the handling other than what is necessary to ascertain the nature and functioning of the goods. He shall not be liable for diminished value where the trader has failed to provide notice of the withdrawal right in accordance with Article 9(b).

For service contracts subject to a right of withdrawal, the consumer shall bear no cost for services performed, in full or in part, during the withdrawal period.

Article 18 Effects of the exercise of the right of withdrawal on ancillary contracts

1. Without prejudice to Article 15 of Directive 2008/48/EC, if the consumer exercises his right of withdrawal from a distance or an off-premises contract in accordance with Articles 12 to 17, any ancillary contracts shall be automatically terminated, without any costs for the consumer.

2. The Member States shall lay down detailed rules on the termination of such contracts.

Article 19 Exceptions from the right of withdrawal

1. In respect of distance contracts, the right of withdrawal shall not apply as regards the following:

(a) services where performance has begun, with the consumer's prior express consent, before the end of the fourteen day period referred to in Article 12;

(b) the supply of goods or services for which the price is dependent on fluctuations in the financial market which cannot be controlled by the trader;

(c) the supply of goods made to the consumer's specifications or clearly personalized or which are liable to deteriorate or expire rapidly;

(d) the supply of wine, the price of which has been agreed upon at the time of the conclusion of the sales contract, the delivery of which can only take place beyond the time-limit referred to in Article 22(1) and the actual value of which is dependent on fluctuations in the market which cannot be controlled by the trader;

(e) the supply of sealed audio or video recordings or computer software which were unsealed by the consumer;

(f) the supply of newspapers, periodicals and magazines;

(g) gaming and lottery services;

(h) contracts concluded at an auction.

2. In respect of off-premises contracts, the right of withdrawal shall not apply as regards the following:

(a) contracts for the supply of foodstuffs, beverages or other goods intended for current consumption in the household, selected in advance by the consumer by means of distance communication and physically supplied to the consumer's home, residence or workplace by the trader who usually sells such goods on his own business premises;
(b) contracts for which the consumer, in order to respond to an immediate emergency, has requested the immediate performance of the contract by the trader; if, on this occasion, the trader provides or sells additional services or goods other than those which are strictly necessary to meet the immediate emergency of the consumer, the right of withdrawal shall apply to those additional services or goods;
(c) contracts for which the consumer has specifically requested the trader, by means of distance communication, to visit his home for the purpose of repairing or performing maintenance upon his property; if on this occasion, the trader provides services in addition to those specifically requested by the consumer or goods other than replacement parts necessarily used in performing the maintenance or in making the repairs, the right of withdrawal shall apply to those additional services or goods.
3. The parties may agree not to apply paragraphs 1 and 2.

Article 20 Excluded distance and off-premises contracts
1. Articles 8 to 19 shall not apply to distance and off-premises contracts:
(a) for the sale of immovable property or relating to other immovable property rights, except for rental and works relating to immovable property;
(b) concluded by means of automatic vending machines or automated commercial premises;
(c) concluded with telecommunications operators through public payphones for their use;
(d) for the supply of foodstuffs or beverages by a trader on frequent and regular rounds in the neighbourhood of his business premises.
2. Articles 8 to 19 shall not apply to off-premises contracts relating to:
(a) insurance,
(b) financial services whose price depends on fluctuations in the financial market outside the trader's control, which may occur during the withdrawal period, as defined in Article 6(2)(a) of Directive 2002/65/EC and
(c) credit which falls within the scope of Directive 2008/48/EC.
3. Articles 8 to 19 shall not apply to distance contracts for the provision of accommodation, transport, car rental services, catering or leisure services as regards contracts providing for a specific date or period of performance.

Chapter IV Other consumer rights specific to sales contracts

Article 21 Scope
1. This Chapter shall apply to sales contracts. Without prejudice to Article 24(5), where the contract is a mixed-purpose contract having as its object both goods and services, this Chapter shall only apply to the goods.
2. This Chapter shall also apply to contracts for the supply of goods to be manufactured or produced.
3. This Chapter shall not apply to the spare parts replaced by the trader when he has remedied the lack of conformity of the goods by repair under Article 26.
4. Member States may decide not to apply this Chapter to the sale of second-hand goods at public auctions.

Article 22 Delivery

1. Unless the parties have agreed otherwise, the trader shall deliver the goods by transferring the material possession of the goods to the consumer or to a third party, other than the carrier and indicated by the consumer, within a maximum of thirty days from the day of the conclusion of the contract.
2. Where the trader has failed to fulfil his obligations to deliver, the consumer shall be entitled to a refund of any sums paid within seven days from the date of delivery provided for in paragraph 1.

Article 23 Passing of risk

1. The risk of loss of or damage to the goods shall pass to the consumer when he or a third party, other than the carrier and indicated by the consumer has acquired the material possession of the goods.
2. The risk referred to in paragraph 1 shall pass to the consumer at the time of delivery as agreed by the parties, if the consumer or a third party, other than the carrier and indicated by the consumer has failed to take reasonable steps to acquire the material possession of the goods.

Article 24 Conformity with the contract

1. The trader shall deliver the goods in conformity with the sales contract.
2. Delivered goods shall be presumed to be in conformity with the contract if they satisfy the following conditions:
(a) they comply with the description given by the trader and possess the qualities of the goods which the trader has presented to the consumer as a sample or model;
(b) they are fit for any particular purpose for which the consumer requires them and which he made known to the trader at the time of the conclusion of the contract and which the trader has accepted;
(c) they are fit for the purposes for which goods of the same type are normally used or
(d) they show the quality and performance which are normal in goods of the same type and which the consumer can reasonably expect, given the nature of the goods and taking into account any public statements on the specific characteristics of the goods made about them by the trader, the producer or his representative, particularly in advertising or on labelling.
3. There shall be no lack of conformity for the purposes of this Article if, at the time the contract was concluded, the consumer was aware, or should reasonably have been aware of, the lack of conformity, or if the lack of conformity has its origin in materials supplied by the consumer.
4. The trader shall not be bound by public statements, as referred to in paragraph 2(d) if he shows that one of the following situations existed:
(a) he was not, and could not reasonably have been, aware of the statement in question;
(b) by the time of conclusion of the contract the statement had been corrected;
(c) the decision to buy the goods could not have been influenced by the statement.
5. Any lack of conformity resulting from the incorrect installation of the goods shall be considered as a lack of conformity of the goods where the installation forms part of the sales contract and the goods were installed by the trader or under his responsibility. The same shall apply equally if the goods, intended to be installed by the consumer, are installed by the consumer and the incorrect installation is due to a shortcoming in the installation instructions.

Article 25 Legal rights – Liability for lack of conformity
The trader shall be liable to the consumer for any lack of conformity which exists at the time the risk passes to the consumer.

Article 26 Remedies for lack of conformity
1. As provided for in paragraphs 2 to 5, where the goods do not conform to the contract, the consumer is entitled to:
(a) have the lack of conformity remedied by repair or replacement,
(b) have the price reduced,
(c) have the contract rescinded.
2. The trader shall remedy the lack of conformity by either repair or replacement according to his choice.
3. Where the trader has proved that remedying the lack of conformity by repair or replacement is unlawful, impossible or would cause the trader a disproportionate effort, the consumer may choose to have the price reduced or the contract rescinded.
A trader's effort is disproportionate if it imposes costs on him which, in comparison with the price reduction or the rescission of the contract, are excessive, taking into account the value of the goods if there was no lack of conformity and the significance of the lack of conformity.
The consumer may only rescind the contract if the lack of conformity is not minor.
4. The consumer may resort to any remedy available under paragraph 1, where one of the following situations exists:
(a) the trader has implicitly or explicitly refused to remedy the lack of conformity;
(b) the trader has failed to remedy the lack of conformity within a reasonable time;
(c) the trader has tried to remedy the lack of conformity, causing significant inconvenience to the consumer;
(d) the same defect has reappeared more than once within a short period of time.
5. The significant inconvenience for the consumer and the reasonable time needed for the trader to remedy the lack of conformity shall be assessed taking into account the nature of the goods or the purpose for which the consumer acquired the goods as provided for by Article 24(2)(b).

Article 27 Costs and damages
1. The consumer shall be entitled to have the lack of conformity remedied free of any cost.
2. Without prejudice to the provisions of this Chapter, the consumer may claim damages for any loss not remedied in accordance with Article 26.

Article 28 Time limits and burden of proof
1. The trader shall be held liable under Article 25 where the lack of conformity becomes apparent within two years as from the time the risk passed to the consumer.
2. When the trader has remedied the lack of conformity by replacement, he shall be held liable under Article 25 where the lack of conformity becomes apparent within two years as from the time the consumer or a third party indicated by the consumer has acquired the material possession of the replaced goods.
3. In the case of second-hand goods, the trader and the consumer may agree on a shorter liability period, which may not be less than one year.
4. In order to benefit from his rights under Article 25, the consumer shall inform the trader of the lack of conformity within two months from the date on which he detected the lack of conformity.

5. Unless proved otherwise, any lack of conformity which becomes apparent within six months of the time when the risk passed to the consumer, shall be presumed to have existed at that time unless this presumption is incompatible with the nature of the goods and the nature of the lack of conformity.

Article 29 Commercial guarantees

1. A commercial guarantee shall be binding on the guarantor under the conditions laid down in the guarantee statement. In the absence of the guarantee statement, the commercial guarantee shall be binding under the conditions laid down in the advertising on the commercial guarantee.
2. The guarantee statement shall be drafted in plain intelligible language and be legible.
It shall include the following:
(a) legal rights of the consumer, as provided for in Article 26 and a clear statement that those rights are not affected by the commercial guarantee,
(b) set the contents of the commercial guarantee and the conditions for making claims, notably the duration, territorial scope and the name and address of the guarantor,
(c) without prejudice to Articles 32 and 35 and Annex III(1)(j), set out, where applicable, that the commercial guarantee cannot be transferred to a subsequent buyer.
3. If the consumer so requests, the trader shall make the guarantee statement available in a durable medium.
4. Non compliance with paragraph 2 or 3 shall not affect the validity of the guarantee.

Chapter V Consumer rights concerning contract terms

Article 30 Scope

1. This Chapter shall apply to contract terms drafted in advance by the trader or a third party, which the consumer agreed to without having the possibility of influencing their content, in particular where such contract terms are part of a pre-formulated standard contract.
2. The fact that the consumer had the possibility of influencing the content of certain aspects of a contract term or one specific term, shall not exclude the application of this Chapter to other contract terms which form part of the contract.
3. This Chapter shall not apply to contract terms reflecting mandatory statutory or regulatory provisions, which comply with Community law and the provisions or principles of international conventions to which the Community or the Member States are party.

Article 31 Transparency requirements of contract terms

1. Contract terms shall be expressed in plain, intelligible language and be legible.
2. Contract terms shall be made available to the consumer in a manner which gives him a real opportunity of becoming acquainted with them before the conclusion of the contract, with due regard to the means of communication used.
3. The trader shall seek the express consent of the consumer to any payment in addition to the remuneration foreseen for the trader's main contractual obligation. If the trader has not obtained the consumer's express consent but has inferred it by using default options which the consumer is required to reject in order to avoid the additional payment, the consumer shall be entitled to reimbursement of this payment.
4. Member States shall refrain from imposing any presentational requirements as to the way the contract terms are expressed or made available to the consumer.

Article 32 General principles

1. Where a contract term is not included in Annex II or III, Member States shall ensure that it is regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.

2. Without prejudice to Articles 34 and 38, the unfairness of a contract term shall be assessed, taking into account the nature of the products for which the contract was concluded and by referring, at the time of the conclusion of the contract, to all the circumstances attending the conclusion and to all the other terms of the contract or of another contract on which the former is dependent. When assessing the fairness of a contract term, the competent national authority shall also take into account the manner in which the contract was drafted and communicated to the consumer by the trader in accordance with Article 31.

3. Paragraphs 1 and 2 shall not apply to the assessment of the main subject matter of the contract or to the adequacy of the remuneration foreseen for the trader's main contractual obligation, provided that the trader fully complies with Article 31.

Article 33 Burden of proof

Where the trader claims that a contract term has been individually negotiated, the burden of proof shall be incumbent on him.

Article 34 Terms considered unfair in all circumstances

Member States shall ensure that contract terms, as set out in the list in Annex II, are considered unfair in all circumstances. That list of contract terms shall apply in all Member States and may only be amended in accordance with Articles 39(2) and 40.

Article 35 Terms presumed to be unfair

Member States shall ensure that contract terms, as set out in the list in point 1 of Annex III, are considered unfair, unless the trader has proved that such contract terms are fair in accordance with Article 32. That list of contract terms shall apply in all Member States and may only be amended in accordance with Articles 39(2) and 40.

Article 36 Interpretation of terms

1. Where there is doubt about the meaning of a term, the interpretation most favourable to the consumer shall prevail.

2. This Article shall not apply in the context of the procedures laid down in Article 38(2).

Article 37 Effects of unfair contract terms

Contract terms which are unfair shall not be binding on the consumer. The contract shall continue to bind the parties if it can remain in force without the unfair terms.

Article 38 Enforcement in relation to unfair contract terms

1. Member States shall ensure that, in the interests of consumers and competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by traders.

2. In particular, persons or organisations, having a legitimate interest under national law in protecting consumers, may take action before the courts or administrative authorities for a decision as to whether contract terms drawn up for general use are unfair.

3. Member States shall enable the courts or administrative authorities to apply appropriate and effective means to prevent traders from continuing to use terms which have been found unfair.
4. Member States shall ensure that the legal actions referred to in paragraph 2 and 3 may be directed either separately or jointly depending on national procedural laws against a number of traders from the same economic sector or their associations which use or recommend the use of the same general contract terms or similar terms.

Article 39 Review of the terms in Annexes 2 and 3
1. Member States shall notify to the Commission the terms which have been found unfair by the competent national authorities and which they deem to be relevant for the purpose of amending this Directive as provided for by paragraph 2.
2. In the light of the notifications received under paragraph 1, the Commission shall amend Annex II and III. Those measures designed to amend non essential elements of this Directive shall be adopted in accordance with the regulatory procedure with
scrutiny referred to in Article 40(2).

Chapter VI General provisions

Article 40 The Committee
1. The Commission shall be assisted by the Committee on unfair terms in consumer contracts (hereinafter referred to as "the Committee").
2. Where reference is made to this paragraph, Article 5a(1) to (4), and Article 7 of Decision 1999/468/EC shall apply, having regard to the provisions of Article 8 thereof.

Article 41 Enforcement
1. Member States shall ensure that adequate and effective means exist to ensure compliance with this Directive.
2. The means referred to in paragraph 1 shall include provisions whereby one or more of the following bodies, as determined by national law, may take action under national law before the courts or before the competent administrative bodies to ensure that the national provisions for the implementation of this Directive are applied:
(a) public bodies or their representatives;
(b) consumer organisations having a legitimate interest in protecting consumers;
(c) professional organisations having a legitimate interest in acting.

Article 42 Penalties
1. Member States shall lay down the rules on penalties applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive.
2. Member States shall notify those provisions to the Commission by the date specified in Article 46 at the latest and shall notify it without delay of any subsequent amendment affecting them.

Article 43 Imperative nature of the Directive
If the law applicable to the contract is the law of a Member State, consumers may not waive the rights conferred on them by this Directive.

Article 44 Information
Member States shall take appropriate measures to inform consumers of the national provisions transposing this Directive and shall, where appropriate, encourage traders and code owners to inform consumers of their codes of conduct.

Article 45 Inertia selling
The consumer shall be exempted from the provision of any consideration in cases of unsolicited supply of a product as prohibited by Article 5(5) and point 29 of Annex I of Directive 2005/29/EC. The absence of a response from the consumer following such an unsolicited supply shall not constitute consent.

Article 46 Transposition
1. Member States shall adopt and publish, by [eighteen months after its entry into force] at the latest, the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith communicate to the Commission the text of those provisions and a correlation table between those provisions and this Directive.
They shall apply those provisions from [two years after its entry into force].
When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.
2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Chapter VII Final provisions

Article 47 Repeals
Directives 85/577/EEC 93/13/EEC and 97/7/EC and Directive 1999/44/EC, as amended by the Directives listed in Annex IV*,* are repealed.
References to the repealed Directives shall be construed as references to this Directive and shall be read in accordance with the correlation table in Annex V.

Article 48 Review
The Commission shall review this Directive and report to the European Parliament and the Council no later than [insert same date as in the second subparagraph of Article 46(1) +five years].
If necessary, it shall make proposals to adapt it to developments in the area. The Commission may request information from the Member States.

Article 49 Entry into force
This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

ANNEX 3: SPECIFIC PROVISIONS OF THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG) REFERRED TO

Article 75

If the contract is avoided and if, in a reasonable manner and within a reasonable time after avoidance, the buyer has bought goods in replacement or the seller has resold the goods, the party claiming damages may recover the difference between the contract price and the price in the substitute transaction as well as any further damages recoverable under article 74.

Article 76

(1) If the contract is avoided and there is a current price for the goods, the party claiming damages may, if he has not made a purchase or resale under article 75, recover the difference between the price fixed by the contract and the current price at the time of avoidance as well as any further damages recoverable under article 74. If, however, the party claiming damages has avoided the contract after taking over the goods, the current price at the time of such taking over shall be applied instead of the current price at the time of avoidance.

(2) For the purposes of the preceding paragraph, the current price is the price prevailing at the place where delivery of the goods should have been made or, if there is no current price at that place, the price at such other place as serves as a reasonable substitute, making due allowance for differences in the cost of transporting the goods.

Article 82

(1) The buyer loses the right to declare the contract avoided or to require the seller to deliver substitute goods if it is impossible for him to make restitution of the goods substantially in the condition in which he received them.

(2) The preceding paragraph does not apply:

(a) if the impossibility of making restitution of the goods or of making restitution of the goods substantially in the condition in which the buyer received them is not due to his act or omission;

(b) if the goods or part of the goods have perished or deteriorated as a result of the examination provided for in article 38; or

(c) if the goods or part of the goods have been sold in the normal course of business or have been consumed or transformed by the buyer in the course of normal use before he discovered or ought to have discovered the lack of conformity.

ANNEX 4: DETAILED ANALYSIS OF CURRENT USE OF TERMS IN THE SALE OF GOODS ACT 1979

General Note
All sections referred to below are contained in Annex 5.

(a) Specific goods

A4.1 There are seven sections in the SoGA which make reference to specific goods.

Section 6 (goods which have perished), section 7 (goods perishing before sale but after agreement to sell)

A4.2 Two sections, confined to sales of specific goods, deal with the situation where the goods have perished either at the time the contract is made (s. 6) or after an agreement to sell has been made, but before the risk passes to the buyer (s. 7).

Section 17 (passing of property), section 18 (rules for ascertaining intention)

A4.3 The provisions in the SoGA concerning the passing of property between the seller and buyer differ depending upon whether goods are 'specific', 'ascertained', 'unascertained' or 'future'. Section 17, which lays down the basic rule that property passes when the parties intend it to pass, applies to specific and ascertained goods. Section 18, which contains rules for ascertaining the intention of the parties, contains three rules which apply only to sales of specific goods: Rules 1, 2 and 3.

Section 19 (reservation of right of disposal)

A4.4 Section 19(1), which permits the seller of goods to reserve the right of disposal of them until certain conditions have been fulfilled, applies, inter alia, to specific goods.

Section 29 (rules about delivery)

A4.5 Section 29 is concerned with general rules about delivery, which normally depend upon the express or implied contractual arrangements between the parties. If the contract does not specify whether it is the buyer's responsibility to take possession of the goods or the seller's responsibility to send them to the buyer, sub-s. (2) makes special provision for sale of specific goods which, to the knowledge of the parties at the time the contract is made, are held somewhere other than the seller's place of business or his residence. In such a case, the place where the goods are located is the place of delivery.

Section 52 Specific Performance

A4.6 Section 52, which enables a claimant in an action for breach of contract to seek a discretionary order of specific performance, is confined to contracts for specific or ascertained goods.

(b) Ascertained goods

A4.7 Reference is made to ascertained goods in three sections of the SoGA.

Section 16 (goods must be ascertained)

A4.8 Section 16, which is concerned with the transfer of property in goods, refers to the fact that property cannot pass in unascertained goods unless and until they become ascertained.

Section 17 (passing of property)

A4.9 Section 17, which lays down the basic rule that property passes when the parties intend it to pass, applies, inter alia, to ascertained goods.

Section 52 Specific Performance

A4.10 As seen above in connection with specific goods, s. 52, which enables claimants to seek specific performance, applies to contracts for ascertained goods.

(c) Unascertained goods

A4.11 Three sections of the SoGA refer to unascertained goods.

Section 16 (goods must be ascertained)

A4.12 Section 16 specifies that, before property in unascertained goods can pass, the goods must first be ascertained.

Section 18 (rules for ascertaining intention)

A4.13 Section 18 lays down rules for determining the intention of the parties to a contract regarding the passing of property. Rule 5 is concerned specifically with, inter alia, unascertained goods.

Section 20A (undivided shares in goods forming part of a bulk)

A4.14 Section 20A makes provision for when property and ownership is to pass in contracts where there is the sale of a specified quantity of unascertained goods forming part of a specified bulk and part, or all, of the price of the goods has been paid for by the buyer.

(d) Existing goods

A4.15 The only section in the SoGA which refers to existing goods is s. 5(1), which provides the definition of existing goods and distinguishes them from future goods.

(e) Future goods

A4.16 Reference is made to future goods in two sections of the SoGA.

Section 5 (distinction between existing and future goods)

A4.17 As mentioned in para A4.15, future goods are contrasted with existing goods in s. 5. A specific provision in s. 5(3) explains that a present sale of future goods is to be treated as an agreement to sell the goods.

Section 18 (rules for ascertaining intention)

A4.18 Section 18, Rule 5, applies to future goods and provides a means of determining the intention of the parties as to when property in the goods is to pass, unless a different intention is apparent in the contract.

ANNEX 5: EXTRACTS FROM THE SALE OF GOODS ACT 1979

5 Existing or future goods
(1) The goods which form the subject of a contract of sale may be either existing goods, owned or possessed by the seller, or goods to be manufactured or acquired by him after the making of the contract of sale, in this Act called future goods.
(2) (Not relevant)
(3) Where by a contract of sale the seller purports to effect a present sale of future goods, the contract operates as an agreement to sell the goods.

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

7 Goods perishing before sale but after agreement to sell
Where there is an agreement to sell specific goods and subsequently the goods, without any fault on the part of the seller or buyer, perish before the risk passes to the buyer, the agreement is avoided.

16 Goods must be ascertained
Subject to section 20A below where there is a contract for the sale of unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained.

17 Property passes when intended to pass
(1) Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.
(2) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case.

18 Rules for ascertaining intention
Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer.
Rule 1 Where there is an unconditional contract for the sale of specific goods in a deliverable state the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed.
Rule 2 Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state, the property does not pass until the thing is done and the buyer has notice that it has been done.
Rule 3 Where there is a contract for the sale of specific goods in a deliverable state but the seller is bound to weigh, measure, test, or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until the act or thing is done and the buyer has notice that it has been done.
Rule 4 is not relevant.
Rule 5

(1) Where there is a contract for the sale of unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods then passes to the buyer; and the assent may be express or implied, and may be given either before or after the appropriation is made.
(2) Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee or custodier (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is to be taken to have unconditionally appropriated the goods to the contract.
(3) Where there is a contract for the sale of a specified quantity of unascertained goods in a deliverable state forming part of a bulk which is identified either in the contract or by subsequent agreement between the parties and the bulk is reduced to (or to less than) that quantity, then, if the buyer under that contract is the only buyer to whom goods are then due out of the bulk—
(a) the remaining goods are to be taken as appropriated to that contract at the time when the bulk is so reduced, and
(b) the property in those goods then passes to that buyer.
(4) Paragraph (3) above applies also (with the necessary modifications) where a bulk is reduced to (or to less than) the aggregate of the quantities due to a single buyer under separate contracts relating to that bulk and he is the only buyer to whom goods are then due out of that bulk.

19 Reservation of right of disposal
(1) Where there is a contract for the sale of specific goods or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled; and in such a case, notwithstanding the delivery of the goods to the buyer, or to a carrier or other bailee or custodier for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled.

20A Undivided shares in goods forming part of a bulk
(1) This section applies to a contract for the sale of a specified quantity of unascertained goods if the following conditions are met—
(a) the goods or some of them form part of a bulk which is identified either in the contract or by subsequent agreement between the parties; and
(b) the buyer has paid the price for some or all of the goods which are the subject of the contract and which form part of the bulk.
(2) Where this section applies, then (unless the parties agree otherwise), as soon as the conditions specified in paragraphs (a) and (b) of subsection (1) above are met or at such later time as the parties may agree—
(a) property in an undivided share in the bulk is transferred to the buyer, and
(b) the buyer becomes an owner in common of the bulk.
(3) Subject to subsection (4) below, for the purposes of this section, the undivided share of a buyer in a bulk at any time shall be such share as the quantity of goods paid for and due to the buyer out of the bulk bears to the quantity of goods in the bulk at that time.
(4) Where the aggregate of the undivided shares of buyers in a bulk determined under subsection (3) above would at any time exceed the whole of the bulk at that time, the

undivided share in the bulk of each buyer shall be reduced proportionately so that the aggregate of the undivided shares is equal to the whole bulk.
(5) Where a buyer has paid the price for only some of the goods due to him out of a bulk, any delivery to the buyer out of the bulk shall, for the purposes of this section, be ascribed in the first place to the goods in respect of which payment has been made.
(6) For the purposes of this section payment of part of the price for any goods shall be treated as payment for a corresponding part of the goods.

29 Rules about delivery
(1) Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending in each case on the contract, express or implied, between the parties.
(2) Apart from any such contract, express or implied, the place of delivery is the seller's place of business if he has one, and if not, his residence; except that, if the contract is for the sale of specific goods, which to the knowledge of the parties when the contract is made are in some other place, then that place is the place of delivery.
(remaining sub-sections not relevant)

Section 52 Specific performance
(1) In any action for breach of contract to deliver specific or ascertained goods the court may, if it thinks fit, on the plaintiff's application, by its judgment or decree direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages.
(2) The plaintiff's application may be made at any time before judgment or decree.
(3) The judgment or decree may be unconditional, or on such terms and conditions as to damages, payment of the price and otherwise as seem just to the court.
(4) The provisions of this section shall be deemed to be supplementary to, and not in derogation of, the right of specific implement in Scotland.

ANNEX 6: DANISH SALE OF GOODS ACT 2003, as amended.

2(1) A contract for the supply of goods to be manufactured or produced is to be considered a sale for the purposes of this Act. In a non-consumer sale, this shall only apply if the party who undertakes the manufacture or production supplies the substantial part of materials necessary.
(2) However, this Act does not apply to contracts for the construction of buildings or other facilities on immovable property.
(3) The provisions of this Act regulating contracts of sale shall apply correspondingly to contracts of barter or exchange.

3. For the purposes of this Act, a sale of generic goods does not only mean the sale of a specific quantity of a specified type of goods but also the sale of a specific quantity of a specified bulk.

Delivery of the Goods (Place of Delivery)
9(1) The seller shall deliver the goods at the place where, at the time of the conclusion of the contract, he had his residence. If, at the time of the conclusion of the contract, the seller was carrying on business and the contract relates to that business, delivery shall be made at the place of business.
(2) If, at the time of the conclusion of the contract, the goods were at a place other than one specified in subsection (1) above, and if the parties knew or ought to have known this, that place is to be considered the place of delivery.

Passing of Risk
17(1) The risk of accidental loss of or damage to the goods is on the seller until delivery has been made.
(2) (applies to non-consumer sales only)

ANNEX 7: FINNISH SALE OF GOODS ACT 1987

Section 6 Sale of goods to be collected by buyer
(1) The goods shall be placed at the buyer's disposal at the place where the seller had his place of business at the time of the conclusion of the contract or, if the seller did not have a place of business that had a relationship to the contract, at the seller's place of residence. If the parties, at the time of the conclusion of the contract, knew that the goods or the stock from which the goods were to be drawn were at a particular place, the goods shall be placed at the buyer's disposal at that place.
(2) The goods are delivered when they have been taken over by the buyer.

Section 7 Sale involving carriage of goods
(1) If the contract involves carriage of the goods to the buyer within the same locality or within an area where the seller normally arranges for the carriage of similar goods, the goods are delivered when they are handed over to the buyer.
(2) If, in cases not within paragraph (1), the contract involves carriage of the goods and unless a trade term or other term of the contract stipulates otherwise, the goods are delivered when they are handed over to the carrier who has undertaken the carriage of the goods from the place of dispatch.
If the seller himself undertakes the carriage of the goods, delivery does not take place until the goods are handed over to the buyer.
(3) If the goods have been sold "free at", "delivered to" or "delivered free at" a particular place, the goods are not be considered delivered until they have arrived at that place.

Section 12 Risk
If the goods are at the risk of the buyer, he must pay the price even if the goods deteriorate or are destroyed, lost or diminished, provided that the loss or damage is not due to an act or omission of the seller.

Section 13 Passing of risk
(1) The risk passes to the buyer when delivery of the goods takes place under the contract or section 6 or 7.
(2) If, because of an act or omission of the buyer or any other reason attributable to the buyer, the goods are not delivered when delivery is due, the risk passes to the buyer when the seller has fulfilled his obligations with regard to their delivery.
(3) If the goods are to be placed at the buyer's disposal at a place other than the seller's place of business or residence, the risk passes when delivery is due and the buyer is aware that the goods have been placed at his disposal at that place.

Section 14
Notwithstanding the provisions of section 13, the risk does not pass to the buyer until the goods are clearly identified to the contract, whether by markings on the goods, by the transport documents or otherwise.

ANNEX 8: UNIFORM COMMERCIAL CODE, UNITED STATES OF AMERICA

§ 2-105. Definitions: "Future" Goods;

(1) Goods must be both existing and identified before any interest in them may pass. Goods that are not both existing and identified are "future" goods. A purported present sale of future goods or of any interest therein operates as a contract to sell.
(2) There may be a sale of a part interest in existing identified goods.
(3) An undivided share in an identified bulk of fungible goods is sufficiently identified to be sold although the quantity of the bulk is not determined. Any agreed proportion of the 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 that then becomes an owner in common.

§ 2-501. Insurable Interest in Goods; Manner of Identification of Goods.

(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. Such identification can be made at any time and in any manner explicitly agreed to by the parties. In the absence of explicit agreement identification occurs
(a) when the contract is made if it is for the sale of goods already existing and identified;
(b) if the contract is for the sale of future goods other than those described in paragraph (c), when goods are shipped, marked or otherwise designated by the seller as goods to which the contract refers;
(c) when the crops are planted or otherwise become growing crops or the young are conceived if the contract is for the sale of unborn young to be born within twelve months after contracting or for the sale of crops to be harvested within twelve months or the next normal harvest season after contracting whichever is longer.
(2) The seller retains an insurable interest in goods so long as title to or any security interest in the goods remains in him and where the identification is by the seller alone he may until default or insolvency or notification to the buyer that the identification is final substitute other goods for those identified.
(3) Nothing in this section impairs any insurable interest recognized under any other statute or rule of law.

§ 2-613. Casualty to Identified Goods.

Where the contract requires for its performance goods identified when the contract is made, and the goods suffer casualty without fault of either party before the risk of loss passes to the buyer, or in a proper case under a "no arrival, no sale" term (Section 2-324) then
(a) if the loss is total the contract is avoided; and
(b) if the loss is partial or the goods have so deteriorated as no longer to conform to the contract the buyer may nevertheless demand inspection and at his option either treat the contract as avoided or accept the goods with due allowance from the contract price for the deterioration or the deficiency in quantity but without further right against the seller.

§ 2-716. Buyer's Right to Specific Performance or Replevin.

(1) Specific performance may be decreed if the goods are unique or in other proper circumstances. In a contract other than a consumer contract, specific performance may be decreed if the parties have agreed to that remedy. However, even if the parties agree to specific performance, specific performance may not be decreed if the breaching party's sole remaining contractual obligation is the payment of money.
(2) The decree for specific performance may include such terms and conditions as to payment of the price, damages, or other relief as the court may deem just.
(3) The buyer has a right of replevin or similar remedy for goods identified to the contract if after reasonable effort the buyer is unable to effect cover for such goods or the circumstances reasonably indicate that such effort will be unavailing or if the goods have been shipped under reservation and satisfaction of the security interest in them has been made or tendered.
(4) The buyer's right under subsection (3) vests upon acquisition of a special property, even if the seller had not then repudiated or failed to deliver.

ANNEX 9: AUSTRALIAN LEGISLATION

Australian Trade Practices Act 1974, s. 74

(1) In every contract for the supply by a corporation in the course of a business of services to a consumer there is an implied warranty that the services will be rendered with due care and skill and that any materials supplied in connexion with those services will be reasonably fit for the purpose for which they are supplied.

(2) Where a corporation supplies services (other than services of a professional nature provided by a qualified architect or engineer) to a consumer in the course of a business and the consumer, expressly or by implication makes known to the corporation any particular purpose for which the services are required or the result that he or she desires the services to achieve, there is an implied warranty that services … will be reasonably fit for that purpose or are of such a nature or quality that they might reasonably be expected to achieve that result, except where the circumstances show that the consumer does not rely, or that it is unreasonable for him to rely, on the corporation's skill and judgment. …

Australian Trade Practices Amendment Bill 2010, s. 61(2)

If:

(a) a person (the ***supplier***) supplies, in trade or commerce, services to a consumer; and

(b) the consumer makes known, expressly or by implication, to:

(i) the supplier; or

(ii) a person by whom any prior negotiations or arrangements in relation to the acquisition of the services were conducted or made;

the result that the consumer wishes the services to achieve;

there is a guarantee that the services, and any product resulting from the services, will be of such a nature, and quality, state or condition, that they might reasonably be expected to achieve that result.

Contents of Replacement Schedule 2 of the Trade Practices Act 1974, contained in Australian Trade Practices Amendment Bill 2010, awaiting Royal Assent

Part 3-2—Consumer transactions
Division 1—Consumer guarantees

Subdivision A—Guarantees relating to the supply of goods
51 Guarantee as to title
52 Guarantee as to undisturbed possession
53 Guarantee as to undisclosed securities etc.
54 Guarantee as to acceptable quality
55 Guarantee as to fitness for any disclosed purpose etc.
56 Guarantee relating to the supply of goods by description
57 Guarantees relating to the supply of goods by sample or demonstration model
58 Guarantee as to repairs and spare parts
59 Guarantee as to express warranties

Subdivision B—Guarantees relating to the supply of services
60 Guarantee as to due care and skill
61 Guarantees as to fitness for a particular purpose etc.

Annex 10: New Zealand Consumer Guarantees Act 1993, as amended

Part 4 Supply of services

28 Guarantee as to reasonable care and skill
29 Guarantee as to fitness for particular purpose
30 Guarantee as to time of completion
31 Guarantee as to price

Right of redress against suppliers where services fail to comply with guarantees
32 Options of consumers where services do not comply with guarantees
33 Exceptions to right of redress against supplier in relation to services
34 Contracts of work and materials

Provisions relating to cancellation
35 Application of right to cancel contract
36 Failure of substantial character
37 Rules applying to cancellation
38 Effects of cancellation
39 Ancillary power of Court or Disputes Tribunal to grant relief
40 Saving

Part 5 Miscellaneous provisions

Exceptions
41 Exceptions
42 Exception in respect of repairs and parts
43 No contracting out except for business transactions
43A Exclusion of liability in favour of non-contracting supplier

General provisions
44 Assessment of damages in case of hire purchase agreements
45 Liability for representations
46 Liability of assignees and creditors
47 Jurisdiction
(The remaining sections concern amendments to legislation and contracts to which the Act applies)

ANNEX 11: DRAFT OF COMMON FRAME OF REFERENCE, BOOK IV INDEX

Chapter 4: Remedies

Section 1: Limits on derogation
IV. A. – 4:101: Limits on derogation from remedies for non-conformity in a consumer contract for sale

Section 2: Modifications of buyer's remedies for lack of conformity
IV. A. – 4:201: Termination by consumer for lack of conformity.
IV. A. – 4:202: Limitation of liability for damages of non-business sellers

Section 3: Requirements of examination and notification
IV. A. – 4:301: Examination of the goods
IV. A. – 4:302: Notification of lack of conformity
IV. A. – 4:303: Notification of partial delivery
IV. A. – 4:304: Seller's knowledge of lack of conformity

Chapter 5: Passing of risk

Section 1: General provisions
IV. A. – 5:101: Effect of passing of risk
IV. A. – 5:102: Time when risk passes
IV. A. – 5:103: Passing of risk in a consumer contract for sale

Section 2: Special rules
IV. A. – 5:201: Goods placed at buyer's disposal
IV. A. – 5:202: Carriage of the goods
IV. A. – 5:203: Goods sold in transit

Chapter 6: Consumer goods guarantees
IV. A. – 6:101: Definition of a consumer goods guarantee
IV. A. – 6:102: Binding nature of the guarantee
IV. A. – 6:103: Guarantee document
IV. A. – 6:103: Guarantee document
IV. A. – 6:105: Guarantee limited to specific parts
IV. A. – 6:105: Guarantee limited to specific parts
IV. A. – 6:107: Burden of proof
IV. A. – 6:108: Prolongation of the guarantee period

Part B Lease of goods

Chapter 1: Scope of application and general provisions
IV. B. – 1:101: Lease of goods
IV. B. – 1:102: Consumer contract for the lease of goods
IV. B. – 1:103: Limits on derogation from conformity rights in a consumer contract for lease
IV. B. – 1:104: Limits on derogation from rules on remedies in a consumer contract for lease

Chapter 2: Lease period
IV. B. – 2:101: Start of lease period

IV. C. – 6:107: Limitation of liability

Chapter 7: Information and advice
IV. C. – 7:101: Scope
IV. C. – 7:102: Obligation to collect preliminary data
IV. C. – 7:103: Obligation to acquire and use expert knowledge
IV. C. – 7:104: Obligation of skill and care
IV. C. – 7:105: Conformity
IV. C. – 7:106: Records
IV. C. – 7:107: Conflict of interest
IV. C. – 7:108: Influence of ability of the client
IV. C. – 7:109: Causation

Chapter 8: Treatment
IV. C. – 8:101: Scope
IV. C. – 8:102: Preliminary assessment
IV. C. – 8:103: Obligations regarding instruments, medicines, materials, installations and premises
IV. C. – 8:104: Obligation of skill and care
IV. C. – 8:105: Obligation to inform
IV. C. – 8:106: Obligation to inform in case of unnecessary or experimental treatment
IV. C. – 8:107: Exceptions to the obligation to inform
IV. C. – 8:108: Obligation not to treat without consent
IV. C. – 8:109: Records
IV. C. – 8:110: Remedies for non-performance
IV. C. – 8:111: Obligations of treatment-providing organizations

This publication is also available on our website at http://www.bis.gov.uk

Any enquiries regarding this publication should be sent to:

Department for Business, Innovation and Skills
1 Victoria Street
London SW1H 0ET

URN 10/1255