THE LAW REFORM COMMISSION OF HONG KONG

REPORT

SALE OF GOODS AND SUPPLY OF SERVICES

[TOPIC 21]

We, the members of the Law Reform Commission of Hong Kong, present our report on Sale of Goods and Supply of Services.

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Chapter 1

Introduction

1.1 Terms of reference

On 20th June 1987 the Chief Justice and the Attorney General, under powers granted by the Governor in Council on 15th January 1980, as amended on 7th June 1983, referred to the Law Reform Commission ("The Commission") for consideration and report the following questions:

1. Whether under the Sale of Goods Ordinance the obligations of a seller of goods to supply goods that are of merchantable quality and reasonably fit for their purpose should be reformulated.

2. Whether in a contract for the sale of goods the remedies available to the buyer for breach of the seller's obligations as to quality and fitness of the goods should be altered.

3. Whether it would be desirable to introduce any statutory control over unfair terms in contracts for the sale of goods or supply of services.

4. Whether in relation to contracts for the supply of services any statutory obligation should be imposed on the seller.

1.2 Sub-committee membership

A Sub-committee was appointed under the chairmanship of Miss Christine Loh, a member of the Commission, and held its first meeting in November 1987. The full membership of the Sub-committee is shown at Annexure 1.

1.3 Method of working

1.3.1 The Sub-committee met on 20 occasions and consulted various individuals and organizations. In August 1988 a consultation paper consisting of a summary of the Sub-committee's preliminary position and a questionnaire shown at annexure 4, were sent to these bodies seeking their views on the need for reformulation of the implied terms as to quality, modification in existing remedies for breach of these terms, introduction of statutory obligations on the seller in contracts for the supply of services and statutory

control over unfair terms in contract for the sale of goods and supply of services. A list of the persons and organisations who were sent a copy of the consultation paper, together with an indication of those who responded and volunteered comments is shown at Annexure 3. An analysis of the result is set out at Annexure 4. Some of these organizations distributed the questionnaire to their members and the analysis was prepared on the basis of individual response rather than a corporate response.

1.3.2 In December 1988 Mr Merry, a member of the Sub-committee, addressed a seminar of business and professional men, convened by the Institute for International Research to discuss, amongst other things, these issues. Articles on the work of the Sub-committee have also appeared in Chinese and English newspapers.

1.3.3 At two of our meetings we were pleased to have with us Professor Sutton, Professor of Law and Dean of Faculty of Law, University of Queensland, at which he gave valuable assistance and contribution to our discussion.

1.3.4 In July 1989 the Sub-committee submitted its report to the 70th meeting of the LRC and the Commission considered the subject at its 70th, 71st and 72nd Meetings.

1.4 Format of Report

The report is divided into 9 chapters. The first, of which this section forms part, deals with introductory matters. The second discusses the seller's obligations to supply goods that are of merchantable quality and reasonably fit for their purposes under the Sale of Goods Ordinance. Chapters 3, 4 and 5 examine the buyer's remedies for breach of these statutory obligations. Chapter 6 considers whether in relation to contracts for the supply of services, statutory obligations corresponding to the obligations of a supplier of goods under the Sale of Goods Ordinance should be imposed on the seller. Chapter 7 is concerned with the question whether the courts should be given statutory power to strike down unfair contracts for the sale of goods and supply of services or unfair terms in such contracts. Chapter 8 deals with the wider issue of consumer protection law in Hong Kong and the final chapter comprises a summary of the Sub-committee's recommendations.

Chapter 2

The implied terms as to quality and fitness of goods

2.1 Background

2.1.1 Section 16(1) of the Sale of Goods Ordinance (hereinafter referred to as the Ordinance) follows section 14(1) of the English Sale of Goods Act 1893 (hereinafter referred to as the Act). It was framed negatively - that no term regarding quality and fitness of goods for any particular purpose is implied into contracts for sale of goods - because the Act tried to summarise the effect of the pre-existing sale of goods cases: the Act was a codifying, rather than an amending, statute. The common law of sale, built up case-by-case over centuries of litigation between merchants, was based on the principle that the buyer was the party who should guard his own interest (caveat emptor). Judges were later prepared to ameliorate the harshness of the principle by reading terms into contracts, but it was natural that, when Sir McKenzie Chalmers attempted at the end of the nineteenth century to capture the case-law and set it down in statute, he should have reflected the principle by drafting section 14 in the negative subject to exceptions.

2.1.2 It was also natural that he should give no definition of "merchantable quality" for it was felt that that was a notion commercial men understood. Any attempt to pin down the notion would reduce its flexibility and limit the court's power to deal with each case on its facts and in the light of current commercial attitudes.

2.1.3 Although the 1893 Act successfully summarised the late-Victorian law of sale, commerce did not thereafter stand still. New ways of trading emerged, not the least of which was the great expansion in retail sales to non-businessmen, which gave a new meaning to an old word: consumer. Only a few years after the Act was passed one judge observed that the phrase "merchantable quality" was appropriate to natural products but not to machines (Farwell J, in Bristol Tramways v Fiat Motors [1910] 2 KB 831). Indeed, most of the leading cases on merchantable quality, even into the 1960s, concerned commodities such as grain and nuts. The surge of consumerism exposed the phrase to more criticism: it was said to be inappropriate to consumer sales, too technical and incomprehensible to laymen.

2.1.4 In the 1950s the United States' jurisdictions began to overhaul their laws on sale, which hitherto had been similar to those in England. Their

laws are now in the Uniform Commercial Code - section 2-314(2) defines merchantable quality. In 1969, the English Law Commission produced a report on Sale of Goods (Law Com No. 24) which proposed the test of whether goods were acceptable in place of whether they were of merchantable quality. In 1972, South Australia produced its own definition of merchantable quality. In 1973, a shortened and revised version of the English Law Commission's definition was introduced in England, and was copied by Hong Kong in 1977 and is the present section 2(5) of the Ordinance.

2.1.5 The definition was thought to be a synthesis of the case-law on merchantable quality. It was therefore in tune with the purpose of the Act of codifying the common law. It has been praised by Lord Denning as "the best that has yet been devised" (Cehave v Bremer [1976] QB 44).

2.1.6 In 1974, Parliament in England turned its attention to other deficiencies in section 14. The requirement that the terms as to merchantable quality and fitness of goods were implied into sales by description only was replaced by a requirement that the sale must be in the course of business: this means that those terms are not implied in "private sales" where the seller is not selling in a business capacity. Section 14(2)(b) also clarified that any examination by the buyer must be before the sale was made. Those changes were also introduced into our Ordinance in 1977.

2.1.7 The tide of reform spread to Canada. In 1978, Saskatchewan relabelled the quality required of goods as "acceptable quality" and the following year, the Ontario Law Reform Commission (hereinafter referred to as the OLRC) published a report on the reform of the law of sale of goods. The OLRC report is seminal in Commonwealth jurisdictions in that it took a wider approach to reform, proposing an act which was closer to the spirit of the Uniform Commercial Codes than to the English Act. The OLRC's proposed definition of merchantable quality, however, was the English 1973 definition with additions. Those additions in part reflected the deficiencies which were identified in the 1973 definition.

2.1.8 Although the Act was replaced in 1979, the new Act was essentially a re-enactment of the previous version. The definition of merchantable quality survived, although its deficiencies led to the Law Commissions of England and Scotland (hereinafter referred to as the Law Commissions) being asked to reconsider it and other topics which resulted in a working paper in 1983 and the final report in 1987 (Law Com No. 160).

2.1.9 In 1981, a proposed Uniform Sales Act, based on the OLRC report was adopted by the Canadian Uniform Law Conference attended by provincial representatives and the federal government. In 1982, the Alberta Institute of Law Research and Reform recommended that the proposed Uniform Sales Act be adopted in Alberta. However, to-date, no Canadian province has yet put the OLRC recommendations into law.

2.2 Criticisms of the implied term as to merchantable quality

The above being the background, the criticisms of section 16 of the Ordinance that have been made are that it is misleading, in that it is formulated in the negative; obscure, in that it uses the antique and technical phrase "merchantable quality" and unsatisfactory in that it is restricted to business sales. Of section 2(5), it is said to be unclear as to how the definition applies to multi-purpose goods, second-hand goods and goods with minor or cosmetic defects; the phrase "reasonable to expect" is said potentially to work against consumers in certain situations; the time at which the quality of goods is to be judged is not spelt out, which creates problems concerning how durable goods must be in order to satisfy the definition; and, finally, it is said that other factors apart from purpose, description and price should be specifically mentioned as relevant. Each of those criticisms is discussed in this chapter.

2.3 Consumer sales v commercial purchases

2.3.1 Before discussing sections 16 and 2(5) in detail, a brief discussion should be given to consumer sales and commercial purchases. The implied term of merchantable quality applies equally to both types of transactions but the surge of twentieth century consumerism raises the question of whether the existing implied term adequately cover consumer sales.

2.3.2 Section 57(4) stipulates that any term of a contract for the sale of goods exempting from all or any of the provision of sections 15, 16 and 17 shall be void in a consumer sale (see Chapter 7 para 7.2.1). Section 57(7) goes on to define a "consumer sale" to mean:

> *" ... a sale of goods (other than a sale by auction or by competitive tender) by a seller in the course of a business where the goods -*
>
> *(a) are of a type ordinarily bought for private use or consumption; and*
>
> *(b) are sold to person who does not buy or hold himself out as buying them in the course of a business."*

2.3.3 It is difficult to argue that consumer sales should have a higher (or for that matter, lower) quality standard than commercial purchases. After all, there is no reason why, for example, writing pens bought by individuals should carry a different quality standard than those bought by an office for office use, or bought by a stationery company trading in pens. However, dealings between merchants differ from dealings between merchants and consumers because their respective relationships with each other are essentially different.

2.3.4 In very broad terms, commercial sale of goods contracts are negotiated and entered into between businessmen who are familiar with their trade products. Whilst the relative sizes of the parties may be different, for example, the buyer is a substantial corporation and the seller is a small company, the desire to continue business relations with each other often enables any problems arising from the terms of the contract to be solved in a practical and amicable manner.

2.3.5 Whilst commercial contracts are entered into between businessmen as part of their business activities, consumer sales are entered into between the seller, who is selling as part of his business, and the buyer who buys in a non-trading capacity for consumption rather than for profit. We believe there is justification for making some special provisions for consumer sales in the Ordinance. Some of our recommendations (see 2.9.4; 2.11.2; 2.12) for consumer sales seek essentially to better clarify frequent consumer queries about the quality of goods, rather than to refute the usefulness of the concept of merchantable quality.

2.3.6 We are conscious that we are departing from the recommendations of the Law Commissions in our report. They reasoned that if there were different implied term of quality for consumer and non-consumer transactions, the shopkeeper would be buying from the wholesaler under a contract containing a different implied term from that under which he sells to his customer, the consumer. The Law Commissions concluded that there should not be two different sets of implied term of quality for consumer and non-consumer transactions. We believe that the implied term of quality for consumer sales should be expanded because the nature of the relationship between merchants and between merchants and consumers are essentially different, as explained above.

2.4 Negative formulation of section 16

2.4.1 The reason that section 16 is drafted in the negative is, as explained, historical. It is a matter of form only; the substance of the law is unaffected. One fear must be, however, that a casual reader, particularly a non-lawyer, would be misled. He might conclude from section 16(1) that there is no implied terms as to quality. If reformulation would be cosmetic and would not change the law, it might be asked whether the change is really necessary. The aim must be to draft as readily comprehensible legislation as possible so that the meaning of the law could be understood by everyone.

2.4.2 Accessibility and comprehension aside, section 16(1) and (2) should be reformulated because those subsections no longer reflect the law accurately in that the exception in section 16(2) has grown to be greater than the rule in section 16(1). The implied term as to quality is formulated positively in American and some Commonwealth jurisdictions.

<u>We recommend that section 16(1) be deleted and that it be reformulated so that the implied term as to merchantability is stated in the positive.</u>

2.5 Use of the word "merchantable"

2.5.1 The use of the word "merchantable" to describe the quality expected of goods sold in sections 16 and 2(5), whilst explicable historically, is now said to be anachronistic and misleading. The word is no longer used in everyday English, even in commerce, but its primary meaning (capable of being sold among merchants, acceptable in the market) is readily understood by English speakers.

2.5.2 The word "merchantable" has in fact acquired technical meaning at law as a result of interpretation by the courts over the years. It can be equated with "acceptable" or "satisfactory" in an objective sense. The English Law Commission proposed the substitution of "acceptable" for "merchantable", but that recommendation was not enacted. Whilst there was a desire to make the law more accessible, we doubt whether "acceptable" would really be an improvement on "merchantable". The merit of "merchantable" is that it is familiar and has a well-know minimum content with a flexible periphery. That flexibility was summarized by Ormrod LJ in Cehave v Bremer -

> *"Merchantable ... is a composite quality comprising elements of description, purpose, condition and price. The relative significance of each of these elements will vary from case to case according to the nature of the goods in question and the characteristics of the market which exists for them."*

2.5.3 Although the drawback of a flexible notion is that one cannot be certain in all cases whether the goods in question have attained the required standard, in practice, uncertainty rarely arises. In commercial sales the standard expected in the trade is usually that which the court will use in deciding what is merchantable (and anyway, that standard may be written into the contract), whilst in most consumer sales it will be obvious that the defective goods are not of merchantable quality (and anyway, the defect may be covered by a guarantee given by the retailer or the manufacturer). As many types of goods ranging from clothing and footwear to household and office electrical appliances must comply with international or national quality standards, it is likely that any relevant quality codes will be made available to the court for their consideration whether a product in question is merchantable. The problems which consumers face are more the result of ignorance of their rights and practical difficulties in enforcing them than the result of deficiencies in the standard of quality which the law requires.

2.5.4 What is under attack is not the advantages of having a flexible standard but the label which is to be put upon that standard. The standard would not in substance change, and its useful adaptability to circumstances would not be lost just because it was called "acceptable quality", "adequate quality" or whatever. Indeed "acceptable" and "adequate" are more clearly words of fluctuating content than "merchantable", which carries a (spurious) connotation of precision.

We recommend that the word "merchantable" to retained and that section 16 makes reference to section 2(5) so that readers would not overlook it.

2.5.5 We believe the Chinese words used to describe merchantable quality should be accurately translated to give some notion of the richness of the concept of merchantability. We endorse the phrase used in the Chinese version of the Ordinance translated by the Chinese Language Division: 可銷售的品質。

2.6 Restriction to business sales

2.6.1 The implied term applies to sales "in the course of a business" only. That phrase has given rise to some difficulties. It clearly covers sales by those whose business involve the sale of the goods in question, such as retailers, wholesalers and manufacturers. Some academic writers suggested that transactions by a seller who normally sells goods of a different type from those involved in the sale under scrutiny (a cloth merchant selling his delivery van), or who normally does not sell any goods at all (a dentist selling his office desk) are sales in the course of a business. Such difficulties led to suggestions that "sales by way of trade" may be a more suitable phrase. However, a House of Lords decision (Davies v Sumner [1984] 1 WLR 1301, recently followed by the Court of Appeal in R & B Brokers Ltd v U.D.T. Ltd [1988] 1 WLR 321) concerning the phrase "in the course of a trade or business" in section 1(1) of the Trade Descriptions Act 1968 made it clear that for the transaction to be considered in the course of a trade or business, it must have been carried out with some degree of regularity.

2.6.2 The expression "in the course of a business" is used in the English Sale of Goods Act and Unfair Contract Terms Act, as well as in Australian sales legislation. Since the meaning of the phrase has been clarified by case-law and the phrase is widely used in Commonwealth sales legislation, we recommend that "in the course of a business" be retained.

2.7 Multi-purpose goods

2.7.1 After the definition of merchantable quality was introduced in 1973 (1977 in Hong Kong), there was some disagreement among academic writers as to whether the definition had changed the law unintentionally. The focus of the disagreement was the words "purpose or purposes" in section 2(5) of the Ordinance and the effect on the quality expected of multi-purpose goods. The dispute appears to have been settled by the Court of Appeal in M/S Aswan Engineering Establishment Co v Lupdine Ltd [1987] 1 WLR 1 where it was held that the statutory definition had not altered the prior law.

2.7.2 It might be thought that it is not right to expect a seller to warrant that his goods are fit for all their possible normal uses. On the other hand, it

might be felt that the prior case-law, which indicated that it was sufficient if the goods were suitable for just one of many possible normal uses was equally draconian. One interpretation of section 2(5) would avoid either extreme and would emphasise the references in the definition to description, price, other relevant circumstances and reasonableness. In other words, just because on one set of facts one type of multi-purpose goods with a certain defect are not of merchantable quality, it does not follow that in another set of circumstances another, or even the same, type of multi-purpose goods with another, or even an identical, defect will also be unmerchantable.

Since the meaning of the phrase "purpose or purposes" has been clarified by case-law, we recommend that it be retained.

2.8 Second-hand goods

2.8.1 Used goods are often bracketed with "seconds" (that is, slightly defective or shop-soiled goods). Such goods are to be distinguished from goods sold by retailers in "sales" (that is, at a discount, in order to increase turnover or reduce stocks). Sales goods are not reduced in price because of their lower quality, but simply as a promotional exercise; the standard expected of them is the same as that for all new goods. "Seconds" and used goods are offered at a lower price precisely because they are not new; the standard expected of them is therefore usually not the same as for new goods. Second-hand goods are not always of a lower quality though, as rare or well-made old goods can be valuable and of a better quality than their modern equivalents.

2.8.2 The flexible nature of merchantable quality accommodates second-hand goods. Section 2(5) allows the court to decide what standard it is reasonable to expect having regard to the circumstances, one of which is that the goods have been used and another may be reflected in the price.

2.8.3 A buyer who knows that he is negotiating to buy a used product, perhaps with no guarantee, will be more likely to examine the goods; if he does so, he will lose the implied term as to merchantable quality, at least as regards defects which that examination ought to reveal. Sales of second-hand goods are also often private sales, which fall outside the statutory implied term. Those considerations aside, the implied term applies to second-hand goods just as surely as it does to new goods. If there is a problem, it is that this is not widely appreciated; this is not a legal problem but one of public information and consumer education.

2.9 Cosmetic and minor defects

2.9.1 A more substantial criticism of the statutory definition is that, with its accent on fitness for purpose, description and price, it makes insufficient allowance for relatively small defects which may be peripheral to the main use of the goods but are nevertheless important to the buyer. The

common illustration is the scratched new car. The defect is superficial and does not prevent the car from being used.

2.9.2 Sense would dictate that such defects should not entitle the buyer to call the contract off, as would be the case if the defects constituted breaches of merchantable quality. Sense would also dictate that the buyer should be entitled to have the defects remedied or be compensated by the seller. Unfortunately, with merchantable quality, there is no halfway house. If the condition is broken, the buyer is (unless he has accepted the goods) entitled to return the goods. If it is not broken, he is not entitled to replacement or compensation (although he may be if the supplier has given a guarantee offering wider protection than the Ordinance).

2.9.3 The fear is that if sense dictates that the buyer should not be allowed to reject the goods and have his money back when his complaint concerns a small problem, the court will probably say there is no breach and the buyer will be left with no remedy. To guard against that, the Law Commissions suggested that the English equivalent to section 2(5) should spell out that cosmetic and minor defects are matters relevant to merchantability.

2.9.4 There is a substantial body of case-law on motor car sales showing that the court decided quite differently on similar facts in order to achieve justice. In order to make the law clear and to strengthen consumer protection, the appearance and finish of goods, and their freedom from minor defects should be listed as aspect of quality to which the court should have regard in consumer sales (see also 2.3.5).

<u>We recommend that the appearance and finish of goods, and their freedom from minor defects be listed in section 16 as aspects of merchantable quality in consumer sales.</u>

2.10 Time for assessing quality

Section 2(5) does not state when the goods are to be assessed whether they are as fit for their purpose(s) as it is reasonable to expect in the circumstances. However, case-law is clear that the time to judge quality is the time when the goods are delivered.

2.11 Durability

2.11.1 Section 2(5) does not provide how long the goods sold must remain in its original merchantable state. However, goods will not be of merchantable quality unless they are reasonably durable. For example a new television set which breaks down after a few days, even though apparently in good condition when delivered, was surely not of merchantable quality. What is reasonably durable will depend on the nature of the goods and the other

circumstances of the case. For example, a pair of fashion shoes is not expected to be as durable as a pair of walking shoes.

2.11.2 There is, however, no express reference in the Ordinance to the concept of durability. Some Commonwealth law commissions recommended that durability be included in their sales legislations as an aspect of quality. That reform has been carried out in Ireland and adopted in 1981 by the Canadian Uniform Law Conference. We believe its inclusion would be helpful in consumer sales (see 2.3.5).

We recommend that durability be included as an aspect of merchantable quality in section 16 in consumer sale.

2.12 Safety

A product, which is unsafe can hardly be said to be fit for its purpose(s). Under the existing law, the requirement that goods must be safe is arguably embraced by "all the other relevant circumstances" in section 2(5). Safety is most important in consumer products, and in particular home appliances and goods for children. There is a case that such an important matter should be spelt out in consumer sales (see 2.3.5).

We recommend that safety be included as an aspect of merchantable quality in section 16 in consumer sales.

2.13 Terms of the sale

"Terms of the sale" is listed as a relevant circumstance to merchantable quality in Victoria, Australia. We believe it is unnecessary since the terms of the sale are obviously relevant and, to the extent that the terms are express and contradict the statutory implied terms, they would, as a matter of law, take precedence. Also insofar as they relate to purpose, description and price, the terms of the sale are already made expressly relevant by section 2(5).

2.14 Other factors

(A) "Reasonable to expect"

Section 2(5) requires a standard that is "reasonable to expect". The test of reasonableness is an objective one and the arbiter is the court. Knowledge of common (low) standards may be a circumstance, but it is not the only one. If it were, and if reasonable expectation is equated with common knowledge, section 2(5) would be a charter for shoddy workmanship which in our opinion it is not.

(B) Exception to merchantable quality

Section 16(2) imposes upon the seller the obligation to supply goods of merchantable quality except in two situations. The first relates to defects drawn to the buyer's attention and has not given rise to difficulties. The second exception relates to defects which the examination ought to reveal if the buyer examined the goods before contract. Academic writers argued that "defects which the examination ought to reveal" means that the examination referred to is the one that was carried out, thus a casual examination which would not reveal the defects would not negate the implied condition. However, there is little criticism of section 16(2) and we therefore do not see the need for change.

(C) Fitness for a particular purpose

For single purpose goods, it is unnecessary to apply section 16(3), the term as to fitness, because the requirement of fitness is built into the definition of merchantable quality. Thus, if a hot-water bottle bursts it is neither "merchantable" nor "fit".

The word "particular purpose" has been interpreted in Hardwick Game Farm v Suffolk Agricultural Poultry Producers Association [1969] 2 AC 31 by Lord Morris as a specified purpose and can be an ordinary purpose. If however, the purpose for which the buyer wants the goods is made known to the seller but there is some peculiarity pertaining to the buyer's condition of which the seller is unaware, the seller is not liable under section 16(3) if the goods turned out to be unfit because of the buyer's condition. For example, in Griffiths v Peter Conway Ltd [1939] 1 All ER 685, the plaintiff bought a coat from the defendant and contracted dermatitis because she had abnormally sensitive skin. As the coat would not have harmed an ordinary person and the plaintiff's condition was not disclosed to the defendant, the latter was not liable. Obviously, if the plaintiff had disclosed her condition and sought the defendant's advice before the purchase, there could well be liability (see Christopher Hill Ltd v Ashington Piggeries [1972] AC 441).

The operation of section 16(3) appears to have been satisfactorily explained by case-law. We see no need for change.

Chapter 3

Remedies for breach of the implied terms as to quality and fitness of goods

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3.1 Introduction

3.1.1 In the law of contract, the remedies for breach of a contractual term are traditionally linked to the classification of the term as a "condition" or "warranty". Breach of the former entitles the aggrieved party to repudiate the contract, whilst the breach of the latter only entitles him to damages. In the context sale of goods, the breach of a condition by the seller may give the buyer the right to reject the goods and to recover the price if it has already been paid. Breach of a warranty by the seller may result in damages only.

3.2 Distinction between condition and warranty

3.2.1 The Ordinance does not define "condition" although section 13 stipulates when a condition may be treated as a warranty. Section 2(1) however defines "warranty". The seller's obligation as to quality and fitness of goods (section 16) and his obligation as to title (section 14), description (section 15) and correspondence with sample (section 17) are all conditions under the Ordinance. It was thought at one time that all contractual terms had to fall within one category or another and that the remedies for breach depended on categorisation.

3.2.2 The English Court of Appeal case Hong Kong Fir Shipping Co v. Kawasaki Kisen Kaisha [1962] 2 QB 26 changed all that. A contract term was held to be neither a condition nor a warranty, but an "intermediate" term. It was decided that because such a term could be broken in many different ways ranging from the most trivial to the most serious, the remedy for its breach should depend on the nature and effect of the breach in question. The right of the innocent party to repudiate the contract depended on whether he had been deprived:

> *"of substantially the whole benefit which it was intended he should obtain from the contract." (per Lord Diplock LJ at page 70)*

3.2.3 The invention of the intermediate term was deemed necessary because of the inflexibility of the condition-warranty distinction. If the condition is broken, the buyer can return the goods and get his money back. If it is not, he is not entitled to any remedy. When the condition of

merchantable quality is broken because of a serious defect in the goods, it is fair to allow the buyer to reject, but where the defect is minor, it does seem unfair to require the seller to take the goods back and return the price.

3.3 The Law Commissions' approach

3.3.1 The English and Scottish Law Commissions in their joint consultative paper on Sale and Supply of Goods thought that the implied terms as to quality and fitness of goods should not be classified as conditions because such classification is inconsistent with developed case-law which recognises the intermediate term.

3.3.2 However, after consultation, the Law Commissions decided that the classification of condition should be retained for the implied terms in the equivalent sections to sections 15-17 of the Ordinance. They believed that to abandon the classification would weaken the position of consumer buyers as they would no longer enjoy an unfettered right to reject defective goods.

3.4 The OLRC's approach

3.4.1 The OLRC recommended in its report on Consumer Warranties and Guarantees in Sale of Goods (1972) that the distinction between condition and warranty should be abolished and replaced by a single concept of "warranty". They pointed out that American sales law has never adopted the distinction to no detriment. They thought the distinction focussed on the prior classification of the obligation rather than on the severity of its breach, leading to the anomalous consequences that a buyer who complains of a minor infraction of a condition was entitled to reject the goods and terminate the contract, whereas the buyer who can only show breach of a warranty was forced to continue with the contract however serious the breach.

3.4.2 A similar recommendation was subsequently made in their 1979 report on Sale of Goods. In their view, there were very few terms the breach of which would so seriously prejudice the other party's position that they may fairly be treated as essential terms. The OLRC also recommended a new regime of remedies for breach of the single term "warranty" which depended on the gravity of the breach.

3.5 Conclusion

3.5.1 We believe there is a strong case for retaining the distinction between condition and warranty in consumer sales so that the consumer's right of rejection could be preserved.

3.5.2 We would have liked to recommend abolishing the distinction for commercial transactions because the distinction has effectively been

abolished by the court in Hong Kong Fir. The arguments for abolition are strong: the introduction of the intermediate term and buyers in commercial transactions generally perform their contractual obligations, such as payment, even if the seller is in breach of a condition because an amicable solution could usually be found as the desire to continue business relations is an overriding consideration. If businessmen do not abide by the classification of the term, there does not seem to be much point in retaining the distinction.

3.5.3 One argument in favour of retaining the distinction is that since we believe the distinction should be retained for consumer sales, it is desirable to have a common rule for both types of transactions. Further, the distinction between consumer and commercial sales is not always clear cut. For example, Question 4(B) of our questionnaire (see Annexure 4) produced widely divergent responses to whether the stated transactions were consumer or commercial.

3.5.4 However, we are unable to recommend the abolition of the distinction for one very strong reason. Our terms of reference limited our consideration to the implied terms as to quality and fitness of goods and the remedies for the breach of those terms. It would be inappropriate for us to recommend the abolition of the distinction because there are other terms in the Ordinance (sections 14, 15 and 17) which we have not been asked to examine and which retain the distinction.

We recommend that the distinction between condition and warranty be retained in all sale of goods contracts. Had the terms of reference been to review the entire Sales of Goods Ordinance, we would have more scope to consider the abolition of the distinction.

Chapter 4

A right to repair and replacement?

4.1 Introduction

4.1.1 The buyer has the absolute right at law to reject defective goods. It may be thought the rule is too harsh because it seems unfair to the seller if the defect is small and can be easily remedied. In everyday life, a buyer is often satisfied with repairs or, better still, to have the defective goods replaced with new ones.

4.1.2 The issue to be considered is whether the seller should be given a statutory right to correct the defect. Such a right is often referred to as the right to "cure".

4.2 The Canadian approach

4.2.1 The cure principle is recognised by a number of Canadian jurisdictions in their consumer legislation. The Saskatchewan Consumer Products Warranties Act and the New Brunswick Consumer Product Warranty & Liability Act (1978) give the seller the right to rectify breaches which are not substantial.

4.2.2 The OLRC believed that consumer remedies should be flexible in order to reflect the varying circumstances which may arise in practice. They recommended the buyer's remedies in the proposed Consumer Products Warranties Act to be as follows:

> *"(a) Where the breach is remediable and the breach is not of a fundamental character, the retailer or manufacturer should have a reasonable opportunity to make good the breach, including any breach in the implied warranties of title, freedom from encumbrances, and quiet possession.*
>
> *(b) 'Breach of a fundamental character' means*
> *(i) That the product departs significantly in characteristics and quality from the contract description; or*
> *(ii) That the product is substantially unfit for its ordinary or specified purpose; or*
> *(iii) That the product, in its existing condition, constitutes a potential hazard to the health or property of the purchaser or any other person.*

(c) *Where the defect is of a fundamental character and appears within a reasonable period after delivery of the product to the purchaser, the purchaser should be able to reject the product and be entitled to a refund of the purchase price, subject to a reasonable deduction for the use of the goods. The purchaser should also be entitled to recover any other damages which he may have suffered, subject to the usual tests of foreseeability.*

(d) *In other cases, where the defect has not been remedied within a reasonable time, the purchaser should have the option of rescinding the contract as under (c) or of having the defect remedied elsewhere and recovering the cost thereof from the retailer or manufacturer, together with any other reasonably foreseeable damages which he may have suffered." (OLRC Report on Consumer Warranties and Guarantees in the Sale of Goods (1972), p 45.)*

4.2.3 The OLRC also recommended a regime of cure for commercial sales where the buyer's right to reject is confined to substantial breaches of the seller's obligations only. The OLRC considered the relative positions of the buyer and the seller, and recommended that even after the buyer has rejected the goods, the seller has the right to cure provided he can seasonably notify the buyer of his intention to cure the defect which must be curable without unreasonable prejudice, risk or inconvenience to the buyer. The type of cure itself must also be reasonable in the circumstances.

4.3 The English approach

4.3.1 The Law Commissions considered the position of the consumer buyer who usually buys goods for domestic or personal use and not for profit. He will generally not be satisfied with defective goods when he intended to buy perfect goods. A price reduction may be insufficient compensation. The Law Commissions thought that the consumer should never be prevented from rejecting defective goods and terminate the contract if that is what he wants.

> *"The seller is also likely to be in a stronger bargaining position than the consumer buyer: the buyer may in practice have to drop his claim or accept less than his due. Given that the overwhelming majority of consumer disputes are not taken to court, or even to lawyers, the relative strength of the bargaining position of each party is, in our view, a factor of critical importance." (Law Com. No. 160 Para 4.4)*

4.3.2 Commercial buyers are in the business of dealing in goods and are usually able to dispose of goods of different qualities through access to the appropriate channels. A breach by the seller can usually be measured in monetary terms.

A commercial buyer may seize on a technical breach to end the contract when the market has moved against him.

> *"The diminution in value caused by the quality defect may be trifling; the diminution caused by the fall in the market price may be immense. Is it just in those circumstances to allow the buyer to reject the goods and terminate the contract so as to cause the loss due to the change in market to fall on the seller and not on himself?" (Law Com. No. 160, para 4.5)*

The Law Commissions originally recommended that the seller be given the right to repair or replace defective goods. On consultation, the following objections were raised:

(1) The recommendation was too adverse to consumers because it would give a seller reason to argue that the consumer was not entitled to return defective goods and get the price back.

(2) The recommendation left too many questions unanswered and disputes about how the cure principle would actually operate would create uncertainties. For example, did the seller have to redeliver the "cured" goods to the buyer, or did the buyer have to collect them?

In the end, the Law Commissions recommended that the classification of the implied terms in sections 13-15 of the Sale of Goods Act as "conditions" should be retained for consumer sales so that the consumer would continue to enjoy an absolute right to reject defective goods.

4.3.3 The Law Commissions were not in favour of applying the cure principle to commercial sales which usually involve more substantial sums of money than consumer sales because firstly, it would be difficult to provide a detailed enough code which would cover all eventualities in commercial transactions. Secondly, sellers may seek to do all they can to impose cure upon the buyer in some cases, and in others, buyers may seek cure for minor but irremediable defects simply to have the opportunity to reject goods because the market has changed. Further, a cure principle may not be practical where goods were imported with the seller many miles away.

4.3.4 The Law Commissions recommended that in commercial sales the statutory implied term as to quality should also remain a condition but that the Sale of Goods Act should provide that where the breach is so slight that it would be unreasonable for the buyer to reject the goods, the breach is not to be treated as a breach of condition but may be treated as a breach of warranty.

4.4 Conclusion

4.4.1 The strongest arguments for establishing cure provisions in the Ordinance for both commercial and consumer transactions are: that it is

already common practice and that its existence would prevent an opportunistic buyer from reneging when he no longer wanted to abide by the contract.

4.4.2 On consultation, there was substantial agreement that cure provisions should be established. We believe the reason for the wide support was because most people act in good faith and are reasonable in their dealings with others be they acting in the capacity of a businessman or a consumer. To honest folks, the cure principle appears eminently acceptable.

4.4.3 Arguments against establishing cure provisions include: if there was no absolute right to reject defective goods and if there was an obligation to submit goods for cure, the original state of the goods may be rendered undiscoverable by the cure process; and that it was incorrect to assume that when a buyer made a purchase that he wanted the goods and would be willing to have defects rectified, quite the contrary, when a buyer buys goods, he expects them to be free from defects and it would be quite wrong to give a statutory right to the seller to provide cure. In addition, there would be arguments about the operation of such cure provisions (for example, as to whether the cure had been effective).

4.4.4 Our view is that it would not be easy to devise cure provisions for commercial transactions which is simple to operate. Businessmen generally find solutions through negotiations and we are not convinced that having a statutory right to cure will help businessmen in the resolution of disputes on quality of goods. As for consumer purchases, the general level of consumer education is relatively low in Hong Kong and consumer legislation have not been developed. The law should therefore stand on the side of the consumer who is often in a weaker bargaining position than the seller. We do not want to give the seller any grounds for arguing that he has a legal ground to resist rejection of defective goods.

4.4.5 <u>We conclude that cure provisions should not be introduced for either commercial or consumer sales. We are persuaded that when a buyer buys goods, he expects and has a right to expect them to be of merchantable quality</u>.

4.4.6 Although inapplicable to the United Kingdom and Hong Kong, we have taken note of the United Nations Convention on Contracts for the International Sale of Goods (1980) where an attempt was made to advance upon sale of goods legislation for international commercial transactions. The Convention gives the buyer the option to ask for replacement where there has been fundamental breach of contractual terms. The buyer may ask for repairs where the breach is remediable. The Convention does not give the seller a right to repair or replace defective goods.

Chapter 5

Loss of right to reject

5.1 Introduction

5.1.1 Section 13(3) of the Ordinance states that the buyer cannot reject goods for the breach of any condition if he has accepted them. The buyer, however, may claim damages. Section 37 deems acceptance to have taken place in three situations.

5.2 (A) Acceptance by express intimation

5.2.1 A buyer can expressly intimate that he accepts the goods. Section 36 states that a buyer cannot be deemed to have accepted goods which he has not had a reasonable chance of examining. A common practice is for the buyer to be asked to sign an acceptance note on delivery. Such note usually contains a statement to the effect that the goods were examined and accepted in good condition. Very often there was no real examination of the goods.

5.2.2 We believe acceptance should be deduced from all the relevant circumstances and the buyer should not be presumed to have accepted the goods by signing acceptance note alone. It is especially important in consumer purchases. The Law Commissions proposed during their consultation that a consumer should not by his signature of an acceptance note lose his right to reject unless he had in fact had a reasonable opportunity examine the goods.

<u>We recommend that section 36(1) be amended so that it would clearly state that notwithstanding the fact that the buyer has signed an acceptance note or a similar document, his right to reject is not lost unless he had in fact had a reasonable opportunity to examine the goods.</u>

5.3 (B) Acceptance by an act inconsistent with the ownership of the seller

5.3.1 It was explained in <u>Kwei Tek Chao v British Traders & Shippers Ltd</u> [1954] 2 QB 459 that "the ownership of the seller" referred to the possible reversion of ownership to the seller when the goods were rejected. For example, acts inconsistent with the seller's ownership in commercial sales are sub-sales and delivery of goods to a sub-buyer.

5.3.2 In the context of consumer sales, the Law Commissions pointed out that there is little authority on what constitutes an inconsistent act apart from cases where goods have been destroyed, damaged, used or where goods have been incorporated into a structure, so that they cannot be returned. The Law Commissions originally suggested that the rule should be that the buyer might not reject the goods unless they are in substantially the same condition on rejection as on delivery. After consultation, this proposal was dropped because an express provision limiting the right to reject in an area where there was no evidence of difficulties in practice would not serve the interests of consumers because it would give sellers a ground to argue that he does not have to take defective goods back.

The Law Commissions also considered whether the inconsistent act rule should be abolished altogether in consumer sales but in the end decided to retain it for both consumer and commercial sales. They recommended that the rule should not apply if all the buyer had done was to dispose of the goods in some way. Should he retrieve them in time, he should be able to reject them. Thus, a buyer would be able to return defective goods even if he had resold them and they had been rejected by the sub-buyers.

5.3.3 The Canadian jurisdictions took a different approach by abandoning the rule (section 8.2. Uniform Sale of Goods Act). The OLRC reasoned that the relevant section in the English Act raised difficult points of construction, that the amendment (subordinating the inconsistent act rule to the buyer's right of rejection) possibly did not go far enough (for example, where the buyer fails to take the opportunity to examine the goods or fails to discover the defect, and resells to a sub-buyer who rejects the goods) and that the rule did not serve any useful purpose.

5.3.4 The fact that there is very little case law on the operation of the rule may not necessarily indicate that it is working well, as the Law Commissions suggested. It may be that the rule is superfluous. With the exception of section 14, section 13(3) applies to other sections apart from section 16. In Rowland v Divall (1923) 2 KB 500 it was decided that there can be no acceptance of goods which the seller had no right to sell. That being the case, it would be beyond our scope to recommend abolition when that would affect other sections, such as sections 15 and 17. Had the review been for the whole Ordinance, there would be more scope to consider other possibilities.

We recommend that the inconsistent act rule be retained but that section 37 be clarified that a buyer would be able to return defective goods even if he had sold them and that they had been rejected by the sub-buyers.

5.4 (C) Acceptance through lapse of a reasonable time

5.4.1 The third way in which a buyer can accept the goods is to retain them for longer than a reasonable time without informing the seller that he

wants to reject them. Section 58 states that what is a reasonable time is a question of fact. Decided cases, mostly of motor car sales, show that there is no consistent period which judges thought was reasonable. In some cases, the time allowed for revocation included the time the car was being repaired.

5.4.2 A seller wants commercial certainty that goods sold months ago would not be returned because of defects which should have been spotted earlier. A buyer wants to have full knowledge of any defects before he accepts the goods. Those are conflicting expectations which in the case of multi-component products, in which defects may only manifest themselves after a period of use, are not easily reconciled.

5.4.3 Nevertheless, the law should give some sensible and coherent guidance as to what is a reasonable time in the context of sale of goods. The Law Commissions suggested that periods spent attempting repairs should not count.

Another solution is offered by section 21 of the Irish Sale of Goods and Supply of Services Act (1980) in consumer sales where, despite breach of a condition by the seller, the consumer buyer can only claim for breach of warranty because by the passage of time, he has accepted the goods if the consumer buyer:

> *" ... promptly upon discovering the breach makes a request to the seller that he either remedy the breach or replace any goods which are not in conformity with the condition, then, if the seller refuses to comply with the request or fails to do so within a reasonable time, the buyer is entitled (i) to reject the goods and repudiate the contract or (ii) to have the defect constituting the breach remedied elsewhere and to maintain an action against the seller for the cost thereby incurred by him. The onus of proving that the buyer acted with promptness ... shall be on him."*

5.4.4 In our consultative questionnaire, we asked "How long should the buyer have in which to examine the goods before he is deemed to have accepted them". The general response was that it depended on what the product in question was. Trade and business organizations in general replied that the period of time the buyer should have should depend on the type and quantity of the goods bought which seems to us a sensible approach.

5.4.5 We have considered different periods of time but it is impossible to fix a period which would apply to all types of goods and the infinite varieties of circumstances. Other law reform bodies have also found it difficult to formulate a definitive period of time or formula. We feel that statutory definition or guidance would be futile and perhaps counter productive, and have accordingly not recommended any change.

Chapter 6

The supply of services

6.1 Introduction

There is no statute setting out the essential obligations of a supplier of services in Hong Kong. Thus, common law applies. In Britain, the Supply of Goods and Services Act 1982 (hereinafter referred to as the SGSA) puts into statutory form the main common law obligations.

6.2 Definition of "services"

6.2.1 The SGSA defines a contract for the supply of a service as "a contract under which a person (the supplier) agrees to carry out a service". The SGSA does not attempt to define "services". The Secretary of State has the power under the SGSA to exempt specified services from all or any of the implied terms. Services, which have been exempted include services of an advocate, of company directors and building society directors and the services rendered by an arbitrator or umpire. The Irish Sale of Goods and Supply of Services Act 1980 takes a similar approach.

6.2.2 The State of Victoria, Australia took a different approach. Section 84(1) of the Victorian Goods (Sales and Leases) Act 1981 gives a short but exhaustive list of services. A narrow definition of services could also be found in the Federal Trade Practices Act 1974. This was in section 74(3) in Division 2 of the Act which deals with conditions and warranties implied in consumer transactions. In 1986 section 74(3) was repealed. This leaves section 4, the interpretation section of the Act, to define services. The section provides that "services include, without limiting the generality of that expression, the rights or benefits that are to be provided under -

(a) a contract for -

(i) the performance of work (including work of a professional nature but not including work under a contract of services), whether with or without the supply of goods;

(ii) the provision of, or of the use or enjoyment of facilities for, amusement, entertainment, recreation or instruction; or

(iii) the conferring of rights or privileges for which remuneration is payable in the form of a royalty, tribute, levy or similar exaction;

(b) a contract of insurance; or

(c) a contract between a banker and a customer of the banker entered into in the course of the carrying on by the banker of the business of banking, or any other contract for or in relation to the loan of moneys."

A wide definition of "services" is also included in the draft Supply of Goods and Services Bill proposed by the Tasmanian Law Reform Commission. The trend is therefore not to limit the services to which the law would apply.

6.2.3 We prefer the English approach because we believe there is no need to define "services", just as it is unnecessary to exhaustively define "goods". As for exemptions, we believe it is unnecessary to exclude any particular service from the scope of the legislation.

6.2.4 Section 12 of the SGSA states that a contract for the supply of services includes a contract where goods are transferred or hired. Therefore, contracts for work and materials fall within the scope of the legislation. The servicing or repair of a car and the servicing and maintenance of domestic appliances all come within the SGSA. Section 4 requires that the materials supplied must be of merchantable quality and be fit for purpose similar to those required in section 14 of the Sale of Goods Act. The work element, that is the service supplied, is governed by section 13 of the SGSA and is discussed below.

6.3 The implied term of care and skill

6.3.1 Section 13 of the SGSA states that if the contract is one where the supplier is acting in the course of a business, there is an obligation to supply the service with reasonable care and skill, reflecting the common law position. The standard of care was described by McNair J. in Bolam v Friern Hospital Management Committee [1957] 2 All ER 118 as

> *"the standard of the ordinary skilled man exercising and professing to have that special skill. It is well-established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular skill."*

The test is an objective one - the supplier must come up to the standard of an ordinary supplier of that type of service. There are also decisions giving guidance on whether the claim lies in contract or in tort where a professional contractor is in breach of the duty of care.

6.3.2 In Australia, the expression "due skill and care", is used (section 74(1) Trade Practices Act; section 9(1) Victorian Goods (Sales and Lease) Act; section 8 Tasmanian draft Supply of Goods and Services Bill.) The Irish Sale of Goods and Supply of Services Act uses "due skill, care and diligence".

There has been criticism of the use of the word "due" as it is unclear whether it imposes a higher duty than the avoidance of negligence. We prefer the word "reasonable" because it is more prevalent in common law usage.

6.4 The implied term on time for performance

Where the supplier is acting in the course of a business and the time for the service is not fixed by the contract or determined by the course of dealings between the parties, section 14 of the SGSA requires that the service be carried out within a reasonable time. Section 14(2) states that what is a reasonable time is a question of fact. For example, in Charnock v Liverpool Corporation [1968] 1 WLR 1498, damages were awarded where a car which should only take five weeks to repair took eight.

6.5 The implied term for consideration

6.5.1 Where the consideration or the manner in which it is to be determined is not dealt with in the contract or by a course of dealing between the parties, section 15 of the SGSA requires that the purchaser pay a reasonable charge. That section does not give the court the power to interfere if a consumer has made a bad bargain.

6.5.2 The English Law Commission in its 1986 Report on Implied Terms in Contracts for the Supply of Services (Law Com. No. 156) considered and rejected the suggestion by the National Consumer Council that a discretionary power should be conferred upon the court to re-open agreements in cases of "blatant exploitation". (see Chapter 8).

6.6 Stricter and additional obligations

6.6.1 There is no implied obligation in the SGSA on the supplier that the promised services will produce the intended effect. In contrast, in Australia (section 74(2) Federal Trade Practices Act; section 9(2) South Australian Consumer Transactions Act; section 92 Victorian Goods (Sales and Leases) Act) there is an implied warranty that where the consumer makes known the purpose for which the services are required or the result that he wishes to achieve, the services will be reasonably fit for that purpose or are such that they might reasonably achieve that result, unless the consumer does not rely on the supplier's skill or judgment, or it is unreasonable for him to do so.

6.6.2 In its 1986 report the English Law Commission considered the Australian provisions but thought it would be inappropriate to add them to the SGSA because they thought there was as yet no clear evidence of a positive need for an extension of the range of terms implied in the SGSA. Whilst we appreciate the intention of Australian provisions, we believe imposing such a

statutory obligation could in fact decrease consumer protection because there would be no liability if the supplier could show that the consumer did not rely on his skill or judgment. For example, where the consumer gives instructions for work to be done, the Australian provisions could be construed so that because the instructions were from the customer, that the services supplied were fit for the purpose for which it was intended even if the contractor knew that it would not produce the desired effect that the customer had in mind.

6.6.3 Section 74(1) of the Australian Federal Trade Practices Act requires that in contracts for work and materials any materials supplied in connection with those services will be reasonably fit for the purpose for which they are supplied. The English Law Commission in its 1979 Report on Implied Terms in Contracts for the Supply of Goods (Law Com. No. 95) criticised the section for omitting the qualification that there has to be reliance on the supplier's skill and judgment thereby rendering a supplier liable for damages even where the customer insisted on using materials contrary to the supplier's advice. The section, therefore, appears to impose much stricter obligations on a supplier of work and materials than the implied terms as to quality and fitness in sections 71(1) and (2) impose on a seller of the same materials as the implied term as to fitness in section 71(2) would only apply if the buyer satisfied the court that he relied on the seller's skill or judgment.

6.6.4 The English Law Commission in its 1986 report also considered and rejected the term that the supplier should possess the necessary skill implied in the Irish Sale of Goods and Supply of Services Act. They thought it unnecessary because the customer would not sustain damage unless the supplier failed to exercise reasonable skill. Further, the term was implied at common law and since the SGSA does not affect any term implied by common law, the term would continue to be implied.

6.7 Conclusion

We recommend that the statutory obligations on suppliers of services be introduced in Hong Kong as in the English Supply of Goods and Service Act 1982. Provision should be made to prohibit the exclusion or restriction of liability for breach of the implied obligations in consumer transactions.

Chapter 7

Control over unfair or unjust terms

7.1 Introduction

7.1.1 Contracts between suppliers of goods or services and consumers are as a general rule drawn up by the supplier. The terms of these contracts are understandably designed to protect the interests of the supplier rather than those of the consumer. When a consumer signs a contract, it is very likely that it will contain terms that are detrimental and even unfair to him. Sometimes these terms are so unfair that they can be regarded as harsh or unconscionable. However the consumer generally signs the contract without being given the opportunity to read it in full. Even if he has had the opportunity to read it, he is in no position to bargain for alteration of the terms, for the supplier would not negotiate with him. If he did not sign it, he simply would not get what he wanted. And if he went to another supplier, he would find that he was faced with a similar set of terms. There is some control over exemption clauses in other jurisdictions. Quite apart from exemption clauses, there have been steps to control extremely unfair terms which are not just exclusion of liabilities but which reach into other terms of the contract on the grounds that they are unjust, harsh or unconscionable.

7.1.2 The question therefore arises whether there should be legislation in Hong Kong giving the courts power to rewrite or strike down such terms in sale and supply contracts. It must be said at once that what we are concerned with here is terms which are not merely unfair but are harsh or unconscionable. Since unconscionability is a very high test and a harder test than unfairness, it is envisaged that such legislation would apply only to extreme cases, which would be very rare.

7.2 Existing statutory control over unfair terms in contracts for the sale of goods

7.2.1 We are aware that control over a particular type of unfair term in contracts for the sale of goods, namely exemption clauses, exists in the Sale of Goods Ordinance. Section 57 provides that an exemption clause in a contract for the sale of goods which attempts to exclude liability for breach of the implied term as to title shall be void and that a clause in a consumer sale contract which exempts the seller from all or any of the implied terms as to quality, fitness or correspondence of the goods with description and sample shall also be void, while in non-consumer cases the clause shall not be enforceable to the extent that it would not be fair or reasonable to allow

reliance on it. However, paragraph 3 of our terms of reference asks us the question whether it would be desirable to introduce any statutory control over unfair terms in contracts for the sale of goods or supply of services. We are therefore concerned not only with terms purporting to exclude section 14 (the implied term that the seller has the right to sell the goods etc), 15 (the implied condition that the goods shall correspond with the description), 16 (the implied conditions as to quality and fitness of goods) or 17 (the implied condition in sale by sample), but with any unfair terms in contracts for the sale of goods or supply of services.

7.3 Judicial intervention in contract terms

7.3.1 Before we consider the desirability of legislation governing harsh or unconscionable contract terms we should consider the existing power of the courts to strike down such terms. There are a number of well-established areas of law where relief is granted against enforcement of harsh and unconscionable terms. For instance, the court has a wide discretion in equity to grant relief against the exercise of forfeiture provisions in contracts, such as a power under which a contracting party confiscates a deposit paid by the other party or a landlord terminates the lease of his tenant. Probably the best-known power of the courts to interfere with the contractual bargain concerns clauses which purport to lay down fixed sums of money to be paid by a defaulting party to the other party as compensation: if the fixed sum is a genuine pre-estimate of the loss, it will be enforceable, but if the court is of the opinion that it is not and that therefore the sum is a penalty, the court will refuse to order that the fixed sum is the appropriate amount of damages.

7.3.2 There are other circumstances in which contractual provisions will not be enforced because of equitable considerations. If a party made the agreement, even a commercial agreement, acting under physical or financial duress, it will not be enforced. If a party made the agreement acting under the undue influence of the other party, it will not be enforced: undue influence is readily inferred where the relationship of the parties is 'fiduciary', that is one in which a duty of utmost good faith is owed by one party to the other (examples are: trustee-beneficiary, solicitor-client). There are also long-established doctrines which protect a mortgagor-borrower from the strict letter of his agreement with the mortgagee-lender, so that a court will not allow the mortgagor to be prevented from paying off (redeeming) the mortgage and will not allow the mortgagee to exploit the mortgagor's weak position by taking an unfair and unconscionable collateral advantage from the mortgagor.

7.3.3 Lawyers tend to regard these and other instances of judicial interference with the terms of contracts as ancient exceptions to the rule that a man must keep his bargains, a rule which is said to provide certainty and predictability. It has been argued, however, that these "exceptions" are in fact merely illustrations of a general rule that equity will intervene to strike down harsh and unconscionable transactions. The author of a recent book on this subject (Robert Clark, Inequality of Bargaining Power (Carswell, 1987)) suggests that a general power to set aside dispositions of property as a result

of circumstances governing a party's conscience grew out of decisions of the Courts of Equity and has now entered the general law. This supports the minority views of Lord Denning who, in Lloyds Bank v Bundy [1975] QB 326, identified five categories of circumstances in which equity would relieve a party against unfairness and, after examining the cases, suggested that a common principle, based on inequality of bargaining power, was detectable. However the actual decisions in cases from which the doctrine of inequality of bargaining power had been inferred by Lord Denning can be explained on other grounds and were so explained by other members of the court. There is therefore no general judicial support for or acceptance of a general doctrine of unconscionability on the basis of inequality of bargaining power.

7.3.4 In Hong Kong there seems to be even less judicial support for this doctrine. In 1980 an attempt was made by a District Judge to apply the principle to a standard form contract. In OTB International Credit Card Ltd v Michael Au [1980] HKLR 297, Au was the holder of a credit card issued by OTB. The card was stolen from Au's car. Upon discovering the theft, Au immediately telephoned the company. Details of the loss were recorded by the company and Au was told to confirm the loss in writing as soon as possible. He did so the following morning. On the day of loss however the card was used by some other person to make purchases totalling $3,216.09, although the signature on the purchase slips did not resemble the signature of Au. The company billed him for the cost of these purchases but he refused to pay, so the company took action against him in the District Court. At trial, Judge Jones (as he then was) held that Au had notice of the following rule of membership: -

> *"In the event of loss or theft of the card, the holder must immediately notify the company by registered mail or telegram and until such notification is received by the company, the holder will remain responsible for all purchases charged through the use of such card."*

However he held that it would be unconscionable for the company to rely on this term and dismissed the action. One of the factors which influenced the Judge appeared to be the superior bargaining power of the company in being able to impose on Au their standard conditions of agreement. On appeal, the Court of Appeal rejected Judge Jones' reasoning and held that the clause in question was a reasonable one and was also reasonably necessary for the protection of the legitimate interest of the company and commensurate with the benefits accruing to Au under the contract. Au was bound by the terms of his contract. [We understand that nowadays such terms are not commonly included in credit card agreements.]

7.3.5. In Pao On v Lau Yiu Long [1980] AC 614, however, there seems to be some support from the Court of Appeal in Hong Kong for such a doctrine. However on appeal to the Privy Council, disapproval was expressed over the doctrine, at least where businessmen are negotiating at arm's length.

7.3.6 In National Westminister Bank plc v Morgan [1985] AC 686 Lord Scarman expressed similar views when questioning "whether there is any need in the modern law to erect a general principle of relief against inequality of bargaining power". Parliament having dealt with a number of specific instances in which superior bargaining power might be abused, he doubted "whether the court should assume the burden of formulating further restriction". Similar doubts have been expressed by eminent commentators, such as Goff and Jones and Dr Sealy. It seems, therefore, doubtful that inequality of bargaining power is the common strand suggested by Lord Denning.

7.4 What is unconscionability?

7.4.1 Inequality of bargaining power is, however, only part of a more general principle, unconscionability, which appears in the older cases. The development of unconscionability into a doctrine of equity permitting interference in contracts is discussed by Clark, who quotes the judgment of the High Court of Australia in Jenyns v Public Curator of Queensland [1953] QSR 225:

> *"The jurisdiction of a Court of Equity to set aside a gift or other disposition of property as, actually or presumptively, resulting from undue influence, abuse of confidence or other circumstances governing the conscience of the donee is governed by principles the application of which calls for a precise examination of the particular facts, a scrutiny of the exact relations established between the parties and a consideration of the mental capacities, processes and idiosyncracies of the donor. Such cases do not depend upon legal categories susceptible of clear definition and giving rise to definite issues of fact readily formulated which, when found, automatically determine the validity of the disposition."*

This quotation suggests that conscionability is a flexible and fluctuating concept that looks at more than just the words of the clause or contract in question and which has been more readily used by the courts in relation to property transactions rather than consumer or commercial transactions. The reluctance of the courts to extend it into these areas has led to the introduction of consumer protection legislation which employs the concept of contract terms which are unconscionable or similar concepts such as unjust or unreasonable terms (for example, the Trade Practices Act in Australia, the Business Practices Act in Ontario and the Contracts Review Act in New South Wales). Clark says, however, that such legislation is narrower than the equitable power to intervene on grounds of unconscionableness, although it is helpful because it educates consumers and lawyers as to the potency of the concept.

7.4.2 Unconscionability is therefore neither new nor unknown, but it is a vague notion. It is not the same as fraud, nor is it the same as unfairness or

unreasonableness, although it shares elements with all of them. Similarly, a contract or clause which is unconscionable is not the same as one which is improvident. Unconscionability focusses on the conscience of a party who is using a power which he holds over another. Where those persons have an agreement, that power stems from the agreement. The question for the court is whether, in all the circumstances, the exercise of that power is one which a court of conscience ought to permit.

7.4.3 Although it is impossible to pin unconscionability down, there are identifiable elements to it which may be present in a particular case. One element, inequality of bargaining power, has already been mentioned, although this involves sub-elements such as the identity, status and education of the parties and whether the party in the inferior position had an opportunity to take independent advice and whether he was able to make an informed judgment when signing the agreement. Associated with this is whether that party had adequate time to deliberate over his decision to sign and whether he was acting under pressure. Such pressure could come from the other party's sales techniques or position of influence or could stem from the financial or personal situation of the first party. Sometimes the conduct of the other party amounts to more than pressure and constitutes sharp practice, coercion or even fraud.

7.4.4 The type of transaction has an obvious bearing on conscionableness, the courts being more willing to intervene where the contract is a consumer one rather than a thoroughgoing commercial one in which risks are more readily appreciated. But the type of transaction is bound up with the identity of the parties and the regulation of consumer contracts by statute in other jurisdictions has removed the demand for judges there to intervene on the basis of equity.

7.4.5 The consequences of the bargain for the party in the inferior position is an important element. If the benefits received by him are obviously inadequate in relation to the detriment suffered by him so that it could be said that no reasonable person who was properly advised would have entered into the transaction, there will be a strong impetus for the court to intervene especially if the inadequacy of the consideration can be explained by a factor (such as the age, health or education of the first party) which points towards unconscionability.

7.4.6 The unusualness or otherwise of the clause under attack and its prominence or otherwise in the contract are also relevant. A party who is confronted by a wall of small print can be forgiven for not reading it, especially if it is presented on a take-it-or-leave-it basis by a man in a hurry. Some clauses may be so detrimental to his interests (despite being common in the trade) that they should be picked out in bold type and may be even boxed and pointed out by a red hand, as recommended by Lord Denning.

7.5 Desirability of unconscionability legislation

7.5.1 The question remains as to whether such power to set aside unfair, harsh or unconscionable contracts should be introduced by legislation. This question has been considered by the Law Reform Commission recently in connection with its work on control on exemption clauses. The Commission considered the unconscionability provisions in Article 2.302 of the American Uniform Commercial Code and the New South Wales Contracts Review Act 1980, which give the court a power to reform any contract which it considers to be unjust so as to avoid injustice. It concluded that such sweeping powers would be unsuitable for Hong Kong in that they result in an unacceptable degree of uncertainty and recommended that exemption clauses be regulated through the adoption of the English Unfair Contract Terms Act in Hong Kong. The Commission was then, of course, dealing with contracts generally. We are now asked to consider the desirability of such legislation in relation to particular types of contracts, namely contracts for the sale of goods and supply of services. It is for us to consider the arguments for and against such legislation afresh.

7.5.2 Apart from New South Wales, legislation controlling unconscionable contracts has been enacted in the Australian Capital Territory (Law Reform (Harsh and Unconscionable Contracts) Ordinance 1976). Such legislation has also been recommended for South Australia by their Law Reform Committee. In 1986 the Federal Trade Practices Revision Act inserted a new section 52A in the Trade Practices Act, subsection (1) of which prohibits a corporation, in trade or commerce, in connection with supply or possible supply of goods and services from engaging in conduct that is unconscionable. Section 52A(5) states that the goods or services must be of a kind ordinarily acquired for personal, domestic or household use or consumption. The term "unconscionable" is not defined in the section but section 52A(2) lists five factors to which the court should have regard in considering whether the conduct in a particular case is unconscionable within the meaning of the section, although these matters are not to be taken in any way as a limitation of the circumstances which the court may consider relevant. The court may have regard to:

> *"(a) the relative strengths of the bargaining positions of the corporation and the consumer;*
>
> *(b) whether, as a result of conduct engaged in by the corporation, the consumer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the corporation;*
>
> *(c) whether the consumer was able to understand any documents relating to the supply or possible supply of the goods or services;*
>
> *(d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the consumer by*

the corporation or a person acting on behalf of the corporation in relation to the supply or possible supply of the goods or services; and

(e) the amount for which, and the circumstances under which, the consumer could have acquired identical or equivalent goods or services from a person other than the corporation."

7.5.3 The main argument in favour of an unconscionability provision appears to be that judges need to be given a clear general power to strike down unfair terms or contracts so that they would not have to resort to artificial interpretation or distinction in order to avoid injustice.

7.5.4 A major argument against such legislation is that legislation of this kind may create uncertainty as to whether an apparently binding contract may be enforceable. One dissenting member of the South Australian Law Reform Committee, which had recommended the adoption of the New South Wales Act in South Australia, observed that the issue of whether a particular contractual provision is so one-sided as to be unjust is one which would often involve a subjective element on the part of the judge who would find it difficult to divorce the issue from his own social values and personal background. He went on to say that even accepting that a set of general principles might subsequently be developed by judges to explain and confine the doctrine which the Act sought to establish, "the extent to which a general principle laid down by Parliament should be left to the courts to develop is a matter of degree. It is a most far-reaching development for Parliament to simply give a mandate to courts to alleviate injustice." He suggested that attention should be given to specific rules of law where abuses and unfair practices are known to exist.

7.5.5 We however do not feel that the objection that an unconscionability provision introduces uncertainty into the law carries weight. If certainty were the sole aim of law, it would justify passing a statute, or adopting a principle of interpretation, that the consumer or weaker party was always wrong (or, indeed, right). There is another aim of law, which is fairness. As Lord Atkin put it "finality is a good thing, but justice is a better". Certainty is a pragmatic rather than a principled consideration craved by lawyers so that they can advise their clients upon their rights. We do not belittle certainty, but we do not feel that it is paramount. Certainty in this context is sometimes sought to be justified by the principle of sanctity of contract, that a party must abide by his agreement. This assumes of course that a piece of paper signed by that party is truly his agreement. But in reality that party has not genuinely consented to the terms on that paper, which are in standard form and have not been read (or been expected to be read) by him, let alone been the subject of negotiation. The principle of sanctity of contract carries conviction only if there is a contract in the sense of a full-hearted agreement which is the result of free and equal bargaining. Unfortunately, in modern life, there is rarely the time or the opportunity for

such bargaining; it has been replaced by the convenient form and the standard term.

7.5.6 Professor Cranston points out in "Consumers and the law" (2nd ed, 1988) that the objection that an unconscionability provision could introduce uncertainty ignores the ways courts have historically narrowed discretion. Although the counter-argument is that it is questionable whether the judiciary possess the necessary breadth of vision for such a discretion to be entrusted to them, in his view it is possible to meet some of these criticisms by fleshing out an unconscionability provision on the basis of legislative and judicial experience in the area of unjust contracts.

7.5.7 The Alberta Institute of Law Research and Reform also felt that the development of a doctrine of unconscionability would not result in uncertainty if the doctrine is laid down within clear statutory guidelines.

7.5.8 We take the view that there is already uncertainty in some well-accepted concepts, such as reasonableness, the statutory test for control of exemption clauses. The concept of unconscionability, according to Professor Yates, has at least two advantages over the present concept of reasonableness. Firstly, the court can look at the particular circumstances of the consumer who may not be a "reasonable man" in the objective test of reasonableness. Secondly the court is able to consider the conduct of both parties, not just that of the complainant.

7.5.9 In the United States, decided cases show that Article 2.302 of the Uniform Commercial Code has been used mainly by consumers and that the facts in cases where relief had been granted are extreme. For instance, exorbitant prices in relation to the value of the goods in a contract between a home improvement business and an 87-year-old woman and in contracts negotiated by a firm selling door-to-door to low income, poorly educated consumers have been held to be unconscionable.

7.5.10 In New South Wales there have been only a few reported cases in which a contract has been set aside under the Contracts Review Act. One of these cases is Partyka v Wilkie (1982) A.S.C. 55-213 in which the plaintiff, who had migrated from Poland about a year previously responded to an advertisement offering employment in California, free air ticket to that state and accommodation. On meeting the defendant, the plaintiff was persuaded to pay him $6,600 on signing a declaration of trust. The document appeared to give him 1% interest in a motel in California. The plaintiff read this document but in view of his limited command of English did not understand it. Taking into account the plaintiff's limited understanding of English and his reliance on the defendant in explaining the nature of the obligation undertaken, the Judge held that the contract was unconscionable. The contract was declared void and the defendant ordered to repay the money.

7.6 Examples of unconscionable contractual provisions

7.6.1 Before we assess the need for legislation in Hong Kong controlling unconscionable terms in contracts for the sale of goods and supply of services, it is necessary to have some idea of the extent of the problem relating to the existence of such terms. The Consumer Council pointed out in a paper on consumer protection in 1986 that potentially harsh and unconscionable terms other than exemption clauses are often found in contracts concerning consumer sales. It gave as examples terms in housing mortgage agreements and restrictive conditions for the use of credit cards.

7.6.2 One common provision in credit card agreements which may be considered harsh or unconscionable is the provision providing for a defaulting borrower to indemnify the costs of obtaining judgment against him. Such provisions have, we understand, been unpopular with the High Court Masters who are invariably called upon to give effect to them. Solicitors acting for banks and companies whose cardholder agreements contain such provisions often sue in the High Court, despite the debt being relatively small and well within the jurisdiction of the District Court. As a result the legal costs are inflated and the debtor must, under the judgment, pay these costs, which the agreement often provides shall be on the basis of a full indemnity to the bank or company rather than on the usual, lower basis of costs between party and party.

7.6.3 Possibly unconscionable clauses can also be found in motor insurance agreements. One example is a clause providing for the insured to inform the insurance company immediately should he be involved in a road accident. Failure to give notice is a breach of the policy which entitles the company to repudiate liability. It should however be pointed out that "immediately" has been interpreted as "as soon as possible", and so is less harsh than it appears.

7.6.4 It has also been suggested that clauses in agreements between tour operators and consumers giving the operator the right to cancel any tour without compensation or unilaterally to increase the price of the tour, clauses in agreements between laundry companies and consumers requiring the consumer to collect the clothing sent for cleaning within 15 days failing which the laundry company has the right to sell it, are unconscionable. It can be seen that clauses which are arguably unconscionable are commonly found in agreements for the supply of services.

7.7 Conclusion

7.7.1 Our initial reaction was that if the court should be given powers to review harsh or unconscionable provisions in sale of goods and supply of services contracts, that would lead to uncertainty in the law and would amount to interference with freedom of contract. We had thought that the introduction of legislation on the control of exemption clauses would be sufficient.

7.7.2 On consultation, there was much support for introducing legislation in Hong Kong to control harsh or unconscionable terms. It was suggested to us, we think with justification that, in focussing on the contents of the clause itself, we were taking too narrow a view and that unconscionability also depended on the circumstances of how the contract was entered into. We are now of the view that this is an important area and that it could help to protect the consumer.

7.7.3 Admittedly, a power to strike down harsh or unconscionable terms will rarely help the little man, particularly as he would still need to go to court if he wanted to attack the contract. However, we feel that such statutory provision would have a restraining effect on large organisations in that their lawyers would be more even-handed when drafting their contracts because the court could strike down what terms it considered to be harsh and unconscionable. We are also conscious that large organisations, and perhaps in particular those offering financial services, may decide that such restraining legislation will mean that their risk of doing business has increased and would therefore increase their price which will of course have to be borne by the consumer. However, consumers may be less hesitant to enter into contracts because they know they will be better protected which could increase the overall business of the seller of goods and services.

7.7.4 The objection that such provisions would be too vague could be met by the argument that it is intended to apply to extreme cases which would be quite rare. If we trust our court to decide fairly and impartially, we should trust that the court will also exercise a new power to strike down harsh and unconscionable terms and rewrite the terms appropriately. Further, specific matters which would assist the court in determining whether the contractual provision is in the circumstances harsh or unconscionable could be spelt out in the legislation. In other jurisdictions the kind of factors the court is directed to take into account include:

- the price charged by the seller and that charged by other suppliers,

- the relative bargaining strength of the seller and the consumer,

- the degree of understanding of the relevant contract document,

- the degree to which one party has taken advantage of the inability of the other party to protect his interests because of his physical or mental infirmity, illiteracy, inability to understand the language of the agreement and lack of education, lack of business knowledge or experience, financial distress or similar factors, and

- whether undue influence or pressure was exerted during negotiation.

7.7.5 We believe such legislative control should be confined to consumer contracts of sale of goods and supply of services. Since unconscionability is a question of fact to be determined having regard to all the circumstances of the case, it is impossible to give it a precise definition. Each case must be decided on its own facts using the guidelines listed in 7.7.4. As commercial contracts are generally the result of arm's length negotiations between parties who have better knowledge about their business and who want to continue commercial relations, we do not propose that our recommendation should apply to them.

Accordingly, we recommend that a provision such as section 52A of the Australian Trade Practices Act be adopted in sale of goods and supply of services in Hong Kong.

Chapter 8

Consumer protection law in Hong Kong

8.1 Introduction

8.1.1 For the sake of completeness, this chapter highlights other areas relevant to the general issue of consumer protection. The following laws all have some element of consumer protection.

(1) Trade Descriptions Ordinance Cap 362

(2) Sale of Goods Ordinance Cap 26

(3) Public Health and Municipal Services Ordinance Cap 132 and Food and Drugs (Composition and Labelling) Regulations and Colouring Matter in Food Regulations

(4) Weights and Measures Ordinance Cap 51

(5) Money Changers (Disclosure of Rates, Charges and Commissions) Ordinance Cap 34

(6) Money Lenders Ordinance Cap 163

(7) Pharmacy and Poisons Ordinance Cap 138

(8) Antibiotics Ordinance Cap 137

(9) Small Claims Tribunal Ordinance Cap 338

(10) Travel Agents Ordinance Cap 218

(11) Consumer Council Ordinance Cap 216

8.2 Consumer information

8.2.1 The Trade Descriptions Ordinance, in summary, requires vendors of goods to be honest in their descriptions of what they sell, whether the description is in an advertisement, on a sign in the shop, in a brochure, in markings on the goods or their packets, or in the patter of the salesman. Heavy criminal penalties can be imposed if the description is dishonest. There is provision for positive rules to be made, requiring certain information to be given about certain products, but, except in the case of gold, this has not

been done. The Sale of Goods Ordinance incorporates an indirect provision to the same effect. Goods sold by description must comply with the description, and if they do not, the buyer has remedies in the civil courts. There are some specific rules relating to food and drugs in the Public Health and Municipal Services Ordinance and Regulations made under it. Some food and drugs are required to carry descriptive or warning labels and to comply with the description.

8.2.2 There are a very limited number of consumer information provisions applying to services. Two examples are the Money Changers Ordinance which requires money changers to display certain details and to give customers certain information prior to the transaction taking place, and the Public Service Vehicles Regulations made under the Road Traffic Ordinance, which requires certain operators to display their charges. Money lenders also have to give customers details of their transactions.

8.3 The gaps

8.3.1 Other jurisdictions have much stronger consumer information laws than those of Hong Kong. For example in Sweden, the Marketing Practices Act 1975 requires that if a tradesman omits to deliver information of particular significance to consumers, the Market court could require him to give such information. In Australia, under the Trade Practices Act 1974 an injunction or damages may be obtained where conduct occurs in trade or commerce that is misleading or deceptive or is likely to mislead or deceive.

8.3.2 Hong Kong law deals with actual misrepresentations, but not with more subtle ones which may lead to dishonest sales tactics on the shop floor. One common tactic is known as "bait and switch". A product is advertised at a bargain price, when in fact there are either no, or very small, stocks. The buyer arrives at the store in response to the bait, is told the low priced goods are all sold out and is then persuaded to buy another, more expensive, item. Several jurisdictions such as Australia and New Zealand control this type of abuse by requiring reasonable stocks be held, and that, if less than a certain number are in stock, the actual number available be specified. In the United States, it is an offence for the advertiser to fail to supply the advertised goods for a reasonable time and in reasonable quantities having regard to reasonably anticipated demand.

8.3.3 Another common price-advertising control requires advertisements offering goods for sale by installments to state their total price. It is illegal simply to advertise the monthly installment.

8.3.4 A major gap in Hong Kong law is that the advertising controls in the Trade Descriptions Ordinance do not apply to services. In most jurisdictions advertising controls apply to services as well as to goods. Section 14(1) of the Trade Descriptions Act 1968 (UK) makes it an offence to make a false or reckless statement in relation to various aspects of providing services, accommodation and facilities.

8.3.5 There are no civil remedies under the Trade Descriptions Ordinance. The only remedy is criminal prosecution under the Ordinance, which may lead to punishment for the dishonest advertiser, but there is no compensation for the consumer who has suffered.

8.3.6 In some jurisdictions, a breach of the equivalent legislation is ground for civil as well as criminal action. Hong Kong's Ordinance expressly excludes this possibility (s.34).

8.3.7 Despite its deficiencies, the provisions of the Trade Descriptions Ordinance could of course be enforced for the protection of the consumer. In Hong Kong it appears that it is used more for the purpose of prosecuting business crimes. The statistics on enforcement action supplied by the Commissioner of Customs and Excise support the view that the Trade Descriptions Ordinance is mainly used as anti-counterfeiting legislation. This in our view is a reflection of the consumer's lack of information and knowledge as regards their rights generally. The public should be made aware that the Ordinance is not concerned with trade mark or goldware but with control over false trade descriptions by imposing criminal liability on persons applying misleading or false descriptions to goods.

8.4 Product safety

8.4.1 Many products on the market are potentially hazardous and many countries passed laws to try to ensure that they are safe. Hong Kong has a few laws which apply to specific products or types of products. The food hygiene and composition regulations made under the Public Health and Municipal Services Ordinance are one category as are the Pharmacy and Poisons and Antibiotic Ordinances. But there is no comprehensive product safety legislation.

8.4.2 While consumers may be able to get redress against the sellers or manufacturers of unsafe products by civil action in the courts, this does not prevent the manufacturer continuing to produce unsafe products, nor purchasers of products already made being injured by them.

8.4.3 The approach adopted to deal with this problem in other countries has tended to be two-fold. Firstly power is given to a government official to prohibit the import or manufacture of named hazardous goods. He may also publicise the danger, order the manufacturer or importer to label the goods to indicate the danger, and, in some cases, order the manufacturer to recall them. In the UK under the Consumer Safety Act 1978, the Secretary of State has the power to make "prohibition orders" and "prohibition notices" prohibiting persons from supplying dangerous goods. The relevant provision is recently re-enacted in the Consumer Protection Act 1987. In Canada the Hazardous Products (Hazardous Substance) Regulations requires labelling of prescribed products to contain information such as the nature of any hazard (e.g. "flammable", "corrosive"), a signal word such as "danger" or "caution",

instructions for first aid treatment (e.g. the names of antidotes) and a hazard symbol. Secondly, legal remedies are often improved by, for example imposing strict liability on the manufacturer, making the retailer liable for injuries caused to anyone by the product, or shifting the burden of proof. An example is section 2 of the UK Consumer Protection Act 1987 which makes the producer or importer of a product strictly liable for any damage caused by a defect in the product. Section 10 of the Act further makes it an offence to supply, offer to supply or expose for supply any consumer goods which fail to comply with the general safety requirement.

8.4.4 Recently the Hong Kong government has looked into the safety of electrical goods and an Electricity Ordinance is expected to be enacted in due course. When enacted the Ordinance will, amongst other things, deal with safety standards of electrical products and specific criteria to be met by certain types of products.

8.5 Consumer credit

8.5.1 Hong Kong has very little law relating to consumer credit. The Money Lenders and Pawnbrokers Ordinances obviously have some peripheral bearing, but there is no Hire Purchase Ordinance, nothing to control other credit arrangements with shops, and no controls over banks' lending activities from a borrower's point of view.

8.5.2 Hong Kong does not have a Hire Purchase Ordinance, but one is in the course of preparation at present. A modern hire purchase law generally abolishes some of the anomalies which arise at common law because of the varying ways in which hire purchase is documented, requires information to be given to purchasers so that they can find out the full cost of the transaction, requires sellers to give notice before repossession takes place, forbids certain oppressive repossession methods, requires a pro rata credit to be given where an agreement is paid off early, or the goods repossessed and sold, and requires efforts to be made to sell repossessed goods at a reasonable price, and that any surplus after payment of amounts owing be refunded to the purchaser.

8.5.3 Many jurisdictions have now gone further and introduced general consumer credit legislation. This usually requires borrowers to be given full information so that they can calculate the cost of the arrangement and compare it with other sources. Inequitable arrangements can be overruled in the courts, and early payment and repossession arrangements are controlled.

8.6 Separate legislation for consumer sales

8.6.1 In Hong Kong, the Sale of Goods Ordinance is the only law governing sale of goods. Many of the Commonwealth jurisdictions, for

example, New Brunswick, Saskatchewan, and South Australia, have enacted separate legislations for consumer and commercial sales.

8.7 Access to remedies: enforcement of consumer rights

8.7.1 The rights given to a buyer under the Sale of Goods Ordinance are enforced by taking proceedings in court. If the goods supplied are unmerchantable or unfit for the buyer's purpose, the buyer can take the seller to court and sue him for breach of his obligations under the Ordinance. Whether the matter would be dealt with in the District Court or the Small Claims Tribunal depends on the amount of money involved. The jurisdiction of the District Court has recently been increased to $120,000 and that of the Small Claims Tribunal to $15,000. As a result, more consumer cases would now go to the Small Claims Tribunal. Litigation is however unpopular with the consumer for the following reasons. He would have to pay legal fees if he employed a lawyer. Where the amount of money involved is small, litigation is hardly justified as the costs may exceed the amount of money claimed. Litigation also tends to be long-winded and it causes the consumer anxiety to have the matter hanging over him for a long time. It may therefore be thought that it is to the advantage of the consumer to have the matter dealt with in the Small Claims Tribunal where the proceedings are informal and legal representation is disallowed. That assumption may, however, be incorrect as it may be difficult for the consumer to present and argue his case before the adjudicator. The fact that most people brought their cases to the Consumer Council or the Hong Kong Tourist Association rather than going to court or tribunal shows that consumers dislike litigation and would only go to court as a last resort.

8.7.2 Rules introduced to protect the consumers would only be effective if they could be readily and easily enforced. Legislation giving a right to sue in court may not be adequate as a consumer protection measure. We note that the dissatisfied buyer usually receives a refund of the purchase price or replacement of the goods where the police take up the complaint on his behalf, which suggests that criminal sanctions are more effective than civil sanction.

8.7.3 To enhance consumers' access to remedies Britain set-up the Office of Fair Trading. The office is headed by the Director General of Fair Trading, a post created by the Fair Trading Act 1973 which confers on him various powers, two of which are of particular significance in relation to remedies. Firstly he is empowered to obtain "cease and desist" orders from the Restrictive Practices Court against business which engage in a course of conduct detrimental to the economic, health or safety interest of the consumers, if the business concerned would not give an assurance that the practice will be discontinued. Secondly, section 124(3) of the 1973 Act imposes a duty on the Director General of Fair Trading to encourage trade associations to prepare codes of practice for guidance in safeguarding and promoting the interests of the consumers. Some twenty codes of practice have been approved by the Office of Fair Trading, most of which relate to

contracts for the supply of services such as laundry and dry cleaning, funerals, travel, cars and photography.

8.7.4 It is of course not just a matter of having consumer protection laws. Making consumers aware of their rights is equally important. Consumers are not normally aware of their statutory rights. They are generally not aware, for example, that they have the right to sue their supplier if what they have been supplied with is defective. In the UK where guarantee is given, it must be accompanied by a statement informing the consumer that his statutory rights are not affected.

8.8 Conclusion

8.8.1 From the foregoing, which is by no means a comprehensive review of consumer protection law in other countries, it is clear that Hong Kong lags far behind other Commonwealth jurisdictions in the development of consumer protection law. Even if our recommendations in this report were implemented and were to result in amendments to the Sale of Goods Ordinance, this would only go a short way towards what others have done. In our view, the wider aspects of consumer protection should be examined. We understand that the Law Reform Commission's Control of Exemption Clauses Report is being implemented and a Control of Exemption Clauses Ordinance will be passed in due course, but more will need to be done. As there are so many areas of consumer protection law that could be considered, we believe that the Hong Kong Government should review the wider aspects of consumer protection laws so that the position of the consumer in Hong Kong could be improved.

Chapter 9

Summary of recommendations

9.1 We believe that the basic principle in section 16 and section 2(5) of the Sale of Goods ordinance (the Ordinance) that the goods sold under a contract for the sale of goods should be of merchantable quality - that the goods are as fit for the purpose or purposes for which goods of that type are commonly bought, bearing in mind the description of the goods, their price (if relevant), and all the other circumstances - should be retained for both commercial and consumer sale of goods contracts. We recommend that the word "merchantable" be retained and that section 16 makes reference to section 2(5) so that readers would not overlook it. (Para. 2.5.4)

9.2 However, since the exception in section 16(2) has grown to be greater than the rule in section 16(1) and the term is implied into most sales contracts, we believe that it would be appropriate for section 16(1) to be rephrased to reflect that there is a positive requirement for goods to comply with the quality standard rather than to retain the present negative formulation. We recommend that section 16(1) be deleted and that it be reformulated so that the implied term as to merchantability is stated in the positive. (Para 2.4.2)

9.3 We suggest that in consumer sale of goods the following matters should be listed as aspects of quality to which the court should have regard:

(a) their appearance and finish, (para 2.9.4)

(b) their freedom from minor defects, (para 2.9.4)

(c) their durability, (para 2.11.2)

(d) their safety, (para 2.12)

9.4 We recommend the distinction between condition and warranty be retained in all sale of goods contracts, so that consumer buyers would continue to enjoy an unfettered right to reject defective goods. We were tempted to recommend abolishing the distinction for commercial transactions because the distinction has effectively been abolished by the court in Hong Kong Fir. However, we are unable to recommend abolition of the distinction between condition and warranty because our terms of reference limited our consideration to the implied terms in relation to quality (section 16) and the remedies for breach of those implied terms only. It would be inappropriate for us to recommend abolition of the distinction in section 16 when other sections

of the Ordinance (sections 14, 15 and 17) continue to recognise the distinction. (Para. 3.5.4)

9.5 We conclude that cure provisions should not be introduced for either commercial or consumer sales. We are persuaded that when a buyer buys goods, he expects and has a right to expect them to be of merchantable quality. (Para. 4.4.5)

9.6 We recommend that section 36(1) be amended so that it would clearly state that notwithstanding the fact that the buyer has signed an acceptance note or a similar document, that his right to reject is not lost unless he had in fact had a reasonable opportunity to examine the goods. (Para. 5.2.2)

9.7 We recommend that the inconsistent act rule be retained but that section 37 be clarified that a buyer would be able to return defective goods even if he had sold them and that they had been rejected by the sub-buyers. (Para. 5.3.4)

9.8 We recommend that statutory obligations on suppliers of services be introduced in Hong Kong as in the English Supply of Goods and Services Act 1982. Provision should be made to prohibit the exclusion or restriction of liability for breach of the implied obligations in consumer transactions. (Para. 6.7)

9.9 We are of the view that the development of consumerism has made traditional contractual principles somewhat out-dated. The position of the individual consumer is considerably weaker than that of the seller who is often a large corporation or a distributor for a substantial manufacturer. The disparity in economic strength and resources between the buyer and the seller often puts the buyer in a disadvantageous position when he has complaints about the product. We believe there is room in the Ordinance to go beyond limiting exemption clauses only. Accordingly we recommend that a provision such as section 52A of the Australian Trade Practices Act be included in the Ordinance to control harsh or unconscionable terms for consumer sale of goods and supply of services contracts. We have not recommended legislative control for commercial sale of goods and supply of service contracts because we maintain that businessmen are better able to negotiate their business contracts and protect their interests. (Para 7.7.5)

Annexure 1

Membership of Sub-committee

Chairperson:	
Miss Christine Loh	Managing Director Philipp Brothers (HK) Ltd Law Reform Commission Member
Members:	
Mr Malcolm Merry	Barrister (formerly Senior Lecturer Faculty of Law University of Hong Kong)
Mr Job Young*	Council Member Consumer Council
Mr K.M. Li	Deputy Chief Executive Consumer Council
Mr Alexander Woo	Chairman Hong Kong Cotton Spinners Association
Mrs Karen Loh	Vice Chairman Bozell
Ms Mabel Tsui**	General Manager Development & Services Hong Kong Tourist Association
Mr George Rosenberg***	Senior Crown Counsel Attorney General's Chambers
Mr Maximilan Ma****	Managing Director Lee Heng Diamond Co Ltd Commission member, retired from Commission in December 1987
Secretary:	
Miss Mary Ho	Senior Crown Counsel Attorney General's Chambers

* Up to July 1988
** Up to October 1988
*** Up to February 1988
**** Up to December 1987

Annexure 2

Sale of Goods Ordinance

Section 2(5)

1973 c. 13, s. 7(2).

(5) Goods of any kind are of merchantable quality within the meaning of this Ordinance if they are as fit for the purpose or purposes for which goods of that kind are commonly bought as it is reasonable to expect having regard to any description applied to them, the price (if relevant) and all the other relevant circumstances; and any reference in this Ordinance to unmerchantable goods shall be construed accordingly. *(Added, 58 of 1977, s. 2)*

Section 13

When condition to be treated as warranty.

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

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

(3) Where a contract of sale is not severable, and the buyer has accepted the goods or part thereof, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty, and not as a ground for rejecting the goods and treating the contract as repudiated, unless there is a term of the contract, express or implied, to that effect. *(Amended, 47 of 1969, s. 5)*

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

Section 16

Implied undertakings as to quality or fitness.
1973 c. 13, s. 3.

16. (1) Except as provided by this section, and section 17, and subject to the provisions of any other enactment, there is no implied condition or warranty as to the quality or fitness for any particular purpose of goods supplied under a contract of sale.

(2) Where the seller sells goods in the course of a business, there is an implied condition that the goods supplied under the contract are of merchantable quality, except that there is no such condition -

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

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

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

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

(5) Subsections (1), (2), (3) and (4) apply to a sale by a person who in the course of a business is acting as agent for another as they apply to a sale by a principal in the course of a business, except where that other is not selling in the course of a business and either the buyer knows that fact or reasonable steps are taken to bring it to the notice of the buyer before the contract is made.

(6) In the application of subsection (3) to an agreement for the sale of goods under which the purchase price or part of it is payable by instalments any reference to the seller shall include a reference to the person by whom any antecedent negotiations are conducted.

(7) In subsection (6) "antecedent negotiations" means any negotiations or arrangements with the buyer whereby he was induced to make the agreement or which otherwise promoted the transaction to which the agreement relates.

(Replaced, 58 of 1977, s. 6)

Section 36

Buyer's right of examining goods.

36. (1) where goods are delivered to the buyer, which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.

(2) Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract.

Section 37

Acceptance of goods.

37. The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or (except where section 36 otherwise provides) when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them.

(Amended, 47 of 1969, s. 5)

Section 57

Exclusion of implied terms and conditions. 1973 c.13, s.4.

57. (1) Subject to subsections (2) to (11) where any right, duty or liability would arise under a contract of sale of goods by implication of law, it may be negatived or varied by express agreement, or by the course of dealing between the parties, or by usage if the usage is such as to bind both parties to the contract.

(2) An express condition or warranty does not negative a condition or warranty implied by this Ordinance unless inconsistent therewith.

(3) In the case of contract of sale of goods, any term of that or any other contract exempting from all or any of the provision of section 14 shall be void.

(4) In the case of a contract of sale of goods, any term of that or any other contract exempting from all or any of the provisions of section 15, 16 or 17 shall be void in the case of a consumer sale and shall, in any other case, not be enforceable to the extent that it is shown that it would not be fair or reasonable to allow reliance on the term.

(5) In determining for the purposes of subsection (4) whether or not reliance on any such term would be fair or reasonable regard shall be had to all the circumstances of the case and in particular to the following matters -

(a) the strength of the bargaining positions of the seller and buyer relative to each other, taking into account, among other things, the availability of suitable alternative products and sources of supply;

(b) whether the buyer received an inducement to agree to the term or in accepting it had an opportunity of buying the goods or suitable alternatives without it from any source of supply;

(c) whether the buyer knew or ought reasonably to have known of the existence and extent of the term (having regard, among other things, to any custom of the trade and any previous course of dealing between the parties);

(d) where the term exempts from all or any of the provisions of section 15, 16 or 17 if some condition is not complied with, whether it was reasonable at the time of the contract to expect that compliance with that condition would be practicable;

(e) whether the goods were manufactured, processed, or adapted to the special order of the buyer.

(6) Subsection (5) shall not prevent the court from holding, in accordance with any rule of law, that a term which purports to exclude or restrict any of the provisions of section 15, 16 or 17 is not a term of the contract.

(7) In this section "consumer sale" means a sale of goods (other than a sale by auction or by competitive tender) by a seller in the course of a business where the goods -

(a) are of a type ordinarily bought for private use or consumption; and

(b) are sold to a person who does not buy or hold himself out as buying them in the course of a business.

(8) The onus of proving that a sale falls to be treated for the purposes of this section as not being a consumer sale shall lie on the party so contending.

(9) Any reference in this section to a term exempting from all or any of the provisions of any section of this Ordinance is a reference to a term which purports to exclude or restrict, or has the effect of excluding or restricting, the operation of all or any of the provisions of that section, or the exercise of a right conferred by any provision of that section, or any liability of the seller for breach of a condition or warranty implied by any provision of that section.

(10) It is hereby declared that any reference in this section to a term of a contract includes a reference to a term which although not contained in a contract is incorporated in the contract by another term of the contract.

(11) This section is subject to section 62(5).

(Replaced, 58 of 1977, s. 8)

Annexure 3

Organizations and Individuals Consulted

(Those who responded are marked *)

*	The Hong Kong Bar Association
*	The Law Society of Hong Kong
*	The Chinese General Chamber of Commerce
	Indian Chamber of Commerce
	Kowloon Chamber of Commerce
	New Territories General Chamber of Commerce
	Australian Chamber of Commerce
*	Canadian Chamber of Commerce
	Hong Kong Japanese Chamber of Commerce & Industry
	Hong Kong General Chamber of Commerce
	British Chamber of Commerce
	American Chamber of Commerce
	Hong Kong Junior Chamber of Commerce
*	The Judiciary
	(Hon Mr Justice Liu
	Judge Chism
	Judge Wong
	Judge Leonard
	Judge Scriven)
	Hong Kong Automobile Association
*	The Consumer Council
*	Hong Kong Tourist Association
	Chartered Institute of Arbitrators (Hong Kong Branch)
*	Hong Kong Federation of Women Lawyers
	Hong Kong Magistrates' Association
	Hong Kong Society of Advocates
	Air Conditioning & Refrigeration Association
	Hong Kong Association of Travel Agents
	Building Contractors' Association, Ltd
*	Chinese Manufacturers' Association of Hong Kong
	Hong Kong Computing Industry Federation
	Hong Kong Cotton Spinners Association
	Hong Kong Exporters' Association
*	Hong Kong Electrical Contractors' Association Ltd
	Federation of Hong Kong Cotton Weavers
*	Federation of Hong Kong Garment Manufacturers
*	Federation of Hong Kong Industries
	Federation of Hong Kong Watch Trades & Industries Ltd
	Hong Kong & Kowloon Machinery & Instrument Merchants' Association Ltd
	Hong Kong & Kowloon Electrical Appliances Merchants Association Ltd
	Hong Kong Metal Merchants Association

Hong Kong Art Craft Merchants Association
Hong Kong Direct Mail & Marketing Association Ltd
* Hong Kong Management Association
Sales Marketing Executive Club of HK
Hong Kong & Kowloon Photographic Merchants Association Ltd
Retail Management Association
Hong Kong Trade Development Council
* Trade & Industry Branch
* Faculty of Law, University of Hong Kong
* Ms Carol Pedley
* Mr R.C. Allcock

Annexure 4

Analysis of Questionnaire Results

Q.1 (A) Under the Sale of Goods Ordinance there is an obligation on a seller to supply goods of merchantable quality. Do you think the word "merchantable" is appropriate to describe the quality that a buyer is entitled to expect of goods?

Category of organization	Answer	
Legal Profession/Lawyers	Yes – 5	No – 4
Trade/Business Organizations	Yes – 25	No – 24
Consumer Organizations	Yes – 2	
Chamber of Commerce	Yes – 5	No – 3
Government Department	Yes – 1	

Total Number of Yes – 38

Total Number of No – 31

Q.1 (B) Are any of the following more suitable?

Acceptable, Saleable, Adequate, Appropriate

Category of organization	Answer
Legal Profession/Lawyers	Appropriate – 2 Acceptable – 1 No – 3 No answer – 3
Trade/Business Organization	Acceptable – 9 Appropriate – 6 Saleable – 6 Adequate – 3 No answer – 3
Consumer Organizations	No answer – 2

Chamber of Commerce	Saleable – 1 adequate or appropriate – 1 any of the listed word – 1 No answer – 1
Government Department	Acceptable – 10 Appropriate – 8 Saleable – 7 Adequate – 3

Q.2 As regards the standard of quality, should there be any distinction between consumer and commercial transactions?

Category of organization	Answer	
Legal Profession/Lawyers	Yes – 3	No – 6
Trade/Business Organizations	Yes – 39	No – 11
Consumer organizations	Yes – 2	
Chamber of Commerce	Yes – 6	No – 2
Government Department	Yes – 1	

Total Number of Yes – 51

Total Number of No – 19

Q.3 (A) Is the existing quality stated in sections 16(2) and 2(5) of the Sale of Goods Ordinance adequate?

Category of organization	Answer	
Legal Profession/Lawyers	Yes – 4	No – 5
Trade/Business Organizations	Yes – 22	No – 26
Consumer Organizations		No – 2
Chamber of Commerce	Yes – 3	No – 5
Government Department		No – 1

Total Number of Yes – 29

Total Number of No – 39

Q.3 (B) If not could it be improved by incorporating any of the following matters:

(a) the fitness of the goods for all their common purposes;

(b) their appearance and finish;

(c) their freedom from minor defects;

(d) their safety;

(e) their durability;

(f) adequate packaging, labelling as the nature of the goods required; and

(g) conformity of the goods to representations or promises made on the container or label or other material accompanying the goods?

Category of organization	Answer
Legal Profession/lawyers	(a) to (g) – 2 (a) to (e) – 1 (e) and (g) – 1
Trade/Business Organizations	(a) – 15, (b) – 6, (c) – 5, (d) – 15, (e) – 10, (f) – 11 (g) – 15, (a), (f) and (g) – 1
Consumer Organizations	(a) to (g) – 2
Chamber of Commerce	(a) to (g) – 1, (a) and (g) – 1, (a),(d),(e) & (g) – 1 (a),(d),(f) & (g) – 1
Government Department	(a) to (g)

Q.3 (C) Are there any other matters that ought to be included?

Category of organization	Answer
Legal Profession/lawyers	Under (f) manufacturer's name and address to be included. A positive requirement to have adequate labelling should (if necessary) be provided by separate

	legislation eg re good & drugs. (f) and (g) can be regarded as "relevant circumstance" and need not be specified.
Trade/Business Organizations	There should be restriction on clauses in consumer contracts which exclude certain services from warranty. Country of origin of the goods should be specified on the standard package lables. Stipulation should also be made as to the length of period that the product, is used properly, may be expected to endure.
Consumer Organizations	The quality of goods must conform to the descriptions or representations made in the advertisement by suppliers. Inherent defects.
Government Department	Also conformity of goods to oral representations or promises made by the seller.

Q.3 (D) One suggestion was to reword section 2(5) to state that goods are of merchantable quality if they are "as fit for the main purpose for which goods of that type are commonly bought." Is that preferable?

Category of organization	Answer	
Legal Profession/Lawyers	Yes – 2 No answer – 1	No – 6
Trade/Business Organizations	Yes – 27 No answer – 2	No – 29
Consumer Organizations		No – 2
Chamber of Commerce	Yes – 5	No – 3
Government Department		No – 1

Total Number of Yes – 34

Total Number of No – 41

Q.4 (A) In determining whether a transaction is a consumer sale or not, should the emphasis be placed on the use to which the goods are to be put (i) or the identity of the buyer (ii)?

Category of organization	Answer
Legal Profession/Lawyers	(i) – 5, (ii) – 1 both (i) & (ii) – 2
Trade/Business Organizations	(i) – 39, (ii) – 10
Consumer Organizations	(i) – 1 both (i) & (ii) – 1
Chamber of Commerce	(i) – 7, (ii) – 1
Government Department	(i) –1

Total Number of (i) – 53

Total Number of (ii) –12

Total Number of both (i) & (ii) – 3

Q.4 (B) Do you consider any of the following as consumer transactions?

(i) government department buys 50 typewriters

(ii) carpenter buys blank invoice forms

(iii) carpenter buys carpentry tools

Category of organization	Answer
Legal Profession/Lawyers	Yes to (i), (ii) & (iii) – 6 No to (i), (ii) & (iii) – 3
Trade/Business Organisations	Yes to (i), (ii) & (iii) – 1 Yes to (i) – 24, No to (i) – 12; Yes to (ii) – 24, No to (ii) – 8; Yes to (iii) – 23, No to (iii) – 8
Consumer Organizations	Yes to (i), (ii) & (iii) – 2
Chamber of Commerce	Yes to (i) – 6, No to (i) – 2, Yes to (ii) – 6, No to (ii) – 2 Yes to (iii) – 3, No to (iii) – 5

Government Department	Yes to (i), (ii) & (iii) – 1

Total Number of Yes		Total Number of No	
(i)	40	(i)	17
(ii)	40	(ii)	13
(iii)	36	(iii)	16

Q.5 Should the right to reject goods depend on whether the term of contract which has been broken is a condition or warranty?

Category of organization	Answer	
Legal Profession/Lawyers	Yes – 4	No – 5
Trade/Business Organizations	Yes – 32	No – 18
Consumer Organizations		No – 2
Chamber of Commerce	Yes – 3	No – 5
Government Department		No – 1

Total Number of Yes – 39

Total Number of No – 31

Q.6 (A) Do you think the Sale of Goods Ordinance should contain provisions permitting a seller to cure defects in goods supplied to a buyer ?

Category of organization	Answer	
Legal Profession/Lawyers	Yes – 7	No – 2
Trade/Business Organizations	Yes – 41	No – 11
Consumer Organizations		No – 2
Chamber of Commerce	Yes – 6	No – 2
Government Department	Yes – 1	

Total Number of Yes – 55

Total Number of No – 17

Q.6 (B) (a) If yes, do you think it should apply to both consumer and commercial transactions?

Category of organization	Answer	
Legal Profession/Lawyers	Yes – 5	No – 2
Trade/Business Organizations	Yes – 34 No comment – 2	No – 7
Chamber of Commerce	Yes – 6	No – 1
Government Department	Yes – 1	

Total Number of Yes – 46

Total Number of No – 11

Q.6 (B) (b) within what period of time should the cure be effected? Is it sufficient to state "promptly" or "within a reasonable time"? Of the two, which do you prefer ?

Category of organization	Answer
Legal Profession/Lawyers	within a reasonable time – 2 Promptly – 1 as soon as reasonably possible – 1 a specified time and let out eg. within one month or such further time as may be necessary in the circumstances – 1 not beyond the time, as known or should have been known to the seller, by which the buyer requires the goods – 1
Trade/Business Organizations	There was a split of opinion on the question within what period of time should the cure be effected with substantially the same number of respondents choosing "within a reasonable time" and "promptly" and two announced the exact length of period should be specified.
Chamber of Commerce	within a reasonable time – 3; promptly – 2 depends on commodities – 1 within a reasonable time to be agreed

	upon by both seller and buyer – 1
Government Department	promptly – 1

Q.7 In commercial transactions, should the buyer be able to reject if the breach of quality is slight?

Category of organization	Answer	
Legal Profession/Lawyers	Yes – 2 Depends on circumstances –1 Depending on how slight – 1	No – 5
Trade/Business Organizations	Yes – 34 No reply – 3	No – 13
Consumer Organizations	No comment – 1 Can't answer – 1	
Chamber of Commerce	Yes – 3 Depend on nature of goods – 1	No – 4
Government Department	No	

Total Number of Yes – 39

Total Number of No – 23

Q.8 If newly purchased goods have to be sent back to the seller for repair and collected by the buyer afterwards, should the buyer (i) or the seller (ii) bear the delivery costs?

Category of organization	Answer
Legal Profession/Lawyers	(ii) – 9
Trade/Business Organizations	(i) – 3, (ii) – 46 depending on whether the fault lies with the buyer or seller – 1
Consumer Organizations	(ii) – 2
Chamber of Commerce	(i) – 2, (ii) – 5, small items shall be collected by buyers at their own expense while the delivery costs for large items should be borne by the sellers – 1

Government Department (ii) – 1

Total Number of (i) – 5

Total Number of (ii) – 63

Q.9 Should the law require that whenever a consumer buyer is asked to sign any document at the time of delivery that there must be a clear notice stating that the signing would not prejudice the buyer's right to his remedies?

Category of organization	Answer	
Legal Profession/Lawyers	Yes – 8	No – 1
Trade/Business Organizations	Yes – 27	No – 3
Consumer Organizations	Yes – 1	No – 1
Chamber of Commerce	Yes – 7	No – 1
Government Department	Yes – 1	

Total Number of Yes – 44

Total Number of No – 6

Q.10 (A) In consumer transactions, how long should the buyer have in which to examine the goods before he is deemed to have accepted them?

Category of organization	Answer
Legal Profession/Lawyers	A reasonable time – 6 As soon as reasonably possible – 3 3 days after delivery – 1
Trade/Business Organizations	The majority answered that the time the buyer should have in which to examine the goods before he is deemed to have accepted them depends on the type and quantity of the goods. Various other periods ranging from 1 to 30 days were suggested. Some also suggested a reasonable time.
Consumer Organizations	a reasonable time – 1 No time at all (unless in the case of

	inherent defects) – 1
Chamber of Commerce	3 days – 2; 7 days – 2; 10 days – 1 A reasonable time – 1 A reasonable period of time to be agreed upon by both the buyer and the seller.
Government Department	As soon as possible – 1

Q.10 (B) Do you think it should be made a criminal offence if a seller requires a consumer to sign any document on delivery of goods which does not state that by signing it he would not lose his legal rights to either reject the goods or seek damages (even though there may not be an agency to enforce it)?

Category of organization	Answer	
Legal Profession/Lawyers	Yes – 1	No – 8
Trade/Business Organizations	Yes – 15	No – 34
Consumer Organizations		No – 2
Chamber of Commerce	Yes – 3	No – 5
Government Department		No – 1

Total Number of Yes – 19

Total Number of No – 50

Q.11 Would your views differ in 9. and 10. if the transaction was one between merchants?

Category of organization	Answer	
Legal Profession/Lawyers	Yes – 2	No – 7
Trade/Business Organizations	Yes – 20	No – 29
Consumer Organizations	No – 1,	No comments – 1
Chamber of Commerce	Yes – 2	No - 6
Government Department	Yes – 1	

Total Number of Yes – 25

Total Number of No – 43

Q.12 Should there be any change to section 57 of the Sale of Goods Ordinance regarding exemption clauses (see enclosed)?

Category of organization	Answer	
Legal Profession/Lawyers	Yes – 2	No – 7
Trade/Business Organizations	Yes – 11 No comment – 25	No – 10
Consumer Organizations	Yes – 1	No – 1
Chamber of Commerce	Yes – 1	No – 4
Government Department		No – 1

Total Number of Yes – 15

Total Number of No – 23

Q.13 (A) Should the courts be empowered by statute to strike down any contractual provision which they consider "unjust", "harsh" or "unconscionable"?

Category of organization	Answer	
Legal Profession/Lawyers	Yes – 5	No – 4
Trade/Business Organizations	Yes – 40	No – 10
Consumer Organizations	Yes – 2	
Chamber of Commerce	Yes – 5	No – 3
Government Department	Yes – 1	

Total Number of Yes – 53

Total Number of No – 17

Q.13 (B) Would your answer be the same if the transaction was a consumer one?

Category of organization Answer

Legal Profession/Lawyers	Yes – 6	No – 3
Trade/Business Organizations	Yes – 40 No comment – 1	No – 9
Consumer Organizations	Yes – 2	
Chamber of Commerce	Yes – 4	No – 4
Government Department	Yes – 1	

Total Number of Yes – 53

Total Number of No – 16

Q 14 Could provision in credit card agreement providing for a cardholder (who may be abroad) to inform the head office of the card issuing company immediately of the loss of his card in default of which the cardholder should be liable for all transactions carried out on his card be considered "unjust" or "harsh" or "unconscionable"?

Category of organization	Answer	
Legal Profession/Lawyers	Yes – 4	No – 5
Trade/Business Organizations	Yes – 33	No – 17
Consumer Organizations	Yes – 1,	can't answer – 1
Chamber of Commerce	Yes – 4	No – 4
Government Department	Yes – 1	

Total Number of Yes – 43

Total Number of No – 26

Q.15 (A) Should statutory obligations of a seller, similar to those implied against the seller in sale of goods (by sections 14-17 of the Sale of Goods Ordinance) be imposed on a supplier of services?

Category of organization	Answer	
Legal Profession/Lawyers	Yes – 8	No – 1
Trade/Business Organizations	Yes – 45 No comment – 1	No – 3

Consumer Organizations	Yes – 2	
Chamber of Commerce	Yes – 2	No – 6
Government Department	Yes – 1	

Total Number of Yes – 58

Total Number of No – 10

Q.15 (B) If yes, is it adequate to require that the quality of service should be carried out with reasonable care and skill?

Category of organization	Answer	
Legal Profession/Lawyers	Yes – 9	No – 0
Trade/Business Organizations	Yes – 34 No comment – 4	No – 10
Consumer Organizations	Yes – 1	No – 1
Chamber of Commerce	Yes – 5	No – 1
Government Department		No – 1

Total Number of Yes – 49

Total Number of No – 12

Q.16 Do you think any new provisions on services should apply to all services or there should be some exemptions? If so what should they be?

Category of organization	Answer
Legal Profession/Lawyers	All – 4, No comment – 1 No answer – 3, restrict to those advertising their services – 1
Trade/Business Organizations	The majority answered that any new provisions on services should apply to all services, some answered that there should be some exceptions.
Consumer Organizations	All – 1, Don't know – 1

Chamber of Commerce	Services which are presently regulated by statute or regulations should be exempted – 1 Any new provisions should be more specific and should be applied gradually – 1 Yes, there should be some exemptions specially for those services offered by charity organizations for the disabled, blind and deaf – 1 The interests of all decent merchants and traders should be protected and they should be allowed to take remedial action on any defects of their products or services offered for sale. However, there should be detailed provisions against any wrongful acts of the unscrupulous merchants and for protection of consumers' rights to the goods or services they buy and use – 1.
Government Department	All