SCOTTISH LAW COMMISSION
(Memorandum No 7)

LAW COMMISSION
(Published Working Paper No 18)

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LAW COMMISSION

(Published Working Paper No. 18)

and

SCOTTISH LAW COMMISSION

(Memorandum No. 7)

PROVISIONAL PROPOSALS RELATING

to

AMENDMENTS TO SECTIONS 12-15 OF THE SALE OF GOODS ACT 1893

and

CONTRACTING OUT OF THE CONDITIONS AND WARRANTIES IMPLIED BY THOSE SECTIONS

22nd May 1968

In view of the urgency of this project it is requested that replies should be forwarded not later than 30th September 1968.

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CONTENTS

APPENDICES

PART I: INTRODUCTION

1. Under Item II of the Law Commission's First Programme it was recommended that an examination be made of the following matters:

(a) the desirability of prohibiting, invalidating or restricting the effects of clauses exempting from, or limiting liability for negligence; and

(b) the extent to which the manner of incorporating such clauses, if permissible, should be regulated.

Paragraph 12 of the Scottish Law Commission's First Programme proposed the examination, within the larger framework of the law of obligations, of standard form contracts and clauses purporting to exclude liability.

2. Although initially it had been recommended by the Law Commission that the examining agency should be an interdepartmental committee, it was eventually decided, with the approval of the Lord Chancellor, the Secretary of State for Scotland and the Lord Advocate, that the examination of this branch of the law should be carried out by the two Law Commissions themselves, and that they should be assisted by a joint Working Party with wide terms of reference.

3. The Working Party, the membership of which is shown in Appendix A, was established in June 1966. Its terms of reference are as follows:

> "To consider what restraints, if any, should be imposed on the freedom to rely upon contractual provisions exempting from or restricting liability for negligence or any other liability that would otherwise be incurred having regard in particular to the protection of consumers of goods and users of services."

These terms of reference combine the particular subject-matter of Item II of the Law Commission's First Programme with other aspects of exemption clauses which are of importance to the wider study of the law of contract under Item I; they also cover part of the Scottish Law Commission's proposed study of the law of obligations mentioned in paragraph 1 above.

4. In view of the important questions relating to consumer protection to which attention was drawn in the Final Report of the Committee on Consumer Protection (the Molony Committee Report - 1962 Cmnd. 1781), priority was given by the Working Party to consideration of the problems of exemption clauses in contracts of sale of goods. Next, in August 1966 the President of the Board of Trade asked the two Law Commissions

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(under section 3(1)(e) of the Law Commissions Act 1965) for advice with regard to the Molony Committee's recommendations on the amendment of the Sale of Goods Act; and this matter was also referred to the Working Party for examination.

5. Initially, therefore, the Working Party has been required to report to the Law Commissions on the following matters:

(a) what amendments, if any, are required to ss.12-15 of the Sale of Goods Act; and

(b) what restrictions, if any, should be placed on contracting out

(i) of the conditions and warranties implied by those sections, and

(ii) of liability for negligence of the seller or manufacturer or intermediate distributor.

6. On the 19th January 1968 the Working Party submitted an Interim Report to the two Law Commissions. On those matters on which, after careful consideration of the Working Party's Interim Report, the Law Commissions have reached preliminary conclusions, they have formulated provisional proposals; but on a certain number of points it has seemed appropriate not to formulate concrete proposals without first studying the views of those to whom this paper is addressed.

PART II: SECTIONS 12-15[1] of the SALE OF GOODS ACT 1893

7. Most members of the Working Party thought that ss.12, 13 and 15 worked reasonably well, but that s.14 (andin particular s.14(2)) was in need of amendment. Other members were critical of all these sections. It was argued that from the Scottish point of view the effect of ss.12-15 had been to reduce the protection afforded to the purchaser by the common law of Scotland; that s.12 added nothing to and merely tended to confuse the pre-existing common law of Scotland; and that ss.13 and 15 were more limited in their scope than the law of Scotland as it stood before the Sale of Goods Act 1893 came into operation. Not even that Act, however, imposed on Scots law the highly technical dichotomy between "conditions" and "warranties" which many English lawyers also found to be unacceptable. But it was generally agreed by the Working Party that to attempt to

(1) The sections are set out in Appendix B.

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eliminate this distinction would involve a radical revision of the whole law of sale and indeed the general law of contract, which would go beyond the scope of the present exercise. This long-term task is being undertaken under the Programmes of the Law Commissions.

8. The Working Party noted that the Uniform Law on the International Sales of Goods has now been enacted in the United Kingdom by the Uniform Laws on International Sales Act 1967; but the Act will not come into operation until the Convention relating to the Uniform Law has come into force. Even then, so far as the United Kingdom is concerned, it will apply only if adopted by the parties. Nevertheless there was considerable support within the Working Party for the Uniform Law as a code which, in comprehensiveness and clarity, represented an improvement on the Sale of Goods Act. Some members considered that the replacement of the whole Sale of Goods Act by the Uniform Law would be preferable to piecemeal amendment of the Act.

9. Though the Law Commissions sympathise with this view, and appreciate the advantages of having the same code applicable to both domestic and international contracts of sale, they regard a solution on these lines as a long-term project outside the ambit of the present limited review. In any event, they consider that any reassessment of the Uniform Law should be deferred until it has operated for a period in practice. The Law Commissions agree with the conclusion of the Working Party that it would be impracticable merely to substitute Articles 33, 52 and 53 of the Uniform Law for ss.12-15 of the Sale of Goods Act, and they endorse the Working Party's decision that the proper course in the present context is to concentrate on possible amendments to the Sale of Goods Act itself.

A. SECTION 12

10. This section contains the conditions and warranties (in Scotland: warranties or material terms) relating to title, quiet possession and freedom from encumbrance. The Scottish criticism of this section has already been mentioned in paragraph 7 above. The Law Commissions think that the section should remain for the moment and that the question of its repeal should await a comprehensive review of the law of sale.

11. The Molony Committee (paragraph 451) did not consider any amendment to the section necessary. The Working Party was in general agreement with this, subject to the following point. The Law Reform Committee, in their Twelfth Report on Transfer of Title to Chattels (Cmnd. 2958) pointed out (paragraph 36) that on a breach of the condition of title the

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present law allows the buyer to recover the whole price paid by him, without any allowance for the use and enjoyment of the goods. The Law Reform Committee recommended that the buyer should be able to recover no more than his actual loss, giving credit for any benefit he may have had from the goods while they were in his possession. The Working Party agreed with this recommendation. So do the Law Commissions.

12. The Law Commissions propose that s.12 should be amended so as to give effect to the recommendation contained in paragraph 36 of the Twelfth Report of the Law Reform Committee.

B. SECTION 13

13. This states that where there is a contract for the sale of goods by description, there is an implied condition (in Scotland: a material term) that the goods correspond with the description. Although the wording of this section has been criticised, it seems to have caused no difficulty, and so long as the distinction between conditions and warranties is maintained in England, it seems desirable to provide that in that jurisdiction conformity with a description is a condition and not a mere warranty. The Working Party considered that no amendment to this section is required. The Law Commissions agree.

C. SECTION 14(1)

14. This subsection relates to the implied condition of (in Scotland: implied term as to) fitness for purpose. In agreement with the views of the Molony Committee (paragraphs 447-449), the majority of the Working Party recommended the following amendments:

(1) The requirement that the goods shall be "of a description which it is in the course of the seller's business to supply" should be replaced by the requirement that the goods are sold "by way of trade".

(2) The proviso excluding sales under a patent or other trade name should be deleted.
The majority of the Working Party considered that this proviso fulfils no purpose since it has been held by the courts that the proviso does not operate where the buyer relies on the seller's skill and judgment.

15. With regard to the Working Party's first recommendation, the Law Commissions agree that the present formula of the subsection should be abolished, but they are not happy with the phrase "by way of trade", which is recommended to replace it. It is intended that the subsection

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should apply to all business sales including those by a manufacturer, and the Law Commissions do not think that the words "by way of trade" express this intention with sufficient clarity. They suggest that the requirement should be that the seller is "acting in the course of trade or business".

The Law Commissions are in complete agreement with the Working Party's second recommendation. Certain English cases show that the proviso does not apply where the buyer can be regarded as having relied on the seller's skill and judgment. This is destructive of the meaning of the proviso, since the wording of s.14(1) itself makes it clear that unless the buyer can be so regarded the subsection has no application anyway. In the light of these cases, no useful purpose is served by the retention of the proviso. Quite apart from these decisions, the Law Commissions see no reason why, when the purchaser is clearly relying on the seller's skill and judgment, the sale of an article under a patent or trade name should exclude the purchaser from the remedies which would otherwise be available to him.

16. The Law Commissions propose that the requirement that the goods shall be "of a description which it is in the course of a seller's business to supply" should be replaced by the requirement that the seller was "acting in the course of trade or business", and that the proviso excluding sales under a patent or other trade name should be deleted.

17. The Molony Committee made no other criticisms of s.14(1) and accordingly no others were considered by the Working Party. However, it has often been pointed out that, in the light of the construction put upon the subsection in the decided cases, its present wording does not express its legal effect with maximum clarity. Although the differences of emphasis in the various judgments are reflected in the speeches of the Law Lords in the recent Hardwick Game Farm Case (see paragraph 20), it seems that the present legal position can be summarised as follows: where goods are purchased for their normal and obvious purpose then, in the absence of anything to the contrary, there is implied a condition that the goods are reasonably fit for that purpose notwithstanding that the buyer has done nothing specifically to indicate that he requires them for that purpose and notwithstanding that he has done nothing more to show that he relies on the seller's skill and judgment than to buy them from a tradesman in that type of goods. If he requires them for some unusual or special purpose, only then must he make his purpose known to the seller, but it seems that, if he does so, then, in the absence of anything to the contrary this will be sufficient to show that he relies on the seller's skill and

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judgment. Moreover, it suffices if the buyer has placed any reliance on the seller's skill and judgment even though he may have relied still more on his own or that of a third party. Hence anyone reading the subsection in ignorance of the case law is liable to be misled. The present legal position might be more accurately and clearly expressed if the subsection were re-worded somewhat as follows:

> "Where goods are bought from a seller acting in the course of trade or business then, unless the circumstances are such as to show that the buyer places no reliance upon the seller's skill and judgment, there is an implied condition (in Scotland: warranty) that the goods shall be reasonably fit for the usual purpose for which such goods are bought or, if the buyer makes known to the seller that he requires the goods for some special purpose, that they are reasonably fit for that purpose."

The Law Commissions invite views on whether a re-formulation on these lines would be desirable.

D. SECTION 14(2)

18. This subsection relates to the implied condition (in Scotland: warranty) of merchantable quality. The Working Party agreed with the Molony Committee (paragraphs 440-446) that the subsection was in need of substantial amendment if the requirements of modern trade and commerce were to be met. The Working Party proposed two amendments which are in accordance with the recommendations of the Molony Committee (paragraphs 441 and 443):

(a) The condition of merchantable quality should cease to be limited to sale by description. The deletion of the words "by description" seemed essential since, as pointed out by the Molony Committee, it was doubtful whether s.14(2) applied to purchases in self-service stores or supermarkets.

(b) The requirement that the seller must have been dealing in goods of the relevant description should be replaced by a requirement that the goods should be sold "by way of trade".

The Law Commissions agree with the substance of these suggested amendments subject to the criticism already made in paragraph 15 above.

19. The Law Commissions propose, accordingly, that the condition of merchantable quality should cease to be limited to sales by description, and that the requirement that the seller must have been dealing in goods

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of the relevant description should be replaced by the requirement that the seller was "acting in the course of trade or business".

20. There was considerable discussion in the Working Party on two important matters, namely, the exact meaning of merchantable quality and the desirability of laying down a specific definition in the Sale of Goods Act. In the case of Cammell Laird & Co. v. Manganese Bronze [1934] A.C. 402, Lord Wright said at p.430: "What subsection (2) now means by 'merchantable quality' is that the goods in the form in which they were tendered were of no use for any purpose for which such goods would normally be used and hence were not saleable under that description." But in the earlier case of Bristol Tramways v. Fiat Motors [1910] 2 K.B. 831 Farwell L.J. at p.841 said: "The phrase in s.14, subsection 2" (i.e. merchantable quality) "is, in my opinion, used as meaning that the article is of such quality and in such condition that a reasonable man acting reasonably would after a full examination accept it under the circumstances of the case in performance of his offer to buy that article whether he buys for his own use or to sell again." In the recent Hardwick Game Farm Case,(1A) Lords Guest, Pearce and Wilberforce expressed a preference for Farwell L.J.'s definition as amplified by Dixon J. in Australian Knitting Mills v. Grant (1933) 50 C.L.R. 387 at p.418, viz. the goods "should be in such an actual state that a buyer fully acquainted with the facts and therefore knowing what hidden defects exist and not being limited to their apparent condition would buy them without abatement of the price obtainable for such goods if in reasonable sound order and condition and without special terms". On the other hand, Lord Morris of Borth-y-Gest preferred Lord Wright's approach, while Lord Reid was critical of all three definitions but suggested that both Lord Wright's and Dixon J.'s were helpful if qualified in certain ways. All their Lordships' observations on s.14(2) were obiter.

21. Hence the exact meaning of merchantable quality is by no means free from doubt. Moreover, the Law Commissions agree with the majority view of the Working Party that it is not satisfactory that an Act which purports to codify a branch of the law should use an expression the meaning of which is far from self-apparent and which becomes meaningful only when the case law is looked at.

(1A) The decision in the House of Lords (sub.nom. Henry Kendall & Sons v. William Lillico & Sons Ltd.) is not yet fully reported but we have been supplied with a transcript of the speeches delivered on 8th May 1968. For a decision of the Court of Appeal see [1966] 1 W.L.R. 287.

22. The Law Commissions agree, therefore, with the majority conclusion of the Working Party that merchantable quality should be defined. The Working Party decided that the definition should be based on Farwell L.J.'s test, but that the element of description and the Scottish concept of price-worthiness should be incorporated. The view was taken that if this were done, there would be no need to exclude the condition in the case of sales of second-hand and imperfect goods and goods sold by auction, as the Molony Committee (paragraph 445) had thought would be inevitable.

23. Accordingly, a large majority of the Working Party approved the following re-formulation of s.14(2) (the text was not intended as a formal legislative draft):

> "(a) Where goods are sold by way of trade there is an implied condition (in Scotland: warranty) that the goods shall be of merchantable quality.
>
> (b) Merchantable quality means that the goods tendered in performance of the contract shall be of such type and quality and in such condition that having regard to all the circumstances, including the price and description under which the goods are sold, a buyer, with full knowledge of the quality and characteristics of the goods, including knowledge of any defects, would, acting reasonably, accept the goods in performance of the contract.
>
> (c) If, prior to the contract, the buyer has had certain defects in the goods specifically drawn to his attention or has examined the goods, the existence of such defects as were drawn to his attention or as he discovered on inspection or would have discovered had he conducted the examination with the care reasonably to be expected of him in the circumstances, shall not be a breach of the condition (in Scotland: warranty) implied by this section."

24. A small minority of the Working Party saw no need for a definition of merchantable quality or thought that the one suggested would not work well in practice. The Law Commissions do not share these views, and they consider that a definition of merchantable quality is desirable, and that one on the lines of that approved by the majority of the Working Party is the best that can be devised in the circumstances. It will be observed that it is, in effect, an amplified version of the definition of Dixon J. which had the approval of the majority of the House of Lords in the Hardwick Game Farm Case. The Law Commissions' conclusion on the matter is, however, tentative, and comments of the recipients of this Working Paper would be welcome.

25. The Law Commissions are aware of, and sympathise with, the criticism that has been made of the expression "merchantable quality" which, though appropriate enough in commercial transactions, seems inappropriate to sales to a private consumer. But the expression has become hallowed by long use and until there is a complete revision of the Sale of Goods Act, it would probably do more harm than good to adopt an alternative expression.

26. The Law Commissions propose that "merchantable quality" should be defined and s.14(2) re-formulated on the lines suggested in paragraph 23 above. But, for reasons given in paragraph 15, they suggest that "by a seller acting in the course of trade or business" should be substituted for "by way of trade" in sub-paragraph (a).

27. Doubt was expressed in the Working Party on whether the expression "by way of trade" (or similar expression) would cover the case of a trading body acting as an agent to sell goods on behalf of a private person, e.g. a motor dealer selling a car on behalf of a private owner. The majority of the Working Party considered that such a sale should be treated on the same footing as a sale by a trader as owner to a consumer. Accordingly, a clause on the following lines was approved as an amendment to s.14:

> "Where goods are sold by an agent or auctioneer acting in the course of trade or profession the goods shall be deemed to be sold by way of trade whether or not the owner of the goods or other person on whose behalf the goods are sold is himself engaged in trade."

This clause would apply to both subsections (1) and (2) of s.14, although s.14(1) would rarely if ever apply to auction sales since a purchaser at an auction relies on his own judgment and not on that of the auctioneer.

28. Strong objections were raised by a few members of the Working Party to this clause on the grounds that it was anomalous and inequitable that if a private individual sold direct to another person, he would not be liable under s.14, whereas if he sold through an agent engaged in trade or through an auctioneer, he would be liable. Such a change in the law, it was argued, was completely unjustified. The view of the Law Commissions is that, in the light of the suggested amendment to the terms of s.14(2) (see paragraph 23 above), the section should certainly apply to auction sales but that there is a case for saying that, in the case of such sales, an express exclusion of liability under that subsection should be permitted. Reference is made to this in paragraphs 55-58 below. To provide that the

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subsection should never have any application to sales through a commercial agent or auctioneer would, in the view of the Law Commissions, be going far further than could be justified on any count. As the Molony Committee pointed out in paragraph 445, "the used car market is a fertile source of consumer trouble". And in some auction sales the buyer will not know whether the auctioneer is selling his own goods, those of another trade seller, or those of a private owner.

Accordingly, the Law Commissions propose that a clause on the following lines should be added to s.14. This clause is to the same effect as the one suggested by the Working Party except that the phrase "by way of trade" has been replaced by the phrase recommended in paragraph 15 above.

> "Where goods are sold through an agent or auctioneer acting in the course of trade or business, the goods shall be deemed to be sold by a seller acting in the course of trade or business,"

E. SECTION 14(3) and (4)

29. These subsections are supplementary and do not require amendment.

F. SECTION 15

30. This section deals with sales by samples. The Molony Committee did not recommend any amendment, but two points arise, the first of which was mentioned by the Working Party:

(a) Subsection (2)(c) states that there is an implied condition (in Scotland: a warranty) that the goods shall be free from any defect rendering them unmerchantable, which may not be apparent on reasonable examination of the sample. If the definition of merchantable quality set out in clause (b) of the re-formulated s.14(2) (see paragraph 23 above) is adopted, it should be made clear that the definition applies to s.15 also.

(b) As a result of some cases decided as far back as 1814-1815 (which have never been overruled) it must, it seems, be shown that (i) there is a term in the contract making the sale a sale by sample, (ii) if the contract is reduced to writing, this term is included in the writing. The Law Commissions consider that the section should be amended so as to dispense with this requirement. This could be done by avoiding the words "term of the contract" in s.15 and using the formula of s.13, i.e. "where there is a sale by sample ...".

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31. The Law Commissions propose that

(a) it should be made clear that the definition of "merchantable quality" in paragraph 23 above applies also to this section, and

(b) it should no longer be necessary to show that there is a term in the contract making the sale a sale by sample nor that, if the contract is reduced to writing, this term is included in the writing.

G. THIRD PARTY BENEFICIARIES OF CONDITIONS AND WARRANTIES

32. Without reaching a definite conclusion as to its merits or demerits, the Working Party referred to the two Law Commissions for fuller examination a proposal for the extension of the seller's obligations under the Sale of Goods Act. The gist of the proposal is to give the donee or user of goods, whether or not he is the actual buyer, a contractual remedy against the seller for any breach of the conditions and warranties imposed by the Act. S.2-318 of the U.S. Uniform Commercial Code extends the seller's warranty, whether expressly entered into or implied under the Code "to ... any person who is in the family or household of the buyer or is a guest in his home if it is reasonable to expect such a person may use, consume or be affected by the goods and who is injured in person by breach of the warranty". In seven States, however, the class of third party beneficiaries is widened, and the seller's obligations are extended "to any person who may reasonably be expected to use, consume or be affected by the goods", but once again liability is limited to claims for personal injury only. The effect of this latter provision is to turn what is at present in England a negligence liability into a strict liability.

33. The present position in English law is that the donee or user of goods bought by someone else has no right to sue the seller for breach of the Sale of Goods Act, as there is no privity of contract between him and the seller. If such a person is injured or his property is damaged by reason of the goods being defective, he may obtain redress only if negligence is established on the part of the seller or manufacturer. This strict maintenance of the boundaries between the fields of contract and tort can lead to a number of anomalies. Three examples will suffice to illustrate them:

/Example

Example A.

A boy buys a catapult and loses an eye because it is defective. He can recover damages from the seller for breach of s.14 of the Sale of Goods Act (Godley v. Perry [1960] 1 W.L.R. 9). If the boy's father had bought the catapult for him, the boy would only have had a negligence claim and, in the case referred to, the only persons who could have been sued successfully were the manufacturers and they were in Hong Kong.

Example B.

A. takes B. out to dinner, A. paying the bill, and both A. and B. suffer as a result of eating snails there (Buckley v. La Reserve [1959] C.L.Y. 1330). A. could successfully claim against the restaurant under s.14 of the Sale of Goods Act, but B. would fail if (which is quite possible) the court thought that the restaurant had taken reasonable care.

Example C.

A man buys a hot-water bottle for his wife from a chemist and it bursts and scalds her (Priest v. Last [1903] 2 K.B. 148). The husband is able to claim under s.14 of the Sale of Goods Act for medical expenses incurred thereby, but any claim by the wife (against the chemist or manufacturer) would depend on her being able to prove negligence.

It is conceived that these cases would have been similarly decided under Scots law.

34. Although it is true that in England, through the operation of the doctrine of res ipsa loquitur, the non-purchasing consumer will often have a satisfactory remedy in tort, that it not always so, as the above examples illustrate. A provision on the lines of the proposal under discussion would give a remedy in such cases. But it is important to realise that the seller's liability to the third party beneficiary would be no greater than his liability to the buyer, as indeed is the position under s.2-318 of the U.S. Uniform Commercial Code. Hence, if in a contract of sale there was an exemption clause which validly excluded or limited the seller's liability to the buyer, it would operate in exactly the same way and to the same extent against the ultimate user.

35. A provision extending the seller's obligations to any person who might reasonably be expected to use, consume or be affected by the goods, would, if applied without some limitation, give a right of action for breach of the Sale of Goods Act not only to the non-purchasing consumer against the retailer but often also to the purchasing consumer against

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the manufacturer (or intermediate distributor). This would considerably strengthen the position of the consumer and seemingly provide a ready solution to the problem of manufacturers' "guarantees". Its effect, however, would be considerably wider than this; it would, for instance, give a right to a factory employee injured by a defective machine to sue the supplier (provided, of course, that there was no exemption clause in the contract of sale).

36. American decisions regarding "products liability" seem, however, to give no clear or consistent guidance as to whether such liability is based on contract or tort (delict) or is sui generis. Accurate classification of the obligations imposed by products liability is highly important, e.g. in assessing damages. Reforming the whole of British law relating to products liability would involve studies in depth in the fields both of contract and tort (or delict). Regretfully the Law Commissions have had to conclude that these extensive studies could not be fitted into the framework of the present inquiry. However, they see the possibility for a limited breakthrough here and now, by extending the benefit of the seller's obligations to certain "third party beneficiaries"; but for the time being such rule should only apply to consumer sales (for definition see paragraph 51(2)). The Law Commissions do not suggest that the rules which at present in Scotland apply to contracts for the benefit of third parties should necessarily apply in the present context. It may be that the obligations of the seller could be imposed by statute. As for the class of persons to be benefited, s.2-318 of the U.S. Uniform Commercial Code, which only benefits members of the buyer's family or household or guests in his home, is, in the opinion of the Law Commissions, too limited; they would extend the benefit of the seller's obligations to any person who may be reasonably expected to use, consume or be affected by the goods. This class would not, however, include factory employees

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(2) The definition there proposed is:

"A 'consumer sale' is a sale of goods which are of a type customarily bought for private use or consumption, by a seller acting in the course of his trade to a buyer other than a trade buyer. A 'trade buyer' is one who carries on or holds himself out as carrying on a trade in the course of which he manufactures deals in or uses goods of that type, and the onus of proof that the buyer is a trade buyer shall rest with the seller. 'Trade' includes any trade, profession or business, and a government department or public authority shall for this purpose be deemed to be carrying on a business. 'Sale' includes an agreement to sell."

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injured during the manufacturing process since neither the machinery nor the goods manufactured will at that stage have been the subject of a consumer sale.

37. The Law Commissions propose therefore that in consumer sales the benefit of the seller's obligations under ss.12-15 of the Sale of Goods Act 1893 should be extended to any person who may reasonably be expected to use, consume or be affected by the goods. Such an extension of the purchaser's remedies would prevent the anomalies illustrated in the examples set out in paragraph 33 above.

38. If a proposal on those lines were implemented, the further question would arise as to whether relief should be granted only in cases of personal injury (as under s.2-318 of the U.S. Uniform Commercial Code) or whether damage to property and financial loss should also be covered. In principle there would certainly be a case for extending relief at least to damage to property. Suppose, for example, that A. purchases an electric blanket which he gives to B. as a present; the electric blanket is defective. It would be anomalous to give B. the right to sue the seller for breach of s.14 of the Sale of Goods Act if he suffered burns, whereas if his bedding was damaged, he would have no remedy unless he could prove negligence.

39. It is a more difficult question whether the third party, in the absence of personal injury or damage to property, should be given the same right as the buyer has to reject the goods forbreach of the implied conditions or to claim damages for their defects. Such a proposition is more difficult to support, especially when the breach is of s.14(1) for that depends on whether the goods are fit for the buyer's purpose - not the purposes of the third party. It is arguable that whereas in the case of personal injury or damage to property, only the third party could claim since he alone has been damaged, in the situation under review, the third party having suffered no damage, it is for the actual buyer, who has sustained the loss in paying the price for a defective article, to enforce his rights against the seller. On the other hand, it may be said that this is an unnecessarily cumbrous procedure which could result in claims by two plaintiffs instead of one. In practice the question would arise only in the case of a donee. A mere user could clearly not sustain any such claim and a sub-purchaser would rarely be in a position to do so since the sale to his seller would not normally be a consumer sale. In the case of a donee it may well be more convenient to allow him alone to claim both for any injury to his person or property

/and

and for the lower value of the faulty goods. It is not thought that this would in practice give rise to any difficulty. If A. buys a car as a present for B., making known that it is required for use on the mountain roads of Wales, it seems sensible that if it is unfit for this purpose, B. should be allowed to return it and get it replaced in cash or kind, rather than A.

40. One relevant consideration in connection with the whole question of extension of liability in favour of third parties is whether this would add to the cost of insurance sufficiently to lead to an increase in the price of goods. The Law Commissions think it is reasonable to infer from the evidence of the insurance experts (summarised in paragraph 72 below) that it could make no significant difference whether contractual liability were extended to a third party or limited to the immediate buyer. In most cases the third party will at present have a claim for personal injuries or damage to property based on negligence and no exemption clause in the contract can affect his claim since he is not a party to the contract in which the exemption clause is embodied. So far as products guarantee is concerned the question whether the action had to be brought by the buyer or could be brought by the donee could not affect the insurance premium.

41. Since the Law Commissions are as yet undecided on the extent to which relief should be granted to third party beneficiaries, they make no specific proposal on the matter at this stage, but would welcome views on the following questions:

If the seller's obligations are to be extended to third party beneficiaries, should the relief to be granted:

(a) be limited to cases of personal injury? or

(b) cover damage to property as well? or

(c) cover all financial loss?

PART III: CO-ORDINATION WITH HIRE-PURCHASE LEGISLATION

42. Since the Hire Purchase Act 1965 and the Hire Purchase (Scotland) Act 1965 apply to most types of sale of goods other than those in which the whole price is paid immediately, it is obviously desirable that so far as possible these Acts and the Sale of Goods Act should contain similar provisions. Even if the proposed amendments are carried out, there will still remain a number of discrepancies between the law relating to the conditions and warranties under the 1965 Hire Purchase Acts and under the Sale of Goods Act. S.18 of the Hire Purchase Acts

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deals with the question of second-hand and defective goods in a manner different from that which the Law Commissions and the Working Party have proposed in the case of cash sales (see paragraphs 20-25). It may be that the differences between the two codes in this respect can be justified. Since a hire purchase agreement and conditional sale agreement have to be in writing, s.18 of the 1965 Hire Purchase Acts provides a practicable solution, but the same solution would not be practicable in consumer cash sales which are rarely in writing. Furthermore, there is nothing comparable in the Sale of Goods Act to s.16 of the 1965 Hire Purchase Acts. The Law Commissions do not think, however, that this is an opportune moment to propose that a provision on the lines of s.16 of the Hire Purchase Acts should be added to the Sale of Goods Act.

PART IV: MERCHANDISE MARKS ACT 1887

43. The Working Party was unanimously of the opinion that the civil remedy available under s.17 of the Merchandise Marks Act should be abolished. The Law Commissions agree. The Trade Descriptions(No.2) Bill, now before Parliament, proposes the repeal of the whole section.

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PART V: CONTRACTING OUT OF CONDITIONS AND WARRANTIES IMPLIED BY SECTIONS 12-15 OF THE SALE OF GOODS ACT 1893

A. Introduction

44. The Molony Report points to the main criticism of the law governing the sale of goods as being "the ease and frequency with which vendors and manufacturers of goods exclude the operation of the statutory conditions and warranties by provision in guarantee cards or other contractual documents" (paragraph 426). The scope of the conditions and warranties (in Scotland, warranties) implied by Sections 12-15 of the Sale of Goods Act 1893 has been considered in Part II of this Working Paper. They are referred to in this Part as "the statutory conditions and warranties".

45. The Working Party, in its Interim Report to the Law Commissions, examined a number of alternative proposals. It is the purpose of this Part of the present Working Paper to seek critical comment upon these proposals and to invite views on certain specific questions.

46. It will be convenient in examining the alternatives, and the questions to which they give rise, to deal separately with consumer sales (i.e. broadly speaking, sales for private consumption), and other sales (here referred to as "commercial sales")(3). It was common ground in the Working Party that a greater degree of protection is called for in consumer sales than exists under the present law, and with certain reservations there was general agreement on the degree of control which should be imposed. On the other hand a majority of the Working Party thought that control should not be extended beyond consumer sales. This controversial topic will be dealt with later in this Paper.

The definition of a "consumer sale"

47. How should consumer sales be defined? The feasibility of distinguishing, in any reform of the law, between consumer sales and commercial sales clearly depends upon a workable definition.

48. The Molony Report suggested two alternative formulations. Under the first alternative (set out in paragraph 469 of the Report) a "consumer sale" would be

> "A sale or agreement to sell (as defined in the Sale of Goods Act 1893) by way of trade of goods customarily bought for private use or consumption to a person who does not buy for the purpose of resale or for letting on hire-purchase or exclusively for use or consumption in any trade or business".

The Report observed that sales to public and local authorities ought to be

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(3) The questions of definition which arise are dealt with in paragraphs 47 to 52 below.

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expressly excluded from the definition by a suitable reservation in the reference to "business".

The second alternative (paragraph 470 of the Report) suggested that a consumer sale might be defined more simply as a sale or agreement to sell (as defined in the Sale of Goods Act 1893) made by way of retail trade or business at or from any place whatsoever. This definition would leave it for the courts to decide what is involved in "retail trade or business"; but the Report expre[illegible] the hope that the courts would evolve a conception in line with the first alternative definition.

49. The disadvantage of the definition suggested in paragraph 469 of the Molony Report is that the seller would at the time of the sale require to know the purpose for which the buyer was acquiring the particular goods in question; otherwise he could not be certain whether a restriction applicable to a "consumer sale" applied or not. Moreover the first definition would exclude sales of articles such as light bulbs or typewriters for use in a trade or profession in circumstances which would normally be regarded as sales by retail.

50. The disadvantage of the alternative definition suggested in Paragraph 470 of the Molony Report is that whilst it might avoid certain anomalies which would arise under the more specific first definition, it does not draw so clear a demarcation line and to that extent might be open to the criticism of involving a greater degree of uncertainty.

51. The Law Commissions have considered whether the disadvantages of these definitions might be avoided and in particular whether the onus placed upon the seller by the definition put forward in paragraph 469 of the Molony Report could be mitigated. Tentatively the following definition is suggested:

> "A 'consumer sale' is a sale of goods which are of a type customarily bought for private use or consumption, by a seller acting in the course of his trade to a buyer other than a trade buyer. A 'trade buyer' is one who carries on or holds himself out as carrying on a trade in the course of which he manufactures deals in or uses goods of that type, and the onus of proof that the buyer is a trade buyer shall rest with the seller. 'Trade' includes any trade, profession or business, and a government department or public authority shall for this purpose be deemed to be carrying on a business. 'Sale' includes an agreement to sell."

This tentative definition would not depend on the seller's knowledge of the particular use to which the buyer proposes to put the goods. It would suffice for him to know whether or not the buyer was or purported to be a trade buyer; it would be immaterial whether the particular purchase was for a private purpose. Moreover, the suggested definition makes it clear that the onus is on the seller to establish that the buyer was a trade buyer; and it is intended by its language to emphasize the difference which often exists between the bargaining position and expertise of the trade buyer and the private buyer vis-à-vis the seller.

52. It is the Law Commissions' provisional view that although there are difficulties in certain limited classes of case in defining a "consumer sale" it would be possible to devise a definition which would reduce the area of uncertainty to a tolerable degree.

B. Consumer sales

An unqualified ban on contracting out

53. The Working Party considered that on sales to consumers the statutory conditions and warranties constitute a reasonable code of fair dealing and that, subject to the proposals in Part II of this Paper, contracting out of those conditions and warranties should be void altogether. Certain members were not satisfied that the definition of merchantable quality suggested in Part II would adequately meet the case of second-hand or imperfect goods, sold as such, and would have wished a specific exception from the ban to be made in their case. But, in the view of the majority, the suggested definition was sufficiently flexible to cater for these cases, particularly as it makes a specific reference to the price and description under which the goods are sold.

54. It should perhaps be mentioned that before reaching this conclusion the Working Party considered and rejected a number of possible solutions. It may be of assistance to readers of this Working Paper if three of these are briefly mentioned. One solution was that there should be a ban on contracting out on sales to consumers subject to specified exceptions. Those who argued against an unqualified ban would no doubt regard the right to limit the seller's obligation for consequential damage as the most important matter for which a special exception should be made. But this is but one of a number of exceptions which might be reasonable and accordingly this solution was rejected on the ground that it would be impracticable satisfactorily to frame these exceptions. If this argument was shown to have substance some thought that a more realistic alternative to an unqualified ban would be a general test of reasonableness on the lines of section 3 of the Misrepresentation Act 1967. Another possible solution was the exclusion of contracting out on sales up to a specified maximum price, thus following the precedent of the Hire Purchase Act 1965, and the corresponding Scottish Act. This, too, was rejected because any maximum adequate to cover sales to private purchasers would cover many more commercial sales than in the case of hire purchase transactions. Even if sales to corporate bodies were excluded as in the 1965 Hire Purchase legislation there would be anomalous distinctions between sales to small businesses which were incorporated and those which were not.

Proposals and questions on consumer sales

55. The Law Commissions endorse the proposal of the Working Party referred to in paragraph 53, subject to one question: Should the proposed ban on contracting out of the statutory conditions and warranties in sections 13 and 15 of the Sale

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of Goods Act apply to sales by auction? This question is of special importance if section 14(2) is to apply to auction sales - on which see paragraph 28 above.

56. The arguments which may be advanced in favour of giving special treatment to sales by auction include the following:

(a) In a number of circumstances auctions provide a convenient method of disposing of goods which it would be difficult or less convenient to sell in any other way. In such circumstances the seller may not be in a position to undertake that the goods comply with the statutory conditions and warranties. Sales of surplus army and other goods by the government, sales of furniture and miscellaneous household effects and sales under judicial authority are cases in point.

(b) In so far as any distinction is drawn between consumer sales and commercial sales it may be difficult in the case of some classes of sale for the auctioneer to know whether the buyer is or is not a trader. If he were a trader he might have greater expertise about the characteristics and quality of the goods than either the seller or the auctioneer.

(c) It is well recognised and accepted by bidders at many classes of auction sale that there is a speculative element in the transaction and that it would be unreasonable to expect the full benefit of the statutory conditions and warranties.

57. Against these arguments may be set the following considerations:

(a) The suggested reformulation of "merchantability" should provide sufficient flexibility to meet the needs of those sellers who have a limited knowledge of the goods or could only acquire such knowledge by unreasonable expenditure.

(b) The difficulties of the seller or auctioneer in describing goods will in any event have to take account of the provisions of the Misrepresentation Act 1967, and any contracting out of those provisions will be void, subject to the discretion of the court, under section 3 of that Act.

(c) In some cases the goods which are sold by auction are works of art or other articles of exceptionally high value, and the advantage to the seller of stimulating competition amongst buyers by the device of an auction should be counterbalanced by his bearing full responsibility under the statutory conditions and warranties.

(d) Freedom to contract out of the statutory conditions and warranties at auction sales might result in abusive practices.

(e) In practice the case for excluding auction sales from control is limited to second-hand or defective goods. Difficulties under this head should be met by the proposed definition of "merchantable quality" which will empower the court to take into account "all the circumstances, including the price and description under which the goods are sold".

58. If exclusion is to be permitted in the case of auction sales it seems clear that this should be restricted to the exclusion of section 14 and, perhaps, section 13. There can be no justification for excluding the conditions and warranties of title under section 12 or the condition that the bulk shall agree with the sample under section 15. Nor is section 14(1) likely ever to have any application to an auction sale since the buyer does not make known the purpose for which he requires the goods so as to show that he relies on the seller's skill and judgment. Furthermore the case for allowing an exclusion of section 13 (that the goods conform to the description) seems much weaker than that for allowing an exclusion of section 14(2). It is appreciated, however, that if section 13 could not be excluded art dealers selling old masters might have to revise their present somewhat esoteric methods of describing the picture's authorship. It may be thought that this would not be a bad thing.

Accordingly before coming to any conclusions the Law Commissions seek views as to whether:

(a) an exclusion of the statutory conditions and warranties should be permissible in the case of sales by auction, and

(b) if so, to what extent?

C. Commercial sales

Should contracting out of the statutory conditions and warranties be extended beyond consumer sales?

59. It was the view of the majority of the Working Party that any control of contracting out of the statutory conditions and warranties beyond the consumer level would be unjustified. The main arguments for and against such control are set out in the two following paragraphs.

60. Those who oppose the extension of control to commercial sales rely on the following main arguments:

(a) The Molony Report referred (in paragraph 3) to a distinctive factor which exists even in the case of small traders: "they have elected to buy and sell as a matter of business"; it also took the view (in paragraph 432 which, however, recognised that the matter might require further consideration) that those who constitute the commercial links in the chain of distribution of consumer goods are "fully capable of protecting themselves". The present evidence before the Working Party supports both of these points.

(b) In commercial contracts it is of paramount importance to establish with certainty where the risk lies so that prices and insurance can be arranged accordingly. It often accords with the interests of both parties that the buyer should accept the risk. Certainty is another important factor. Lawyers should be able to advise their clients with confidence and litigation should be reduced.

(c) Even if some commercial buyers are in need of protection they

/represent

represent too small a minority to justify the extension of control to the whole field of commercial contracts.

(d) The judicial re-writing of commercial contracts might in some cases produce inequity between the parties.

(e) Export sales might be prejudiced if British sellers were subject to restraints to which their foreign competitors are not subject.

61. Those who favour the extension of control to commercial contracts rely on the following main arguments:

(a) Whilst it is true that most of the complaints about the existing law have come from private consumers there are indications that certain business purchasers also need protection. The National Farmers Union, for example, has given evidence about harsh exemption clauses used in the sale of agricultural machinery to farmers.

(b) While the weight of commercial opinion so far expressed has been hostile to the extension of control to commercial transactions, it is noteworthy that the Motor Agents' Association would regard as inequitable any proposal which forbade exemption clauses in the retail sale of motor cars whilst permitting it on sales to the retailers.

(c) It is practically impossible to devise a definition of consumer sale which completely avoids anomaly, for example, by failing to distinguish the purchase of a motor car or typewriter by a doctor from a purchase purely for private use, The Society of Motor Manufacturers and Traders has already put the question why the purchaser of a commercial vehicle should not have the same rights as the purchaser of a private motor car.

(d) The attempts of the courts to control exemption clauses in commercial sales by the restrictive interpretation of terms and the application of the doctrine of fundamental breach show that there is a problem to be faced beyond the consumer level.

(e) It would produce highly anomalous results to forbid contracting out of liability for misrepresentation, as section 3 of the Misrepresentation Act does, while permitting it in the case of the statutory conditions and warranties. The two are inextricably interwoven and where there is a breach of section 13 there will necessarily have been a misrepresentation also as will generally be the case where there is a breach of section 14(1), and sometimes where there is a breach of section 15.

Alternative courses of action in relation to commercial sales

62. In the light of the above arguments consideration is now given to the various courses of action which have been canvassed with regard to contracting out of the statutory conditions and warranties in commercial sales.

/No Control

No control of contracting out in commercial sales; General question as to the position of retailers

63. This solution calls for no comment beyond the arguments set out in paragraphs 60 and 61. But it does give rise to an important question upon which the Law Commissions invite the views of retailers, both large and small. Would retailers regard themselves as being put, in practice, in an unfair position if the law put an outright ban on exemption clauses imposed by retailers whilst, as a matter of law, allowing such clauses to be imposed upon retailers by those from whom they obtain their supplies?

A ban on contracting out on sales to the ultimate consumers of goods whether for private or business purposes

64. One proposal which has been advanced is based upon the view that the dividing line between those purchasers who need protection against contracting out of the statutory conditions and warranties and those who do not does not depend merely upon the likelihood of inequality of bargaining power. The suggested protection of private consumers is based upon this likelihood. But it is suggested that another important test should be the likelihood of the buyer being at a disadvantage in his ability to judge the quality of goods. A trader may be expert in his judgment of products in which he habitually deals. But when a farmer buys a tractor or a trader or professional man buys a complex piece of office equipment he may be no better able to judge its technical qualities than the private purchaser of a refrigerator. It has therefore been suggested that the definition of a sale to a consumer should be so framed as to include the end-purchasers of goods for the purposes of a trade or business who may need protection as much as the private purchaser. The objection that this might extend to transactions at a level where the purchaser would manifestly be capable of safeguarding his own interests could, it is suggested, be met by imposing a price limit beyond which there would be no restrictions on contracting out. The force of the arguments supporting this proposal in principle are appreciated, but the Law Commissions have concluded provisionally that it would be difficult to formulate a workable definition of a "consumer sale" on these lines. They invite comment on the desirability and practicability of legislation on the lines indicated in this paragraph.

Contracting out to be banned, save where reasonable

65. A proposal which was much debated within the Working Party is that contracting out of the statutory conditions and warranties should be of no effect on any sale unless a court allows reliance upon it as being fair and reasonable in the circumstances of the case. This proposal which follows the precedent of s.3 of the Misrepresentation Act 1967 has the advantage of avoiding a definition of

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"consumer sale" and of providing the courts with a flexible instrument of control. It also has the advantage of providing a consistent rule as regards condition and warranties on the one hand and misrepresentations on the other. As already pointed out, wherever there is a breach of section 13 of the 1893 Act (implying a condition that the goods agree with the description) there will necessarily be a misrepresentation also and often the same will apply to breaches of sections 14 and 15. It would be somewhat anomalous if one rule (section 3 of the Misrepresentation Act 1967) applied to contracting out of liability for misrepresentation and a different rule applied to contracting out of the statutory conditions and warranties. It was contemplated that legislation on the lines of this proposal might contain "guide lines" for the assistance of the court by indicating particular matters which the court should take into account, for example, the abuse of inequality of bargaining power. In relation to commercial sales strong opposition to this proposal has been expressed on a number of grounds. Apart from the general objections to the extension of control to commercial transactions particular objection was taken in the Working Party to putting the onus of proof upon the party seeking to rely upon the exemption clause. There were also objections on the further ground that if the precedent of the Misrepresentation Act 1967 were followed reasonableness would not be judged solely on the basis of the facts known at the time when the contract was made but also in the light of subsequent events and circumstances. A general dispensing power of this nature would, it was contended, introduce an intolerable degree of uncertainty into many commercial transactions. Accordingly most members of the Working Party favoured a variant of the proposal reversing the burden of proof and making the date of contract the material date for judging the reasonableness of any contracting out provisions (as in s.2-302 of the U.S. Uniform Commercial Code[4]).

Questions on the proposals set out in paragraph 65

66. The Law Commissions invite comment on the following questions:-

(1) Would a measure of control of commercial sales on the lines referred to in paragraph 65 be desirable in principle?

(2) Should the onus of proof be upon the vendor (to prove the reasonableness of the exemption clause) or upon the purchaser (to prove its unreasonableness)?

(3) Should the test of reasonableness be applied as at the time of the contract or in the light of all the circumstances which have caused the issue of reasonableness to be raised?

(4) If the answers to the above questions were to favour a test of reasonableness which differs from the provisions of section 3 of the Misrepresentation Act 1967, should that section be amended and if so in what respects?

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(4) See Appendix C.

Control with the assistance of the Restrictive Practices Court by "prior validation" or otherwise

67. It has been suggested that the uncertainty as to the enforceability of an exemption clause that might arise if such clauses were subjected to an ex post facto test of reasonableness could be avoided by some procedure (similar to that which is available under the Israeli Standard Contracts Law 1964(5)) whereby a contracting out provision could be tested, in advance of its adoption, before the Restrictive Practices Court or some similar body, and pronounced void if held, in all the circumstances, to be unfair. As a variant of this procedure it has also been suggested that an exemption clause should be void unless approved by the Restrictive Practices Court upon the application of the party who intends to impose it. The Law Commissions agree with the view of the Working Party that neither of these suggestions would be practicable.

68. Another variant of this type of procedure would be to confer upon the Registrar of Restrictive Trade Agreements a power, exercisable on complaint or on his own initiative, to bring before the Restrictive Practices Court clauses which he regards as unfair. This might be combined with a procedure enabling manufacturers or other interested parties to have standard clauses brought before the Restrictive Practices Court for approval.

69. However, any procedure of this character would have the disadvantage that whilst it might be well adapted for the scrutiny of standard forms of contract it would not be suitable for the scrutiny of "individual" contracts. Differences between parties about to enter into a non-standard contract as to fairness of a particular clause in the particular circumstances might thrust a great volume of work upon the court. If on the other hand the parties and more particularly parties to a proposed commercial contract were in agreement as to the fairness of certain contracting out provisions, the court's function would be formal rather than real.

70. Moreover, if such a form of procedure were to be applied to consumer sales it might well have to be combined (as in the Israeli Standard Contracts Law), with a power in the ordinary courts to strike down unreasonable clauses. This might in certain circumstances raise problems of comity between the Restrictive Practices Court and the ordinary courts, for example, where the latter were called upon to pronounce upon the reasonableness of provisions which were the subject of proceedings still pending in the former court. In practice these problems might well be resolved without serious difficulty.

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(5) See Appendix D.

Questions on the solution referred to in paragraph 68

71. The Law Commissions invite comment on the following questions:-

(1) Would a proposal on the lines suggested in paragraph 68 provide a workable means of dealing with unreasonable clauses purporting to contract out of the statutory conditions and warranties in commercial sales and yet avoid the disadvantage of undue interference with commercial bargains?

(2) Would it be practicable to combine that proposal (or any other technique for the prior approval of standard forms of contract) with a power vested in the ordinary courts to strike down a contracting out provision which had not been given prior approval?

Insurance

72. The Working Party were conscious of the importance of taking fully into account the probable impact on insurance of any proposal which would have the effect of placing firmly upon sellers such risks against which they can at present protect themselves by contractual provisions, absolving them from liability or limiting their responsibility. In their Interim Report they referred to the views which had been expressed to them by insurance experts who had been good enough to discuss this matter with the Working Party. The views expressed on the assumption of a ban mitigated by a test of reasonableness may be summarised as follows:-

(a) With regard to accident insurance there would seem to be no insuperable problem. Cover is readily available at present against personal injury or damage to property resulting from accidents caused by defective products. The use of exemption clauses is rarely very material in assessing the premium since insurers realise that even if the clause is legally watertight business considerations may make it impossible or inexpedient to rely upon it. The most important factors are the insurance experience with a given type of goods and the claims record of a particular assured. It is however the general practice in this country to fix a maximum in respect of any one claim and/or a maximum in respect of claims by the same assured. The banning of exemption clauses might increase the present rates of insurance, but prevailing rates are not high and even if they were doubled the rates would still be so small in relation to turnover as not to give rise to any significant increase in the price of goods.

(b) Quality insurance however presents special problems and so does insurance to cover consequential risks such as loss of profits. It is not at present the practice in this country to cover by insurance the cost of replacing faulty or substandard goods or a consequential loss of profits. If there was a demand for this type of insurance it would no doubt be met. But it would be necessary for the law to make it quite clear where

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liability lay. Lack of risk experience in this field makes it difficult to predict the likely cost of such insurance. Premiums would probably be fairly steep at the outset though in time rates would adjust themselves in the light of the experience gained.

73. The Law Commissions would welcome any further views on this aspect of the matter.

International Sales: sales subject to the Uniform Laws on International Sales Act 1967

74. Reference has been made in this Paper to the Uniform Laws on International Sales Act 1967 and to the general problem of international sales, and more particularly of export sales. For the purposes of this Working Paper it is for consideration how far account would require to be taken of the provisions of that Act, when it comes into operation, and whether special provisions would have to be made for international sales.

75. The following tentative points are made:-

(a) It would seem to be necessary to make sure that insofar as contracting out of the statutory conditions and warranties is prohibited or limited, a similar measure of restraint should be applied to any domestic sales to which the corresponding provisions of the Uniform Law, set out in Schedule 1 of the 1967 Act, is applied by agreement between the parties.

(b) It might be necessary, more particularly if control of contracting out were applied also to sales beyond the consumer level, to make similar provisions in relation to import sales subject to the Uniform Law; one important object of such control would be to reinforce the legal protection accorded to domestic consumer sales.

(c) The extension of control to export sales governed by the Sale of Goods Act or the Uniform Law would require consideration. In practice the British exporter would have to pay regard to any "mandatory provisions of law" operative in the country of destination which by reason of Article 4 of the Uniform Law would have applied had the Uniform Law not been chosen by the parties as the law of the contract. In certain markets this might put British exporters to an unfair disadvantage in relation to foreign competitors not subject to similar restrictions.

(d) The points made in paragraphs (b) and (c) above would in practice be of limited materiality if control of contracting out of the statutory conditions and warranties were to be limited to consumer sales.

/PART

PART VI: CONTRACTING OUT OF LIABILITY FOR NEGLIGENCE

76. On a sale of goods there may be a claim in negligence against the seller or against the manufacturer, or, very occasionally, against an intermediate distributor. A claim against the seller will normally be an alternative to a claim under sections 12-15 of the Sale of Goods Act. The latter affords a better remedy to the buyer, for all he has to prove is that there is something wrong with the goods; he need not prove any kind of negligence on the part of the seller. Accordingly a negligence claim is rarely brought against the seller unless (i) liability under sections 12-15 has been excluded and (ii) the exemption clause is not wide enough to exclude liability for negligence. If the exclusion of sections 12-15 were prohibited, there would be still less scope for claims in negligence. But some would remain. Section 14, either in its present form or in the amended form which we have proposed, does not apply to private sales or cases where the buyer relies on the manufacturer's advertising and not on the seller's skill and judgment. Even in trade sales there will still be cases where the goods measure up to the requirement of section 14, yet the seller is liable in negligence because he has given no warning of the dangers involved in using the goods.

77. Of greater importance are manufacturers' "guarantees" which purport to exclude liability for the negligence of the manufacturer and, sometimes, of intermediate distributors. The Molony Committee, which touched on the subject in paragraphs 474-478 of their Report, was urged from several quarters to prohibit contracting out of liability for negligence in consumer sales, but they felt that they ought not to make such a recommendation, as this would involve entering upon the law of tort which was outside their terms of reference. They pointed out that contracting out of liability for negligence was not confined to contracts of sale of goods but extended to many types of contracts for the supply of services; the problem of manufacturers' "guarantees" was but one facet of a far wider problem, namely whether the freedom to contract out of liability for tort should be restricted. The Committee emphasised that

(a) if manufacturers were prohibited from excluding liability, a benefit would be conferred on the purchaser of goods which was denied to the user of services, and

(b) it would not be proper to discriminate against one single class of contractor among the many who rely on exemption clauses as a safeguard from negligence liability - an argument which has particular force where the purchaser has a valid claim against the retailer in contract.

They considered, therefore, that the whole subject required comprehensive study.

78. The Working Party reached the same conclusion as the Molony Committee. Conscious of the desirability of avoiding anomalous distinctions between contracts of sale of goods and contracts for the provision of services, the Working Party took the view that recommendations regarding exclusion of liability for negligence in contracts of sale of goods could not be made until a full examination had been carried out of the exclusion of liability for negligence in contracts for the supply of services also. The Working Party is now engaged on a comprehensive study of the whole problem and proposes to deal with the whole subject of liability for negligence in its Final Report. The Law Commissions consider that the reasons which prompted the Working Party to reach this conclusion, are valid ones, and that the postponement of the report on the subject is justified in the circumstances. They accordingly endorse the Working Party's decision.

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PART VII: SUMMARY OF CONCLUSIONS AND OF QUESTIONS UPON WHICH COMMENT IS INVITED

Amendments to sections 12-15 of the Sale of Goods Act 1893

79. It is proposed that:

(a) Section 12 of the Act should be amended so as to give effect to the recommendation contained in paragraph 36 of the Twelfth Report of the Law Reform Committee, whereby a buyer who is entitled to relief because he has not acquired a good title to the goods, must give credit for any benefit he may have had from the goods while they were in his possession. (Paragraphs 10-12).

(b) In section 14(1) the requirement that goods shall be of "a description which it is in the course of the seller's business to supply" should be replaced by the requirement that the seller was "acting in the course of trade or business", and the proviso excluding sales under a patent or other trade name should be deleted. (Paragraphs 14-16). Views are invited on whether section 14(1) should be re-worded on the lines set out in paragraph 17.

(c) In section 14(2) the condition of merchantable quality (or in Scotland: warranty) should cease to be limited to sales by description and the requirement that the seller must have been dealing in goods of the relevant description should be replaced by the requirement that he was "acting in the course of trade or business". (Paragraphs 18-19).

(d) "Merchantable quality" should be defined for the purposes of section 14(2) and section 15, and section 14(2) should be re-formulated on the lines set out in paragraph 23 with the substitution of "by a seller acting in the course of trade or business" for "by way of trade". (Paragraphs 20-26 and 30).

(e) A clause should be added to section 14 to the effect that where goods are sold through an agent or auctioneer acting in the course of trade or business, the goods shall be deemed to be sold by a seller acting in the course of trade or business. (Paragraphs 27-28).

(f) It should no longer be a requirement that for the purposes of section 15 it must be shown to be a term of the contract that the sale is a sale by sample and that, if the contract is reduced to writing, this term must be included in the writing. (Paragraphs 30-31).

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(g) In consumer sales the benefit of the seller's obligations under sections 12-15 should be extended to any person who may reasonably be expected to use, consume or be affected by the goods. (Paragraphs 32-37). But views are invited on whether this extension should

(a) be limited to cases of personal injury; or

(b) cover damage to property as well; or

(c) cover all financial loss.

(Paragraphs 38-41).

Contracting out of the conditions and warranties implied by sections 12-15 of the Sale of Goods Act 1893

80. It is proposed that any contractual provision which purports to exempt the seller from any obligation arising from a breach of any of the above conditions and warranties shall be void on a consumer sale as tentatively defined in paragraph 51. (Paragraph 53). But views are invited on the question whether an exclusion of the statutory conditions and warranties should be permissible in the case of auction sales, and, if so, to what extent. (Paragraphs 55-58).

81. Views are invited on the following questions relating to commercial sales:

(a) Should contracting out of the statutory conditions and warranties be completely free from control on such sales? (Paragraphs 60, 61 and 63).

(b) If there were no control, would this leave retailers in an unreasonably vulnerable position in the event of control being imposed on exemption clauses in consumer sales? (Paragraph 63).

(c) Would it be practicable to invalidate contracting out of the statutory conditions and warranties on sales to all end-purchasers of goods whether for private purposes or for the purposes of a trade or businsss? (Paragraph 64).

(d) Should contracting out of the statutory conditions and warranties be subject to a general test of reasonableness on the lines of section 3 of the Misrepresentation Act 1967? (Paragraph 65).

(e) If a general test of reasonableness were applied should the onus of proof be upon the seller (to prove the reasonableness of the contracting out clause) or upon the purchaser (to prove the unreasonableness of the contracting out clause)? (Paragraph 65).

(f) If a general test of reasonableness were applied should it be applied as at the time when the contract was made or in the light of the circumstances which have caused the issue of reasonableness to be raised? (Paragraph 65).

/(g)

(g) If the answers to questions (e) and (f) above were to favour a test of reasonableness which differs from the provisions of section 3 of the Misrepresentation Act 1967, should the section be amended and if so in what respects? (Paragraph 65).

(h) Would some form of control by the Restrictive Practices Court (or some other special court or body) on the lines suggested in paragraph 68 provide a workable means of dealing with unreasonable contracting out provisions on commercial sales whilst avoiding the disadvantage of undue interference with commercial bargains? (Paragraphs 68-70).

(i) Would it be practicable to combine the form of control referred to in (h) with a power in the ordinary courts to declare invalid, as being unreasonable, a contracting out provision which had not been the subject of a prior approval by the Restrictive Practices Court (or such other special court or body to which the jurisdiction might be given)? (Paragraphs 68-70).

(j) Should any, and if so what, special provisions be made with respect to international sales? (Paragraph 75).

/APPENDIX

APPENDIX A

JOINT WORKING PARTY ON EXEMPTION CLAUSES IN CONTRACTS

Joint Chairmen:	The Hon. Lord Kilbrandon (Chairman of the Scottish Law Commission)
	Mr. Andrew Martin, Q.C. (The Law Commission)
	Professor T.B. Smith, Q.C. (The Scottish Law Commission)
	Mr. L.C.B. Gower (The Law Commission)
	Mr. M. Abrahams (The Law Commission)
	Mrs. E.L.K. Sinclair (Board of Trade: till February 1967)
	Mr. S.W.T. Mitchelmore (Board of Trade: from February 1967)
	Miss G.M.E. White (Board of Trade)
	Mr. J.A. Beaton (Scottish Office)
	Mr. J.B. Sweetman (Treasury Procurement Policy Committee)
Appointed after consultation with the organisation shown in brackets	Mr. Stephen Terrell, Q.C. (The Bar Council)
	Mr. M.R.E. Kerr, Q.C. (The Bar Council: appointed February 1967)
	Mr. Peter Maxwell, Q.C. (The Faculty of Advocates)
	Mr. W.M.H. Williams (The Law Society: resigned February 1968)
	Mr. J.H. Walford (The Law Society: appointed February 1968)
	Mr. G.R.H. Reid (The Law Society of Scotland)
	Mr. R.G. Scriven (Association of British Chambers of Commerce)
	Mr. W.E. Bennett (The Confederation of British Industry)
	Mr. Gordon Borrie (The Consumer Council)
	Mrs. Beryl Diamond (The Consumer Council: resigned February 1967)
	Mrs. L.E. Vickers (The Consumer Council: appointed February 1967)
Secretary:	Mr. R.G. Greene (The Law Commission)

Mr. Justice Scarman, Chairman of the Law Commission, attended some meetings.

/APPENDIX

APPENDIX B

SECTIONS 12-15 SALE OF GOODS ACT 1893

12. In a contract of sale, unless the circumstances of the contract are such as to show a different intention, there is -

(1) An implied condition on the part of the seller that in the case of a sale he has a right to sell the goods, and that in the case of an agreement to sell he will have a right to sell the goods at the time when the property is to pass:

(2) An implied warranty that the buyer shall have and enjoy quiet possession of the goods:

(3) An implied warranty that the goods shall be free from any charge or encumbrance in favour of any third party, not declared or known to the buyer before or at the time when the contract is made.

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

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

(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer

/relies

relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose, provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose:

(2) Where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality; provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed:

(3) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade:

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

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

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

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

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

/(o)

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

/APPENDIX

APPENDIX C

S.2-302 OF THE U.S. UNIFORM COMMERCIAL CODE

1. The text of the section, which applies only to contracts for the sale of goods, is as follows:

> (1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.
>
> (2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

2. The Uniform Commercial Code was promulgated in 1952 and revised into its present form in 1958. By January 1, 1968, it had been adopted by 49 of the 50 states (the exception being Louisiana) and by the District of Columbia. Of the states which have adopted the Code both California and North Carolina have omitted s.2-302.

3. The purpose of the section is explained in a comment published with it of which the following is an excerpt:

> "This section is intended to make it possible for the courts to police explicitly against the contracts or clauses which they find to be unconscionable. In the past such policing has been accomplished by adverse construction of language, by manipulation of the rules of offer and acceptance or by determinations that the clause is contrary to public policy or to the dominant purpose of the contract. This section is intended to allow the court to pass directly on the unconscionability of the contract or particular clause therein and to make a conclusion of law as to its unconscionability.
>
> The basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract. Subsection (2) makes it clear that it is proper for the court to hear evidence upon these questions. The principle is one of the prevention of oppression and unfair surprise (cf. Campbell Soup Co. v. Wentz, 172 F.2d 80, 3d Cir. 1948) and not of disturbance of allocation of risks because of superior bargaining power ..."

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This part of the comment includes a list of cases, both American and English, which illustrate the underlying basis of the section. They are pre-Code cases and are in the main "commercial" rather than "consumer" contracts, including for the most part cases where courts of equity have refused specific enforcement or courts of law have strictly construed one-sided clauses, to deny a party the full benefit of a clause obtained through the abuse of a clear imbalance of bargaining power.

4. There is no definition in the Code of what constitutes an "unconscionable clause". In early law "unconscionable" contracts were those which were harsh and oppressive, associated with fraud, mistake or gross inadequacy of consideration. The concept was frequently employed by courts of equity as a ground for refusing specific performance; it was also available to a limited extent as a defence at law. An English authority has described an unconscionable contract as one

> "such as no man in his senses and not under a delusion would make on the one hand, and as no honest and fair man would accept on the other ... of such even the common law has taken notice". (Chesterfield (Earl of) v. Janssen (1751) 2. Ves. Sen. 125, 156, per Lord Hardwicke).

5. From the cases cited in the comment and from other sections of the Code (e.g. s.2-719(3) dealing with damages) it seems clear that a wider meaning than this was intended. It has been suggested that from a reading of the Code as a whole "unconscionable" can be equated with "grossly unfair".(1) In the case of Kansas City Wholesale Grocery Co. v. Weber Packing Corporation, 73 P.2d 1272 (1937), referred to in the comment on s.2-302, a clause limiting the time in which complaints could be made was held inapplicable to latent defects in a shipment of catsup which could only be discovered by microscopic analysis. The element of unfair surprise referred to in the comment would appear to include cases of terms in small print on the reverse side of a standard form contract not read by the buyer or drawn to his attention (Henningsen v. Bloomfield Motors, 161 A.2d 69 (1960), - a case of attempted disclaimer of an implied warranty of merchantability which was held to be "so inimical to the public good as to compel an adjudication of its invalidity"). Oppression in the sense of too hard a bargain resulting from a disparity of bargaining power is illustrated by the case of

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(1) 45 Ia.L.Rev. 843, 849 (1960).

/Campbell

Campbell Soup Co. v. Wentz, 172 F.2d 80, 3d Cir. 1948, where a Federal Court of Appeals refused to enforce a contract for the sale of carrots taking strong exception to a clause whereby in cases where Campbell's were prevented from taking delivery in certain circumstances, e.g. a strike, the growers required Campbell's consent to dispose of their carrots elsewhere.

6. As yet there have been few cases on the section so that no clear judicial definition of unconscionability under the section has been evolved. The picture has however been filled out by decisions on other sections of the Code which use the same test, and cases where the courts have found a power of unenforceability on this basis at common law, e.g. Williams v. Walker-Thomas Furniture Co., C.A.D.C. 1965, 350 F.2d 445. In that case unconscionability at common law was held to include "an absence of meaningful choice on the part of one of the parties together with contract terms which unreasonably favour the other party".

7. The dearth of cases under s.2-302 may be partly explained by the greater readiness of the American courts as compared with courts in this country to refuse to enforce contracts which they regard as harsh and unfair by direct findings that the contract is contrary to public policy. Thus in Tunkl v. Regents of the University of California, 383 P.2d 441, (1963) the Supreme Court of California (a state which has adopted the Code but not s.2-302) held that a clause exempting a party from liability for personal injury caused by negligence may be invalidated on public policy grounds where there is marked inequality in bargaining power. It may not therefore be necessary in many cases to seek to rely on s.2-302 save as a last resort.

/APPENDIX

APPENDIX D

ISRAELI STANDARD CONTRACTS LAW 1964

1. In this Law - Definitions

"standard contract" means a contract for the supply of a commodity or a service, all or any of whose terms have been fixed in advance by, or on behalf of, the person supplying the commodity or service (hereinafter referred to as "the supplier") with the object of constituting conditions of many contracts between him and persons undefined as to their number or identity (hereinafter referred to as "the customers"); "commodity" includes land and rights over land, and rights of hire and lease;

"terms of a contract" includes terms referred to in the contract, and any condition, waiver or other matter forming part of the bargain without being expressly stated in the contract itself, but does not include a term specially agreed upon by a supplier and a customer for the purpose of a specific contract; "restrictive term" means any of the terms specified in section 15; "court" includes a tribunal and an arbitrator.

2. A supplier who enters, or intends to enter, into agreements with customers by a standard contract, may apply to the Board appointed for the purposes of the Restrictive Trade Practices Law, 5719-1959 (hereinafter referred to as "the Board") for approval of the restrictive terms of the contract. Application for approval of standard contract.

3. Applications for approval under this Law shall be dealt with by the Board composed of three members, who shall be the Chairman of the Board or any other judge appointed for that purpose by the Minister of Justice and two members of the Board, one of whom at least shall not be a State employee. Composition of the Board.

4. The Board shall not entertain an application for approval made after an objection against a restrictive term of the contract has been raised in a suit between the supplier and one of his customers, nor shall it Restriction on application for approval.

/entertain

entertain an application for approval of a term which a court has, under section 14, decided to regard as void.

Powers of Board.

5. Where an application for approval has been made, the Board may, after hearing the applicant and the Attorney-General or his representative and after giving every person designated under the regulations as a respondent an opportunity to state his arguments, approve any restrictive term of the contract or refuse to approve such term.

Matters to be considered by Board.

6. In deciding upon the validity of a restrictive term, the Board shall consider whether, having regard to the terms of the contract in their entirety and to all other circumstances, such term is prejudicial to the customers or gives an unfair advantage to the supplier likely to prejudice the customers.

Taking evidence; procedure.

7. For the purposes of summoning witnesses and taking evidence the Board shall have all the powers which a District Court has in civil matters. The Board shall determine its procedure in so far as it has not been prescribed by the Minister of Justice by regulations.

Appeal.

8. The applicant, the Attorney-General and any person designated under the regulations as a respondent may, within 60 days, appeal against the decision of the Board to the Supreme Court.

Period of validity of approval.

9. An approval of the Board shall be valid for a period of five years from the day on which it was given or for such shorter period as may be fixed by the Board in its decision.

Effect of approval.

10. A restrictive term of a standard contract approved by the Board shall be of full effect in every contract made in accordance with that standard contract before approval was given or during the period of its validity, and the provisions of section 14 shall not apply thereto.

11. A restrictive term of a standard contract which the Board has refused to approve shall be void; however, if before approval was refused that standard contract had been approved by the Board, the refusal shall not affect any contract made in accordance with that standard contract before such approval or during the period of its validity. Effect of refusal.

12. The Board shall keep a register of its decisions; the register shall be open for inspection by any person. The Board may publish its decisions in such form as it may deem fit in the public interest. Register of decisions; publication.

13. Where the Board has approved the terms of a standard contract, the supplier shall indicate the fact of approval on the face of every contract which he makes with a customer after the approval was given and during the period of its validity. Where no such indication was made on the face of a particular contract, a court may, notwithstanding the Board's approval and the provisions of section 10, act in respect of such contract as provided in section 14. Indication of approval.

14. Where, in any legal proceeding between a supplier and a customer, a court is satisfied that, having regard to the terms of the contract in their entirety and to all other circumstances, a restrictive term is prejudicial to the customers or gives an unfair advantage to the supplier likely to prejudice the customers, it may regard the term or any part of it as void and may order the return to the customer of anything given by him on the strength of such term. Power of court.

15. A restrictive term is a term which - What is a restrictive term.

(1) excludes or limits any liability of the supplier towards the customer, whether contractual or legal, which would have existed but for such term; or

(2) entitles the supplier to cancel the contract, or vary its conditions or suspend its performance, of his own accord, or otherwise

/provides

provides for the rescission of the contract, or the abrogation or limitation of any of the customer's rights thereunder, unless such cancellation, variation, suspension, rescission, abrogation or limitation is conditional upon a breach of the contract by the customer or upon other factors not dependent on the supplier; or

(3) makes the exercise of any right of the customer under the contract conditional upon the consent of the supplier or of some other person on his behalf; or

(4) requires the customer to resort to the supplier or to some other person in any matter not directly connected with the subject of the contract or makes any right of the customer under the contract conditional upon such resort or limits the freedom of the customer to enter into an agreement with a third party in any such matter; or

(5) constitutes a waiver by the customer in advance of any of his rights that would have existed under the contract but for such term; or

(6) authorises the supplier or some other person on his behalf to act in the name of the customer or in his stead for the purpose of realising a right of the supplier against the customer; or

(7) makes accounts or other documents prepared by or on behalf of the supplier binding on the customer, or otherwise imposes on the customer a burden of proof which would not have been on him but for such term; or

(8) makes the right of the customer to any legal remedy dependent on the fulfilment of a condition or the observance of a time-limit, or limits the customer with regard to arguments or to the legal proceedings available to him, unless such term be an arbitration clause; or

(9) refers a dispute between the parties to arbitration in such manner as to give the supplier more influence than the customer on the designation of the arbitrator or arbitrators or the place of the

/arbitration

arbitration or entitles the supplier to choose, of his own accord, the court before which the dispute is to be brought.

Effect on other terms of contract.

16. The fact that a term of a contract has been invalidated by the Board under section 11 or by the Court under section 14 shall not in itself affect the other terms of the contract.

Power of court of appeal.

17. In an appeal against a decision of the Board or against a determination under section 14, the court of appeal may reconsider the matters mentioned in section 6 and 14.

Application to the State.

18. For the purposes of this Law, the State as a supplier shall have the same status as any other supplier.

Terms conforming to enactment or international agreement.

19. The provisions of this Law shall not apply to a term which conforms with, or is more favourable to the customer than, a term prescribed or approved by or under an enactment in force immediately prior to the coming into force of this Law or provided in an international agreement to which Israel is a party or in an agreement between an Israeli corporation approved by the Government for the purposes of this section and a foreign supplier.

Saving of laws and pleas.

20. The provisions of this Law shall not derogate from any other law or affect any plea by virtue of which a contract or any term thereof, whether restrictive or otherwise, may be void or voidable.

Implementation and regulations.

21. The Minister of Justice is charged with the implementation of this Law and may make regulations for such implementation, including rules of procedure of the Board and provisions as to -

(1) persons to be respondents before the Board in addition to the Attorney-General or his representative;

(2) evidence which, notwithstanding the provisions of any law may be admitted or required in any proceedings before the Board;

(3) payment of costs, advocate's fees and witnesses' allowances;

(4) fees to be paid in proceedings before the Board;

(5) procedure in appeals under section 8;

(6) the form of the indication to be made on contracts under section 13.

Transitional provision.

22. The provisions of sections 10, 11 and 14 shall not apply to a contract made before the expiration of six months from the coming into force of this Law or before a decision of the Board under section 5 in respect of such standard contract, whichever date is earlier.