Commentary on
'Party Autonomy and Statutory Regulation: Sale of Goods''

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Introduction

Professor Carter has done an admirable job of comparing the rejection and termination of contract rules in the British Sale of Goods Act, the International Sales Convention and, to a lesser extent, Article 2 of the Uniform Commercial Code. The gaps in the Article 2 coverage are more than adequately filled in Professor Speidel's sophisticated paper. Canadian law is only lightly touched on in Professor Carter's paper, which some will regret. Canada was one of the first, if not the first, common law jurisdiction to address the problems of express and implied warranties and the use of disclaimer clauses in the sale of agricultural machinery, and to breach the walls of privity in imposing warranty liability on the manufacturer of such equipment in favour of the ultimate buyer.3

I could also quibble with some of the analyses and conclusions drawn in Professor Carter's paper but this would be unrewarding. I should like instead to focus on some broader questions — questions, I believe, that need to be addressed in determining the effectiveness and suitability of older and modern sales law regimes.

Object of Exercise

I hope I am not being naive in asking this simple question: what particular purpose did Professor Carter have in mind in comparing the British, Article 2 and CISG sales regimes? The answer, I think, matters because it will enable us to determine whether Professor Carter has achieved his objective. Three purposes come to mind: (a) the intrinsic intellectual interest of comparing different regimes in a gathering such as this; (b) to predict the parties', particularly the buyer's, reactions to the rejection and termination provisions in the Convention; and (c) to evaluate the comparative merits of the three sales regimes, again principally from the buyer's perspective.

In view of the conclusions at the end of Professor Carter's paper,2 the first purpose seems unlikely though not wholly implausible. After all,

* Commentary on paper by Professor Carter appearing in this issue of the JCL at 93.
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journals of comparative law are replete with articles that have no higher objective than to compare legal rules, doctrines and institutions in two or more jurisdictions. However, among modern scholars there is increasing scepticism about the value of such exercises unless they are also linked to some normative benchmarks (such as the efficiency of national and international rules in the commercial law areas or the design of alternative routes to accomplish similar goals) or to explain the impact of cultural, economic or political forces on the evolution of legal rules.

The second purpose suggested above — to predict buyer’s reactions to the Convention’s rejection and termination rules — seems to be what Professor Carter had in mind. However, it ascribes a mistaken purpose because the Convention was not designed to offer a superior sales regime in place of inferior national regimes, although it may have that effect in some cases. The primary objectives of the Convention were to substitute an easily ascertainable choice of law rule governing international sales contracts in place of the multiplicity of frequently uncertain choice of law rules (or, in the case of many developing countries, no choice of law rules at all) found among the world’s 100 or more trading nations and, second, to provide the parties with a ‘neutral’ sales law where the parties were unwilling to accept the sales law of their respective countries as the law governing the transaction. The latter objective was felt to be particularly important in transactions between buyers and sellers located respectively in market oriented and state regulated economies, and vice versa, or in countries with developed and developing economies.

Given the Convention’s rationales, the answer to the question whether the buyer in a common law jurisdiction will opt to be governed by the Convention is surely predictable. Assuming the choice lies with him (frequently because of the supplier’s stronger bargaining position it will not be), he will choose the law with which he is most familiar and whose rules are best established and most accessible from his point of view. Often this will be the law of the buyer’s principal place of business. In the case of commodity contracts where the parties are using a standard form agreement approved by one of the great international trading associations in London, New York, Chicago or elsewhere, it will usually be the law where the trading association has its headquarters.

Professor Carter rightly notes that the buyer’s rejection and termination rights and remedies are substantially less generous in the Convention than they are in the British Act. They are even less generous when compared with the Article 2 provisions. Even if this were not so, a buyer in a sophisticated jurisdiction would have additional reasons for preferring to be governed by his own sales law. It is a mistake, I believe, to judge, a few Convention articles in isolation from the rest of the Convention: the Convention must be judged as a package.

If the buyer embarks on this additional enquiry he would quickly learn that there are other disadvantages to using the Convention as the parties’ law, assuming the buyer has a meaningful say in the matter. Inevitably, the Convention contains significant uncertainties and ambiguities, and it will take many years of litigation and arbitration before they are
satisfactorily resolved. There are also important questions that are not governed by the Convention at all — the essential validity of the contract, the seller's liability for defective products causing death or injury to a person and the property effects of the contract, to mention some obvious examples. It will be an unusual buyer who will not prefer to have all possible questions determined by one law rather than a multiplicity of laws.

Evaluating the Comparative Merits of the Different Sales Regimes

Reading between the lines, comparing the respective merits of the rejection and termination provisions of the three sales regimes also appears to be one of the objects of Professor Carter's paper. It seems to me, however, that the benchmarks he seemingly prefers, certainty and predictability of outcomes, are too simplistic. Let me explain why.

A certain and predictable rule that may favour the buyer at one level, for example, the characterisation of the great implied terms of title, description, merchantability and fitness as conditions in the British Act, may be neutralised by an equally stringent rule at another level, for example, the rule that the buyer only has a very short period of time following delivery to reject the goods on grounds of nonconformity. This means that the buyer will almost never be able to reject the goods where they suffer from a latent defect, however serious, unless there is an express clause extending the time for examination or rejection or unless the court is willing to read an exception into the Act.

A second reason, one that lawyers often overlook, is that buyers who want strong rejection rights will have to pay for them. There are no free lunches! Let me illustrate with a familiar set of facts. B orders a custom made machine. The seller offers him two alternative contracts. The first gives B a strict right of rejection for any non-trivial nonconformity; the second limits the right to major breaches which the seller cannot cure after reasonable effort. The first alternative will cost the buyer 10% more than the second. Which alternative will the buyer choose?

This simple example also illustrates another economic truism. This is that to determine the efficiency of sales rules we must observe their impact on the seller as well as the buyer and ascertain, in the context of a particular breach and assuming the absence of a fully specified contract, which of the two parties is in a better position to absorb the risk of loss arising from a defective product and whether a strong right of rejection (as compared, for example, with a claim for damages) will impose unacceptable allocative costs on the seller. In a seminal study, Professor George Priest has used this approach to determine whether

3 Article 4(a).
4 Article 5.
5 Article 4(b).
6 See the discussion in the Sale of Goods Report, above, n 1, ch 17(C).1.
American courts pursue efficiency objectives in applying the Article 2 rejection provisions and reached the conclusion that they generally do. However, one need not be a lawyer economist to appreciate that there is something seriously amiss with the British (and by a parity of reasoning, with the Australian and Canadian) perfect tender rules if they can lead to such incongruous and opportunistic results as occurred in *Arcos Ltd v E A Ronaasen & Son,*⁸ *IBM Co Ltd v Shcherban,*⁹ and *Re Landau & Moore & Co.*¹⁰ It is surely significant that two leading American commentators on Article 2¹¹ are of the view that the exceptions to the perfect tender rule in UCC 2-602 are as important as the rule itself.

**What do the Agreements Say?**

It seems to me it is also a serious error to look at the sales rules without comparing them with what the parties themselves agree to in practice, for in the case of freely bargained agreements (this is an important proviso) there is no better way to determine the rules' marketability. Professor Carter claims the necessary empirical evidence is not available. He is surely mistaken. In the 1940s Professor Honnold conducted a detailed study of the buyer's rights of rejection under the then US law,¹² which included an examination of many institutionalised practices and agreements. He found that the perfect tender rule was more honoured in the breach than in the observance.

In the 1970s, as part of its *Report on Sale of Goods,*¹³ the Ontario Law Reform Commission conducted a detailed examination of several dozen standard forms supplied by members of the Canadian Manufacturers' Association. The results are shown below.¹⁴

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**Vendor's Liability for Defective Goods and Right to Cure: Industry Clauses**

**Key to clauses:**

- 10 — Liability limited to cost of goods.
- 11 — Liability limited to cost of repair of goods.
- 12 — Liability limited to replacement of goods.
- 13 — Vendor will at his option repair or replace parts proven defective.

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⁸ [1933] AC 470.
⁹ [1925] 1 DLR 864 (Sask CA).
¹⁰ [1921] 1 KB 73, afd [1921] 2 KB 519.
¹¹ White & Summers, *Uniform Commercial Code,* 3rd ed, §§8.3. The authors conclude (p 357) that the Code exceptions have so eroded the perfect tender rule that relatively little is left of it.
¹³ Above, n 1.
¹⁴ Above, n 1, Table 1, p 462.
Industries using these clauses:

- Food and beverage 10, 13
- Rubber and plastic 10, 13
- Leather 10
- Knitting mills —
- Furniture and fixtures 10
- Paper 10
- Printing, publishing and allied industries 10
- Primary metal 13
- Metal fabricating 10, 11, 12, 13
- Non-electrical machinery 10, 11, 12, 13
- Electrical products 10, 12, 13
- Non-metallic mineral products —
- Petroleum and coal products —
- Chemicals 10
- Miscellaneous manufacturing 13

These results, combined with the results of earlier studies, amply justify the following conclusions:

1. Sellers regularly exclude an unlimited right of rejection and/or limit the buyer's remedy for nonconforming goods to recovery of the price.

2. *A priori* characterisation of the terms of the contract, express or implied, seems to play absolutely no part in the parties' agreements.

3. The seller's right to cure a nonconforming tender (that is, to repair or replace defective goods) is very common, particularly in contracts involving the sale of durable goods. Any purchaser of a motor vehicle can readily attest to this fact from personal experience.

4. The British statutory provisions, in terms of their efficiency, flexibility, and reflectiveness of common contractual practices, have little to commend them. Among their major weaknesses are the *a priori* characterisation of the key implied terms, the absence of a seller's right to cure and absence of a good faith doctrine to prevent opportunistic behaviour, the absence of a rule allowing the buyer to revoke his acceptance on the grounds of a latent defect, and of provisions entitling either party to seek adequate assurance of performance in appropriate circumstances — all these and other aspects I do not have time to mention, mitigate, in my view, against the British Act being looked upon as a suitable model for international enactment.

If we apply the same tests to the Convention, the Convention would emerge only marginally better than the British Act and in several respects worse. The test of "fundamental breach" as the primary basis for the buyer's right of rejection and avoidance of the contract is unnecessarily obscure and arguably too demanding. The Convention

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15 Cf UCC § 2-609.
16 Convention, art 25.
17 Convention, art 49.
lacks a clear right to cure.\footnote{Although Professor Honnold is of the view that art 48(1) serves this office; sed qu. See Honnold, \textit{Uniform Law for International Sales under the 1980 Convention}, §296.} Also troubling is the rule that the buyer loses all rights to complain about nonconforming goods if he fails to give notice of the defect within a reasonable time after he has discovered or ought to have discovered it.\footnote{Ibid, art 39(1).}

The Role of Default Rules

Lawyer economists refer to optional rules such as those contained in the sale of goods legislation and in the Vienna Convention as default rules because they only apply where the parties have not adopted different provisions in their contract. The role of default rules is to provide the parties with a standard set of terms which will be triggered automatically in the absence of contrary contractual provisions.

The underlying assumption of all default rules is that they serve a useful purpose because they will save the parties transaction costs and because they reflect the terms the parties would themselves have selected in a substantial number of cases had they applied their minds to the question. This raises an important issue. If I am right in suggesting that many commercial sale contracts, perhaps most, deviate significantly from the remedial regimes spelled out in the sales legislation, why is it that the default rules in the Australian and Canadian Acts and, for the most part, the British Act have not been changed to reflect contemporary usage? Or, to put it more forcefully, what is the point of retaining obsolete default rules that fail to do what they are supposed to do?

This is a big enquiry and I cannot answer it satisfactorily here. Let me simply sketch some of the likely answers. Probably the most important is based on Coase's theorem. This teaches us that the rules of liability do not matter as long as parties can costlessly transact around them. The fully specified sales contract matches this prescription almost perfectly since printing batches of standard form purchase or confirmation of sale forms is relatively costless.

But there are important exceptions. The buyer may refuse to sign the seller's form and instead send in his own differently worded purchase order, thus giving rise to the familiar battle of the forms. Or the terms of the contract may be incomplete or there may be no written contract at all. In all these cases the default rules will continue to apply.

So, it turns out, it is important after all to retain default rules for a significant range of cases, but the challenge remains: how do we make sure the default rules reflect the rules the parties would themselves have adopted had they applied their minds to the question? We seem to confront a Catch-22 dilemma. We assume that since the parties chose not to reduce their contract to writing, or at least not to reduce it fully to

\footnote{Professor Ronald Coase is a British economist and one of the founders of the law and economics movement. He joined the University of Chicago after World War II and won a Nobel prize in economics in 1990 for his pioneering work. For a description of Coase's theorem see Robert Cooter & Thomas Ulen, \textit{Law and Economics}, Scott, Foresman & Co, 1988, pp 5-6.}
writing, it must have been because they were satisfied with the applicable
default rules. Yet we also know from the many cases where there are
written contracts that the most significant default rules are often changed
radically or even rejected altogether. Is it likely then that the parties'
silence in the other cases implies concurrence with the statutory sales
regimes? Surely not.

If this reasoning is sound then we ought not to be content with the
status quo and rely on Coase’s theorem: the default rules do matter and
we ought to make sure that they reflect the best contemporary practices
and promote allocative efficiencies. This is a tall order for, as the New
South Wales Law Reform Commission pointed out in a Working Paper
in the 1970s, it is impossible to design a buyer’s remedial regime that
will be appropriate in all cases.

Nevertheless, I think we can do significantly better than the current
British model. A substantial breach rule should replace the system of
a priori characterisation in all but a limited number of cases, and the
seller should have a broad right to cure where cure can be effected
promptly and without unreasonable inconvenience to the buyer. Economically wasteful and opportunistic conduct should be discouraged
through the adoption of good faith requirements, though I appreciate
I am walking here on contentious ground. One feels much less hesitation
in recommending the adoption of a UCC 2-608 type right of revocation
of acceptance for latent defects. The British rule that a buyer must
discover the defect within a matter of days at most or risk losing the right
to reject altogether is too draconian. Contrary to common impressions, it
does not really help the seller because he would much rather have a
flexible right to cure the defect (by repair, replacement, or reduction
of the price) than face a large damage claim by the buyer.

Where Does the Vienna Convention Fit into this Scheme?

It is not easy to identify the underlying philosophy of the Convention
since it represents the confluence of so many streams. In the pre-war
period the dominant influence was that of a handful of continental
scholars led by Professor Ernst Rabel of the Max Planck Institute of
Comparative Law in Berlin. Their influence was also strongly felt in the
Hague Sales Conventions of 1964 although the Americans made mildly
successful attempts to leaven the rigidities and propensities for
categorisation found in ULS. The American influence is also apparent
in a larger number of the Vienna Convention provisions. Unhappily, the
common lawyer’s predilection for functionally oriented and flexible rules
did not make as much headway in the remedial area as might have been
wished. Instead, one detects a distinct bias in favour of the seller’s
position. As a member of the Canadian delegation, I do not recall many

1975, §13.17, p 220
22 I should emphasise again that these observations are addressed to commercial
contracts; a different remedial regime may be appropriate for consumer contracts.
discussions at the Vienna diplomatic conference about the need for functionalism or pragmatism in the design of the Convention rules, much less about the economist's icon of efficiency goals!

If this analysis is correct, then I think we can expect to see many departures from the default rules even where the parties have not wholly excluded the Convention. But where the parties have no written contract, or only a very skeletal one, their legal representatives, together with lawyers in the other 34 countries that have adopted the Convention to date, will have no option but to build a coherent and harmonious edifice out of the Convention rules. It will be a fascinating and challenging exercise.