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The Qualities of Goods in Sales at the Wholesale Level: Other Answers

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THE QUALITIES OF GOODS IN SALES AT THE WHOLESALE LEVEL: OTHER ANSWERS

DANIEL E. MURRAY*

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I. INTRODUCTION

A. *Sales at the Wholesale Level*

In the sale of goods at the wholesale, as well as the retail, level the success or failure of the sales contract and the applicable law governing this contract can be judged by the paramount standard: did the buyer receive what he bargained for—did the goods “possess the qualities and characteristics expressly or impliedly contemplated by the contract?”¹ No matter how well drafted the remaining portions of the contract may be, no matter how well articulated the provisions of the law of sales governing this contract are, the sales transaction will be a failure unless the qualities of the goods purchased meet the reasonable expectations of the buyer. The quality standards of the contract and the law are the leading players in the commercial drama—all other contractual and juridical standards are merely supporting characters.

This article will attempt to use the Uniform Commercial Code as a

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1. Convention on Article 33(1)(f), the Uniform Law Relating to the International Sale of Goods, 1964. Hereinafter cited as ULISG. The text of this convention is printed in 3 AMERICAN SOCIETY OF INTERNATIONAL LAW, INTERNATIONAL LEGAL MATERIALS 855 (1964); 30 LAW & CONTEMPORARY PROBLEMS 425-450 (1965); and *Some Comparative Aspects of the Law Relating to Sale of Goods*, 13 INTERNATIONAL & COMPARATIVE LAW QUARTERLY 60-84 (Supp. No. 9, 1964).

frame of reference for setting forth the contractual and legal standards governing the qualities of goods, and will then compare provisions of the Latin American commercial and civil codes for "other answers." Finally, certain provisions of the Uniform Law on the International Sale of Goods² will be discussed as furnishing additional answers.

In the United States and England we are accustomed to lumping sales at the wholesale and retail level into one generic mass called "sales." This "lump sum" approach is particularly discernible in the Uniform Sales Act while the Uniform Commercial Code has, in some measure, attempted to articulate different standards in some sales between merchants, as compared with sales by a merchant to a consumer.³ This new thinking of the U.C.C. seems patterned after the older Continental approach which divided the law of sales into two parts: the commercial law of sales which governs the sales between merchants, and the civil law of sales which governs sales between a merchant and the consumer.⁴ This lump-sum thinking of the Anglo-American law ignores the fact that a merchant who is skilled in his trade needs less statutory protection than does the casual consumer who does not possess this skill. Furthermore, merchants are accustomed to specifying the qualities of the goods in their contracts while the consumer buys goods in the ordinary case by paying the price and receiving them in an oral transaction without any quality standards being articulated—there necessarily should be implied standards of quality established by the law for the verbal-acts transactions

2. This Convention—ULISG—has been signed by Greece, the Netherlands, Great Britain and Northern Ireland, San Marino, Italy, Vatican City, Belgium, Germany, Luxembourg, Israel, France and Hungary, but no country had ratified it as of April 2, 1966. Information furnished to the author in a letter dated April 2, 1966, from the Ministry of Foreign Affairs, The Hague.

3. E.g., see UNIFORM COMMERCIAL CODE §§ 2-103(1)(b); 2-104(1); 2-201(2); 2-205; 2-207; 2-209; 2-314; 2-316 Comment 4; 2-326; 2-402(2); 2-403(2) (Title Questions); 2-509(3) (Risk of Loss); 2-603; 2-605; 2-609(2); 2-615; 2-704; 2-708 (apparently); 2-719(3). The UNIFORM COMMERCIAL CODE is hereinafter cited U.C.C. See also, Braucher, *Sale of Goods in the Uniform Commercial Code*, 26 LA. L. REV. 192, 193 (1966).

U.C.C. § 2-104(1) defines a merchant as

a person who deals in goods of the kind or otherwise by his occupation hold himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or their intermediary who by his occupation holds himself out as having such knowledge or skill.

Comments (1-3) state that banks or even universities may be merchants on the basis they hold themselves out as having knowledge or skill peculiar to the practices involved in a particular transaction. It is to be noted that under the above definition, a person or entity may be classified as a merchant *either* because he deals in goods of that kind *or* because he holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction. Of course, both definitions might be applicable in a given case.

4. E.g., Zweigert, *Aspects of the German Law of Sale* and Houin, *Sale of Goods in French Law*, printed in *Some Comparative Aspects of the Law Relating to Sale of Goods*, 146 INTERN'L & COMP. L.Q., (Supp. No. 9, 1964). For a superb article dealing with the growth of the warranty concept in modern Anglo-American and Continental Law, see Kessler, *The Protection of the Consumer Under Modern Sales Law, Part I, A Comparative Study*, 74 YALE L.J. 262 (1964). See also Murray, *Implied Warranty Against Latent Defects: A Historical Comparative Law Study*, 21 LA. L. REV. 586 (1961).

in the retail sale, while a merchant should be able to establish "the law of the contract" by placing these standards within the contract.

It should be noted, however, that many of the Continental European and Latin American countries have duplicated many of the quality provisions of their commercial codes in their civil codes with the result that there may be little difference in any one country between the required quality of the goods in the wholesale or retail sale.⁵ This approach has been continued in the Convention Relating to a Uniform Law on the International Sale of Goods which provides that it "shall apply to sales regardless of the commercial or civil character of the parties or of the contracts."⁶ Some of the commercial codes incorporate by reference certain portions of the purchase and sales rules of the civil codes, and this article will discuss certain of these civil code provisions in a subsequent section.

Anglo-Americans are accustomed to labeling the quality aspects of a sale of goods under the headings of express and implied warranties. These labels are not to be found in Latin America or in the recent Uniform Law on The International Sale of Goods. The Latin American codes use the labels of quality while the Uniform Law on International Sales uses the label "conformity of the goods."⁷ In an effort to find some common denominator, the author has chosen the words "quality" and "qualities" to express the notion that the buyer ought to receive what he bargained for.

The Uniform Commercial Code and the Latin American commercial codes group the questions of quality under various factual and contractual headings which do not always run true for all of the codes, but these headings will be used for the purposes of comparison in the remainder of this article.

B. *A Glimpse at Choice of Law Problems*

In the inter-state sale of goods in the United States few serious conflict of law problems should be raised because of the widespread adoption of the U.C.C.—if the vast majority of the states have the same substantive law of sales virtually all conflicts of law issues are eliminated.⁸ On the other hand, if the sale of goods is international in scope, choice of law problems are inevitable. It seems clear that under the American law, the law governing the validity of the contract, its interpretation and the rights and duties of the parties can be chosen by the

5. *Ibid.* and notes 257-266, *infra*.

6. ULISG, art. 7.

7. ULISG, arts. 33-49. The U.C.C. § 2-106(2) uses a similar thought "Goods . . . are 'conforming' or conform to the contract when they are in accordance with the obligation under the contract."

8. Choice of law problems will increase if adopting states follow the lead of California in re-drafting the "Uniform" Code.

parties in their sales contract when the transaction "bears a reasonable relation"⁹ or a "substantial relationship with the chosen state."¹⁰ For example, a vendor in New York could agree with a buyer in Venezuela that the local law of New York should govern the contract even though delivery was to be made in Venezuela, and an American court could then apply the local law—the U.C.C.—of New York. This local law of New York would then be used to determine the construction of the contract, the extent of express and implied warranties of quality, etc.

If the vendor and the buyer in the above example should fail to make this choice of law in their contract, the forum court could then select the local law of the state with which the contract has its most significant relationship, and this would be decided by grouping the factors of the place of contracting, the place of performance, domicile, nationality, place of incorporation and place of business of the parties, the law under which the contract will be most effective and other miscellaneous factors.¹¹ The place of performance is considered to be the most single important factor;¹² however, in a bilateral sales contract it may be difficult to localize. In the above hypothetical example, it may be difficult to factually ascertain the place of contracting because the acceptance of the offer may have been made in New York or Venezuela.¹³ A court could, on the other hand, adopt an alternative rationale by holding that the rights and duties of the parties to the sales contract are governed by the local law of the place of contracting, unless the contacts which the sales "contract has with another state are sufficient to establish a (substantially) more important relationship between the contract and such other state."¹⁴ It would appear that under the first theory, a court would place greater stress on the local law of the place where the contract was executed, but consideration would have to be given in either case to the grouping of factors or contacts.

The U.C.C. stipulates that it shall be applied "to transactions bearing an appropriate relation to this state."¹⁵ The comments attempt to

9. U.C.C. § 1-105(1). See KINYON & McCLURE, A STUDY OF THE EFFECT OF THE UNIFORM COMMERCIAL CODE ON MINNESOTA LAW 7-10 (1964).

10. RESTATEMENT (Second), CONFLICT OF LAWS § 332(a), (Tent. Draft No. 6, 1960). Under the English Rule it would appear that the parties may expressly choose the law governing their contract even though the contract may not bear any substantial relationship to the chosen country. GRAVESON, THE CONFLICT OF LAWS 345-363 (5th ed. 1965).

11. RESTATEMENT (Second), CONFLICT OF LAWS § 332(b), comments (Tent. Draft No. 6, 1960). For some of the dangers inherent in this concept see Rabel, *Conflicts Rules on Contract*, printed in THE CONFLICT OF LAWS & INTERNATIONAL CONTRACTS 127, 131-132 (1949).

12. RESTATEMENT (Second), CONFLICT OF LAWS (Tent. Draft No. 6, 1960). LORENZEN, SELECTED ARTICLES ON THE CONFLICTS OF LAWS 304-305 (1947).

13. Rabel, *International Sales Law*, printed in THE CONFLICTS OF LAWS & INTERNATIONAL CONTRACTS 34 (1949); LORENZEN, SELECTED ARTICLES ON THE CONFLICT OF LAWS 299-300 (1947).

14. RESTATEMENT (Second), CONFLICT OF LAWS § 332(b), Alternate Version (Tent. Draft No. 6, 1960).

15. U.C.C. § 1-105(1).

breathe some life into this nebulous term "appropriate" by stating that when a transaction has "significant contacts" with a U.C.C. state and also with another non-code state, "the question what relation is 'appropriate' is left to judicial decision."¹⁶ It is submitted that the U.C.C. has invited the courts to use the tests articulated in the Restatement Second, Conflict of Laws.

Three multi-lateral conventions dealing with private international law have been entered into by various Latin American countries since 1889.

Various conventions dealing with International private law were entered into by Argentina, Bolivia, Peru, Paraguay and Uruguay in 1889. The Convention on International Civil Law¹⁷ provides that the law of the country where contracts are to be performed governs their existence, their nature, their validity, their effects, their consequences, their performance and, in general, everything concerning the contract.¹⁸ This Convention gives no hint as to the method of determining the place of performance if the contract is unclear nor does it prescribe an alternate rule of *lex loci contractus* if the place of performance can not be determined from the contract.

The all inclusive nature of the above rule is seriously limited by the thought that contracts dealing with "certain and specified things" are governed by the law of the place where the things were located at the time the contract was made. On the other hand, the law of the place of the debtor (the buyer in a sales contract) would govern when the contract dealt with things determined by their class (*género*). The law of the domicile of the debtor (the buyer) would also govern in contracts dealing with fungible goods.¹⁹

The "execution" (*perfección*) of contracts made by correspondence or through an agent are to be governed by the law of the place from which the offer originated.²⁰ It would appear that a synthesis of the above rules would provide that if a buyer in Argentina should purchase fungible goods or goods "determined by class" from a vendor in Uruguay, the law of Argentina would govern the contract. On the other hand, if the Argentine buyer should purchase "certain and specified" things located in Uruguay from a vendor in Uruguay, the law of Uruguay would control. It is submitted that making the choice of law dependent upon the classification of the goods is rather arbitrary.

16. U.C.C. § 1-105 Comment. Professor Leflar has stated that this rule has been "intelligently framed, with deliberate and foresighted planning of anticipated consequences." Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U.L. REV. 267, 275 (1966).

17. Hereinafter cited CICL. The Text of this Convention is printed in 1 THE COMMERCIAL LAWS OF THE WORLD 283-286 (1903).

18. CICL, art. 33.

19. CICL, art. 34.

20. CICL, art. 37.

The Bustamante Code of 1928,²¹ the most widely adopted of the Latin American treaties, was ratified by Bolivia, Brazil, Chile, Costa Rica, Cuba, the Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Peru and Venezuela, and signed but not ratified by Argentina, Colombia, Mexico, Paraguay and Uruguay.²² Unhappily, the Bustamante Code's provisions relating to the choice of law problems governing contracts lack the specificity of the Montevideo rules of 1889. Commercial contracts are subject to the rules governing civil contracts.²³ The interpretation of contracts should be effected as a general rule "in accordance with the law by which they are governed"; however, when this law is in dispute, consideration will be given to the "implied choice of the parties" and the "the personal law common to the contracting parties shall be presumptively first applied and in the absence of this law, the law of the place where the contract was concluded shall be applied."²⁴ In adhesion contracts the law of the party proposing or preparing the contract is presumed to be accepted in the absence of an express or implied choice to the contrary.²⁵

Although these provisions are not free from ambiguity, it would appear that the parties can make a choice of law governing their contracts by an express provision in the contract while the law of the place where the preparer of a contract of adhesion is located will govern unless the acceptance of the offer negates this inference. If the parties fail to make any mention of the choice of law problem, the law of the place where the contract was concluded will govern unless both parties are subject to the same personal law.

A Treaty on International Commercial Terrestrial Law was proposed in Montevideo, Uruguay in 1940²⁶ to replace the Treaty on International Commercial Law signed in Montevideo in 1889.²⁷ With the exception of certain specialized commercial contracts, this commercial treaty devoted no attention to contracts involving the sale of goods. This hiatus was filled by a companion treaty—Treaty on International Civil Law²⁸—which was signed by Argentina, Paraguay, Uruguay, Bolivia, Peru, Brazil and Colombia, but ratified only by Argentina, Paraguay and

21. The text of THE BUSTAMANTE CODE is printed in French and English in IV HUDSON, INTERNATIONAL LEGISLATION 2279-2354 (1931), and Spanish texts are printed in CONSTITUCIÓN Y LEYES DEL ECUADOR 71-128 (1960) and Alvarado M., CONSTITUCIÓN Y CÓDIGOS DE LA REPUBLICA DE GUATEMALA 611-660 (1957).

22. Status of Inter-American Treaties and Conventions, *Serie Sobre Tratados* No. 5, p. 6, Pan American Union (1964).

23. BUSTAMANTE CODE, art. 244.

24. BUSTAMANTE CODE, arts. 184, 186.

25. BUSTAMANTE CODE, art. 185.

26. Hereinafter cited TICTL. The text of this treaty is printed in 37 AM. J. OF INTERN'L L., Supp. of Documents 132-141 (1943).

27. TICTL, art. 55, *id.* at 140.

28. TICTL, *id.* at 141.

Uruguay.²⁹ The 1940 Civil Law Treaty has filled some of the gaps left by the 1889 Treaty and the 1928 Bustamante Code. The 1940 Treaty on International Civil Law adopted virtually verbatim article 33 of the 1889 Montevideo Treaty.³⁰ However, it filled a hiatus left in the 1889 Montevideo Treaty by providing that when the place of performance cannot be determined, the contract is "governed by the law of the place of celebration."³¹ If the contract is negotiated through correspondence or by agents, the "law of the place where the accepted offer originated" shall govern.³² Parties who are subject to this Convention may not agree to modify any of these provisions.³³ Pursuant to this Convention it would seem that if a contract were negotiated between a vendor in Argentina and a buyer in Uruguay with delivery to be made in Uruguay and payment to be made upon tender of the documents, the law of the contract would be the local law of Uruguay.

Although the conflict of law rules enunciated in the Bustamante Code and the Montevideo Convention of 1940 have replaced the local conflicts of law rules of the ratifying countries with reference to contracts involving two or more of such countries, the local conflicts rules are still important when the vendor is located in the United States and the buyer is in Latin America. Unfortunately, the conceptual and verbal approach of the Latin American countries differ, and it is difficult to make any valid generalizations.

The Commercial Code of Ecuador seems to give full recognition to the conflicts rules of *lex loci contractus* and *lex loci solutionis*. When the parties reside in different places, the contract shall be understood as executed (*celebrado*—literally celebrated) "for all legal effects" in the place of residence of the one who has accepted the original offer or a modified offer.³⁴ However:

All acts concerning the performance of mercantile contracts executed in foreign countries and performable in Ecuador shall be governed by the Ecuadorian laws. Thus, delivery and payment, the money [in the sense of currency] in which the payment must be made, the measurement of any kind, receipts and their forms, the responsibilities imposed for the lack of performance or imperfect or tardy performance and any other act relative to the mere performance of the contract must be regulated by the dispositions of the laws of the Republic, *unless the contracting parties have agreed on something else*.³⁵

29. Hereinafter cited TICL. Status of Inter-American Treaties and Conventions, *Serie Sobre Tratados* No. 5, p. 31, Pan American Union (1964).

30. TICL, art. 37.

31. TICL, art. 40.

32. TICL, art. 42.

33. TICL, art. 5 (additional protocol).

34. CÓDIGO DE COMERCIO, art. 147.

35. CÓDIGO DE COMERCIO, art. 154 (Emphasis added).

Colombia³⁶ and Chile³⁷ have virtually the same rules as Ecuador. Venezuela³⁸ has similar rules but the phrasing has been condensed. Nicaragua has adopted the *lex loci contractus* rule of the above countries,³⁹ but has apparently omitted any mention of the place of performance rule. Chile and El Salvador articulate the rule that "the effects of contracts executed in a foreign country to be performed in Chile [El Salvador] shall be regulated by the Chilean [Salvadorian] laws."⁴⁰ Mexico follows the same concept.⁴¹

In Peru "the nature and effects of the obligation are governed (*rigen*) by the law of the place where contracted."⁴² Costa Rica has adopted a combination of the *lex loci contractus* rule with the rule of nationality:

For the interpretation of a contract and in order to fix the mediate or immediate effects which result from it, attention shall be made to the laws of the place where the contract has been executed, but if the contracting parties have the same nationality, attention shall be paid to the laws of their country.⁴³

The Brazilian law follows the Costa Rican concepts of combining the *lex loci contractus* with the law of nationality and then adds the third test of place of performance. In Brazil, the substance and effect of obligations shall be governed by the place where they were contracted "unless otherwise stipulated." However, the Brazilian law shall always govern contracts made in foreign countries which are to be performed in Brazil or contracts made between Brazilian nationals in a foreign country.⁴⁴

In the area of international sales, two Conventions have attempted to articulate conflicts of law principles for the sale of goods: (a) The Hague Convention of 1955 on the Law Applicable to International Sales of Goods⁴⁵ and (b) the Convention Relating to a Uniform Law on the International Sale of Goods of 1964 (ULISG).⁴⁶

Under the 1955 Convention, an international sale of goods is governed by the local law of the country designated by the parties, and this designation must be an express clause in the contract "or it must

36. CÓDIGO DE COMERCIO TERRESTRE, arts. 191, 202.

37. CÓDIGO DE COMERCIO, arts. 104, 113.

38. CÓDIGO DE COMERCIO, arts. 115, 116.

39. CÓDIGO DE COMERCIO, art. 91.

40. CÓDIGO DE CIVILES, art. 16 (Chile); CÓDIGO DE CIVILES, art. 16 (El Salvador).

41. CÓDIGO DE CIVILES, art. 13.

42. CÓDIGO DE CIVILES, art. VII.

43. CÓDIGO DE CIVILES, art. 7.

44. CÓDIGO CIVIL BRASILEIRO, art. 13.

45. Hereinafter cited LAISG. An English translation of the Convention is printed in I AM. J. COMP. L. 275 (1952).

46. *Supra* note 1.

result without any doubt from the provisions of the contract.”⁴⁷ If the parties have not expressly or impliedly declared which law should govern their contract, then the international sale is governed by the local law of the country where the vendor has his habitual residence when he receives the order. If the order is received by an “establishment of the vendor” the sale is then governed by the local law of the country where the establishment is located.⁴⁸ The stress put on the residence of the vendor is then counteracted by the rule that if the vendor, or his representative, agent or traveling salesman, receives the purchase order in the country where the buyer has his habitual residence (or an establishment which gives the purchase order) the local law of the buyer’s country of habitual residence will govern the contract.⁴⁹ However, in the absence of an express clause to the contrary, any inspection of goods made upon their delivery will be governed by the local law of the country of delivery which will set the periods within which an inspection must take place, the service of notice of the results of the inspection upon the vendor and the measures to be taken in the event of a refusal of the goods.⁵⁰ The above rules shall not cover questions dealing with the capacity of the parties and the form of the contract.⁵¹

Unfortunately these simple, practical rules were not utilized in the Uniform Law on the International Sale of Goods (ULISG) of 1964, although it would appear that a country which ratifies the ULISG may elect at the time of ratification that it will follow the 1955 Conflicts Convention rather than the conflicts rules of the ULISG.⁵² The ULISG governs the sale of goods by parties whose places of business are in different countries when the goods are to be carried from one country to another, or when the offer and acceptance have been affected in different countries, or when the goods are delivered to a country other than the one in which the offer and acceptance have been effected. The application of these rules will not depend upon the nationality of the parties, and the parties to a sales contract may exclude (expressly or by implication) the application of the ULISG or any part of it to the contract.⁵³ Conversely, the parties to the contract may choose to adopt the ULISG as the law of the contract even though they do not have their places of business or their habitual residences in different countries and even though these countries are not parties to the Convention “to the extent that it does not affect the application of any mandatory provisions

47. LAISG, art. 2.

48. LAISG, art. 3.

49. *Ibid.*

50. LAISG, art. 4.

51. LAISG, art. 5.

52. ULISG, art. IV.

53. ULISG, art. 3.

of the law which would have been applicable if the parties had not chosen a Uniform Law (ULISG)."⁵⁴ Finally, when the provisions of the ULISG apply, all rules of private international law shall be excluded.⁵⁵

It is to be noted that in defining the scope of the coverage of the ULISG⁵⁶ the word "states" is used rather than the normal phrase "contracting states." As a result, if a vendor in the United States receives an order from a buyer in Italy for shipment of goods to Italy, and Italy has adopted the ULISG while the United States has not, an Italian court would have to apply the Convention to the contract unless the parties had excluded it by their agreement. In an even more extreme example, if a vendor in the United States receives an order from a buyer in Ecuador for shipment of goods to Ecuador and the vendor has assets in Italy, the Ecuadorian buyer may bring suit in Italy and the Italian courts will have to apply the ULISG (unless excluded by the contract) even though the contract of the parties has not the slightest contact with Italy. In both of these examples, if the vendor brings suit in the United States (which is not a party to the ULISG) the courts will apply American conflicts of law rules to determine which law governs, while the Italian court in both cases would apply the ULISG. In the latter example, an Ecuadorian court would apply Ecuadorian conflicts of law rules if suit were brought in that country by either the buyer or the vendor. Prior to the ULISG, most international sales would involve conflicts of law problems concerning the laws of two countries while after ULISG becomes effective, courts may have to deal with three conflicting voices.⁵⁷

Inasmuch as the conflicts rules of the United States, many of the Latin American countries and the ULISG provide that the parties to a contract can, within reasonable limits, specify that the local law of any particular country (rather than the ULISG) may apply, it would seem imperative that every international sales contract articulate this choice.⁵⁸

54. ULISG, art. 4.

55. ULISG, art. 2.

56. ULISG, art. 1.

57. For a critique of the conflicts of law provisions of the ULISG, see Nadelmann, *The Uniform Law on the International Sale of Goods: A Conflict of Laws Imbroglia*, 74 YALE L.J. 449 (1965); Berman, *The Uniform Law on International Sale of Goods: A Constructive Critique*, 30 LAW & CONTEMP. PROB. 354, 359-360 (1965); Honnold, *The Uniform Law for the International Sale of Goods: The Hague Convention of 1964*, 30 LAW & CONTEMP. PROB. 326, 332-334 (1965). For a counter critique, see Tunc, *The Uniform Law on the International Sale of Goods: A Reply to Professor Nadelmann*, 74 YALE L. J. 1409, 1412-1413 (1965).

58. For a superb analysis of the concept of the parties' rights to choose the law governing their contracts, see 2 RABEL, *THE CONFLICT OF LAWS: A COMPARATIVE STUDY* 359-431 (2d ed. 1960). See also note 62 HARV. L. REV. 647 (1949); and Folsom, *Clauses in International Contracts Involving Choice of Law, Language, Forum and Conflict Avoidance*, printed in INTERNATIONAL COMMERCIAL CONTRACTS, Southwestern Legal Foundation 41-57 (1965).

II. SALES BY SAMPLE AND DESCRIPTION

A. *The Uniform Commercial Code*

Under the Uniform Commercial Code, any sample or model which is made part of the basis of the sale creates an express warranty that all of the goods will conform to the sample or model.⁵⁹ A sample in this context means an object which was actually drawn from the bulk of the goods being sold, while a model "is offered for inspection when the subject matter is not at hand and which has not been drawn from the bulk of the goods."⁶⁰ Whenever a sample or model is displayed to the buyer, there is a presumption that the sample or model is intended to be part of the bargain. However, if a sample has been drawn from an existing bulk it must be considered as describing the value of the goods bargained for while a model (which may be merely a reduced size version of the object) which has not been drawn from the bulk of the goods may not carry as strong a factual presumption that it is "a literal description of the subject matter."⁶¹ The comments to this section of the U.C.C. fail to specifically cover a common situation in the building trades where there may be a model of the object (e.g., a storm window or window that opens with a crank operator) which is used to demonstrate the object and, at the same time, the bulk of the goods may be located adjacent to the model. In this latter situation, it would appear that a court could treat this factually hybrid case as more nearly akin to the sample sale than a sale by model and hold the vendor to a higher standard of compliance.⁶²

The same section of the U.C.C. provides that any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.⁶³ The word description would not seem to be a word of art, for a sales contract "is normally a contract for a sale of something describable and described."⁶⁴ The description may be made by the use of words, technical specifications, and blueprints. The description of quality may be set by past dealings between the parties, and "of course, all descriptions by merchants must be read against the applicable trade usages with the general rules as to merchantability resolving any doubts."⁶⁵ It would appear that under the code a sale by sample or model will, in the majority of cases, also be a sale by description, while the converse will not be true.⁶⁶

59. U.C.C. § 2-313(1)(c).

60. U.C.C. § 2-313(1)(C), comment 6.

61. *Ibid.*

62. In *Loomis Bros. Corp. v. Queen*, 46 Del. 79, 17 D & C 2d 482 (1958) the court described a "miniature" of a storm window as a sample in one part of the opinion and a model in another. Inasmuch as the item was a miniature, it would have to be a model rather than a sample.

63. U.C.C. § 2-313(1)(B).

64. U.C.C. § 2-313, comment 4.

65. U.C.C. § 2-313, comment 5. See Levie, *Trade Usage and Custom Under the Common Law and the Uniform Commercial Code*, 40 N.Y.U. L. REV. 1101 (1965).

66. E.g., *Loomis Bros. Corp. v. Queen*, *supra* note 62.

In addition to these express warranties of sale by sample and description there may still be an implied warranty that the goods are fit for a particular purpose⁶⁷ and the terms of the description and the factual background of the contract establish a fitness for a particular purpose which prevails irrespective of the facts that the goods conform to the sample.⁶⁸ The comments suggest that any question of fact as to whether an express warranty rather than an implied warranty of fitness for a particular purpose was intended to apply, "must be resolved in favor of the warranty of fitness for a particular purpose as against all other warranties except when the buyer has taken upon himself the responsibility of furnishing the technical specifications."⁶⁹

As a further standard, any affirmation of fact or promise made by the vendor in addition to the description or the sample, and which is part of the basis of the bargain, will also create an independent express warranty that the goods shall conform to this affirmation or promise.⁷⁰

Under the Uniform Sales Act, it was necessary that the buyer allege and prove that he had relied upon the affirmations of fact by the vendor in order to establish an express warranty.⁷¹ This concept has been eliminated, and the test under the U.C.C. is whether the affirmations of fact became "part of the basis of the bargain."⁷² The differences in approach may be little more than semantic in the ordinary case: a buyer who did not believe the vendor's affirmations of fact would probably not enter into the bargain—if he believed the affirmations he probably entered into the bargain because he relied on the affirmations.⁷³ However, the U.C.C. permits affirmations of fact by the vendor subsequent to the sale to be a modification of the original contract of sale and binding against the vendor. For example, if the vendor should make some affirmation of fact relative to the quality of the goods upon delivery, this affirmation would bind the vendor even though the vendee contracted to purchase the goods and paid for them prior to the day of delivery.⁷⁴ In this latter example, it could not be said that the buyer relied upon the affirmation of fact when he took delivery because he was already bound to purchase the goods under the original contract.

The very real possibility that the express and implied warranties may overlap or conflict has been recognized by the U.C.C.⁷⁵ which pro-

67. U.C.C. § 2-315.

68. *Ibid.*

69. U.C.C. § 2-315, comment 2.

70. U.C.C. § 2-313(1)(a).

71. UNIFORM SALES ACT § 12.

72. U.C.C. § 2-313 and comment 3; Cosway, *Sales—A Comparison of the Law in Washington and the Uniform Commercial Code*, 35 WASH. L. REV. 617, 620-621 (1960).

73. Louer, *Sales Warranties Under the Uniform Commercial Code*, 30 MO. L. REV. 259, 265-266 (1965).

74. U.C.C. § 2-209 & 2-313, comment 7.

75. U.C.C. § 2-317.

vides that express and implied warranties shall be construed as being cumulative and consistent with each other. However, if this interpretation is unreasonable the intention of the parties will be used to determine the dominant warranty. The Code establishes standards for determining this intention.⁷⁶ It is to be noted that exact specifications displace an inconsistent sample or model while only a sample from an existing bulk displaces inconsistent general language of description.⁷⁷ Apparently, a model (as distinguished from a sample) would not dispel inconsistent general language. Express warranties displace inconsistent implied warranties other than the implied warranty of fitness for a particular purpose. These rules of construction are not cast-iron in nature; they may be changed by facts which show that this hierarchy was not within the intention of the parties at the time of the sales contract.⁷⁸ Under the various combinations contemplated by the code, it would seem that a sale by model could also include an express warranty of description, an express warranty (or warranties) based upon affirmations of fact, an implied warranty (or warranties) of fitness for particular purposes and perhaps a warranty of merchantability if it were not inconsistent with an express warranty.

The U.C.C. does not seem to take any position on whether there can be a sale by description when the goods are available for inspection by the buyer; there were conflicting voices on this point under the Uniform Sales Act with the majority taking the position that when there is no adequate opportunity to inspect the goods, even though they may be present at the time of the sale, there may be a sale by description.⁷⁹ There would seem to be another reason why the presence of the object

76. U.C.C. § 2-317:

(a) Exact or technical specifications displace an inconsistent sample or model or general language of description.

(b) A sample from an existing bulk displaces inconsistent general language of description.

(c) Express warranties displace inconsistent implied warranties other than an implied warranty of fitness for a particular purpose.

In *Willmon v. American Motor Sales Co.*, 44 Erie County L.J. 51 (Pa. 1961) the court held that a 90 day-4000 mile express warranty given in the sale of a new car does not exclude an implied warranty of merchantability. "Where the express warranty and the implied warranty amount to the same guarantee then both may exist in the transaction." *Whiting Corp. v. Process Eng'r, Inc.*, 273 F.2d 742, 745 (1st Cir. 1960). In the recent case of *Sperry Rand Corp. v. Industrial Supply Corp.*, 337 F.2d 363 (5th Cir. 1964), the court held that an express warranty will not exclude an implied warranty which is not inconsistent with the express warranty.

77. In *Hall v. Puget Sound Bridge & Dry Dock Co.*, 403 P.2d 41 (Wash. 1965) the Supreme Court of Washington held that when a contract describes gravel and refers to samples of the gravel, the contract contains both an implied warranty of description and sample under the UNIFORM SALES ACT. Under the U.C.C. the result should be similar, except that these warranties would be labeled as express rather than implied, so long as there is no inconsistency between the description and the sample.

78. U.C.C. § 2-317, comment 3.

79. Compare 1 WILLISTON, SALES 577 (Rev. 3d ed. 1948) with VOLD, SALES 433-34 (2d ed. 1959) and *Adams v. Peter Tramontin Motor Sales*, 42 N.J. Super. 313, 126 A.2d 358 (1956) (dicta).

should not prevent a sale by description from arising. For example, if a horse should be available for inspection and the seller describes the horse by its pedigree, its age, that it is a pacer, etc., these latter descriptive statements may not be ascertained by a mere examination of the animal. Therefore, the basis of the bargain would not be just the animal itself, but the animal as described.

B. *The Latin American Commercial Codes*

At first blush, the Latin American codes of commerce articulate principles of sales by sample and by description which do not appear too different from their North-American counterparts. However, their basic underlying conceptual similarities should not blur the following differences: (1) the latin codes do not create any dichotomy between a sample and a model; (2) the latin codes seemingly contemplate that sales by sample and by description are conceptually designed for cases where the goods are not present before the parties at the time of the sale; (3) the latin codes do not articulate any distinction between express and implied qualities; (4) the latin codes provide by varying phraseology that the quality stipulated in the contract must be compared with "qualities of merchandise determined and known in commerce"; and (5) that any dispute as to whether the goods conform to samples or conform to the qualities specified in the contract must be determined by experts.

The Peruvian Code of Commerce provides that "if the sale is made upon samples or upon [goods] of a determined quality known to commerce, the buyer may not refuse to receive the contracted goods if they conform to the samples or the quality predesignated in the contract."⁸⁰ In case the buyer refuses to receive the goods, both parties shall appoint experts who shall decide if the goods "are or are not acceptable."⁸¹ If the experts declare that the goods are acceptable, the contract of sale shall be considered consummated, and, in a contrary case, the contract shall be considered rescinded without prejudice to the right which the buyer has to an indemnification.⁸²

Uruguay,⁸³ Argentina⁸⁴ and El Salvador⁸⁵ have provisions which closely resemble the Peruvian rule. Because of other provisions of these codes, it is obvious that this rule is solely designed to cover those cases in which the actual goods (as distinguished from a sample or a description) are not available for visual inspection (*a la vista*) by the buyer when the contract of sale is made. A clearer articulation of this principle is made in the Chilean and Guatemalan codes which state that the "purchase by

80. CÓDIGO DE COMERCIO, art. 322.

81. *Ibid.*

82. *Ibid.*

83. CÓDIGO DE COMERCIO, arts. 521, 559.

84. CÓDIGO DE COMERCIO, art. 456.

85. CÓDIGO DE COMERCIO, art. 82.

order (*por orden*) of a thing designated only by its species and which the seller must remit to the buyer, implies upon the part of the latter [the buyer] the power to dissolve the contract if the thing is not sound and [is not] of regular quality."⁸⁶ The Uruguayan and Argentine version of this rule provides that "in the sale of things which are not in view, and which must be remitted to the buyer by the vendor, it shall always be understood that the resolutive condition (*condición resolutoria*—a condition subsequent justifying the cancellation of the contract) was stipulated for the case in which the thing is not of the agreed quality."⁸⁷ In a similar vein, when the sale deals with "samples it implicitly carries the condition that the sale will be dissolved if the merchandise does not result consistent with the samples."⁸⁸ The comparable Ecuadorian rules are virtually the same as those of Chile and Guatemala.⁸⁹ Nicaragua seems to follow the comparable wording of the Peruvian, Chilean and Guatemalan Codes.⁹⁰

It is somewhat surprising to discover that Honduras, whose code goes into great detail about sales on approval and on trial, devotes virtually no attention to the purchase of goods by sample or by description.⁹¹ Similar omissions appear in the commercial codes of Venezuela and Costa Rica.⁹²

The Brazilian Civil Code defines a "warranty" of sample concept which resembles the U.C.C.: "If the sale is made by sample, it is understood that the vendor assures the thing sold to have the qualities shown by the sample."⁹³ The Commercial Code then provides that if the sale is made by samples, or by a quality known in commercial usage which is designated in the contract, the buyer may not refuse the goods if they correspond exactly with the samples or with the quality designated. If there is any doubt on the point, the doubt must be decided by arbitrators.⁹⁴

The purchase-sale contracts of goods which are executed in Mexico dealing with samples or qualities of merchandise "determined and known" in commerce "shall be taken as perfected only by the consent of the parties."⁹⁵ In case of disagreement between the parties, each party will appoint a merchant and these merchants will appoint a third mer-

86. CÓDIGO DE COMERCIO, art. 134 (Chile); CÓDIGO DE COMERCIO, art. 247 (Guatemala).

87. CÓDIGO DE COMERCIO, art. 522 (Uruguay); CÓDIGO DE COMERCIO, art. 547 (Argentina).

88. CÓDIGO DE COMERCIO, art. 135 (Chile); CÓDIGO DE COMERCIO, art. 248 (Guatemala).

89. CÓDIGO DE COMERCIO, arts. 174, 175.

90. CÓDIGO DE COMERCIO, arts. 343, 347.

91. Article 778 which mentions the sale by sample does not really answer the questions raised by this method of sale.

92. See CÓDIGO DE COMERCIO, art. 455 (Costa Rica).

93. CÓDIGO CIVIL BRASILEIRO, art. 1135.

94. CÓDIGO COMMERCIAL BRASILEIRO, art. 201.

95. CÓDIGO DE COMERCIO, art. 373.

chant in the event of discord between them. These merchants shall then decide about the conformity or nonconformity of the delivered merchandise with the samples or qualities upon which the contract is based.⁹⁶

Bolivia provides that when the sale is made on the basis of samples or the specification of qualities known in commerce, it shall be considered consummated, provided that the goods conform with the samples or with the specified qualities in the opinion of experts. If the experts find to the contrary, the contract may be rescinded and the vendor will be liable for damages and interest.⁹⁷

The rules requiring that the goods be examined by "experts" or "expert arbitrators" seem reminiscent of a guild-type society where merchants of each class are located in certain areas and are subject to the provisions of a code especially designed for merchants rather than to the business environment prevailing in the United States. However, the U.C.C. has traces of a somewhat similar rule based upon contract rather than the force of law. Whenever there is a dispute between the parties, they "may agree to a third party inspection or survey to determine the conformity or condition of the goods and may agree that the findings shall be binding upon them in any subsequent litigation or adjustment."⁹⁸ It would seem that a clause of this nature could be included in the original contract of sale, although the wording of the entire section and its location within the code might lead one to think that this agreement was permissible only after a dispute had arisen. The comments to this section state that the word "conformity" is meant to include not just the state of the goods, but the interpretation of the entire contract, while the word "condition" refers solely to the degree of damage or deterioration which the goods show.⁹⁹ A written and authenticated report of the inspection or tests by a third party is *prima facie* evidence¹⁰⁰ in court and binding upon the parties if they have so provided in their agreement submitting the inspection to the third party.

C. *The Uniform Law on the International Sale of Goods*

The Uniform Law on the International Sale of Goods is consistent with the Latin American law in not using the express and implied warranty dichotomy of the Anglo-American world. The test is: do the goods conform to what the parties bargained for in accordance with six standards set by the ULISG?¹⁰¹ The ULISG apparently draws a distinction

96. *Ibid.*

97. *CÓDIGO DE COMERCIO*, art. 313.

98. U.C.C. § 2-515.

99. U.C.C. § 2-515, comment 3.

100. U.C.C. § 1-202.

101. Obligations of the seller as regards the conformity of the goods

A. Lack of conformity, Article 33:

1. The seller shall not have fulfilled his obligation to deliver the goods where he has handed over:

between a "sample or model" without any explanation of the difference.¹⁰² The ULISG use of the phrase that there is a lack of conformity when "goods . . . are not those to which the contract relates"¹⁰³ would seem to be the equivalent of the sale by description of the United States and Latin American codes. As previously stated,¹⁰⁴ the Latin codes when dealing with sales by sample or description are referring to sales where the goods themselves are not available for inspection prior to entering into the sales contract. This same concept seems to be implied in the ULISG when it states that in certain cases the vendor shall not be liable for any lack of conformity if at the time of the conclusion of the contract the buyer knew "or could not have been unaware of" such lack of conformity,¹⁰⁵ and sales by sample or model and of "goods . . . to which the contract relates"¹⁰⁶ are expressly excluded from this category.

The ULISG does not provide for the appointment of experts to examine the goods upon their delivery in a sale by sample or by description. In his notice to the vendor of any lack of conformity, the buyer is required to specify its nature and to invite the vendor or his agent to examine the goods.¹⁰⁷ In addition, the methods of examination may be governed by clauses in the sales contract, or in the absence of these clauses "by the law or usage of the place where the examination is to be effected."¹⁰⁸ Under this latter rule, if the place of delivery has a law or usage calling for the use of experts their services would be utilized.

III. SALES ON GUARANTY, ON APPROVAL AND ON TRIAL

A. *The Uniform Commercial Code*

It is surprising to note that the U.C.C. has no specific provisions covering sales contracts whereby the vendor guarantees performance of

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- a) part only of the goods sold or a larger or a smaller quantity of the goods than he contracted to sell;
 - b) goods which are not those to which the contract relates or goods of a different kind;
 - c) goods which lack the qualities of a sample or model which the seller has handed over or sent to the buyer, unless the seller has submitted it without any express or implied undertaking that the goods would conform therewith;
 - d) goods which do not possess the qualities necessary for their ordinary or commercial use;
 - e) goods which do not possess the qualities for some particular purpose expressly or impliedly contemplated by the contract;
 - f) in general, goods which do not possess the qualities and characteristics expressly or impliedly contemplated by the contract.
2. No difference in quality, lack of part of the goods or absence of any quality or characteristic shall be taken into consideration where it is not material.

102. ULISG, art. 33(c).

103. ULISG, art. 33(b).

104. *Supra* notes 80 *et seq.*

105. ULISG, art. 36.

106. Article 36 expressly excludes sub-sections (a), (b), and (c) of art. 33, note 101 *supra*.

107. ULISG, arts. 39(1), (2).

108. ULISG, art. 38.

chattels for a specific period since many durable products (e.g., automobiles, appliances, etc.) are now sold under various forms of guaranty.¹⁰⁹ It is true, of course, that most of these guarantees run to the consumer rather than the retailer; however, a retail dealer who has to stand behind a guaranty is also concerned with the terms because the initial responsibility for the guaranty will fall back upon him. Of course, a guaranty is encompassed within the generic concept of an express warranty¹¹⁰ and the general rules governing the construction of contracts; however, the usual warranty deals with some existing quality of the goods while a guaranty will extend to the replacement of parts, repair, etc. during a specific period of time. It is quite possible that an express or implied warranty may be more extensive than a guaranty,¹¹¹ and some rules should have been enunciated as to reconciling any possible conflicts.

Under the Uniform Commercial Code¹¹² and prior law¹¹³ when a contract of sale allows the buyer to return conforming goods it is a "sale on approval" if the goods are delivered primarily for use and a "sale or return" if the goods are delivered primarily for resale. The sale on approval is customarily used on the retail level while a sale or return is used on the wholesale level. As the comments state, "every presumption runs against a delivery to a consumer being a 'sale or return' and against a delivery to a merchant for resale being a 'sale on approval.'"¹¹⁴ The comments continue with the thought that these two transactions have nothing to do with a lack of conformity of the goods with any kind of a warranty.¹¹⁵

Section 2-326 would appear to be primarily a rule for the construction of contracts when the intention of the parties does not clearly appear from the terms of the sale, and the phrasing "unless otherwise agreed" would seem broad enough to allow the parties to provide that a sale between merchants could be a sale on approval rather than a sale or return. The possibility of a sale on approval to a retail seller also seems contemplated by section 2-327(1)(a) which provides that in a sale on approval a return of goods by the buyer to the vendor is at the vendor's risk and expense "but a merchant buyer must follow any reasonable instructions" from the vendor.

There could conceivably be cases where a merchant buyer (retailer, jobber or wholesaler) would desire the right to try out the goods to his

109. Note 11, *supra*.

110. See e.g., *Turkish State Railways Adm'r v. Vulcan Iron Works*, 153 F. Supp. 616 (M.D. Pa. 1957).

111. E.g., *Hennigsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1959); *Willmon v. American Motors Sales Co.*, *supra* note 76.

112. U.C.C. § 2-326, 2-327. For the early development of these concepts, see Murray, *Sale or Return and Sale on Approval of Goods*, 1962 Wis. L. Rev. 93 (1962).

113. VOLD, *SALES*, *op. cit. supra* note 79, at 385-87.

114. U.C.C. § 2-326, comment 1.

115. *Ibid*.

personal satisfaction before putting them on sale to his customers; this might be particularly true if the merchant buyer were contemplating selling a new product or one produced by a manufacturer without a recognized name. For example, a buyer (manufacturer, jobber or wholesaler) contemplating a franchise arrangement with a manufacturer may use the sale or return arrangement. The goods conform to the contract and the wholesale buyer sells them to retail merchants. In a short time, defects appear causing the retail merchants to bring suit against the wholesale buyer who upon "vouching in"¹¹⁶ (or suing the manufacturer in a separate action) discovers that the manufacturer is insolvent with the result that all loss will fall upon him. If the wholesale buyer had stipulated in the original contract with the manufacturer that the goods would be taken on approval for a certain period or that they would be taken subject to a trial for a period of time, these latent defects might have been disclosed before the buyer sold the goods to his merchants with a consequent avoidance of liability.¹¹⁷

In addition to the above example, the sale on approval or on trial might have additional application when food and beverages are being sold at the wholesale level, and the canner, vintner, etc., is not a "standard brands" company. The food or beverage might conform with all express and implied warranties but it might still be tasteless or have a taste which would not appeal to the ultimate consumer, or have a taste which would vary within the lot purchased because of a lack of quality control in the manufacturing process. The orthodox sale or return contract might not be satisfactory to either the wholesaler or the retail merchant because the credit for returned goods would not compensate for the loss of good will engendered by sales of tasteless or poor tasting food to the ultimate consumer. Finally, as a practical matter it is extremely difficult to frame express warranties in the form of specifications setting guidelines for taste as distinguished from wholesomeness or some other more objective standard.

B. *The Latin American Commercial Codes*

The problems raised in the wholesale sale of food and beverages must be the underlying reason why so many Latin American Commercial

116. U.C.C. § 2-607(5)(a). See also FED. R. CIV. P. 14, FLA. R. CIV. P. 1.180 (1967) for the rules governing "third party practice." See also *Knab v. Aldens Irving Park, Inc.*, 49 Ill. App. 2d 371, 199 N.E.2d 815 (1964).

117. For example, a manufacturer who is planning to use a rubberized or plasticized material in the manufacture of clothing may enter into a sale by sample contract with the manufacturer of the material. The material supplied seemingly complies with the samples, but after awhile "bugs" appear in the use of this material. A contract which provides for a sale by sample as well as "on approval" of the clothing manufacturer would seem advisable. *Skopes Rubber Corp. v. United States Rubber Co.*, 299 F.2d 584 (1st Cir. 1962); *Alper Blouse Co. v. E. E. Connor & Co.*, 309 N.Y.S.2d 67, 127 N.E.2d 813 (1955). There has been a conflict of authority as to whether the "approval" of the buyer is to be measured by the approval or satisfaction of a reasonable man or by the more subjective standard of the honest judgment of the buyer. 1 RESTATEMENT CONTRACTS § 265 (1960); 1 WILLISTON, SALES 483-88 (1948).

Codes provide for a sale contingent upon a "tasting" by the merchant buyer; in some codes the condition is implied by law while other codes require it to be reserved by the buyer. Some of these codes carry the approval concept over into the sale of other goods besides foods and beverages. Many of the codes provide for a term of three days in which the trial, tasting or examination of the goods must be made, unless the contract has provided for a different period.

It may be possible to reject these Latin American rules as mere relics of a society which at the time of their enactment had not reached a modern stage of industrial development with its mass, uniform production and quality control;¹¹⁸ however, it is submitted that these Latin American rules might be answers to the problems posed in the beginning of this section.

The new Code of Commerce of Costa Rica (1964) provides for some interesting concepts dealing with sales on guaranty and on approval or satisfaction. When the vendor guarantees the function of the article for a fixed time, the buyer who notes defects during the period of the guaranty must (unless there is a clause in the contract to the contrary) inform the vendor within thirty days after discovering the defect under "penalty of caducity."¹¹⁹ If the guaranty of good performance has no fixed period, it shall be understood as being given for a period of one year. A court which has jurisdiction of commercial matters is empowered at the request of the buyer to establish a period of time for the repair of the article or, in a proper case, to order the delivery of a substituted article without prejudice to the recovery of damages for the breach of the guaranty.¹²⁰

The purchase and sale of a thing which it is customary to taste shall "not be perfected" (in the sense that it is a condition precedent) until the buyer has manifested his agreement. If the "examination" (in the sense of taste) must be made in the vendor's establishment, the vendor shall remain free from liability (*liberado*) if the buyer does not "examine" within the time established by the contract or by the custom of the place; in the absence of a time fixed by contract or by the custom, the term will be set by the vendor. If the object is already in the possession of the buyer at the time of executing the contract and he does not indicate his dissent within twenty-four hours, his silence shall be interpreted as an acceptance of quality and quantity.¹²¹ It is interesting to note that this provision governing the sale of food and beverages is couched in the lan-

118. Quality control may be in the near future a matter of routine in certain industries in the Central American Common Market under Art. 3, *Convenio Sobre El Regimen de Industrias Centroamericanas de Integracion*, 1958, and Art. 4, *Protocolo al Convenio Sobre El Regimen de Industrias Centroamericanas de Integracion*, 1963.

119. *CÓDIGO DE COMERCIO*, art. 452. The work "caducity" is used in the sense of a lapsing of a right.

120. *CÓDIGO DE COMERCIO*, art. 452.

121. *CÓDIGO DE COMERCIO*, art. 453.

guage of a condition precedent; however, when the sale deals with goods which are to be used on a trial basis, the contract of sale is subject to a condition subsequent:

When the purchase-sale is stipulated conditioned upon trial [by the buyer], it shall be understood to be subject to a suspensive condition that the thing has the necessary and agreed qualities for use for which it is designated. The trial must be performed in the manner and term provided for in the contract; on a lack of a contractual stipulation heed will be given to the custom [in the place].¹²²

The sale on guaranty, on trial and "taste approval" provisions of the Costa Rican Code are virtually duplicated in the Honduran code; however, the Honduran code provides that any judicial action which the buyer may bring against the vendor who has guaranteed the goods must be brought within "six months counted from the moment of discovering" the defect. In addition, if the guaranty has no fixed period, it will be for three years rather than the one year period in Costa Rica.¹²³

Nicaragua fails to make any mention of sales on a trial basis, but "whenever a thing sold at sight [in the sense that the thing is available for visual examination by the buyer] which it is customary to buy by tasting, the reservation of [the right of] trial shall be presumed and this trial implies the condition that the thing is sound (*sana*) and of regular quality."¹²⁴ An identical provision is found in the law of Chile;¹²⁵ however, the Chilean law contains a trial provision not found in Nicaragua. In Chile, when a buyer of a thing at sight expressly reserves the right to make a trial without fixing a time for making it, the contract of sale shall be reputed as verified under a suspensive condition during a term of three days. This term shall begin to run from the day on which the vendor requires the buyer to accomplish the trial, and if the buyer does not make the trial within this period he shall be taken as "having given up the contract."¹²⁶ The counterparts of these latter provisions are also found in the Ecuadorian and Guatemalan laws.¹²⁷

In a somewhat similar vein, buyers in Argentina and Uruguay may expressly stipulate in the contract of sale that they have the power to approve the merchandise contracted for. If the buyer delays expressing his approval "more than three days after a summons [to do so] made by the vendor, the contract shall be considered without effect."¹²⁸

122. CÓDIGO DE COMERCIO, art. 454.

123. CÓDIGO DE COMERCIO, art. 775-77.

124. CÓDIGO DE COMERCIO, art. 346.

125. CÓDIGO DE COMERCIO, art. 132.

126. CÓDIGO DE COMERCIO, art. 131.

127. CÓDIGO DE COMERCIO, arts. 171-72 (Ecuador); CÓDIGO DE COMERCIO, arts. 244-45 (Guatemala).

128. CÓDIGO DE COMERCIO, art. 520 (Uruguay); CÓDIGO DE COMERCIO, art. 455 (Argentina).

In Peru and El Salvador buyers have the right to rescind a sales contract if the contract stipulates that they have reserved the right to test the goods.¹²⁹ The codes of these countries fail to indicate any period of time in which the tests must be conducted.

The Brazilian laws governing sales on approval bear a great resemblance to their counterparts in the United States in that both systems seem to confine these transactions to sales by a retailer to a consumer, rather than from a wholesaler to a retailer. The Brazilian Commercial Code gives no recognition to the sale on approval concept in commercial sales, but it is included in the civil code. In Brazil a "sale upon approval is considered made upon suspensive condition, if in the contract it has not been expressly given the character of a resolute condition."¹³⁰ This kind of sale includes the sale of goods which it is "customary to try, measure, weigh, or experiment with, before being accepted."¹³¹ The buyer is considered a bailee of the goods until he manifests his acceptance of them.¹³² If the contract fails to provide for a specific time in which the buyer must accept or reject the goods, "the seller has the right to notify him judicially to make it [the acceptance or rejection] within a fixed and non-extendible time, under penalty of the sale being considered as perfected."¹³³ The payment of the purchase price without any reservation by the buyer will be considered as an acceptance.¹³⁴

The "taste" rule of the Colombian Code of Commerce appears to be unique in Latin America:

Whenever the thing sold is open to view and is of the kind which it is customary to buy by tasting, the reservation of the right to try is understood by the law and implies a suspensive condition if the thing is sound and of medium quality, unless it results from the circumstances or from the terms of the contract that the intention of the parties has been to perform an unconditional contract.¹³⁵

In most of Latin America the laws presume that the buyer has the right to taste foods and beverages while under the above provision this presumption may be rebutted by the circumstances (usages in the trade) or from the terms of the contract that the parties intend a sale without this right to taste.

In Bolivia, "sales of merchandise in which the buyer has made it a condition to test them, shall not be perfected unless there is eventually

129. CÓDIGO DE COMERCIO, art. 232 (Peru); CÓDIGO DE COMERCIO, art. 83 (El Salvador).

130. CÓDIGO CIVIL BRASILEIRO, art. 1144.

131. *Ibid.*

132. CÓDIGO CIVIL BRASILEIRO, art. 1145.

133. CÓDIGO CIVIL BRASILEIRO, art. 1147.

134. CÓDIGO CIVIL BRASILEIRO, art. 1146.

135. CÓDIGO DE COMERCIO TERRESTRE, art. 222.

a new agreement between the parties."¹³⁶ There is a similar implied condition when the sale deals with goods which are not available at the time of the sale and which are not classified as to quality in commercial usage: "neither shall be perfected, until a new agreement of the parties, the sales made without the merchandise being open to view or when [the merchandise] may not be classified by its quality known in commerce."¹³⁷ The rather awkward wording of these two articles apparently means that these sales are subject to a condition precedent—the original contract of sale is not perfected until the buyer approves of the goods.

C. *The Uniform Law on the International Sale of Goods*

The Uniform Law on the International Sale of Goods does not expressly recognize any sale on approval or sales subject to trial, and the only mention of a guarantee is a passing reference that when a lack of conformity constitutes a breach of a guaranty covering a period more than two years after delivery of the goods, the time for notifying the vendor of the lack of conformity is extended during the period of the guarantee.¹³⁸

IV. QUALITIES OF FITNESS AND MERCHANTABILITY: DISCLAIMERS, INSPECTION AND LATENT DEFECTS

A. *The Uniform Commercial Code*

In sales subject to the provisions of the Uniform Commercial Code, there may be an implied warranty that the goods are fit for a particular purpose when the vendor has reason to know at the time of the contract for sale that the goods are required for this purpose, and the buyer "is relying on the vendor's skill or judgment to select or furnish suitable goods."¹³⁹ The buyer need not inform the vendor of this particular purpose so long as the vendor "has reason to know" of it.¹⁴⁰ Under the Uniform Sales Act¹⁴¹ if a buyer purchased goods by a trade or patent name, there would not be a warranty of fitness for a particular purpose; now under the U.C.C. it is a question of fact as to whether the buyer's specification of a trade name indicates that he was not relying upon the "vendor's skill or judgment." The comment states that "if the buyer himself is insisting on a particular brand he is not relying on the seller's skill and judgment and so no warranty results."¹⁴² If, for example, a retail merchant should purchase bulldozers for a particular kind of earth moving problem from a manufacturer, it would appear that a court could hold

136. CÓDIGO DE COMERCIO, art. 311.

137. CÓDIGO DE COMERCIO, art. 312.

138. ULISG, art. 39(1).

139. U.C.C. § 2-315.

140. U.C.C. § 2-315, comment 1.

141. U.S.A. §§ 15(1), (4).

142. U.C.C. § 2-315, comment 5.

that the buyer was insisting upon a particular brand and there would not be an implied warranty of fitness for a particular purpose; however, there could still be an implied warranty "if the article has been recommended by the seller as adequate for the buyer's purposes."¹⁴³ It would appear that the quoted language would give rise to an "express warranty of fitness for a particular purpose"¹⁴⁴ as well as an implied warranty, and this would be most important in the event there was a disclaimer¹⁴⁵ of warranties in the sales contract. It is possible to disclaim the *implied* warranty of fitness for a particular purpose by the use of appropriate language, or when the buyer has examined the goods prior to entering into the contract, or by the usages of the trade or course of dealings.¹⁴⁶ If an express warranty has been made, then any disclaimer of it would be ineffective. Of course, any disclaimer of an express warranty may indicate in doubtful cases that an express warranty was not made.

In the United States every sale by a merchant who deals in goods of that kind contains an implied warranty of merchantability, unless the warranty is excluded or modified under the terms of the contract. The Uniform Sales Act failed to define the concept of "merchantable quality."¹⁴⁷ and the courts, with some disagreement, have attempted to define the word as meaning "fair average quality," "marketable" or "resalable."¹⁴⁸ The U.C.C. has articulated criteria for determining whether the goods are merchantable, but these criteria are not to be considered as an exclusive definition.¹⁴⁹ A satisfactory definition might be that merchantable goods are

fit for the ordinary purposes for which such goods are used and must be of a quality comparable to that generally acceptable in that line of trade under the description or other designation of the goods used in the agreement and must therefore be 'honestly' resalable in the normal course of business because they are what they purport to be.¹⁵⁰

143. *Ibid.*

144. U.C.C. § 2-313(1)(a).

145. U.C.C. § 2-317(c).

146. U.C.C. § 2-316. It should be noted that if the vendor retains a purchase money security interest, any "no warranties" clause in the purchase money security agreement may not be considered as affecting warranties of quality established in the separate sales transaction. For example, if the wholesaler sold goods to the retailer and there were express or implied warranties, or both, the separate financing agreement (e.g., a trusts receipts transaction) which disclaimed all warranties or which forbade the buyer from asserting any breach of warranty against the seller or its assignee, would not be effective to negate the original warranties. U.C.C. § 9-206 and comments. For the problems involved in disclaimers of warranty in the consumer field, see Note, 77 HARV. L. REV. 318 (1963). An "Integration Clause" in a sales contract will not prevent the implication of warranties unless it explicitly excludes implied warranties, *Sperry Rand Corp. v. Industrial Supply Corp.*, 33 F.2d 363 (5th Cir. 1964).

147. U.S.A. § 15(2). *But compare* Valley Refrigeration Co. v. Lange Co., 242 Wis. 466, 8 N.W.2d 294 (1943); U.C.C. §§ 2-202, 2-209 and comments.

148. *VOLD, SALES* 437 (2d ed. 1959).

149. U.C.C. § 2-314, comment 6.

150. U.C.C. § 2-314, comments 2, 8.

In order for the goods to be honestly resalable, the most important consideration to a merchant-buyer, the goods would necessarily have to meet the contract description, be of fair average quality within this description in the case of fungible goods, and "run within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved."¹⁵¹

It is to be noted that a contract which describes the goods not only sets up conditions for the creation of an implied warranty of merchantability but it may very well also create an express warranty of description, hence a disclaimer of the implied warranty of merchantability would not relieve the vendor of the express warranty of description.¹⁵² The Code provides that the implied warranty of merchantability may be disclaimed or modified if the language (whether written or oral depending upon the nature of the contract) mentions the word "merchantability." If a written sales contract is used, the disclaimer clause must be conspicuous. In addition to disclaimers of warranties by the vendor,

when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him.¹⁵³

The above clause refers solely to examinations of the goods before the sales contract is entered into, and it does not refer to the right to inspect upon delivery.¹⁵⁴ A professional buyer when purchasing goods within his field of specialization will be held to have assumed the risks which a professional in his field ought to have observed, while a non-professional will be judged by the standards of a layman.¹⁵⁵ Furthermore, this clause does not attempt to exclude latent as distinguished from patent defects.¹⁵⁶ Even if the buyer notices defects, but the vendor makes statements that the goods are merchantable or that the defects will not interfere with the quality of the goods, he may be held liable for an express warranty if the buyer indicates clearly that he is relying on the vendor's express statements rather than on the results of his own examination.¹⁵⁷

Assuming that the above examination was made, or it was not made because the goods were unavailable for inspection, the buyer has the

151. U.C.C. §§ 2-314(a), (b) and (d), comment 8.

152. U.C.C. § 2-313, comment 4. It would appear to be virtually impossible to disclaim "any description of the goods which is made part of the basis of the bargain." See U.C.C. § 2-313, comment 4, and KINYON & McCLURE, *A STUDY OF THE EFFECT OF THE UNIFORM COMMERCIAL CODE ON MINNESOTA LAW* 96 (1964). *But see* HART & WILLIER, *FORMS & PROCEDURES UNDER THE UNIFORM COMMERCIAL CODE*, § 22.33, Form 2-1, Clause 151 and preceding text (1965).

153. U.C.C. § 2-316(3)(b).

154. U.C.C. § 2-316, comment 8.

155. *Ibid.*

156. *Ibid.*

157. *Ibid.*

right to make an inspection upon delivery or within a reasonable time thereafter unless the goods were shipped "C.O.D." or for payment against documents, except when the documents give the right of inspection before payment.¹⁵⁸ If the inspection discloses a breach in any warranty, the buyer may reject or accept all of the goods or accept any satisfactory commercial unit or units and reject the rest.¹⁵⁹ This rejection must be made within a reasonable time after delivery, and the buyer must seasonably notify the vendor.¹⁶⁰ The buyer in his notice to the vendor must specify the defect or defects and he will be precluded from later asserting unstated defects to justify his rejection or to establish a breach of the contract when the vendor could have cured the defect if he had received seasonable notice of it, or "between merchants when the seller has, after rejection, made a request in writing for a full and final written statement of all defects on which the buyer proposes to rely."¹⁶¹ Assuming that a buyer makes a reasonable inspection at the time of delivery of the goods, fails to discover any breaches of warranty, and accepts the goods by paying for them, he is still not without recourse. If the buyer notifies the vendor of any breach of warranty within a reasonable time after he discovers, or should have discovered, the breach¹⁶² and before there has been any substantial change in the condition of the goods which is not caused by their own defects, he may revoke his acceptance. The buyer's right to revoke his acceptance is conditioned upon the fact that his failure to discover the non-conformity of the goods was reasonably induced by the difficulty of discovery.¹⁶³ It is to be noted that the buyer's notification to the vendor that he is revoking his acceptance need not go into the same detail that would be required if he were rejecting the tender or delivery rather than revoking his acceptance of a completed delivery.¹⁶⁴

The Code gives some protection to the vendor by providing that the parties may stipulate in the sales contract that the buyer is to have a fixed time for rejecting the goods upon tender of delivery or delivery and another fixed time for revoking the acceptance¹⁶⁵ so long as the times set are not manifestly unreasonable.¹⁶⁶

158. U.C.C. § 2-513.

159. U.C.C. § 2-601. However, it should be noted that different rules govern the rejection of goods when the contract requires or authorizes the delivery of goods in installments. The buyer in an installment contract may reject a non-conforming installment if the non-conformity substantially impairs the value of the installment and the non-conformity cannot be cured, and, unless the non-conformity of the installment substantially impairs the value of the whole contract, the buyer must accept the installment if the vendor gives adequate assurance that he will cure the non-conformity. On the other hand, if the non-conformity of the installment does substantially impair the value of the whole contract the buyer may reject the installment and cancel the contract. U.C.C. § 2-612 and comments and U.C.C. § 2-609. See notes 234 and 248 *infra*.

160. U.C.C. § 2-602.

161. U.C.C. § 2-605.

162. U.C.C. § 2-607.

163. U.C.C. § 2-608.

164. U.C.C. § 2-607, comment 4.

165. U.C.C. § 2-608, comment 4; U.C.C. § 2-602, comment 1.

166. U.C.C. § 1-204(1)

It would appear that the Code's rather involved and complex rules regarding rejection and revocation have obscured the simple concept that rejection is designed for patent defects and revocation of acceptance is designed for latent defects—it is wondered if the Latin codes have not reached the same objectives with less verbiage?

B. *The Latin American Commercial Codes*

Most of the Latin American codes are content to state the rules about merchantability in broad, general terms of "defects" and "vices" (*vicios*) without any attempt to define these terms; a somewhat similar approach is discernible in the Uniform Sales Act. It is to be wondered if the U.C.C.'s attempt to define merchantability has done more than simply list examples of "defects" and "vices?"

From a structural standpoint, the Latin American codes vary from each other; some codes present a series of articles attempting to cover the right to inspect, the right to complain and the times for complaining and the bringing of suits. Other codes attempt to cover the same areas within one rather all-embracing article. Despite the structural differences, there are few conceptual differences. The differences which exist are mainly as to the times when complaint may be made and when suit may be brought. The discussion which follows must be separated from those provisions of the code which have been previously discussed dealing with sales of goods by samples, description (where the goods were not available for inspection at the time of the sale) and sales on trial, "taste approval" and guaranty, in the same manner that a discussion of the law in the United States must be divided into the kinds of sales involved.

The Costa Rican Commercial Code is an example of those codes which attempt to lump all of the rights and duties into one article. In general, the Costa Rican buyer who at the time of receiving the goods makes an examination and trial to his satisfaction, does not have the right to make a claim against the vendor alleging a vice or defect of quantity or quality. However, the buyer has the right to make a claim against the vendor for these reasons if he has received the goods packaged or baled, provided that he makes written claim upon the vendor or his representative within five days after receiving the goods. The written claim may be based upon a defect or vice which arises from a case of accident, or *force majeure* or deterioration by the nature of the goods. As a means of protection to the vendor from spurious claims, he may demand during the act of delivery that an examination be made of the quantity and quality. If this examination is made in the presence of the buyer or of his agent to receive merchandise and "if these show themselves to be satisfied, no further claim may be made (*si estos se dan por satisfechos, no cabra ulterior reclamo*).” If the vices are hidden (in the sense of latent defects) the buyer must denounce them in writing to the vendor or his representa-

tive within ten days after the delivery, unless the contract of sale provides otherwise. Any judicial action must be instituted within three months after the date of delivery.¹⁶⁷

In Venezuela the buyer who has received goods shipped from another place must serve written notice of apparent defects upon the vendor within two days after receipt, "unless a longer time is necessary by reason of the peculiar conditions of the article sold or of the person of the seller."¹⁶⁸ The buyer must make a written report of hidden defects within two days after discovering them, but he may be deprived of this right to complain by any lack of diligence.¹⁶⁹ If the buyer receives the goods and makes an examination and accepts their receipt without reservation, he may not later complain about a defect in the quality or quantity of the goods. It would appear that this latter rule is subject to the prior rule governing latent defects. The Venezuelan rule amplifies the Costa Rican rule regarding goods which are shipped in bales or packages:

When merchandise is delivered in bales or under wrappings which prevent its examination, and where the buyer expressly and formally reserves the right to examine it, he may, within eight days immediately following delivery, present a claim for defects of quality and lack of quantity, showing, in the case of the former, that the heads or ends of the pieces are found intact, and in the case of the latter, that the damages or defects are of such a nature that they could not have occurred in his [the buyer's] warehouses by fortuitous happening, nor be caused deceitfully without leaving traces of fraud.¹⁷⁰

Guatemala has virtually the same rule, but the period for making a complaint has been shortened to three days.¹⁷¹

Similarly to the Costa Rican rule, the Venezuelan and Guatemalan Codes stipulate that the seller may demand that a full examination as to quality and quantity be made at the time of delivery and in this case no subsequent claim for defects may be made.¹⁷² Again, this latter provision would seem to be subject to the rule governing latent defects.

In Nicaragua if the goods are not present before the parties and they are designated by species and quality, the buyer has the power to dissolve the contract if the goods are not of the stipulated quality.¹⁷³ During the act of delivery, the vendor may demand that the buyer make a complete examination of the quantity and quality of the goods and if he fails to

167. CÓDIGO DE COMERCIO, art. 450.

168. CÓDIGO DE COMERCIO, art. 144.

169. *Ibid.*

170. CÓDIGO DE COMERCIO, art. 145.

171. CÓDIGO DE COMERCIO, art. 272

172. CÓDIGO DE COMERCIO, art. 145 (Venezuela); CÓDIGO DE COMERCIO, art. 259 (Guatemala).

173. CÓDIGO DE COMERCIO, art. 347.

do so, "it shall be understood that he [the buyer] renounces all subsequent claim."¹⁷⁴ The buyer has five days after receipt of the goods in which to make written claim for a lack of quality or quantity, and thirty days in which to make claim for "interior vices" (in the sense of latent defects) or any right against the vendor will be forfeited.¹⁷⁵ This written claim must be in the form of a protest which precisely states the faults or vices in the goods.¹⁷⁶ This protest must be formulated before a notary or local authority and two witnesses, and all of these persons must attest that an inspection was made of the goods and of the faults or defects noted in the inspection; they must express their judgment that said faults or defects were not caused by accident and that there are no indications of fraud on the part of the buyer. The declarations contained in this protest are subject to contrary proof.¹⁷⁷

Vices or defects which are attributed to goods which have been sold, "as well as the differences between the species or qualities of the goods [as provided for in the contract] shall always be determined by arbitrator experts provided there is no stipulation to the contrary."¹⁷⁸

In sales in Peru and El Salvador of goods which are neither available for inspection nor classified by a determined and known quality in commerce, it is understood that the buyer reserves the power to examine the goods and to freely rescind the contract if the goods are not satisfactory.¹⁷⁹

The Mexican Code of Commerce counterpart to these rules is phrased in clearer grammatical and legal style:

When the subject matter of a purchase-sale contract is merchandise which has not been seen by the buyer nor may be classified by a determined quality known in commerce, the contract shall not be taken as being perfected while the buyer has not examined and accepted them.¹⁸⁰

The Argentine and Uruguayan codes articulate rules which resemble in substance the Peruvian and Mexican codes, but use a somewhat different phrasing:

In all purchases which are made of merchandise which is not open to view nor which may be classified by a quality determined and recognized in commerce, it is presumed that the buyer has reserved [the right] to examine them and to freely rescind

174. *CÓDIGO DE COMERCIO*, art. 353.

175. *CÓDIGO DE COMERCIO*, art. 357.

176. *CÓDIGO DE COMERCIO*, art. 358.

177. *CÓDIGO DE COMERCIO*, art. 359.

178. *CÓDIGO DE COMERCIO*, art. 363.

179. *CÓDIGO DE COMERCIO*, art. 323 (Peru); *CÓDIGO DE COMERCIO*, art. 83 (El Salvador).

180. *CÓDIGO DE COMERCIO*, art. 374.

the contract, if the goods are not as agreed. . . . Thus . . . a delaying by the buyer of the act of examination . . . more than three days after a summons made by the vendor, the contract shall be considered without effect.¹⁸¹

The Peruvian buyer may be denied the right to file a claim for defects if he has examined the goods "to his satisfaction" at the time he received them. If the goods are received in packages or bales, he has four days in which to file his claim for defects.¹⁸² The buyer in El Salvador has only three days in which to make claim for defects in quality or shortages in quantity, and the vendor may protect himself from any such claims during this period by demanding that an examination of the quality and quantity of the packaged goods be made during the act of delivery "to the satisfaction of the buyer."¹⁸³

In both Peru and El Salvador claims for "internal vices" must be made within thirty days following the date of delivery.¹⁸⁴ Mercantile sales contracts may not be rescinded in Peru because damages may have been incurred, but the contracting party who has proceeded with malice or fraud in the contract or its performance shall indemnify the damaged party without prejudice to a criminal action being brought for these acts.¹⁸⁵

Chile (whose code was the model for codes in other countries) has, in a number of widely separated articles, several rules which are virtually the same as those mentioned in Costa Rica.¹⁸⁶ However, the Chilean law adds the view that "the vendor is obligated to respond for the hidden vices which [the goods] contain in accordance with the rules established in the title Purchase and Sale in the Civil Code."¹⁸⁷ The rather stringent effect of this provision is limited by the thought that the "redhibitory actions [actions for recession or reduction of the price] are prescribed by the lapse of six months counted from the day of the actual delivery of the goods."¹⁸⁸ The Purchase and Sale Title of the Chilean Civil Code and the "redhibitory actions" will be discussed in the next section of this article. The Ecuadorian Code fairly well follows the latter provisions of the Chilean Code;¹⁸⁹ however, the redhibitory action in Ecuador may be brought within one year when the goods are received from a foreign country rather than the standard six months rule in Chile.¹⁹⁰ This same

181. CÓDIGO DE COMERCIO, art. 520 (Uruguay); CÓDIGO DE COMERCIO, art. 455 (Argentina).

182. CÓDIGO DE COMERCIO, art. 331.

183. CÓDIGO DE COMERCIO, art. 85.

184. CÓDIGO DE COMERCIO, art. 337 (Peru); CÓDIGO DE COMERCIO, art. 88 (El Salvador).

185. CÓDIGO DE COMERCIO, art. 339.

186. CÓDIGO DE COMERCIO, arts. 133, 146, 158-59.

187. CÓDIGO DE COMERCIO, art. 154.

188. *Ibid.*

189. CÓDIGO DE COMERCIO, arts. 173-74, 191-92.

190. CÓDIGO DE COMERCIO, art. 191.

article, in an attempt to cover the choice of law problem, provides that the existence of the hidden vices shall be proved by the "means admitted in the place to which the sold goods have been destined."¹⁹¹ The Ecuadorian Code further states that in the sale of a thing which is open to view and is designated at the time of the contract of sale only by its species, "it shall not be understood that the buyer reserves the right to examine it (*examinarla*)."¹⁹² This provision is duplicated in the Chilean, Nicaraguan, Colombian and Guatemalan Codes with the exception of the last word—examine; these latter codes use the words "try it" (*probarla*).¹⁹³ If this difference in wording is to be construed literally, it would appear that a buyer in Ecuador may not even examine the goods prior to or at the time of their receipt in order to determine if they conform to the contract. However, in Ecuador, Chile, Colombia and Guatemala the buyer has the right to make an express reservation of the right to examine the goods in his contract, and it would seem wise for the buyer to insist on this boon.¹⁹⁴ It is also to be noted that in Nicaragua and Guatemala if the goods are of a kind which it is customary to taste before taking receipt of, then the contract implies that the buyer has this right.¹⁹⁵

Ecuador, Chile, Nicaragua, Colombia and Guatemala agree that "if the contract simultaneously determines the species and quality of the thing which is sold and can be seen, it is understood that the purchase has been made under a suspensive condition that the thing is of the agreed species and quality."¹⁹⁶ These countries further agree that if the buyer alleges at the time of delivery that the goods are not of the species and quality provided for in the contract, the goods shall be examined by experts.¹⁹⁷

In Uruguay and Argentina those "vices or defects which are attributed to things sold, as well as the difference in qualities [between the goods received and the samples or descriptions upon which the sale was based] shall always be determined by arbitrator experts, provided there is no stipulation to the contrary."¹⁹⁸

191. *Ibid.*

192. CÓDIGO DE COMERCIO, art. 170.

193. CÓDIGO DE COMERCIO, art. 344 (Nicaragua); CÓDIGO DE COMERCIO, art. 130 (Chile); CÓDIGO DE COMERCIO TERRESTRE, art. 220 (Colombia); and CÓDIGO DE COMERCIO, art. 243 (Guatemala).

194. CÓDIGO DE COMERCIO, art. 171 (Ecuador); CÓDIGO DE COMERCIO, art. 131 (Chile); CÓDIGO DE COMERCIO TERRESTRE, art. 220 (Colombia); and CÓDIGO DE COMERCIO, art. 244 (Guatemala).

195. CÓDIGO DE COMERCIO, art. 344, 346 (Nicaragua); CÓDIGO DE COMERCIO, art. 243, 245 (Guatemala).

196. CÓDIGO DE COMERCIO, art. 173 (Ecuador); CÓDIGO DE COMERCIO, art. 133 (Chile); CÓDIGO DE COMERCIO, art. 345 (Nicaragua); CÓDIGO DE COMERCIO TERRESTRE, art. 223 (Colombia); and CÓDIGO DE COMERCIO, art. 246 (Guatemala).

197. CÓDIGO DE COMERCIO, art. 173 (Ecuador); CÓDIGO DE COMERCIO, art. 133 (Chile); CÓDIGO DE COMERCIO, art. 345 (Nicaragua); and CÓDIGO DE COMERCIO, art. 246 (Guatemala).

198. CÓDIGO DE COMERCIO, art. 559 (Nicaragua); CÓDIGO DE COMERCIO, art. 476 (Argentina).

The U.C.C. states that "goods to be merchantable must be at least such as . . . in the case of fungible goods, are of fair average quality within the description; and . . . run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved"¹⁹⁹ A somewhat similar concept is evidenced in the Costa Rican law:

If the contract does not determine with all precision the species and quality of the merchandise which has to be delivered, the buyer may not demand the best nor may the vendor comply by delivering the poorest. In this case the buyer must agree with a medium species and quality. If there is no agreement [as to this medium] the question shall be decided by the competent judicial authority according to the proceedings established by the acts of voluntary jurisdiction (*jurisdicción voluntaria*—a special kind of juricial proceedings).²⁰⁰

The above provision would appear to be unique in Latin America in its attempt to delineate some standard of merchantability. Another faint glimmering of this notion of merchantability may be discerned in the Hondurian rule that "if the thing sold does not have the essential qualities for the use to which it has been destined, the buyer may obtain the nullification (*resolución*) of the contract, following the rules given for nullification for nonfulfillment, unless the defect does not exceed the limits permitted by usages (*los usos*)."²⁰¹ An even better statement of this standard of merchantability is contained in the Brazilian rule dealing with latent defects:

The seller, even after delivery, is answerable for the vices and hidden defects of the thing sold, which the buyer was unable to discover before its receipt, if they are such as to make it unsuitable for the use for which it was intended, or they diminish its value in such way that the buyer, if he had known them, either would not have bought it, or would only have given a much lower price for it.²⁰²

The succeeding article²⁰³ provides that the above rule "principally applies when the goods are delivered in bales or covers which prevent their examination or recognition" if the buyer within ten days after receiving the goods makes a claim against the vendor for a shortage in quantity or defect in quality, but in regard to a shortage he must prove that the ends of the bales or covers were intact and in regard to a defect in quality that the defect could not have been caused by an accident (*caso fortuito*) while the goods were in the buyer's possession. However, "this claim can-

199. U.C.C. §§ 2-314(2)(c), (d).

200. CÓDIGO DE COMERCIO, art. 421.

201. CÓDIGO DE COMERCIO, art. 773.

202. CÓDIGO COMERCIAL BRASILEIRO, art. 210.

203. CÓDIGO COMERCIAL BRASILEIRO, art. 211.

not be made when the seller imposes on the buyer the duty of examining the goods before he receives them, nor after the price has been paid."²⁰⁴ This latter rule would seem to be a categorical rejection of any notion that a latent defect may be asserted if it is discovered later than ten days after an inspection is made at the time of receipt of the goods. Finally, any question regarding defects or differences in quality must be determined by arbitrators.²⁰⁵

It is surprising to observe that the Brazilian law does not seem to follow the majority of Latin American codes in providing for sales when the goods are before the parties (*a la vista*) at the time of the sale, or when the goods are not present, but they are described in the contract and the quality is not known by commercial usage.

The "hidden defect" rule of the Brazilian Code supposedly resembles the Uruguayan and Argentine laws;²⁰⁶ however, these latter countries seem to extend greater protection to the buyer than does the law of Brazil. In Argentina and Uruguay when the goods are delivered in bundles or crates which impede the examination and verification of the goods, the buyer may assert any claim for a shortage of quantity or vice in quality within three days after the delivery.²⁰⁷ On the other hand, the vendor may always demand in the act of delivery that a complete inspection be made of the goods as to their quality and quantity and this will bar any subsequent claim for defects or shortages.²⁰⁸ Both of these rules are, however, subject to the rule that "the results of internal vices of the thing sold which may not have been able to be perceived by the examination which is made at the time of delivery shall be on account of the vendor during six months following the date of delivery," and after this period has elapsed the vendor shall be free of all responsibility.²⁰⁹

The latent defect provisions of the Bolivian Code of Commerce do not apparently resemble the applicable provisions of any other Latin American country. The buyer shall not have a claim against the vendor "whenever the things have been delivered to him by number, weight or measurement."²¹⁰ However, "whenever the buyer receives wholesale goods, he may claim what he deems convenient for him within eight days [following the receipt of the goods] unless the vendor has demanded an

204. *Ibid.*

205. C DIGO COMERCIAL BRASILEIRO, art. 217.

206. C DIGO COMERCIAL BRASILEIRO arts. 56-7 (Bevilaqua 1953).

207. C DIGO DE COMERCIO, art. 472 (Argentina); and C DIGO DE COMERCIO, art. 546 (Uruguay).

208. C DIGO DE COMERCIO, art. 472 (Argentina); and C DIGO DE COMERCIO, art. 547 (Uruguay).

209. C DIGO DE COMERCIO, art. 548 (Uruguay). Article 473 of the ARGENTINE COMMERCIAL CODE provides that a court which has jurisdiction in the case may order that the defect will be on the account of the vendor during a fixed period which may not exceed six months following the date of delivery.

210. C DIGO DE COMERCIO, art. 328.

examination of them at the time of their delivery, in which case no claim shall be admissible."²¹¹ The above provision is then qualified by the succeeding rule that "the hidden vices of the thing which it was not possible to discover at the time of the examination, shall fall back (*recaerán*) upon the vendor as long as six months following their delivery."²¹² This Bolivian rule is entirely opposite to the Brazilian rule.

In Mexico the buyer who does not make a written claim within five days after receiving the goods for a lack of quantity or quality or within thirty days after receipt of the goods for internal vices, "loses any action and right to claim for said causes against the vendor."²¹³ The Mexican code does not seemingly follow the Brazilian²¹⁴ rule that the vendor may demand that the vendee make an inspection of the goods and thereby bar any subsequent claim. This omission is not found in the law of Guatemala which first states that "the vendor is obliged . . . to respond for the hidden vices which [the goods] contain in accordance with the rules established by the common law," but then qualifies this fiat by stating that "the buyer shall not be heard to complain about a defect of quality . . . provided that he has examined the goods at the time of the delivery and has received them without a prior protest."²¹⁵

C. *The Uniform Law on the International Sale of Goods*

As previously stated,²¹⁶ the ULISG has articulated certain standards of quality in order to determine if the vendor has fulfilled his obligations.²¹⁷ Parts "d" and "e" are directly comparable to the American notions of warranty of merchantability and warranty of fitness for a particular use.

211. CÓDIGO DE COMERCIO, art. 329.

212. CÓDIGO DE COMERCIO, art. 330.

213. CÓDIGO DE COMERCIO, art. 383.

214. *Supra* notes 202 *et seq.*

215. CÓDIGO DE COMERCIO, arts. 267, 271.

216. *Supra* note 101.

217. Obligations of the seller as regards the conformity of the goods:

A. Lack of conformity, Article 33:

1. The seller shall not have fulfilled his obligation to deliver the goods where he has handed over:
 - a) part only of the goods sold or a larger or a smaller quantity of the goods than he contracted to sell;
 - b) goods which are not those to which the contract relates or goods of a different kind;
 - c) goods which lack the qualities of a sample or model which the seller has handed over or sent to the buyer, unless the seller has submitted it without any express or implied undertaking that the goods would conform therewith;
 - d) goods which do not possess the qualities necessary for their ordinary or commercial use;
 - e) goods which do not possess the qualities for some particular purpose expressly or impliedly contemplated by the contract;
 - f) in general, goods which do not possess the qualities and characteristics expressly or impliedly contemplated by the contract.
2. No difference in quantity, lack of part of the goods or absence of any quality or characteristic shall be taken into consideration where it is not material.

This rule adds the thought that absence of quality which is not material shall not be taken into consideration.²¹⁸ In the event that the buyer knew or "could not have been unaware of" a lack of conformity described in sections d, e, or f, the vendor will not be liable.²¹⁹ This provision is the seeming equivalent of section 2-316(3)(b) of the U.C.C.²²⁰

The ULISG does not expressly provide for a disclaimer of "warranties" of quality; however, "the parties to a contract of sale shall be free to exclude the application thereto of the present law either entirely or partially. Such exclusion may be express or implied."²²¹ This provision would seem broad enough to allow the parties to exclude all or part of the quality standards of the Convention and to substitute different ones.

The buyer is required by the ULISG to examine the goods (or to have them examined) promptly at the place of destination if the goods are delivered by a carrier.²²² The method of examination is subject to the agreement of the parties or, in the absence of agreement, by the law or the usage of the place where the examination is to be performed.²²³ However, when the contract requires payment against the documents the buyer has a duty to pay the price before he may examine the goods.²²⁴ The buyer under a C.O.D. sale according to the ULISG has the right to examine the goods before he pays the price while a C.O.D. buyer operating under the U.C.C. does not have this right.²²⁵

The buyer loses his right to assert a lack of conformity of the goods if he does not give the vendor notice promptly after he has discovered or ought to have discovered the discrepancy. If the defect in the goods is one which could not have been discovered when the goods were delivered and is noticed subsequently, the buyer must promptly notify the vendor after the discovery. The buyer must assert any claim for defects within a period of two years from the date the goods "were handed over, unless the lack of conformity constituted a breach of guarantee covering a longer period."²²⁶ The buyer is required to specify any lack of conformity when giving notice to the vendor, and he is required to invite the vendor to examine the goods or to have them examined by his agent.²²⁷

The vendor may not assert the defense that the buyer failed to make an inspection upon delivery or failed to discover patent or latent defects,

218. ULISG, art. 33(2).

219. ULISG, art. 36.

220. (b) when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him. . . .

221. ULISG, art. 3.

222. ULISG, art. 38.

223. *Ibid.*

224. ULISG, art. 72.

225. Compare ULISG, art. 72, with U.C.C. § 2-513(3).

226. ULISG, art. 39.

227. ULISG, art. 39(2).

or failed to make complaint within the two year period if the lack of conformity relates to facts which the vendor knew or "which he could not have been unaware of" and which he failed to disclose to the buyer.²²⁸ Somewhat similar concepts are evidenced in the redhibitory action provided for in the laws of Chile, Colombia, Ecuador and Guatemala which will be discussed in the following section.²²⁹

V. REMEDIES: CURE AND COVER, SPECIFIC PERFORMANCE, RECISSION, AND DAMAGES

A. *The Uniform Commercial Code*

When the buyer in the United States rejects the goods or revokes his acceptance of them because of non-conformity of the goods, he may recover the paid purchase price from the vendor.²³⁰ The buyer may also "cover" by buying in good faith and without unreasonable delay goods in substitution for those purchased from the vendor. The buyer may in that case recover the difference between the cost of the "cover" and the contract price together with the expenses incurred in the inspection, receipt, transportation, care and custody of goods which were rejected, commercially reasonable charges, expenses or commissions incurred in effecting "cover" and any other reasonable expenses.²³¹ The buyer may also recover consequential damages which include any losses resulting from the general or particular requirements of the buyer which the seller at the time of contracting had reason to know and which the buyer could not reasonably prevent by securing "cover" or other means.²³² If the buyer is unable to "cover," he may seek specific performance to compel the vendor to furnish conforming goods and to pay damages.²³³

The vendor is given limited protection against the seeming harshness of the above rules by having limited rights "to cure" non-conforming goods. If the time for performance has not run and the buyer has rejected the goods on the ground of non-conformity, the vendor may seasonably notify the buyer of his intention to "cure" and may then make a conforming delivery within the contract period. If the buyer, on the other hand, rejects the goods after the date of performance on the ground of non-conformity and the vendor had reasonable grounds for believing that the tender would be acceptable, the vendor has an additional reasonable time to make a conforming tender if he seasonably notifies the buyer. Although the wording of this provision seems confined to the rejection of a tender rather than the revocation of an acceptance after a tender, the rule should be the same in both cases.²³⁴

228. ULISG, art. 40.

229. *Infra* notes 249 *et seq.*

230. U.C.C. § 2-710.

231. U.C.C. § 2-712, 2-715.

232. U.C.C. § 2-715(2)(a).

233. U.C.C. § 2-716.

234. U.C.C. §§ 2-508(1), (2), when considered in conjunction with the wording of

In addition to the remedies of rejection and revocation of acceptance, the buyer may accept the goods and (by notifying the vendor within a reasonable time after he discovers or should have discovered the non-conformity or breach of warranty)²³⁵ recover damages for breach of warranty which are computed as the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount. In a proper case, incidental and consequential damages may be recovered in the same manner as if the buyer had rejected the goods or revoked his acceptance.²³⁶

The buyer may deduct all or a part of the damages from the amount of the unpaid purchase price by notifying the vendor.²³⁷ A measure of protection from the severity of the above rules is afforded the vendor by allowing the parties to stipulate in the sales contract for a reasonable amount of liquidated damages.²³⁸ Furthermore, the sales contract may provide for remedies in addition to or in substitution for those provided in the U.C.C., and may limit or alter the measure of damages recoverable "as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of non-conforming goods or parts."²³⁹ The sales contract may also exclude or limit consequential damages where the loss is a commercial one.²⁴⁰ Of course, any clause excluding or limiting damages must be reasonable and the courts are empowered to strike down any unconscionable clause.²⁴¹

A buyer may rescind or claim rescission of the sale, or reject or revoke acceptance because of fraud of the vendor, and none of these actions will be held to be inconsistent with a claim for damages or other remedy.²⁴²

The buyer must bring his action for breach of warranty within four years after the breach, even though the buyer may not be aware of it, because of the notion that the breach of warranty occurs upon tender of

§§ 2-605(1)(a), 2-607(2), 2-608(1), and (3), might lead a court to this result. However, it may be argued that these sections must be confined to the narrow situations described therein and that § 2-612, dealing with installment contracts, inferentially excludes application of the cure rule to cases where there is a revocation of acceptance as distinguished from a rejection of the tender of delivery. See note 159 *supra*. For an excellent analysis of the ambiguities of the Code's cure rules, see Peters, *Remedies for Breach of Contracts Relating to the Sale of Goods Under the Uniform Commercial Code: A Roadmap for Article Two*, 73 YALE L.J. 200, 209-16 (1963).

235. U.C.C. § 2-607(3).

236. U.C.C. §§ 2-714, 2-715.

237. U.C.C. § 2-717.

238. U.C.C. § 2-718. This section and § 2-719 *infra* note 239, are subject to the rule that any unconscionable contract or clause will be stricken by the courts, U.C.C. § 2-302.

239. U.C.C. § 2-719.

240. *Ibid.*

241. U.C.C. § 2-719, comment 1.

242. U.C.C. § 2-721.

delivery of the goods.²⁴³ However, if the vendor guarantees future performance, the cause of action for breach of warranty accrues when the breach is or should have been discovered during the guarantee period.²⁴⁴ The parties may reduce the limitation period to one year in the contract of sale, but they may not extend it.²⁴⁵

B. *The Latin American Commercial and Civil Codes*

In El Salvador and Peru when there is a defect in quality, the "buyer may choose either rescission of the contract or its fulfillment in accordance with what is agreed, but always with the right to indemnification of the damages which have been caused him by the defects."²⁴⁶ The specific performance section of the U.C.C.²⁴⁷ does not seem to give an aggrieved buyer a comparable right in the United States; the remedy of specific performance seems to be limited to the case where the vendor fails to deliver any goods rather than defective goods. The U.C.C. gives the vendor of defective goods a right "to cure" the defects under certain conditions,²⁴⁸ but there does not seem to be a reciprocal right given to the buyer. The El Salvadorian and Peruvian rules would seem to be an improvement over the U.C.C. provisions. Peru, after giving the buyer the right to choose to rescind or require the vendor's performance in the event of defects in quality or shortages in quantity, then forbids the rescission of mercantile contract for the cause of *lesión*,²⁴⁹ but provides that damages and interest may be awarded against a vendor "who has proceeded with malice or fraud in the contract or in its performance, without prejudice to a criminal action [being instituted]."²⁵⁰

As previously indicated,²⁵¹ the vendor of goods in Uruguay remains liable for a period of six months for latent vices which were not discovered during the examination of the goods when they were received. This same article provides that "during the said six months, the buyer has the election to return the thing demanding the return of the price or to

243. U.C.C. § 2-725(1), (2).

244. U.C.C. § 2-725(2).

245. U.C.C. § 2-725(1).

246. CÓDIGO DE COMERCIO, art. 85 (El Salvador); and CÓDIGO DE COMERCIO, art. 331 (Peru).

247. U.C.C. § 2-716.

248. U.C.C. § 2-508 and notes 159, 234, *supra*.

249. *Lesion* is derived from the Roman Law concept of *Laesio enormis*. The CODE NAPOLEON adopted the concept in the sale of immovables and provided that a vendor could not rescind a sale unless he proved that he had sold an immovable for less than five-twelfths of its true worth. CODE NAPOLEON, art. 1674. A reciprocal action was denied to the vendee under the Code. CODE NAPOLEON, art. 1683. The CODE NAPOLEON did not adopt the *lesion* concept in the sale of chattels, and art. 1674 confined it to immovables. It would appear that the Bolivian, Peruvian, Brazilian and Mexican prohibitions against recessions of the sale of moveables for *lesion* are derived from the French law. See 2 PLANIOL, CIVIL LAW TREATISE 879-82 (11th ed. Eng. trans. 1959).

250. CÓDIGO DE COMERCIO, art. 339.

251. Note 209, *supra*.

keep it by making that which has been returned a part of the price determined by experts."²⁵²

Mercantile sales contracts may not be rescinded in Bolivia on the grounds of *lesión*, but either party may recover damages and interest against the other party who has acted with an intent to cheat (*con dolo*).²⁵³ Mexico also bars a rescission action on the grounds of *lesión*, but it provides that in addition to a competent criminal action, the buyer may recover damages and interest against the vendor "who has proceeded with an intent to cheat (*dolo*) or malice in the contract or in its performance."²⁵⁴

Rescission is also barred in Brazil for reasons of great inferior value (*lesión*) "in contracts entered into between persons who are all traders, unless mistake, fraud or misrepresentation is proved."²⁵⁵

The limited quasi-rescission right accorded buyers in Chile in sales by sample and by description has previously been discussed.²⁵⁶

In the case of "hidden vices" the commercial codes of Ecuador,²⁵⁷ Chile,²⁵⁸ Colombia²⁵⁹ and Guatemala²⁶⁰ provide that the vendor must respond for the hidden vices of the goods in accordance with the rules established in the Purchase and Sale Title of the Civil Codes. The buyer's action against the vendor—a redhibitory action—will be prescribed (*limitations rule*) six months after the date of actual delivery of the goods. In Chile, Colombia and Ecuador the buyer has the right to rescind the sale or to reduce the price proportionally because of hidden vices.²⁶¹ Chilean Civil Code Redhibitory vices are those which combine the following qualities:

1. To have existed at the time of the sale;
2. To be such, that for them the thing sold does not serve for its natural use, or it only serves so imperfectly, in a manner which makes it presumptive that if the buyer had known of them he would not have purchased them or would have purchased them at a much smaller price;
3. Not having been manifested by the vendor and to be such that the buyer [may not have noticed them without grave negligence

252. CÓDIGO DE COMERCIO, art. 548.

253. CÓDIGO DE COMERCIO, art. 309. The Bolivian rules governing the sales of goods are based upon the CODE NAPOLEON. *E.g.*, see CODE NAPOLEON, arts. 1587, 1588, 1641-48. For the concept of *Dolo*, see 2 PLANTOL, CIVIL LAW TREATISE 607-12 (11th ed. Eng. trans. 1959).

254. CÓDIGO DE COMERCIO, art. 385.

255. CÓDIGO COMERCIAL BRASILEIRO, art. 220.

256. Note 86, *supra*.

257. CÓDIGO DE COMERCIO, art. 191.

258. CÓDIGO DE COMERCIO, art. 154.

259. CÓDIGO DE COMERCIO, art. 246.

260. CÓDIGO DE COMERCIO, art. 267.

261. CÓDIGO CIVIL, art. 1857 (Chile); CÓDIGO CIVIL, art. 1914 (Colombia); and CÓDIGO CIVIL, art. 1914 (Ecuador).

on his part, or such that the buyer] could not easily know them because of his profession or occupation.

Any stipulation in the contract of sale²⁶² which purports to relieve the vendor of liability for latent defects will not protect him if he had knowledge of them and failed to give notice to the buyer.²⁶³ Furthermore, if the vendor knew of the hidden vices and did not declare them, or if they were such that he must have known of them by reason of his profession or occupation, he will be liable not only for restitution or a reduction in the price, but also for damages and interest. If the vendor did not know of the vice or it is not presumed that he had knowledge of it because of his profession or occupation, he will be liable only for restitution of the price or a reduction of the price.²⁶⁴ The prescriptive period for the rescission of the sale is six months after the delivery; however, the buyer may bring an action for a reduction of the price because of the hidden defects within one year after delivery.²⁶⁵ The Guatemalan rules governing the redhibitory action are generally in accord with the rules of Chile, Ecuador and Colombia, although the phrasing varies in minor detail.²⁶⁶

C. *The Uniform Law on the International Sale of Goods*

Assuming that a buyer under the ULISG has given prompt notice to the vendor that the goods do not comply with the contract, he may require performance of the contract by the vendor, or declare the contract avoided or reduce the price, and he may also claim damages no matter what recourse he takes.²⁶⁷

The concept of performance of the contract by the vendor includes remedying defects in the goods when they are produced or manufactured by the vendor, provided he is in a position to remedy the defects. If the sale covers specific goods, performance will consist of the delivery of the goods referred to by the contract.²⁶⁸ This rule would seem broad enough to cover the case of a vendor who has sold specific goods manufactured or produced by another. If the vendor fails to perform within a reasonable time, the buyer retains the right to avoid the contract or reduce the price.²⁶⁹ These broad grants of the right of specific performance are

262. *Código Civil*, art. 1858 (Chile); *Código Civil*, art. 1915 (Colombia); and *Código Civil*, art. 1915 (Ecuador). The bracketed material in the above quotation does not appear in the Chilean Code.

263. *Código Civil*, art. 1859 (Chile); *Código Civil*, art. 1916 (Colombia); and *Código Civil*, art. 1916 (Ecuador).

264. *Código Civil*, art. 1861 (Chile); *Código Civil*, art. 1918 (Colombia); and *Código Civil*, art. 1918 (Ecuador).

265. *Código Civil*, art. 1866-69 (Chile); *Código Civil*, arts. 1923-26 (Colombia); and *Código Civil*, arts. 1923-26 (Ecuador).

266. *Código Civil*, art. 1598-1611.

267. ULISG, art. 41.

268. ULISG, art. 42(1)(a), (b).

269. ULISG, art. 42(2).

limited by the rule that a court is not bound to enter a decree of specific performance or to enforce a foreign decree of specific performance except when it would do so under its domestic law with respect to sales contracts not covered by this Convention.²⁷⁰ Probably the most serious restriction on the buyer's right to demand specific performance is enunciated in the rule that "if it is in conformity with usage and reasonably possible for the buyer to purchase goods to replace those to which the contract relates," the buyer will not be able to secure specific performance and the contract "shall be *ipso facto* avoided as from the time when such purchase should be effected."²⁷¹ Under the U.C.C. inability to cover would justify a decree of specific performance at the request of the buyer, and, conversely, ability to cover would justify a court in refusing this mode of relief.²⁷²

In lieu of requesting specific performance, the buyer may declare that the contract is avoided in its entirety only when there is a lack of conformity of the goods *and also* a failure to deliver the goods on the fixed date, and these acts amount to fundamental breaches²⁷³ of the sales contract.²⁷⁴ On pain of losing this right, the buyer must avoid the contract promptly after notifying the vendor of the lack of conformity. When the buyer has elected specific performance rather than avoidance and the vendor has failed to perform within a reasonable time, the buyer must then avoid the contract promptly after the expiration of this reasonable time.²⁷⁵

It would appear that if the vendor has delivered all or part of the goods on the date fixed for delivery but there is a lack of conformity of the goods delivered (or the failure to deliver any conforming goods on the date fixed for delivery does not amount to a fundamental breach of contract) the vendor has the right to remedy any defect in delivered goods or to deliver conforming goods after this, provided it does not cause the buyer either unreasonable inconvenience or unreasonable expense.²⁷⁶ The buyer may establish a reasonable period for the remedying of the defects or the delivery of the conforming goods, and if the vendor fails to do so

270. ULISG, art. 16.

271. ULISG, art. 25. See also ULISG, art. 85.

272. U.C.C. § 2-716, comment 2.

273. Article 10.

For the purposes of the present Law, a breach of contract shall be regarded as fundamental wherever the party in breach knew, or ought to have known, at the time of the conclusion of the contract, that a reasonable person in the same situation as the other party would not have entered into the contract if he had foreseen the breach and its effects.

Article 28.

Failure to deliver the goods at the date fixed shall amount to a fundamental breach of the contract whenever a price for such goods is quoted on a market where the buyer can obtain them.

274. ULISG, arts. 43, 45(2).

275. ULISG, art. 43.

276. ULISG, art. 44(1).

within this period, the buyer may elect to reduce the price, or require specific performance or promptly declare that the contract is avoided.²⁷⁷ These cure rules of the ULISG seem broader than their counterparts in the U.C.C.²⁷⁸ Under the U.C.C. the vendor must have had reasonable grounds for believing that his non-conforming tender would be acceptable when the time for performance has expired. On the other hand, the ULISG conditions the right of cure by providing that it must not cause the buyer unreasonable inconvenience or unreasonable expense; however, the courts may read this proviso into the U.C.C.²⁷⁹

In lieu of requiring specific performance or avoiding the contract, the buyer, according to a rather awkwardly phrased rule, may reduce the purchase price "in the same proportion as the value of the goods at the time of the conclusion of the contract has been diminished because of their lack of conformity with the contract."²⁸⁰ This rule must mean that the difference between the value of the goods described in the contract and the goods actually received may be deducted from the purchase price.

The statute of limitations rule of the ULISG is rather unusual. The buyer loses his right to assert (either as a claim or defense to a claim) a lack of conformity of the goods after one year from the time he notified the vendor, unless the fraud of the vendor has prevented the buyer from exercising this right. However, if the buyer has not paid the purchase price and has duly notified the vendor of the defects in the goods he may assert the claim of lack of conformity as a defense in an action for the price by claiming a reduction of the price or for damages after the elapse of this period.²⁸¹ The statute of limitations rule of four years under the U.C.C. is binding whether the lack of conformity is asserted as a claim or as a defense to a claim.²⁸²

The ULISG articulates a damage dichotomy depending upon whether or not the buyer has avoided the contract. When the buyer has not avoided the contract he may recover his losses including loss of profit. His recoverable damages may not exceed the loss which the vendor ought to have foreseen at the time of the execution of the contract "in the light of the facts and matter which then were known or ought to have been known to him, as a possible consequence of the breach."²⁸³ When the buyer has avoided the contract and there is a current price²⁸⁴ for the

277. ULISG, arts. 44, 45.

278. U.C.C. § 2-508.

279. Some courts have used the "inconvenience test" prior to the U.C.C. in cases involving an attempted cure of a breach of warranty of title. See BOGERT, BRITTON & HAWKLAND, *SALES & SECURITY* 164-67 (4th ed. 1962). The same principle could be applied to attempted cures for breach of warranty of quality.

280. ULISG, art. 46.

281. ULISG, art. 49.

282. U.C.C. §§ 2-725, 1-201(1).

283. ULISG, art. 82.

284. ULISG, art. 12.

goods the damages shall be computed as the difference between the contract price and the current price on the date of avoidance of the contract. The current price is that prevailing in the market where the transaction takes place. If there is no current price in this market or the application of this market's current price would not be appropriate, the current price in another market as a reasonable substitute will be used and due allowance will be made for the differences in the cost of transportation of the goods.²⁸⁵

When the contract has been avoided and the buyer has purchased replacement goods, he may recover the difference between the contract price and the replacement price.²⁸⁶ The buyer, when he has avoided the contract, may also recover reasonable expenses incurred as a result of the vendor's breach or other losses including loss of profits which should have been foreseen by the vendor at the time of the execution of the contract.²⁸⁷

In the event that the goods do not have a "current price," the buyer may recover his losses, including loss of profits.²⁸⁸

In accord with the U.C.C.²⁸⁹ a buyer under the ULISG has the duty to mitigate damages.²⁹⁰ The ULISG also incorporates by reference the domestic law of the various parties to the Convention in the case of fraud by providing that "damages will be determined by the rules applicable in respect of contracts of sale not governed by the present Law."²⁹¹

VI. CONCLUSION

There seems to be an over-all conceptual consistency in the qualities of goods areas of the Uniform Commercial Code, the Latin American Codes and the Uniform Law on the International Sale of Goods. However, there are enough inconsistencies in the details to create traps for parties who have not made a choice of law in the sales contract. And there are so many ambiguities and inconsistencies within the Uniform Commercial Code that even if the parties have chosen the U.C.C. as the law of their contract, there may not be uniformity of application by courts in the United States let alone by foreign courts which have to translate the sometimes untranslatable into their own languages. Although

For the purposes of the present Law, the expression "current price" means a price based upon an official market quotation, or, in the absence of such quotation, upon those factors which, according to the usage of the market, serve to determine the price.

Compare U.C.C. § 2-724.

285. ULISG, art. 84.

286. ULISG, art. 85.

287. ULISG, art. 86.

288. ULISG, art. 87.

289. *E.g.*, U.C.C. §§ 2-603, 2-704(2), 2-712(2) and comment 3, § 2-715.

290. ULISG, art. 88.

291. ULISG, art. 89.

the Uniform Law on the International Sale of Goods is not perfect, it would seem more efficacious in the international sales area than the U.C.C. because of its integrated organization and relative simplicity of vocabulary.