Time for an English Commercial Code?

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ARTICLES

TIME FOR AN ENGLISH COMMERCIAL CODE?

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A. INTRODUCTION

PARLIAMENT has imposed on the Law Commission the duty to review the law of England and Wales "with a view to its systematic development and reform, including in particular the codification of [the] law . . . and generally the simplification and modernisation of the law".[1] There are a number of points which flow from this. First, as a body which reviews great swathes of the common law to see if they require to be modernised or simplified, the Law Commission has a unique standpoint from which to view the strengths and weaknesses of the common law method. Second, it has unique experience of law reform and the Parliamentary process. Third, in discharge of its functions, it has an interest in seeing that, if codification is appropriate, a recommendation to that effect is made to the Lord Chancellor. It need not be the Law Commission which carries out the recommendation, and indeed the Law Commission could not carry out a project purely of its own initiative.

Parliament has not however vouchsafed us a definition of codification, and English law is not exactly replete with examples of written laws called "codes". What then is codification? In its most extreme form, codification is the process of expressing the whole of the law on a particular topic so that any development of that law has in general to be by way of interpretation of it or deduction from it. The principal difference between a code and, for example, the Unfair Contract Terms Act 1977 is that the whole of the law on a recognisable division of law, such as obligations or contract law, is put into the code. The French *Code civil* or the German Commercial Code are examples of

* Chairman of the Law Commission. This is a revised version of the COMBAR lecture delivered on 4 March 1997 in Lincoln's Inn. The author is grateful to the Commercial Bar Association for their permission to publish it in the Cambridge Law Journal.

[1] Law Commissions Act 1965, s. 3(1). Over the years several learned articles have been written on the topic of codifying commercial law: see for example Goode, "The Codification of Commercial Law" (1986)14 *Monash L. Rev.* 135, and the literature cited therein.

codes of this kind. So far as I am aware there are no codes of this kind in English law. Even if all the companies legislation was to be consolidated into a single statute, there would still not be a comprehensive companies code because there are substantial areas of the law, such as the duties of directors, which have not been put into the legislation and which are not simply a matter of deduction from it. Then there are the less comprehensive codes—the consumer credit legislation, the Sale of Goods Act 1893, the Bills of Exchange Act 1882, the Married Women's Property Act 1882 and the Marine Insurance Act 1906. These codes satisfy the dictionary definition of code even though they cover a relatively limited area because they nonetheless constitute a set of systematic rules on a particular subject.[2] The Children Act 1989, which, *inter alia,* implemented a Law Commission report, brings together all the law on children apart from adoption, and is therefore a form of code. An Act which is the principal source of law on a particular topic is a code in this wider sense.

Both these types of codes have statutory force, but in some jurisdictions there are also authoritative non-binding statements of the law. In the United States of America, the American Law Institute was set up in 1923 in response to a call by prominent legal professionals for improvements in the legal system through the clarification and simplification of the law. In the 1930s to 1950s, the American Institute produced restatements on agency, contract, conflict of laws, property, restitution, security, judgments, torts, trusts and landlord and tenant law. Restatements are not primary sources of law but systematic compilations of American common law. They did not therefore achieve any reform, and they do not have the status of a code. However, they are often relied on by the courts, and in general carry more weight than other treatises. The completion of the restatements was a remarkable achievement of leading academic and other lawyers in the United States, to which tribute is due.

Also to be mentioned in this context is the Uniform Commercial Code which was a joint project of the American Law Institute and the National Conference on Uniform State Laws. The Uniform Commercial Code is a model law covering many aspects of commercial transactions, including sale, negotiable instruments, secured transactions, letters of credit, bills of lading and so on. It was first produced in 1951 and it has been revised on several occasions since. There were many practitioners, judges and academics involved in the drafting, and the original version took some 10 years to produce. The Uniform

[2] *The Concise Oxford Dictionary* (8th ed.) (1990) defines a code "as a systematic collection of statutes, a body of laws so arranged as to avoid inconsistency and overlapping: a set of rules on any subject . . ."

Commercial Code has formed the basis of state law on some at least of the areas covered in nearly all of the states of the USA. The provisions of the code are explained in an accompanying commentary. This is not enacted as part of the state law but forms an authoritative source for assistance in interpreting the code. Again the drafting of the Uniform Commercial Code has been a remarkable achievement, and it has been particularly valuable as a means of ensuring uniformity of commercial law in the various states of the USA.

Codes can be classified not only according to their status and coverage, but also according to the type of law reform they seek to achieve. It is often thought that a code has to be a piece of substantially new law but there is no reason why that need be so. The Bills of Exchange Act 1882 for instance to very large extent makes a statutory statement of the common law and alters the underlying law only in a very minor way. There is therefore no need to assume that the adoption of a code must be accompanied by some radical change in the law. Likewise what is effectively a code may be achieved by enlightened consolidation of several different statutes already in force on the same topic. Alternatively a code could be a hybrid—part new law, part restatement of the common law and part a consolidation of existing statute law.

B. The History of the Codification of English Commercial Law

There would probably be little to say on this part of the subject, were it not for three things. First, the remarkable work on codification which took place in the last century, principally by Sir Mackenzie Chalmers. Second, the drafting of the Indian Contract Code which also took place in the last century, at a time when India was a colony and applied English contract law. Third, the work which has been done by the Law Commission in producing draft codes.

1. Sir Mackenzie Chalmers

Chalmers was born in 1847. In 1875 he joined the Chambers of Farrer Herschell, later Lord Herschell. Herschell encouraged Chalmers to produce a digest on the law of bills of exchange, which involved the study of some 2,500 cases and some 17 statutes. Chalmers set out the law in a number of propositions which he supported with commentary. He published his work in 1878. In 1880 he read a paper on codification to the Institute of Bankers. The idea was an instant success and the Institute instructed him to draft a bill. The bill was introduced into Parliament and considered by a committee of which Lord Herschell was the Chairman. No doubt with the help of Herschell's strong support the bill was passed in 1882.

In 1884 Chalmers became a county court judge in Birmingham. While he was a judge there he set about the task of codifying the law of the sale of goods. This is how he described the common law of sale as he found it:

> [The] rules [of the law of sale] are to be found embodied in judicial decisions ranging from the time of Edward III down to the present year of Her Majesty's reign. Lord Blackburn in his text-book on the *Law of Sale*, devotes seven pages to the discussion of a case decided in the seventeenth year of Edward IV's reign (A.D. 1487). On some points there is a plethora of authority, and as regards them, the reported decisions have become so numerous as to tend to obscure the general principles which underlie them, just as when a tree is in full foliage the numbers of its leaves frequently hide from view the form and development of the trunk and branches which support them. The last edition of Mr. Benjamin's work on Sale contains 1,013 pages, and cites nearly 2,000 English cases. On other questions there is a curious dearth of authority. The important point which was settled in *Glyn Mills Currie & Co* v. *The East and West India Dock Company*[3] was the subject of a *nisi prius* ruling in 1753, but it did not arise again for authoritative decision until 129 years had elapsed. For some elementary principles authority seems to be altogether wanting. Mr. Benjamin lays it down, and no doubt correctly, that in the absence of any different agreement, the place of delivery is the place where the goods are at the time when the contract of sale is made. But he can cite no decision in support of that proposition, and is driven to rely on the authority of Pothier. Now Pothier was an admirable exponent of legal principles, but it is strange that a modern English text-book, re-edited last year, should cite as an authority for an elementary principle a French lawyer who died in 1773, and who was primarily treating of French law, as modified by the custom of Orleans, before the Code Napoleon. The statutory enactments relating to the law of sale are fragmentary in character, and deal only with isolated points . . .[4]

Chalmers added: "The law of sale is in pretty much the same condition as other branches of the common law regulating our everyday life."[5]

In 1888, Chalmers produced a draft of the bill which he settled in consultation with Herschell. Herschell introduced it in the Lords, not to press it, but to get criticisms on it. In 1891 it was introduced again and it was referred to a distinguished select committee consisting of Lords Herschell, Halsbury, Bramwell and Watson. Delay followed while Scots law was taken into account so that the Act when passed could apply to the whole of the United Kingdom.[6] The bill as so modified was again introduced and it became law in 1893.

[3] (1881) 7 App. Cas. 591.
[4] Chalmers, "The Codification of the Law of Sale" (1891) 12 *Journal of the Institute of Bankers* 11, 12–13.
[5] *Ibid.* at p 12.
[6] For an account of the Scottish approach to the codification of commercial law in the United

Nothing daunted, Chalmers went on to tackle his third great contribution to English commercial law, namely the Marine Insurance Act 1906. In 1894 he completed a draft bill synthesising the effect of numerous cases. It was introduced into the Lords where it was considered by a committee consisting of lawyers, shipowners and average-adjusters appointed by Lord Herschell. In 1900 it was again introduced into the Lords and Lord Chancellor Halsbury had it considered by a similar committee, but it was blocked in the Commons until 1906 when Lord Chancellor Loreburn took it up, and it became law.

Before this develops into a panegyric for Chalmers, it should be pointed out that some criticisms can be made of his work, but they are not major ones. For instance, Chalmers' use of the terms "condition" and "warranty" can be criticised. He uses the word "warranty" in the Sale of Goods Act 1893 to mean a subsidiary term of a contract of sale breach of which gives rise to the right to claim damages but not the right to reject the goods.[7] In the Marine Insurance Act 1906, however, the term "warranty" is used to mean a promissory warranty breach of which discharges the insurer.[8] But, as the notes he included in his work on the Sale of Goods Act 1893[9] make clear, Chalmers was following the common law as he found it. The term "warranty" had always had a special meaning in insurance. Likewise in these notes he explained why he had used the term "condition" to mean a term of the contract breach of which gives rise to the right to treat the contract as repudiated. This was the sense in which the expression "condition" was used in conveyancing. It was not there limited to conditions precedent. Moreover, while it is true that the Sale of Goods Act 1893 refers only to conditions and warranties and not to intermediate or innominate terms, breach of which can give rise either to the right to repudiate the contract or the right to claim damages depending on the seriousness of the breach,[10] the omission of innominate terms was not fatal. As the Sale of Goods Act 1893 was only a codifying Act, and the common law before 1893 had recognised innominate terms, the Court of Appeal was able to hold in *The Hansa Nord*[11] that contracts for the sale of goods can contain innominate terms like any other contract. There are criticisms which can be made of common law's use of the terms "condition" and "warranty" and I will refer to them later.

It has been said that Chalmers' intentions in undertaking these

Kingdom, see A. Roger, "The Codification of Commercial Law in Victorian Britain" (1992) 109 L.Q.R 570.

[7] Sale of Goods Act 1890, s. 62(1).

[8] See Marine Insurance Act 1906, s. 33.

[9] See for example, the *Sale of Goods Act 1893*, 2nd ed. (1894), pp. 168–169.

[10] See *Hongkong Fir Shipping Co. Ltd* v. *Kawasaki Kisen Kaisha Ltd.* [1962] 2 Q.B. 26 (C.A.).

[11] *Cehave N.V.* v. *Bremer Handelsgesellschaft G.m.b.H.* [1976] 1 Q.B. 44.

codifications were twofold. First, it is said that his purpose was to assure the commercial community greater certainty in the law, in order to avoid litigation, even if this meant an inconvenient rule. Second, it is said that he considered that codification would simplify the process of legal reasoning by clearly stating the existing principles of commercial law which hitherto might require to await distillation from the mass of case law.[12] The effect of his work was to transform English commercial law from a mainly common law subject to one which had a very significant codified element.[13] And to a large extent Chalmers' work has stood the test of time. One only has to think how time consuming it would have been to learn the law of sale of goods or the law on bills of exchange without the Sale of Goods Act or the Bills of Exchange Act to realise just what a major and permanent contribution Chalmers made to the codification of commercial law in this country.

Sir Mackenzie Chalmers was the most notable of the codifiers, but there were others, including Sir Frederick Pollock who prepared the original draft of the bill that became the Partnership Act 1890. According to the long title, the purpose of the Act was "to declare and amend the Law of Partnership". After it was passed, Pollock wrote "[i]t may be doubted whether the Act will add much to the knowledge of the law possessed by practising members of the Chancery Bar, . . ." but "[p]ossibly members of the Common Law Bar . . . will be thankful for the Act . . .".[14] The Partnership Act has also stood the test of time. It sets out in clear terms the fundamentals of partnership law for the great benefit of the commercial community. It was only in 1997, over a century later, that it was decided by the Government that the law on partnerships should be reviewed. On 24 February 1997, the Corporate and Consumer Affairs Minister, Mr. John Taylor M.P., announced that the Department of Trade and Industry had asked the Law Commission and the Scottish Law Commission to carry out a review of the law on partnerships.[15]

Not all Parliament's attempts at codifying commercial law were as successful as those drafted by Sir Mackenzie Chalmers or Sir Frederick Pollock. In 1882, Parliament tried to simplify the law of personal security over chattels in the Bills of Sale Act 1878. The aim was to make the law easier for the debtor and creditor alike by introducing a requirement for a bill of sale to be in accordance with a particular form, if given by way of security for the payment of money.[16] There

[12] *Simpson's Biographical Dictionary of the Common Law* (1984), p. 108.
[13] So far as I have been able to ascertain, the Acts drafted by Chalmers are the only three English Acts of Parliament which include the words "to codify" in their long title.
[14] Sir Frederick Pollock, *A Digest of the Law of Partnership incorporating the Partnership Act 1890*, 5th ed. (1890), p. vi.
[15] DTI Press Notice, 24 February 1997.
[16] The Bill of Sale Act (1878) Amendment Act 1882, s. 9.

was a vast amount of litigation on such issues as whether the inclusion of additional clauses which creditors wanted to protect their security was permitted.[17]

2. The Indian Codes

In the nineteenth century, a series of codes were drafted for India on contract, criminal law, trusts, property, evidence, procedure, limitation and other subjects. Work on these Codes started in about 1833 and finished some 40 years later. Those who worked on the Codes included men who became distinguished lawyers of the period, including Lord Macaulay, Sir Barnes Peacock, Sir Henry Maine, Sir Fitzjames Stephen, Lord Hobhouse, Lord Chief Justice Erle, Mr. Justice Willes, Lord Justice James and Lord Justice Lush and Sir John Jervis. Sir Frederick Pollock said they were "the best models yet produced".[18] The Indian Codes in part codified rules of English law already received in India, and in part created new law. They were adopted for India, with exclusions on certain points for certain parts of India where they would be inappropriate. Previously a variety of different laws had applied in India, including religious laws, such as Hindu and Mohammedan law. The principal draftsman was a hard-working and gifted man by the name of Whitley Stokes, who began his career as a pupil of Lord Cairns. But the results of his work were not perfect, and several amendments had to be made. However all the most important branches of English law applicable to India except for the law of torts were codified.[19]

The Indian Contract Act 1872 was far more extensive than its title suggests. It covered not only the general principles of the law of contract, but also agency, bailment, partnership, the sale of goods and the law of indemnity and guarantee. It was an early commercial code. Its drafting conventions were in most respects similar to those of an English statute, but there were notable departures. For instance, notes of "explanation" and illustrations were included, for example section 113 provides:

> Where goods are sold as being of a certain denomination, there is an implied warranty that they are such goods as are commercially known by that denomination, although the buyer may have bought them by sample, or after inspection of the bulk.
> *Explanation*—But if the contract specifically states that the goods, though sold as of a certain denomination, are not warranted to be of that denomination, there is no implied warranty.
> Illustrations . . .

[17] See *e.g. Halsbury's Laws of England*, 4th ed. (1992), vol. 4(1) paras. 692 to 720.
[18] *Digest of the Law of Partnership*, 1st ed. (1877), p. xi.
[19] See C.P. Ilbert, "Indian Codification" (1889) 5 L.Q.R 347.

(b) A buys, by sample and after having inspected the bulk, 100 bales of "Fair Bengal" cotton. The cotton proves not to be such as is known in the market as "Fair Bengal". There is a breach of warranty.

As already mentioned, the Uniform Commercial Code also has explanatory material, although this is not incorporated into state statutes.

3. Codification work done by the Law Commission

The Law Commission has done a significant amount of work on codification already, but no Code has as yet, alas, reached the Statute book.

The Criminal Code

The criminal law of England is fragmented. Some offences are governed by the common law, and some are statutory. The law is not only fragmented; it is also in many respects unclear and there are inconsistencies between various offences. As long ago as 1879, a Royal Commission recommended the adoption of a draft criminal code containing over 550 clauses.[20] Penal codes were adopted for many of the colonies, but not in England itself.

It would seem almost axiomatic that criminal law should be accessible and certain, but this is not so in English law. With these points in mind, a distinguished Criminal Code team, whose members included Professor Sir John Smith and the late Professor Edmund Griew, produced a draft Criminal Code which was published by the Law Commission in 1985.[21] This Code was revised and expanded in co-operation with the Commission and republished in 1989.[22] It was a substantial document running to 220 clauses. It was not a complete code. There were for instance a number of offences with which it did not deal, some of which it was hoped would be included in a Criminal Code in the fullness of time. However it did contain extensive provisions on the general principles of liability and on a number of substantive offences, including offences against the person, sexual offences, theft, fraud and related offences. The Code largely restated the existing law with limited changes, such as provisions to implement the recommendations of the Butler Committee on Mentally Abnormal Offenders and provisions to resolve existing inconsistencies and

[20] *Report of the Royal Commission Appointed to Consider the Law Relating to Indictable Offences* (1879) (C. 2345). The Commissioners were Lord Blackburn, Barry J. Lush J. and Mr. Fitzjames Stephen.

[21] *Criminal Law: Codification of the Criminal Law. A Report to the Law Commission* (1985), (Law Com. No. 143).

[22] *Criminal Law: A Criminal Code for England and Wales*, Volumes 1 and 2, (Law Com. No. 177).

anomalies. The Code had the great advantage of bringing most of our criminal law into one enactment and of removing anomalies and introducing sensible changes. It was also put into modern language to make it as accessible and user-friendly as possible.

And what happened to this Code? It became apparent that there was no prospect of Parliament finding time to deal with such a major measure. Accordingly the Commission decided not to press for the whole code but rather to proceed to work on specific offences[23] and to do further work on the general principles.[24] This would mean that the Law Commission would be making recommendations in specific areas rather than a complete code. But the Law Commission's preference remains for a comprehensive code, even if it has to be put together by consolidating a number of enactments on specific areas, including those implementing Law Commission reports. It remains the view of the Commission that in the interests of fairness, certainty, accessibility, coherence and consistency there is an urgent need for a Criminal Code.[25] That can now only be achieved by codification. It cannot be done by the courts alone.[26]

The Contract Code

Codification of the law of contract was included in the first programme of law reform.[27] The project was a joint one with the Scottish Law Commission. Harvey McGregor Q.C. was engaged as a consultant and produced numerous drafts with commentary. His drafts reformed the law, rather than restated it. One can get a glimpse of the approach of the draft contract code by looking at some of its provisions. We have already seen how in the Sale of Goods Act 1893, Chalmers had distinguished between conditions and warranties. This is how the draft code would have dealt with that issue:

> 106. Gradations of promises and obligations
> *"Obligations of the contracting parties are of varying importance but the importance of an obligation is of no practical significance until breach or alleged breach and therefore falls to be ascertained only at that point in time."*
> This section is designed to harmonise English and Scottish law by removing from the former the tendency to categorise obligations

[23] The first such report to be published was *Legislating the Criminal Code: Offences against the Person and General Principles* (Law Com. No. 218).

[24] See the Law Commission *Twenty-Fifth Annual Report 1990* (Law Com. No. 195).

[25] There are many other jurisdictions which have criminal codes, including Queensland, Western Australia, Tasmania, New Zealand and Canada.

[26] See Glazebrook, "Still No Code! English Criminal Law 1894–1994", in *City University Centenary Lectures* (1996) p. 1. (Blackstone Press).

[27] Law Com. No. 1. As to codification of the law of contract, see generally Diamond, "Codification of the Law of Contract" (1960) 31 M.L.R. 861. A draft of a much shorter contract code than the McGregor Code was prepared by the Law Reform Commission of Victoria: see *An Australian Contract Code* (1992) Discussion Paper No. 27.

at the formation stage, as opposed to the stage of performance, and to distinguish between "conditions", "warranties" and "fundamental terms". Under the Code the vital issue is not whether the broken promise is an important promise but whether the breach of any obligation is an important breach. Accordingly, no categorising of obligations according to their apparent weight and importance is to be made before breach and in particular no technical significance is to be attached to the words "condition" and "warranty" or to the expression "fundamental term" in relation to obligations. The consequence of this radical approach is seen when we reach the issue of breach of contract.

Section 306 provided:

306. Substantial breach: relevance and definition:
(1) The effect of breach of contract depends upon whether it is substantial or not.
(2) A breach of contract is substantial either where there is total non-performance by a contracting party or where there is such other failure to perform as to make it unreasonable to require the other party to continue with his own performance.

(1) It is undoubtedly true, as the law stands today, that certain breaches of contract entitle the victim of the breach to invoke more drastic remedies than others. The distinction between the two categories turns upon the nature of the breach—in effect upon whether the breach is or is not substantial—and is an important and useful one, accepted by most legal systems, and one from which there is no reason to depart. But what does need departing from is the bewildering superstructure of conceptual analysis which has grown around this comparatively simple concept. Thus we find that the victim of a breach may invoke the more drastic remedies available for substantial breach—

(1) if what he has promised is "dependent" upon the other party's promise but not if their promises are "independent";

(2) if performance by the other party is a "condition precedent" of his own obligation to perform;

(3) if the contract is an "entire" one but not if it is "severable";

(4) if the breach goes to the "root" of the contract but not if it does not;

(5) if the breach is of a "condition" but not if it is of a "warranty".

These are at base really variations upon the same theme and the Code therefore proposes to effect a drastic amalgamation of all of them. Indeed the concepts of "dependent promises" and "entire contracts", unknown in many legal systems, are best totally discarded.

Moreover, there is a second line of terminology which has also led to confusion: the victim of the breach who invokes the more drastic remedies is sometimes said to reject, sometimes to repudiate, and sometimes to rescind. These variants reflect the difference between the sale of goods—where goods are rejected—and contracts in general, and between law and equity—repudiation being the legal term and rescission the term adopted by

equity. It seems best to eliminate all three terms from the Code in this connection, particularly as repudiation on account of breach is liable to be confused with wrongful repudiation which, if accepted, itself constitutes a breach (see section 303), and rescission on account of breach is liable to be confused with rescission of defective contracts (see section 501 *et seq.*).[28]

(2) Of course the difficult question remains: what constitutes a substantial breach? It is questionable whether a more exact definition can be afforded than the one attempted here. In any event it is thought that, for the moment, the important task is to ensure that the technical distinctions of the past and present are consigned to oblivion . . . [W]ith "conditions" and "warranties" little progress has been made until *Hongkong Fir Shipping Co. Ltd.* v. *Kawasaki Kisen Kaisha Ltd.* [1962] 2 Q.B. 26 (C.A) and *Harbutt's "Plasticine" Ltd.* v. *Wayne Tank and Pump Co. Ltd.* [1970] 1 Q.B. 447 (C.A).[29] Following their lead the Code takes the view that the test whether a breach is substantial depends on the nature and effect of the breach, not on the nature of the provision broken, and cannot be applied until the breach occurs. This is not to say that the terms of the contract will be wholly irrelevant; they may be material in so far as they indicate the relative importance which the parties place on its various provisions. Clearly a breach of a provision which they have indicated is vital is more likely to be a substantial breach. Nor are parties precluded from providing that in certain circumstances one or other shall be entitled to bring the contract to an end (*cf.* section 212): in that event the contract is ended in accordance with its terms and there is no breach. All that is being said it that the nature and effect of the breach is decisive and that the parties cannot prejudge the issue by introducing into their agreements expressions such as "condition precedent" or "time of the essence". This may indicate that they regard the provision as an important one; but a trivial breach of an important provision may not necessarily amount to a substantial breach whereas a grave breach of an important provision may, particularly if the party in breach refuses to perform it at all.[30]

If this approach is adopted it will clearly be desirable to revise existing statutes such as the Sale of Goods Act 1893[31] . . . so as to remove the "condition"—"warranty" dichotomy . . . see, for example, sections 11(1), 11(2) and 53(5), and the definitions of "warranty" and "breach of warranty" in section 62, of the Sale of Goods Act.[32]

[28] Lord Wilberforce deals with the potential confusion from using rescission in these two senses in *Johnson* v. *Agnew* [1980] A.C. 367 at 393.

[29] *Harbutt's 'Plasticine'* has been overruled by *Photo Production* v. *Securicor Transport* [1980] A.C. 827 but on the different issue of whether the particular breach prevented reliance on an exemption clause.

[30] The law however has not developed along these lines: the cases start with *Maredelanto Compania Naviera SA* v. *Bergbau-Handel G.m.b.H. "The Mihalis Angelos"* [1971] 1 Q.B. 164 (C.A).

[31] Now the Sale of Goods Act 1979.

[32] Provisions now in, respectively, s. 11(2)–(4) (for England), s. 11(5) (for Scotland), s. 53(5), s. 61(1) (for England) and s. 61(2) (for Scotland) of the Sale of Goods Act 1979.

The McGregor Code was only a draft. Current Law Commission methodology involves extensive public consultation.[33] There is room for considerable difference of opinion on such matters as the effect of conditions precedent, and clauses expressly making time of the essence of a contract. It may very well be that the draft Code would have been amended after consultation. It is important to consider the passages cited in the round. They are striking examples of what can be achieved by codification. Complexities and distinctions which were introduced into the common law as a necessary part of its development, but which may safely be dispensed with, are stripped away. The core principles are extracted and clearly stated made bright in the crucible of carefully-calibrated codification.

The intention was that the contract code, when completed, should apply to Scotland as well as England and Wales, but there were fundamental differences of opinion between the two Commissions. In 1971 the Scottish Law Commission withdrew from the project.[34] As a result, the Law Commission had to reassess its plan to produce a contract code. In 1972 it suspended work on the code and decided to adopt a topic-by-topic approach.[35] This would enable the Commission to issue consultation papers on more limited areas of contract law. The Law Commission has gone on to consider such specific areas as exemption clauses,[36] minors' contracts,[37] the sale and supply of goods,[38] sale of goods forming part of a bulk[39] and contracts for the benefit of third parties.[40] The Law Commission never reached the stage when it could publish the contract code although Parliamentary Counsel at the Commission spent a considerable time casting it into a form that might ultimately be suitable for a bill. Harvey McGregor's draft and commentaries have, however, very recently been published,[41] though not by the Law Commission.

[33] We have been very pleased to receive the response of COMBAR recently on the Consultation Paper *Shareholder Remedies* (Consultation Paper No. 142).

[34] See the *Scottish Law Commission, Seventh Annual Report* 1971/2 (Scot. Law Com. No. 28), para. 16.

[35] See *Law Commission Eighth Annual Report*, 1972–1973 (Law Com. No. 58) paras. 3–5.

[36] *Exemption Clauses in Contracts, First Report: Amendments to the Sale of Goods Act* 1893 (Joint Report) (Scot. Law Com. No. 12) (Law Com. No. 24) which was implemented by the Supply of Goods (Implied Terms) Act 1973; *Exemption Clauses: Second Report by the two Commissions* (Scot. Law Com. No. 39) (Law Com. No. 69), which led to the Unfair Contract Terms Act 1977.

[37] *Law of Contract: Minors' Contracts* (Law Com. No. 134), which led to the Minors' Contracts Act 1987.

[38] *Sale and Supply of Goods* (Joint Report) (Scot. Law Com. No. 104) (Law Com. No. 160), which led to the Sale and Supply of Goods Act 1994.

[39] *Sale of Goods forming Part of a Bulk* (Joint report) (Scots Law Com. No. 140) (Law Com. No. 211), which was implemented by the Sale of Goods (Amendment) Act 1995.

[40] *Privity of Contract: Contracts for the Benefit of Third Parties* (Law Com. No. 242).

[41] Harvey McGregor *"Contract code drawn up on behalf of the English Law Commission"* (Milan: Giuffre Editore and London: Sweet & Maxwell 1993).

C. Modern Developments

The stimulus for the great codifications of English commercial law that took place in the nineteenth century was the production of the Indian and other colonial codes. These were needed so that the vast continent of India and other then colonies could have a uniform and easily accessible statement of developed law. In this century there has also has been an interest in the codification of commercial law provoked by different stimuli. In particular technological advances in communications have led to an increase in the number of international transactions and that has contributed to the globalisation of the law and commercial practices of the dominant trading nations, often expressed in model laws or international conventions. Added to this has been the growth of the European Union. This is intended to be achieved in part by eliminating differences in the laws of the member states or harmonising them. The desire for a single European legal fabric has in turn reinforced the trend towards codification.

On the international front, there have for example been conventions on the carriage of goods by road,[42] rail,[43] sea[44] and air[45] which have been incorporated into the law of the United Kingdom. There has also been the 1980 United Nations Convention on Contracts for the International Sale of Goods (the Vienna Convention) produced by UNCITRAL (the United Nations Committee on Trade Law), which has not been ratified by the United Kingdom. On the European front, there has been, for example, the Rome Convention on the Law Applicable to Contractual Obligations,[46] and the ill-fated European Community Convention on Insolvency Proceedings[47] which has not yet been adopted. Moreover, the European Community has been one of the main sponsors of the Commission on European Contract Law, which was established to provide principles of contract law for the European Community. The members of the Commission in its work to date have included Professor Roy Goode of St. John's College Oxford and Professor Hugh Beale of Warwick University. One of the Commission's objectives is that at some point in the future the principles identified by the Commission will serve as a draft for a

[42] See the Convention on the Contract for the International Carriage of Goods by Road, to which effect is given on the United Kingdom by the Carriage of Goods by Road Act 1965.
[43] See now the Convention concerning International Carriage of Goods by Rail, to which effect is given in the United Kingdom by the International Transport Conventions Act 1983.
[44] See now the Carriage of Goods by Sea Act 1971.
[45] See now the Carriage by Air Act 1961.
[46] Made applicable to the United Kingdom by the Contracts (Applicable Law) Act 1990.
[47] The Convention can be found in Appendix 3 to the Seventh Report of the House of Commons Select Committee on the European Communities (H.L. Paper 59) (29 March 1996). The Convention was not ratified by the United Kingdom, and as a result failed to achieve the requisite number of signatories.

future European Code. In 1995 the Commission published the first part of the principles, covering performance, non-performance and remedies.[48] Work is proceeding now on the authority of agents and the formation, validity and content of contracts.

There has also been a resurgence of interest in codification north of the Tweed. On 7 February 1997, the Scottish Law Commission published its Fifth Programme of Law Reform.[49] Item No. 2 in that programme is headed Codification. It refers to unsuccessful projects in the 1960s and 1970s to codify the law of evidence and the law of obligations and states that one possible reason why these projects foundered is that they were too ambitious for the time. It refers to later incremental statutory reform as a form of codification. Paragraph 2.16 then states:

> 2.16 We continue to believe, however, that there may also be a place for codification in the wider traditional sense; that is, a comprehensive legislative re-statement of the general principles underlying some unified area of the common law. We therefore propose, as a long-term project, to carry out a feasibility study of codification, focusing on a restricted area of the law as a pilot exercise. We have in mind as possible candidates selected topics in the law of property or in the law of obligations, for example, servitudes, contract or unjustified enrichment.[50]

Then, yet more boldly, paragraph 2.29 states:

> In a recent discussion paper,[51] . . . , we invited comments on a proposal to publish a further discussion paper setting out a "non-binding" statement (or "restatement") of the existing law on unjustified enrichment and seeking views on whether comprehensive statutory codification or further piecemeal statutory reforms are desirable. In an appendix, we also published *Draft Rules on Unjustified Enrichment and Commentary* which had been prepared by Dr. E.M. Clive to test the feasibility of codification.[52] While opinion was divided, there was considerable support for such a discussion paper—hence our present proposal to undertake a further long-term project on the topic, possibly including an exercise in codification.[53]

On our own domestic front, too, there has recently been an extremely important example of the codification of commercial law—the Arbitration Act 1996. The Departmental Advisory Committee on

[48] *Principles of European Contract Law. Part 1: Performance, Non-Performance and Remedies.* Prepared by the Commission on European Contract Law, edited by Ole Lando and Hugh Beale and published by Martinus Nijhoff (1995).
[49] Scot. Law Com. No. 159.
[50] See paras 2.27–2.29.
[51] Discussion Paper No. 99—Judicial Abolition of the Error of Law Rule and its Aftermath (1996).
[52] See footnote 20. The rules represent Dr. Clive's personal views and not necessarily those of the Scottish Law Commission. The Appendix is published as a separate document.
[53] See para. 2.16.

Arbitration under the chairmanship of Lord Mustill had earlier recommended a statutory statement of the more important principles of common law and statute law applicable to arbitration, which is as I see it a form of codification of the law. The Arbitration Act 1996 achieves this codification in a number of ways: it restates existing statute law, for example section 1 of the Arbitration Act 1979 as construed in *Nema*[54] and *Antaios*[55] is restated in section 69 of the 1996 Act (appeal on a point of law). The Act also resolves uncertainty in the case law, for example on the question of the arbitrator's immunity.[56] The Act reverses case law, for example the rule established in *Hiscox* v. *Outhwaite*[57] that an award is to be treated as made where it is signed. The Act also alters arbitration law by introducing some of the provisions of the UNCITRAL Model Law, for example it enables a party to agree to apply "equity clauses" to the substance of their dispute.[58]

The Act is expressed in clear terms. The purpose of the Act was to update and modernise arbitration law and at the same time to make London an attractive venue for international arbitration. The Bill was drafted under the auspices of the Departmental Advisory Committee on Arbitration chaired by Lord Justice Saville. The Act is a striking example of how the need for codification can arise in commercial law, and how codification can be carried through to the statute book. It is early days yet, but it seems likely that the Act will, in relation to the particular matters which it covers,[59] constitute an invaluable code of law for arbitrators and lawyers.

D. The Reasons For and Against Codifying Commercial Law

No one doubts of course the genius of the common law. It is an invaluable method of developing law to meet proven need and it has the advantage that it is tested against real life situations. But there are limits on its ability to develop the law. For instance, the common law process is restricted by the doctrine of precedent and by the unwritten limits on judicial legislation. The limitations on the common law method is one of the reasons why a developed modern society like ours needs a Law Commission which can undertake extensive reviews of large areas of outdated law. However, these limitations, though real, do not materially detract from the value of the common law method.

[54] *Pioneer Shipping Ltd.* v. *BTP Tioxide Ltd.* [1982] A.C. 724.
[55] *Antaios Compania Naviera SA* v. *Salen Rederierna AB* [1985] A.C. 191.
[56] Section 29.
[57] [1992] 1 A.C. 562.
[58] Section 46.
[59] There are aspects of arbitration law with which the Act does not deal, for example, confidentiality.

The next question is what should be done when, as a result of the common law process, principles of law on any particular subject have started to emerge in a recognisable and reasonably solid form from the miasmic stew of the case law. It is important to emphasise that it is not being suggested that codification should be attempted where the law on a particular topic is still in a fluid form to a significant extent.

Blackstone considered that the intervention of statute law was rarely helpful, and frequently inept.[60] His words have a Canute-like ring at the end of the twentieth century. My predecessor, Lord Scarman, the Law Commission's first Chairman, expressed the view in 1983 that "[t]he Common Law is delightful but it is now of marginal importance only".[61] That is a rather more extreme view than I would seek to urge. There is a vastly increased amount of legislation these days, but much of it is hasty and ill-considered. Every lawyer can think of situations where Parliament's intervention has been ineffective or counter-productive. One example is section 153 of the Companies Act 1985 which contains a defence to section 151 of that Act, which prohibits a company from giving financial assistance for the purpose of an acquisition of its shares. The Court of Appeal suggested that the predecessor prohibition might apply where the giving of financial assistance was a subsidiary object of the transaction.[62] Parliament responded by creating a defence where the principal purpose was not to give assistance for the purpose of a share acquisition. A later House of Lords decision[63] deprived the defence of much of its utility in practice by drawing a new and difficult distinction between reason and purpose.[64] It was not enough that the principal reason for giving the assistance was not to facilitate a share acquisition. To obtain the benefit of the defence the company's objective in entering into the transaction had to be to achieve an object independent of the giving of financial assistance and not merely a consequence, or by-product, of it. The Government has recently engaged in consultation on a proposal to amend the legislation to achieve what was originally intended, hopefully with more success. Section 151 apart, however, it is remarkable how little suggestion one hears that English company law is restrictive of commercial enterprise despite its significant codified element.

The deep-seated fears of common lawyers about the effect of codification have been clearly expressed by my fellow Law

[60] See *Hansard (House of Lords)* Vol. 437, p. 634, (15/12/1982).
[61] *Ibid.*
[62] *Belmont Finance Corporation* v. *Williams Furniture Ltd. (No. 2)* [1980] 1 All E.R. 393 (C.A.)
[63] *Brady* v. *Brady* [1989] A.C. 755.
[64] *Belmont Finance Corporation* v. *Williams Furniture Ltd. (No. 2)* [1980] 1 All E.R. 393 (C.A.).

Commissioner, Professor Andrew Burrows, in a recent article in the Edinburgh Law Review.[65]

> I should explain that, perhaps oddly for a Law Commissioner, I am not a great fan of legislative reform of the non-criminal common law. I have too much faith in the judiciary, and too much love of the deductive technique of common law development to wish to see the law frozen by widespread legislative intervention. In my view legislative reform of the law of obligations ought normally to be confined to situations where the law is either already based on statute (*e.g.* the law of limitation periods or the Fatal Accidents Act 1976) or where the common law has plainly taken a wrong turn so that, short of waiting for an enlightened decision of the House of Lords, there is no other way of getting the law back on the right track (*e.g.* the law on restitution of payments under a mistake of law or on contracts for the benefit of third parties).

This passage expresses concern about statute law stifling the ability of judges to develop the law. But in the field of common law I am considering, the principles have already emerged. In that situation, the judge's room for manoeuvre is already limited. The judge must follow the principles that have already been established where the doctrine of precedent applies. The longer a principle has been established the less likely it is that the courts will depart from it, particularly in commercial law where certainty and consistency are recognised as important. In addition, there are limits on the extent to which the courts are able to create new principles of law.[66] Moreover, the courts will still have an important role in interpreting the code.

The limited loss of judicial flexibility must be compared with the positive advantages that can come from codification.

First, codification makes the law more accessible. A code of law, written in modern language, can be read by the non-lawyer, but case law is largely inaccessible to him except through textbooks. Pollock wrote in one of his letters to Oliver Wendell Holmes, "I . . . . admit that the consideration of case law as a pure science tends to make one look on codes as a kind of brutal interference with the natural process of legal reason . . . But Stephen met the supposed scientific objection with (as I think) the right answer: that laws exist not for the scientific satisfaction of the legal mind but for the convenience of lay people who sue or be sued."[67] Law should be expressed, where possible, in the manner in which it will be most easily understood by the user.

[65] A. Burrows, "Legislative Reform of Remedies for Breach of Contract: The English Perspective" [1997] E.L.R. 155, 156.

[66] See for example *Rhone* v. *Stephens* [1994] 2 A.C. 310, 321 (restrictive covenants) and *Kaye* v. *Robertson* [1991] F.S.R. 62 (no tort of privacy).

[67] *The Pollock-Holmes Letters*, Volume 1, Cambridge (1942), pp. 7–8.

Codified law is more intelligible to the layman than case law and so codification can enhance accessibility to law.

Second, it is in most situations quicker and easier to find the answer to a legal problem in a code. The majority of legal problems do not raise new and interesting points of law but can be solved by applying existing well-established principle. Dispensing with encrustations of case law will make it easier to find the answer in many cases. This should reduce the costs of litigation and the costs of taking legal advice and reduce the cost to the taxpayer of the justice system. The approach to the interpretation of codifying statutes adopted by the courts does not favour recourse to the pre-existing law[68] and this assists in the process of dispensing with encrustations of authority.

Third, the process of codification enables the law to be updated and modernised as part of the process. Take for instance the doctrine of consideration in contract. In its opening pages, the commentary on the McGregor Code criticised the doctrine of consideration in these terms:

> The doctrine of consideration never succeeded in drawing a clear distinction between agreements which were bargains and agreements which were gratuitous. From the moment that it was accepted that consideration need not be adequate, all chance of carving out a satisfactory division along these lines disappeared. That no attention should be paid to the adequacy of the consideration was of course a perfectly legitimate and necessary rule designed to protect the person who had made a good bargain and to hold to his promises the person who had made a bad one. But it also gave a simple means for the evasion of the consideration doctrine: a nominal consideration could be used to make a gratuitous promise binding. It therefore cannot truthfully be said that the doctrine acts in any real sense as a sieve through which only bargains can pass.

It is hardly necessary to state what the McGregor Code did about the doctrine of consideration: it proposed the removal of it. But suppose it had set the Rule in *Pinnel*'s case.[69] It would have to have said words to this effect:

> *Where a person is owed a sum of money by another person that person cannot accept a lesser sum in satisfaction of that debt but may accept a smaller sum together with a peppercorn or other chattel instead.*

Such a rule has only to be formulated to be shown to be ridiculous, and one potential advantage of codification would be to enable obvious blots on the law like this to be removed. As the commentary to section

[68] See *Bank of England* v. *Vagliano Bros.* [1891] A.C. 107.
[69] (1602) 5 Co. Rep. 117a; 77 E.R. 237.

306 of the McGregor Code indicates, technical distinctions can in the course of codification be "consigned to oblivion".

Fourth, revision and development of the law through codification avoids the need to wait and see if a point on which the law is uncertain ever comes up for decision. The courts may not be given the chance to resolve an ambiguity either because the point does not arise in litigation or because counsel fail to argue it. For these reasons, the development of the law through the common law system can be haphazard. I have already quoted a passage from Chalmers in which he said that the important point decided in *Glyn Mills* v. *The East and West India Docks Company* about the liability of a warehouseman in conversion had originally arisen on a nisi prius ruling in 1753 but then not again until 129 years later.

Fifth, the process of codification can be used to resolve the uncertainty that arises where there is a conflict on the authorities or where there is no authority on a particular point.

Sixth, and not least, there is in many areas an excessive amount of case law. A hundred years ago, as we have seen, Chalmers compared the common law of sale with a tree in full foliage the number of whose leaves "frequently hide from view the form and development of the trunk and branches which support them". Skeleton arguments are often overburdened with case law. The introduction of the CD-ROM, a powerful research tool for the common lawyer, is sometimes used to inflate skeleton arguments by inserting long extracts obtained from CD-ROM. Valuable court time is spent trying to synthesise the effect of numerous cases. Codification, on the other hand, enables the law to have a clean break with the past. The new clearly-formulated and (where appropriate) updated provision becomes a springboard for further development of the law.[70] Chalmers put this point graphically. He said that developing the law by the common law method was like putting new wine into old bottles. The process of codifying established law, on the other hand, was like putting old wine into new bottles. Now, he said, "I leave it to your commercial experience to decide which plan is best."[71]

E. The Process of Codification

Do the right procedures and technical skills exist to codify the law? It is not a question of whether the right software is available or whether

[70] It can help strengthen the common law system, which Professor Birks advocates in "Equity in the Modern Law: An exercise in Taxonomy" [1996] *Western Australian Law Review* 1, though Professor Birks argues that this can be achieved by a more analytical approach to the common law rather than codification.

[71] (1891) 12 *Journal of the Institute of Bankers* 11, 15.

the product is suitable for user-friendly electronic publishing. Those questions today apply to all forms of expression of the law. The real question is whether the production of a code requires a different process from that by which statute law is generally produced. In my view, codification does have certain special needs if it is to be successful. Codification of commercial law has, as I see it, the following special requirements, at the least, if it is to be successfully achieved:

1. First, codification of the area of commercial law in question must be identified by the commercial community as meeting a real commercial need.
2. Second, the basic work must be done using experts, and with the benefit of extensive research, and experts must include those with practical experience.
3. Third, the proposals must be developed in consultation with the Government Department having responsibility for the area in question.
4. Fourth, Parliamentary Counsel, when instructed to put the proposals into legislative form, should work in co-operation with experts in the field. The language chosen must be clear and at the same time permit creative interpretation by the courts.
5. Fifth, the proposals and the draft legislation should be subject to extensive public consultation before the bill is presented to Parliament.
6. Sixth, consideration must be given to the appropriate drafting conventions. For example it may be appropriate to use illustrations in a code although it would not be appropriate to use them in other forms of legislation. It may also be appropriate to have an authoritative commentary contained in or referred to in the legislation.[72]
7. Seventh, where possible, the Committee of the House of Parliament responsible for scrutinising the draft legislation must be able to receive oral and written evidence from experts, as under the House of Lords' special public bill procedure.[73]
8. Eighth, there should probably also be some means of monitoring the operation of the code in practice and there must be a method of implementing any amendments which are found to be necessary. Amendment may be necessary to deal with a new situation that has arisen or to alter the effect of the code or to reflect case law that has built up around the code.

[72] This problem was addressed in *The Interpretation of Statutes* (Law Com. No. 21) (Scot. Law Com. No. 11), paragraphs 68 to 73.

[73] This is known as the Jellicoe procedure. It is described in Sir Henry Brooke, "Special Public Bill Committees" [1995] *Public Law* 351, the *Law Commission Thirtieth Annual Report* 1995 (Law Com. No. 239) and the Report of the House of Lords Procedure Committee, *Hansard*, 21 January 1997, Cols. 554–556.

F. Conclusions

Although I am the Chairman of the Law Commission, I stress that the views that I have expressed are my own, and not those of the Commission. In any event, the Commission is fully employed at the present time on completion of the Sixth Programme of Law Reform. That programme however lasts only until the end of 1998, so we will have to consider in the near future what law reform projects should be included in the Seventh Programme. I have not mentioned any specific area of commercial law as needing codification, but I have no doubt that there are candidates. The Law Commission will have to consider what are the priorities for its Seventh Programme of Law Reform. Should the Law Commission, for instance, follow the lead of the Scottish Law Commission in its recently published Fifth Programme of Law Reform and carry out a feasibility study into codification of the law of contract, or unjust enrichment? In the coming months, we would welcome views as to what the priorities for future law reform should be.

Now of course it may well be that the Law Commission has neither the human resources, nor the financial resources, required to complete a project on the codification of commercial law. Moreover, even if the Commission does such a project, there is no guarantee that Parliament would enact it. Those problems should not be underestimated. It is very disappointing, for instance, that the Government has not shown more support for the idea of a criminal code. The case for a criminal code is virtually unanswerable: it would make criminal law more coherent, fairer and simpler and cheaper to administer. The case for the codification of commercial law is a different one, and is best judged in my view by reference to the question whether it has become desirable in any field of commercial law to formulate in a single statute principles established by the common law method, and to have some law reform "at the margins". Codification can be seen (for example) in the Sale of Goods Act 1893 and the Arbitration Act 1996. It has worked well in the past, and there is reason to believe that, with the help of commercial lawyers and the commercial community, and the support of the Government and Parliament, it could be successfully achieved in the future and bring benefits to all. A start could be made on an English Commercial Code to which later generations could add.