THE CODIFICATION OF COMMERCIAL LAW

ROY GOODE*

I feel privileged to have been invited to deliver, here at Monash University, the 1988 Memorial Lecture in honour of one of Victoria's most distinguished sons and one of Australia's greatest judges. Sir Wilfred Fullagar, a brilliant classicist and an outstanding lawyer, won not only the respect but the affection of lawyers the world over. His last judgment was rendered posthumously by Sir Owen Dixon, Chief Justice of the High Court, who adopted it as his own. Perhaps the most striking tribute to this remarkable yet modest man came in a letter to Sir Owen from one of the greatest living judges of the United States, who wrote:

> "*The Times* brings me the shocking news of Fullagar's death. So close was my professional communion with Fullagar, solely through the printed pages, that I feel his death as a personal loss, though I never – to my great regret – laid eyes on him."

So it was with the greatest pleasure that I accepted the invitation to deliver this year's Wilfred Fullagar Memorial Lecture, a pleasure enhanced by the presence here tonight of Sir Wilfred's son, Mr Justice Fullagar, and Mrs Fullagar.

In recent years some of the world's most brilliant mathematicians, who have spent a lifetime seeking to reduce their science to a state of order, have evolved a theory of Chaos – that is, of certain types of event so random in their nature that it can be mathematically established that they are incapable of prediction.[1] This is a theory with which, as an absent-minded academic, I feel both comfortable and familiar. And it is about Chaos and its attempted reduction to order and predictability that I shall be talking to you tonight.

I OF CASE LAW, CODES AND STATUTES GENERALLY

The differences between the structure of civil law and that of the common law are well known, if prone to exaggeration. The principles of civil law are enshrined in Codes, the characteristics of which are that they embody general

* Crowther Professor of Credit and Commercial Law and Director of the Centre for Commercial Law Studies, Queen Mary College, University of London, and Commonwealth Banking Corporation Visiting Professor of Banking Law, Centre for Commercial Law and Applied Legal Research, Monash University.

This is the revised and expanded text of the 1988 Wilfred Fullagar Memorial Lecture delivered at Monash University on 9th August 1988.

[1] In a separate, and to me miraculous, exercise they have also succeeded in proving that it is impossible to prove or disprove certain propositions – but not that one!

concepts rather than detailed rules, are comprehensive and are exclusive of prior law within their field. The civilian judge proceeds deductively from principle to decision and it is the relevant Code that provides his authority, so that prior decisions, even of the highest courts, are persuasive rather than binding upon him.

By contrast, the common law, which in theory also possesses no gaps, consists of an ever-increasing body of judicial decisions, applied in accordance with the principle of *stare decisis*, from which broader principles are fashioned inductively by judges and legal writers without legislative sanction and without embodiment in any legislative act. It is thus a characteristic of common law jurisdictions that without textbooks and periodical literature modern non-statute law would be discoverable only by searching laboriously through at least a century of law reports embodying literally hundreds of thousands of judgments, most of which are devoted to facts and arguments rather than to the legal rule. As Professor Aubrey Diamond put it in his 1967 inaugural lecture at Queen Mary College on "Codification of the Law of Contract"[2]

> "In principle, it is much more straightforward to take your law from a statute, where you will, if you are lucky, find statements of law laid down in simple language, uncluttered by the detailed facts of particular cases. Handling a case is much more complicated. The rule may or may not be stated by the judge. Usually it is, but you cannot rely on his words as a certain statement of the law, for the principle – the *ratio decidendi* – must be no wider than necesary for the decision of the instant case. The technique to be used for abstracting the *ratio decidendi* involves not only professional expertise but also an inspired appreciation of trends in judicial attitudes. Small wonder that over the centuries voices have been raised in protest against the tons of verbal pulp that must be squeezed to produce an ounce of pure judicial law."[3]

That great American jurisprude and commercial lawyer Karl Llewellyn went further. In his view, the factors motivating a decision, as opposed to its formally expressed *ratio*, were rarely to be found from the language of the judgments.[4]

Though common lawyers manage remarkably well in such a system, there is periodic pressure, first initiated by Jeremy Bentham, to codify the law or specific fields of law so as to make it more accessible. In England, such codifications have been primarily in the field of commercial law, with legislative codes on partnership, bills of exchange and sale of goods, the last two produced by that superb draftsman Sir Mackenzie Chalmers. These Codes and other common law codifications outside the United States differ from the civilian Codes in three respects: they are designed to reflect the existing law rather than to change the law[5]; they are more detailed, moving from general principle to specific rule; and they are not exclusive, displacing prior

[2] Reproduced in (1968) 31 M.L.R. 361.

[3] *Loc. cit.*, at pp.361-362.

[4] *The Common Law Tradition: Deciding Appeals* (Little, Brown & Co., Bostch. 1960) p. 56.

[5] This approach being perceived as the only way of getting the codification through Parliament – a pragmatic solution but hardly a compliment to our legislators!

law only to the extent that they purport to do so, expressly or by implication.[6]

A further feature of every commercial codification in common law jurisdictions, with but a single exception, is that it is confined to a particular type of commercial transaction, with little or no linkage between codifications of different subjects. So in England there is almost no link between the *Bills of Exchange Act* and the *Sale of Goods Act* or between the latter and the *Bills of Sale Acts*, and the same is true of virtually every other common law jurisdiction. The sole exception is the United States, which some thirty six years ago promulgated the most ambitious codification of commercial law ever attempted in any jurisdiction, the *Uniform Commercial Code*. This Code, now operative in every jurisdiction except Louisiana is not a mere restatement but a triumphant regeneration of American commercial law and an enduring monument to the towering genius of its architect and Chief Reporter, Karl Llewellyn. Inevitably much of what I have to say is shaped by the *Uniform Commercial Code*, and it is with codification of this kind that I am concerned in the present lecture.

Should not other common law jurisdictions now emulate the example of the United States? And if they decide to do so, what problems and policy issues are they likely to encounter on the way?

II WHY CODIFY?

I shall treat this question briefly, because in answering it I am traversing well-trodden ground.[7] Codification fulfils a number of objectives. It simplifies the law and makes it more accessible and more readily ascertainable. All the leading principles and rules are gathered together in one place.

[6] On this last point the distinction is, perhaps, rather finer than is usually thought, for such part of the common law as the statutory codes do not displace lies primarily in principles of general contract law and equity, which in civil law jurisdictions would also not be excluded by a commercial code but would fall within the province of a separate civil code or code of obligations.

[7] In relation to the codification of commercial law, the *locus classicus* is the study *Problems of Codification of Commercial Law* prepared by Patterson and Schlesinger for the State of New York Law Revision Commission in connection with its *Study of the Uniform Commercial Code*, a six-volume examination which profoundly influenced the 1957 Official Text. As regards codification generally, see S.J. Stoljar (ed.), *Problems of Codification* (Australian National University, 1977). The literature on codification is substantial; many of the more important references are to be found in the articles cited in the ensuing footnotes.

One of the most herculean, and very nearly successful, attempts at codification was performed by the first Dean of the Melbourne Law School, Dr William Edward Hearn, who in 1885 presented a Draft Code covering all the substantive general statute law and common law of the State of Victoria as it directly affected the public. But for his untimely death it might well have been enacted. See Ruth Campbell, *A History of the Melbourne Law School 1857-1973*, (Melbourne, 1977) pp.63-70. In the United States, one of the most successful proponents of codification was David Dudley Field, a New York lawyer who drafted and piloted to enactment a number of codes, his most effective opponent being another leading practitioner James Carter, who skillfully marshalled the arguments against codification. See John Honnold, *The Life of the Law* (Free Press of Glencoe, New York, 1964), Chapter 3, "The Codification Movement".

Work on codification helps to identify weaknesses in the existing law, enables the law to be modernised by adapting doctrine to practice and reduces the ambiguities and inconsistencies arising from a patchwork of statutes drafted by different hands at different times, each in isolation from the others. A commercial code provides an integrated corpus of commercial law of which the various branches are linked by common concepts, a coherent philosophy and a consistent terminology, characteristics almost impossible to achieve in separate statutory codifications. Finally, in federal jurisdictions a code covering the whole country, whether in the form of uniform state laws or a federal code, harmonises the commercial laws of the various jurisdictions and thus greatly facilitates interstate trade; indeed, without such a harmonisation the burden of conducting business affairs nation-wide can become intolerable.[8]

Codification may thus be expected not only to produce substantial improvements in the law itself but also to effect enormous savings of time, effort and money previously spent in ascertaining the state of the law, advising on it and complying with it.

It is therefore surprising, particularly in the light of American experience, that such little interest has hitherto been shown in the codification of commercial law.[9] Why should this be so? I suspect that the predominant reason is the resistance of those concerned – primarily lawyers and businessmen – to any kind of change. What lawyer, after spending a decade mastering the intricacies of chattel security law, wants to throw away his hard won expertise and begin again? Better the devil you know than the devil you don't know! But do practising lawyers know their law? Karl Llewellyn offered a striking illustration in support of his very nearly unprintable response to this question:

> "In order to simplify things as best we could, we provided the same kind of law for the transfer of bonds and the transfer of stock. One of the things we provided was that when this stuff came to a registered owner, a simple signature of the person concerned would serve as an endorsement. Whereupon the bar pointed out to us that this was something the bar couldn't take, that nobody would take. Yet at the time the bar was fighting us on this point, the very provision that we had incorporated into the Code, the very provision in dispute – was already the statutory law in 48 states out of 48."[10]

It is, of course, inconceivable that this could happen in Australia or England – or is it?

Other reasons for the lack of interest in codification are inertia, preoccupation with what are considered to be more pressing matters (there are *always* more pressing matters than law reform), an unwillingness to commit adequate human and financial resources to the project and, perhaps, a view that the

[8] But uniformity in a federal jurisdiction is always likely to be incomplete because of constitutional and political difficulties in meshing federal law with uniform state law.

[9] The First Programme of the English Law Commission (Law Cm. No. 1, 1965) contained proposals for the codification of contract law, a project later begun but ultimately abandoned.

[10] Karl Llewellyn, "Why a Commercial Code?" (1953) 22 *Tenn. L. Rev.* 779, 781.

modern practitioner's textbook adequately serves the function of a code. But law reform cannot be indefinitely deferred, and the resources required to carry it out, though far from insignificant, are but a fraction of the time and expense that would be saved with a modern, rational and accessible law. The textbook, though it helps to conceal the deficiencies of uncodified law, is no substitute for a code, for at least two reasons. First, it merely states the law, it neither prescribes it nor changes it. Secondly, the interspersal of rule and analysis in a textbook makes it an inconvenient tool of reference from which to extract a formulation of the rules as a whole.

In England, our principal commercial law statutes have remained in force almost unchanged for 100 years. And this in a country which prides itself on having as its capital city the world's leading financial centre! Apart from complex nineteenth century legislation governing written chattel mortgages by individuals,[11] the rules governing security interests in personal property are to be found almost exclusively in case law, and the same is true of documents of title, the performance of payment obligations, the assignment of receivables and a range of other commercial transactions. In Australia, there has been a spate of legislation, both Federal and State, but there are substantial differences between the laws of one State and those of another, and even within a State the various statutes are neither integrated nor easy to understand. In both countries, it is only through the creativity and good sense of the judiciary and the ingenuity of the businessman and his legal advisers that we have managed to get by so well. But this is no ground for complacency. Trade goes on because it *has* to go on. If we abolished security for payment overnight, the chances are that once our bankers had recovered from the shock life would rapidly return to something approaching normal, even though in terms of banking law it would be the normality of Beirut rather than of Melbourne or Sydney.

But what, you may ask, is so special about a code? What is the distinction between a code and an ordinary statute? Both are, of course, promulgated by the legislature but typically they differ greatly in their preparation, scrutiny, style and content. A code is designed to cover all the leading rules in a particular field and to express these with a greater degree of generality and a tighter integration than an ordinary statute. Whereas ordinary legislation is prepared by legislative draftsmen who are highly skilled at a technical level but are unlikely to have any prior conversance with the field, a code is drafted by experts whose mastery of the subject over many years study gives them a complete picture of the field as a whole and of major weaknesses in the structure and content of the law. With ordinary legislation, parliamentary conventions – in the United Kingdom at any rate – mean that whilst the general principles of a projected new statute may be set out in a government consultative paper on which views are canvassed, the text of the Bill is not disseminated prior to its introduction to Parliament, by which time its structure and language are crystallised without the opportunity for these to be significantly influenced by informed comment. Moreover, the pressure on

[11] *Bills of Sale Acts* 1878-1891.

the legislative timetable may force a government department to accept any opportunity given by the Cabinet to introduce the Bill, even if this allows inadequate time for consultation, in order to avoid losing the department's place in the queue. Amendments to the Bill take place while it is going through Parliament, with all the time pressures of the legislative process, and it is scarcely surprising that at the end of the day the result is all too often an enactment of extraordinary prolixity, obscurity and convolution. By contrast, the text of a draft code is submitted to the stringent scrutiny of many individuals and organisations drawn from a wide range of expertise and undergoes a long and continual process of testing and retesting, shaping and reshaping, drafting and redrafting, so that when finally approved the end product is a highly tempered instrument reflecting a unique combination of theoretical and practical expertise, an accommodation of competing interests and a clarity of style which, if not originally possessed by the draftsman, will be forced upon him by the desire of consultees to understand what each provision of the code means.[12]

Finally, because of the time taken, the range of expertise available and the freedom of the code draftsmen from the drafting traditions and constraints of ordinary legislation, codes can provide finding facilities and interpretative aids which are simply not to be found in normal statutes. For example, the *Uniform Commercial Code* contains at the beginning of each Article not only definitions of general relevance to that Article but an index showing where other definitions used are to be found; and each section is followed by an Official Comment which identifies the prior statutory source, if any, the changes made, the purposes of the changes and new matter, a paragraph by paragraph explanation of each sub-section, cross-references to other relevant sections and definitional cross-references showing where key words used in the section are defined. The official text of an ordinary statute will usually do no more than set out a table of sections, amendments and repeals, with no history, no detailed statement of purposes and no explanations, while internal cross-references are designed primarily to show the relationship between one statutory provision and another rather than to furnish a finding aid to the user. The result is that whereas the reader of the *Uniform Commercial Code* can get a general view of the purpose and effect of a Code provision at a glance, the reader of an ordinary statute often finds it difficult even to begin to grasp the purpose of a particular provision or the problem or mischief at which it is aimed, and has to spend an inordinate amount of time working his way through the entire statute in an endeavour to find out not simply what a particular provision means but *why* it is there in the first place.

So I regard the case for a commercial code as unanswerable. There are, however, a number of difficult issues confronting the architect of a commercial code to which I should now like to turn.

[12] See Soia Mentschikoff, "The Uniform Commercial Code: An Experiment in Democracy", (1950) 36 A.B.A.J. 419.

III WHAT SHOULD GO INTO A COMMERCIAL CODE?

On one view, this is simply another way of posing the question: what is commercial law? Some would even ask: does commercial law exist? Having taught the subject for nearly two decades I desperately hope it does! But what goes into it is another matter. For my purposes I shall treat commercial law as that body of law which governs commercial transactions, that is, agreements and arrangements between professionals for the provision and acquisition of goods, services and facilities in the way of trade. Commercial law as thus defined possesses four characteristics. It is based on transactions, not on institutions; it is concerned primarily with dealings between merchants, in the broad sense of professionals as opposed to consumers; it is centred on contract and on the usages of the market; and it is concerned with a large mass of transactions in which each participant is a regular player, so that the transactions are typical and in large measure repetitive and lend themselves to a substantial measure of standardised treatment. On this basis we would expect commercial law in the sense in which I have used it to exclude consumer law as a *lex specialis* involving non-professionals; to exclude for the most part obligations of a kind normally derived from non-contractual sources of law such as tort, equity, bankruptcy[13] and trusts; and to exclude the law governing institutional structures such as partnerships, corporations, banks, insurance companies, and the like. This is not to say that these are unsuitable subjects for codification, merely that they do not belong in a *commercial* code, which is concerned with contracts and with the dynamics of goods and services moving in the stream of trade rather than with the general law of obligations and the statics of institutional structure and organisation. I shall revert later to the relationship between a commercial code and the general law.

(i) Types of transaction to be covered

Central to commercial law is that most common of contracts, the contract of sale, with its associated contracts of carriage, warehousing, insurance and finance. But the modern view of commercial law embodies a wider perspective, embracing equipment leasing, receivables financing, payment systems, personal property security, rights to investment securities, and a range of other commercial transactions not derived from a contract of sale. It is also necessary for a modern commercial code to accommodate new technology, in particular the teletransmission of trade and financial data, and new systems for clearing dealings in money, commodities and securities.

In deciding what items from a shopping list should be included in a commercial code, two points must be borne in mind. First, commercial law is not an abstraction, it is a tool for its users, whose needs will vary from place to place according to national practices, tradition and the level of sophisti-

[13] Though bankruptcy laws typically give effect to pre-bankruptcy real rights, subject to special rules designed to avoid unfairness to the general body of creditors.

cation of its business and financial institutions. No country should slavishly copy the sophisticated model represented by the American *Uniform Commercial Code*, which is designed for a country of fifty jurisdictions and some two hundred million inhabitants addicted to lawyers and litigation. Secondly, where the business community has codified trade usage this may make legislation both unnecessary and unhelpful. For example, there would seem little need to codify the law relating to documentary credits in view of the adoption around the world of the Uniform Customs and Practice.[14]

(ii) The application of a commercial code to non-commercial transactions

While the emphasis of the *Uniform Commercial Code* is on commercial transactions, the draftsmen, preserving the common law tradition, made no attempt to exclude non-commercial contracts from its ambit. The formal separation of civil and commercial transactions to be found in some civil law systems has never been adopted by the common law and even those civil law jurisdictions that have it are said to have experienced difficulties. What the *Uniform Commercial Code* does do is to identify certain rules which apply solely to dealings between merchants[15] and others which are restricted to transactions involving consumers.[16] This is a sensible approach, for many of the Code rules are equally appropriate for commercial and non-commercial transactions, and little purpose is served by leaving the latter to remain governed by the vagaries of the common law.

(iii) Transactions omitted from the *Uniform Commercial Code*

Of some interest is the omission from the *Uniform Commercial Code* of major types of commercial transaction which one might expect to find covered in a code of this kind. Examples are guarantees, commercial agency, banking transactions (other than those relating to cheques) and insurance contracts. One explanation of the omission of these is that the function of the *Uniform Commercial Code* was seen not so much as codifying commercial law in general but rather as bringing together in revised and integrated form those branches of commercial law which had already been codified in uniform laws prepared under the aegis of the National Conference of Commissions on Uniform State Laws. It may also be noted that, whether by accident or by design, the types of contract selected for inclusion in the code and its statutory predecessors are those which had been allowed to develop with the minimum interference of equity, whereas guarantees, agency, duties of bankers to customers and third parties and contracts of insurance are heavily underpinned by concepts of equitable obligation, reflecting the fact that the parties

[14] Uniform Customs and Practice for Documentary Credits (1983 revision), promulgated by the International Chamber of Commerce.

[15] E.g. ss.2-201 (relaxation of Statute of Frauds requirements), 2-207(2) (additional terms in acceptance or confirmation), 2-209(2) (modification or rescission of agreement).

[16] Achieved indirectly in Art. 9 through the definition of "consumer goods" (goods used or bought for use primarily for personal, family or household purposes – s.9-109(1)) and special rules governing security interests in consumer goods, e.g. ss.9-307(2) (protection of buyer), 9-505 (debtor's rights on repossession by secured party).

are involved not merely in a contract but in a continuing relationship and, moreover, a relationship attracting fiduciary duties. The Code, on the other hand, is concerned primarily with short-term, discrete contracts; it is not directed to on-going relationships, nor has it anything to say about the special problems of long-term contracts, problems which are relational, not purely contractual.

There is in my view no necessary reason why the rights and duties of the various parties arising from contracts of guarantee, commercial agency and the like should not be dealt with in a commercial code; indeed, their inclusion would do much to dispel the widespread ignorance of these matters prevailing among lawyers as well as laymen. But the impact of non-contractual sources of obligation, such as equity and trusts, brings me to a second, and rather more fundamental question which the Code draftsmen themselves had to address, namely the relationship between the Code and the pre-existing general law.

IV HOW FAR SHOULD A COMMERCIAL CODE BREAK WITH THE PAST?

Since commercial law is a particular subset of the law of obligations, it is obviously impossible for a commercial code, even in the much broader form employed in civil law jurisdictions, to operate as a completely self-contained corpus of law independent of the general law. Hence the *Uniform Commercial Code*, following the example of Sir Mackenzie Chalmers,[17] is careful to preserve the application of "the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause."[18]

But as one of the main functions of a Code is to reform the law and to bring it into line with modern ideas of good sense and reasonableness, it is necessary to cast off the dead wood of mechanical conceptualisation, of sterile distinctions and refinements serving no useful purpose and of approaches to interpretation and decision-making which inhibit the healthy organic growth of the law and confine it to the slavery of a pedantic adherence to precedent.

The problem is where to strike the balance between preserving the old and replacing it with the new. No system of jurisprudence can afford, in introducing new law, to discard the heritage which gave it birth. In the graphic words of Portalis, the chief draftsman of the French *Civil Code*:

> "No nation has ever indulged in the perilous undertaking of suddenly cutting itself off from all that has civilized it, and of remaking its entire existence."[19]

[17] *Sale of Goods Act* 1893, s.61(2), re-enacted in *Sale of Goods Act* 1979, s.62(2).

[18] Section 1-103.

[19] Address to the French legislative assembly when presenting the draft Civil Code in 1804. The text reproduces the translation given by M. Shael Herman in (1972) 18 *Loyola L. Rev.* 23, 26.

But what the Code draftsman has to try to ensure is that in interpreting the Code on issues arising within its field of application the court looks to the language, policies and purposes of the Code itself, not to pre-Code case law. Hence there is no place for a canon of construction which rests on the assumption that the Code is intended to enact pre-Code law except as otherwise stated. This is well understood in the common law world. Nearly a century ago the House of Lords ruled that in actions relating to bills of exchange it was impermissible to look at case law preceding the *Bills of Exchange Act* to interpret the statutory provisions, except in cases of doubt;[20] and the English Court of Appeal has taken a similar line in construing the statutory definition of merchantable quality.[21] However, Karl Llewellyn, through his familiarity with the civil law tradition, saw that it was not sufficient to treat the express provisions of the Code as exclusive of prior law; it was necessary to go further and have the Code fill its own gaps.[22] In other words, the *Uniform Commercial Code* should be a source of law in that judges should be encouraged to rely on its express provisions not only directly but by way of analogy. Hence the injunction in s.1-102(1) that the Code is to be liberally construed and applied to promote its underlying purposes and policies[23] — a provision which, it has been said,

> "consecrates the general process of development or unfolding the code, so that it decides by analogy what it does not control by genuine interpretation ('construction')."[24]

It is thus desirable to lay down, explicitly or implicitly, a hierarchy of interpretational norms. First, the language of the Code must be applied. If the Code is silent on the point in issue, recourse must be had to its underlying purposes and policies, so that a specific Code rule can be applied by analogy to the case under consideration. Only if these purposes and policies offer no guide to the correct solution does it become legitimate to draw on pre-Code case law. Such an approach is now increasingly reflected in conventions on international trade law. Thus the 1980 Vienna Convention on Contracts for the International Sale of Goods[25] and the 1988 Unidroit Conventions on International Factoring[26] and International Financial Leasing[27] lay down the following hierarchical rule of interpretation:

> "Questions concerning matters governed by this Convention which are not

[20] *Bank of England* v. *Vagliano Bros.* [1891] A.C. 107, 144.

[21] *Rogers* v. *Parish* [1987] 2 All E.R. 232, *per* Mustill L.J. at p.235.

[22] See Shael Herman, "Llewellyn the Civilian: Speculations on the Contribution of Continental Experience to the Uniform Commercial Code," (1982) 56 *Tulane L. Rev.* 1125, 1148.

[23] These are described in s.1-102(2) as being:
"(a) to simplify, clarify and modernize the law governing commercial transactions;
(b) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties;
(c) to make uniform the law among the various jurisdications."

[24] Mitchell Franklin, "On the Legal Method of the Uniform Commercial Code," (1951) 16 *Law and Contem. Problems* 330, 333.

[25] Art. 7(2).

[26] Art. 4(2).

[27] Art. 6(2).

expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of rules of private international law."

V THE ROLE OF CONCEPTS IN A COMMERCIAL CODE

I now turn to a problem which I believe to be of first importance in the codification of commercial law, namely the respective roles of concepts and problem-solving rules. Many American scholars, influenced by the school of legal realism, have become scornful of conceptual thinking. When last year I put to a commercial law professor at one of America's top law schools the conceptual problem involved in a bank taking a pledge of its own paper or a security interest in its own customer's credit balance – the latter process being rightly described in a recent English case as conceptually impossible[28] – I was told that in America they had long ago jettisoned conceptual rubbish of this kind; they were concerned to produce results, and if a creditor wanted security over an obligation he himself owed, he should have it! I retired suitably abashed. No longer, it seems, can conceptual impossibility be allowed to stand in the way of a man enforcing in his own right a claim against himself in his own right. If it is commercially convenient that an obligation owed by D to C should be elevated into a species of property *as between D and C*,[29] so that C's claim against D ceases to be a mere debt and is miraculously transmuted into a property claim, then the law should bend itself to accommodate such commercial convenience. So if we are to believe the American law professor – he had better remain nameless – if for no better reason than that I have completely forgotten his name – concepts no longer matter, whether in legislation or in judicial reasoning. The legal alchemist has now discovered how to convert metal into gold, how to transmute a debt into a proprietary claim!

My thesis is that this is not only nonsense but dangerous nonsense, a perversion of Karl Llewellyn's thinking which he himself would not for a moment have countenanced. The notion that pragmatism in the drafting of a Code dispenses with the need for underlying concepts is one to which I am remorselessly opposed, for rules without principles offer no guidance to the parties or the judge in cases outside the rules, nor are they able to cater for changes in business practice which it is a function of a commercial code to accommodate. A code which *merely* provides practical solutions to typical problems – a charge unfairly levelled against the *Uniform Commercial Code* by some of its critics – leads to the very kind of mechanical reasoning to which our pragmatist colleagues so rightly object. The question is not whether there is a place for concepts in a commercial code but how they should be used. It was the misuse of conceptual thinking against which Karl Llewellyn fought so hard and so successfully.

[28] *Re Charge Card Services Ltd.* [1986] 3 All E.R. 289.

[29] It is, of course, property in the relationship between C and his assignee or incumbrancer.

A concept is misused when it is made to act as the master rather than the servant of the law maker. A striking illustration is found in the concept of property in the sale of goods. It is taken as axiomatic in our *Sale of Goods Act*, and in yours, that risk passes with the property, so that if the goods are destroyed after the buyer has acquired the property in them but before they have been delivered it is his loss. *Res perit domino.* And this is applied as an axiomatic consequence of ownership regardless whether control is with buyer or seller. Since risk is linked to frustration, ownership also indirectly controls frustration, and in addition the right to payment. The Code abandons this "lump concept" approach in favour of specific rules for each step of performance, geared to produce what the commercial world would consider a fair result.

A concept is also misused when it is made to produce indirectly and covertly a legal result which can be achieved directly and openly. An example is section 175 of the UK *Consumer Credict Act* 1974, which provides that:

> "Where under this Act a person is deemed to receive a notice or payment as agent of the creditor or owner under a regulated agreement, he shall be deemed to be under a contractual duty to the creditor or owner to transmit the notice, or remit the payment, to him forthwith."

This cryptic provision appears to be an oblique reference to a rule of agency law that notice or payment to the agent is notice or payment to the principal where the agent is under a duty to pass it on to the principal. But why not say this directly? Why force the reader to resort to textbooks on agency law?

A further misuse of a concept occurs when it features in a statutory formulation which no longer reflects what the courts are doing, typically because the rule has become the exception and the exception the rule. The UK *Sale of Goods Act* and its counterparts in other parts of the Commonwealth provide a good illustration. Section 14(1) tells us:

> "Except as provided by this section and section 15 below [I pause to reflect that the current generation of English parliamentary draftsmen no longer trusts us to know that section 15 comes after section 14], and subject to any other enactment, there is no implied condition or warranty about the quality or fitness for any particular purpose of goods supplied under a contract of sale."

The intelligent layman would reasonably understand from this that English law continues to reflect the old common law maxim *caveat emptor.* Of course, nothing could be further from the truth. The exceptions have eaten up the rule, and in almost every case the seller has an implied obligation to furnish goods that are of merchantable quality and fit for their purpose.

Finally, a concept which is benign, even beneficial, may turn out to be unnecessary and thus discardable. Take as an example the reasoning from property which led to the creation of the floating charge. The floating charge is one of equity's most brilliant creations which, for more than a century, has been of enormous benefit to financiers throughout the British Commonwealth. It is a device, and on the whole a successful device, designed to accommodate two competing requirements, that of the creditor for security

and that of the debtor to be able to turn over his circulating assets freely in the ordinary course of business. The underlying concept here is that a creditor should be allowed to obtain a security interest in a shifting fund of assets but not to assert that interest against specific assets in the hands of the company or a third party in a situation in which he has given the company continued power to manage and deal in its assets as if it were the unincumbered owner.[30]

The floating charge has proved a highly useful device, albeit not free from difficulty both in concept and in policy. But one hundred years later we can now see, with the advent of Article 9 of the *Uniform Commercial Code*, that the floating charge was a wholly unnecessary instrument born out of a mechanical misapplication of a concept of property law. A person cannot, it was said, claim to have a security interest in his debtor's asset when at the same time he leaves the debtor free to deal with that asset as his own. This would be to perpetrate a fraud on innocent third parties. But why? All the court had to do was to uphold the security interest but lay down a priority rule to protect the purchaser on the basis of the debtor's implied or ostensible authority to dispose of the asset, and the problem is solved. When a principal delivers goods to his commercial agent with instructions to resell in the agent's own name, leaving the principal undisclosed, we do not say that this entrustment is incompatible with the principal's continued ownership; we merely say that in a priority contest between P and T, a buyer, T wins. The reasoning that led to the floating charge is thus the same kind of fallacious *a priori* reasoning from the concept of property as produced the *res perit domino* rule in contracts of sale of goods. American jurisprudence prior to the Code had established a similar rule, the rule in *Benedict* v. *Ratner*,[31] which held that unless the creditor policed the collateral and restricted the debtor's dominion over it by requiring him to account for proceeds the security would be void as a fraud against third parties; and in America the problem was exacerbated by the fact that American law did not possess the concept of a floating charge. But section 9-205 of the Code has swept away the rule in *Benedict* v. *Ratner*. Third parties acquiring an interest in collateral or proceeds over which the debtor retains dominion are adequately protected by principles of agency law as to the effect of authorised dealings by the agent and by the Code's priority rules.

So we must strive to ensure that our concepts are necessary, that they are put to proper use, that they do not become dictators stultifying legal growth, and that their formulation in legislation reflects what the courts are actually doing. But *are* there concepts of commercial law? Or is commercial law no more than an aggregation of the different rules governing particular forms of commercial contract, with no linking themes of any kind? If this is the case, and if it is what we want, then a commercial code is not for us. I believe that commercial law does exist and that it embodies a philosophy, not always

[30] See R.M. Goode, *Legal Problems of Credit and Security* (2nd edn. London, Sweet & Maxwell, 1982), Chapter 3.

[31] 268 U.S. 353, 45 S.Ct. 566, 69 L.Ed. 991 (1925).

very coherent but nonetheless present, and fundamental concepts, not always very clearly articulated but nonetheless helping to implement that philosophy and to serve the needs of the business community. By the philosophy of commercial law I mean those underlying assumptions of fairness and utility which inform commercial law and run like a thread through its different branches. By concepts of commercial law I mean those principles of law, whether the common law or legislation, which are a particular response to the needs of the commercial community and thus apply with special vigour to commercial transactions, even though they are capable of application to non-commercial dealings.

VI THE PHILOSOPHY AND CONCEPTS OF COMMERCIAL LAW

The primary function of commercial law, in the sense in which I use that term, is to accommodate the legitimate practices and expectations of the business community in relation to their commercial dealings. This sounds much easier than it is. Business law reflects commercial life, and life is not simple. The law and the judges have to balance a range of competing values, the relative weight of which varies not only from one legal system to another but from one age to another within a single jurisdiction. Those who criticise the *Uniform Commercial Code* for appearing to face all ways at once are correct in the accusation but unfair in the criticism, for the Code does no more than reflect the fact that desirable objectives often pull in opposite directions and require conflicting treatments. The problem for the law maker is much the same as that confronting two consultants treating the same patient, one for diabetes which requires insulin and another for hypoglycaemia which reacts adversely to insulin.

1. The philosophy of commercial law

There would seem to me to be eight principles which together make up the philosophy of commercial law. They are:

a) Party autonomy
b) Predictability
c) Flexibility
d) Good faith
e) The encouragement of self-help
f) The facilitation of security interests
g) The protection of vested rights
h) The protection of innocent third parties.

I shall say a few words about each.

(a) *Party autonomy*

The general philosophy of the common law is that businessmen should be free to make their own law. A contract is a contract. A party is entitled to the benefit of his bargain and to the strict performance of conditions of

the contract, whether they relate to the time of performance or the description or quality of what is to be tendered as performance. Only where contract terms are so restrictive, oppressive or otherwise incompatible with society's goals as to offend against the public interest should the courts intervene to curb the sanctity of contract. One reason for upholding contracts is a philosophical one, that of freedom under the law, including the freedom to fetter one's own freedom. Another is that the enforcement of contractual undertakings helps to promote security and predictability[32], a matter of some importance to the business world. Hence the *Uniform Commercial Code* makes it clear, in section 1-102(2)(b) and (3), that freedom of contract is a principle of the Code.[33] But freedom of contract cannot be absolute, and the Code itself contains numerous specific restrictions, as well as a general bar on contracting out of the obligations of good faith, diligence, reasonableness and care.[34] The circumstances which are considered to justify legislative or judicial interference in the bargain of the parties to a commercial transaction vary widely according to the *mores* of the particular society, the familiarity of the judges with the problems of business life and the relative importance of a particular State as an international centre of commerce or finance. As Sir Anthony Mason, the Chief Justice of the High Court of Australia, pointed out in last year's Wilfred Fullagar Memorial Lecture when remarking on the High Court's movement away from legal formalism in recent years:[35]

> "The general principles of English contract law are set out in the large commercial cases decided by the House of Lords. Whether these general principles are entirely suited to Australian contract law which, as we are not an international commercial or maritime centre, is much more consumer oriented, is open to question. No doubt this difference explains why we have been more inclined to give equitable relief."

The view in London, as I see it, may be broadly expressed in these terms: "business life is rough and tough; if you can't take care of yourself or don't know what you're doing, you shouldn't get into it in the first place!" In other words, in a contest between contract and equity in a commercial dispute, contract wins almost every time; and I suspect that one reason why foreigners so frequently select English law, rather than Continental law, to govern their contracts and English courts to adjudicate their disputes is that they know where they stand on the law and can rely on judges experienced in commercial transactions to give effect to their understanding. Related to the contract/equity conflict is the tension between conflicting goals expressed in the opposing maxims of international law, *pacta sunt servanda* and *rebus sic stantibus*. It takes a great deal to persuade an English court that change of circumstances modifies or discharges even a long-term contract.

[32] See below.
[33] Section 1-101, Official Comment, para. 2.
[34] Section 1-102(3).
[35] (1987) 13 *Mon. L.R.* 149 at p. 153.

(b) *Predictability*

The business world attaches high importance to the predictability[36] of judicial decisions on legal issues. The weight given by a legal system to the need for predictability compared with equity and flexibility will, of course, vary from jurisdiction to jurisdiction and will depend in no small measure on the volume of business and of dispute resolution a particular State has or wishes to attract. A reasonable degree of predictability is needed in the commercial world because so much planning and so many transactions, standardised or high in value, are undertaken on the basis that the courts will continue to follow the rules laid down in preceding cases. But every businessman and his lawyer knows that there are tides in judicial philosophy, that every action ultimately produces a reaction, that a form of liability denied by one generation of judges will be vigorously developed by the next. This had implications for the business community but need not, indeed should not, influence the drafting of a commercial code, for the swing of judicial thinking tends to be more fundamental, laying its roots in the general law of obligations rather than in commercial law as such.

(c) *Flexibility*

Needless to say, the man of affairs wishes to have his cake and eat it; to be given predictability on the one hand and flexibility to accommodate new practices and developments on the other. Karl Llewellyn was acutely aware of the need to accommodate these opposing goals in the *Uniform Commercial Code*; and he sought, with a fair measure of success, to achieve that accommodation by building into the Code a range of flexible words and concepts to encourage the organic growth of Code law whilst trusting the courts to observe the general policies and philosophy of the Code as a whole. Thus we find references to "the continued expansion of commercial practices through custom, usage and agreement of the parties"[37] and to "obligations of good faith, diligence, reasonableness and care"[38] as well as the preservation of general principles of law and equity.[39] In England the courts are on the whole very responsive to the needs of the business community and reluctant to deny recognition to the legal efficacy of commercial instruments and practices in widespread use. As in the Army, there are two opposing but equally effective techniques to avoid bringing disaster on your head from on high. One is to keep out of the way, proceed in stealth and hope that no one will know you are there, still less what you are doing. The other is the exact opposite, namely to promote your activities with a fanfare of trumpets, persuade the rest of the corps to join you and then defy the authorities to upset such a large number of people and such a huge volume

[36] Also termed "certainty", a term I dislike as nothing in life is certain except uncertainty, and this is particularly true of litigation.
[37] U.C.C. s.1-102(2)(b).
[38] U.C.C. s.1-102(3).
[39] U.C.C. s.1-103.

of business by declaring it illegal! In the international markets the latter technique seems to work rather well, always so long as one does not come up against a rural judge whose main interests lie in equity and the avoidance of unconscionable bargains!

(d) *Good faith*

The attitude of the common law to the question of good faith in contracts is curiously ambivalent and is fashioned by English legal history. In civil law jurisdictions the duty of good faith is inherent not only in contractual but in pre-contractual relationships. Particularly vigorous is the general requirement of good faith embodied in section 242 of the German *Civil Code*, which has given rise to a mass of doctrine and jurisprudence and is widely applied. Section 1-203 of the *Uniform Commercial Code* provides that:

> "Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement."

By contrast, good faith is not a general requirement of English law for the enforcement of *legal* rights or the exercise of *legal* remedies. A party can exercise a right to terminate a contract for breach even though it causes him no loss and his sole motive is to escape the consequences of a bad bargain; and a party able to perform a contract without need of the other party's co-operation can in general proceed with performance against the other party's wishes, and even when that party no longer has an interest in the performance, and then claim payment of the contract sum.[40] Where good faith does surface in commercial transactions is in a priority dispute or where some equitable right or remedy is involved. It is surely high time that English law adopted a general principle of good faith and cast off its historical shackles.

(e) *The encouragement of self-help*

Compared to continental legal systems, the common law is remarkably indulgent towards self-help. Acceleration clauses can be invoked, contracts can be terminated or rescinded, goods repossessed, liens and rights of contractual set-off exercised, receivers and managers appointed and securities realised, all without any need for judicial approval, the only limiting factor (in the absence of special legislation) being that one must not commit a breach of the peace. There seems no pressure to modify this approach in relation to commercial transactions, nor, with the enormous pressure of work on courts all over the world, does a change seem particularly necessary or desirable. Civilised self-help has the advantages of speed, efficiency, flexibility and cheapness upon which the smooth functioning of business life so much depends.

[40] *White & Carter (Councils) Ltd.* v. *McGregor* [1962] A.C. 413. In extreme cases the court may be willing to find that the innocent party ought to have accepted a repudiation and mitigated his loss, as in *Attica Sea Carriers Corporation* v. *Ferrostaal Poseidon Bulk Reederei GmbH (The Puerto Buitrago)* [1976] 1 Lloyd's Rep. 250.

(f) *The facilitation of security aspects*

As an aspect of the common law's attitude towards self-help, but also an independent characteristic, we may note that – again by comparison with continental systems – it is extremely favourable to the creation of security interests. Security can be taken over almost any kind of asset, tangible or intangible, usually with little or no formality; it can cover present and future property without the need for specific description; and it can secure present and future indebtedness. The creditor has the option of security by possession, ownership (mortgage) or mere charge. He has the facility of appointing a receiver over the entirety of a debtor company's assets, with full powers to take over and manage the company's business, without the creditor being in any way responsible for his receiver's acts or omissions so long as the creditor does not intervene in the conduct of the receivership. Moreover, one of the particular features of insolvency law is that it recognizes and protects interests created and perfected under non-insolvency rules, so that in general a security interest will be accepted as having priority over the claims of the general body of unsecured creditors in the debtor's bankruptcy or winding up.

One of the criticisms levelled against Article 9 was that it was *too* favourable to secured creditors and gave inadequate consideration to the claims of the general body of unsecured creditors. But the balance of the interests of secured and unsecured creditors is primarily a function of insolvency law, not of commercial law, for so long as the debtor is solvent the existence of security is of no moment to the unsecured creditor, who can take a judgment and enforce it by execution.

(g) *The protection of vested rights*

(h) *The protection of innocent third parties*

These two well established principles of commercial law do, of course, run in opposite directions. The first reflects a general feeling that an owner should not lose his property without fault; the second, that innocent buyers (including incumberancers) should be protected against proprietary rights of which they have no notice, in order to ensure the free flow of goods in the stream of trade. Like most legal systems, English law faces both ways. Its starting position is the *nemo dat* principle but its *Sale of Goods Act* moves towards the civilian principle *possession vaut titre*. Third parties may also acquire overriding rights where the holder of a prior security interest has failed to perfect it by registration. No ordering of priorities can do justice in every case, but the position in English law has probably become more incoherent than under most legal systems. Certainly we would expect a commercial code to provide a reasonably rational balance between competing interests and one which, as under the *Uniform Commercial Code*, moves away from distinctions between legal and equitable interests. A rational law should seek to embody two principles: first, that no one should suffer loss or subordination of his rights without fault; secondly, that no one should be affected by a prior interest of which he has neither knowledge nor the means of

acquiring knowledge. These two competing principles can be harmonised in some measure by registration requirements, which on the one hand provide the owner of an interest with a means of protecting it and on the other allow third parties to ignore a registrable interest which is unregistered. But we cannot prescribe registration of all real rights, and the problem then is to establish the general, or residuary, rule. For residuary cases I believe the interests of commerce require the civilian principle of *possession vaut titre* rather than the common law principle *nemo dat quod non habet*. A party who puts an article of commerce, tangible or intangible, into the stream of trade must take his chances. This is simply an application in the field of property rights of the policy that dictates that equity should be slow to interfere in commercial transactions.

2. The concepts of commercial law

(a) *The concept of a market*

As one would expect in a body of law concerned with dealings among merchants, the concept of a market is central to commercial law. By this is meant not necessarily a physical market in which traders strike bargains *in praesenti* on the floor of the market but a mechanism for bringing together substantial numbers of participants who deal in commodities, securities or money and who make a market by acting both as buyers and as sellers at prices determined by supply and demand. With the advent of telecommunications physical markets are steadily giving way to markets established by computer networks in which the participants are linked to each other and to a central system operated by the relevant exchange for striking bargains and displaying market prices. Commercial law is influenced by the concept of a market in a variety of ways. Parties dealing in a market are deemed to contract with reference to its established and reasonable customs and usages, which can have the effect of giving a special meaning to ordinary words, of importing rights and obligations not normally implied, of permitting tolerances in performance which would not be accepted in the general law of contract and of expanding or restricting remedies for a shortfall in performance, as where a small deficiency in quantity or quality is compensatable by an allowance against the price, to the exclusion of the remedy of termination of the contract. The market price is taken as the reference point in computing damages against a seller who fails to deliver or a buyer who fails to accept the subject-matter of the contract, and a party who reduces his loss by a subsequent sale at a higher price or a subsequent purchase at a lower price is not normally required to bring this saving into account,[41] contrary to the normal contract rules as to mitigation of damages.

The problem for commercial law is to define the manner in which a usage of the market is to be established, a matter that can be of great difficulty but on which much may turn. In the recent *Bankers Trust* litigation,[42] the

[41] See R.M. Goode, *Commercial Law*, (Harmondsworth, Penguin, 1982) pp. 325-327, 360-361.
[42] *Libyan Arab Foreign Bank* v. *Bankers Trust Co.* [1988] 1 Lloyd's Rep. 259.

plaintiffs sought to recover in England over US$300 million which were held in, or should have been transferred to, a dollar-denominated account in London, and which the defendants, an American bank, declined to pay on the ground that it would infringe an American Presidential Order freezing dollar deposits payable to Libyan entities. The defence failed, and the claim succeeded, largely because the defendants were unable to establish an alleged usage of the Euro-dollar market to the effect that dollar deposits held outside the United States could be withdrawn or transferred only through the New York clearing, involving processess in the United States which an English court would recognize as within the jurisdiction of the US regulatory authorities.[43]

(b) *The importance of customs or usages of a trade or locality*

Even without a market a court will recognize established customs or usages, such as those of a particular trade or locality, where the circumstances indicate that the parties were contracting by reference to the custom or usage. The enforceability of abstract payment undertakings is an important example to which I shall allude in more detail shortly.

(c) *The importance of a course of dealing*

Since traders are often concerned in a continuous and consistent course of dealing with each other, it is taken for granted that the usual terms apply, whether or not spelled out in the contract. Terms implied by a course of dealing are thus a fruitful source of implication into commercial contracts.

(d) *The concept of negotiability*

A key feature of commerical law is its recognition of the need for the ready marketability of commercial assets, in particular goods, money obligations and securities. Hence the development of documents of title and negotiable instruments and securities, the delivery of which (with any necessary indorsement) passes constructive possession (goods) or legal title (instruments and securities) to the underlying rights. Hence also the rule, confined to negotiable instruments, that a holder in due course acquires a title free from equities and defects in the title of his transferor. The concept of negotiability derives from the old law merchant and is a particular characteristic of commercial law. Its importance in facilitating dealings with goods in transit and with negotiable securities may be expected to decline as systems evolve for the paperless transfers of goods and securities, an evolution which the draftsman of a commercial code will have to be ready to accommodate. The same is true of negotiable instruments payable at sight or on demand, since these are payment documents rather than credit instruments and in relative terms are gradually giving way to electronic funds transfers. By contrast, term instruments may be expected to retain their vigour, since there seems no

[43] See R.M. Goode, "Concepts of Payment in the Expropriation or Freezing of Bank Deposits" [1987] J.I.B.L. 80; Ross Cranston, "The Libyan Arab Foreign Bank Case" [1987] J.I.B.L. 499.

reasonable prospect of devising a commercially viable system for replicating electronically the negotiability of a paper document.[44]

(e) *The enforceability of abstract payment undertakings*

General contract law requires a promise not made under seal to be supported by consideration if it is to be enforceable. But all kinds of legal magic can be worked by mercantile usage. It is generally accepted – though to this day there are no English decisions directly on the point – that certain types of payment undertaking become binding when communicated to the beneficiary, despite the absence of any consideration or any act of reliance on the part of the beneficiary. I refer in particular to the obligations of a bank issuing a documentary credit, a standby credit and a performance bond or guarantee. The contracts engendered by such undertakings are of a peculiar kind, since they are neither unilateral nor bilateral in the ordinary sense, they involve no acceptance of an offer and no consideration. Exactly what types of payment undertaking will be so enforced remains a matter of conjecture. Is this privileged status confined to undertakings by banks? And if so, which types of undertaking? The answer apparently lies in mercantile custom and usage, a force so powerful that it can sweep aside without argument what is generally considered to be a basic principle of contract law.

I hope I have demonstrated to your satisfaction that there *is* a philosophy of commercial law and there *are* concepts of commercial law which mark out commercial transactions for special treatment. Other concepts may suggest themselves as desirable, such as the irrevocability of firm offers in dealings between merchants.[45] But my purpose is not to produce an exhaustive catalogue, simply to refute the notion still current in some circles that commercial law is merely an aggregation of rules governing particular classes of transaction with no common threads calling for an integrated codification.

VII THE CODIFICATION PROCESS

Responsibility for production of draft articles of a code must necessarily be assumed primarily by a small number of specialist reporters, with overall direction by a Chief Reporter and oversight by one or more specialist review committees. But the success of a codification project depends not simply on the skill of the draftsmen but on its acceptance by the businessmen and legal practitioners for whom it is designed. It is thus of prime importance to engage them in the debate, not merely on the principles and policies but on the text of the proposed code while this is in its formative stages. What is required is not the imposition of a code from on high but pressure for its adoption

[44] See E.P. Ellinger, "Electronic Funds Transfer as a Deferred Settlement System", in R.M. Goode (ed.), *Electronic Banking: The Legal Implications* (Institute of Bankers and Centre for Commercial Law Studies, London, 1985), pp. 41-44.

[45] See U.C.C., s.2-205.

from below.[46] The expertise of the commercial community and of its legal advisers must therefore be harnessed to the project so as to ensure that the code provisions actually work to produce a sensible result which accords with legitimate business practice and expectations.

VIII THE LANGUAGE AND LIMITS OF CODIFICATION

Crucial to the success of a Code is the use of language which is clear, concise and consistent, which "shows its reason on its face"[47] and which combines the particularity that guides the reader with the generality that accommodates new developments and allows reasonable freedom to the judge to do justice in a widely differing range of situations. The curse of legal drafting in common law jurisdictions is that the draftsman uses far too many words. He does not trust the judge to use his commonsense, feels it necessary to stop up every loophole, real or imaginary, and concentrates on producing the desired legal effect to the exclusion of communicating what he is about to his readers. In so doing he fails to realise that for each problem he solves two take its place. The minute particularisation positively encourages a judge to rule that with so many words what is not specified is not covered. The more words, the more scope for dispute about meaning, the more chance of inconsistency and obscurity, the less likelihood of accommodation to change and the greater the risk of uncertainty and error.

The civilians do these things much better. They make every word work its passage and rely heavily on *travaux preparatoires* in cases of doubt. One has only to contrast modern national legislation with the language of an international Convention to see how far apart are the worlds of the two sets of draftsmen. For example, during the course of the debate on Article 13 of the Unidroit Convention on International Financial Leasing the Drafting Committee was asked to amend the Article so as to ensure that a lessor who relied on a contractual provision calling up future rentals on default was required to give a discount for the acceleration of payment. One can imagine how this might have been done in Westminster – hundreds of words designed to cover every conceivable factor. In the Drafting Committee we covered the point with just three (yes, *three*) simple words; we merely inserted "value of the" before "future rentals". Not as detailed as the *Uniform Commercial Code*,[48] not quite as precise, but clear in concept, leaving the court free to take into account all relevant circumstances in arriving at the appropriate acceleration discount. The amendment elicited a single question and answer and was then approved without debate. Even more remarkable is the achieve-

[46] The process by which the drafting of the *Uniform Commercial Code* evolved was succinctly described by Karl Llewellyn in his Statement to the New York Law Revision Commission, reproduced in its *Hearings on the Uniform Commercial Code*, vol. 1 1954, at pp.26-27.

[47] This principle of the patent reason, which lay at the heart of Karl Llewellyn's drafting policies, is reproduced in William Twining's classic work *Karl Llewellyn and the Realist Movement*, (London, Nicolson, 1973) pp.321-322.

[48] Which in s.2A-103(1)(u) provides a definition of "present value" running to 77 words.

ment of the Victorian Law Reform Commission and Ministry of Consumer Affairs in reducing the two and a half pages of the *Credit Act* 1984 to a mere 17 lines!

What are the limits of codification? First, it is unreasonable to expect a code that is simple and fully comprehensible to the layman. Commercial law is necessarily complex because commercial life is complex. We cannot expect a code to be simple; what we can expect is that its policies, purposes and concepts are clear, and this is what really matters. Secondly, we cannot demand of a code that it speaks with total unity of purpose or language. We have seen that there are many competing norms to be accommodated and a code has to strike the best balance it can. Thirdly, we cannot demand of a code that it foresees every eventuality, likely or unlikely. After all, we cannot play God. The best we can do is to cover the typical case with reasonable precision and to build in a measure of flexibility to allow the court to adjust for the atypical situation and to accommodate changes in practice not envisaged when the code was drafted. Fourthly, we cannot hope to eliminate either inconsistency or ambiguity. The meaning of words is inherently elusive. In the graphic words of Holmes J.:

> "A word is not a crystal, transparent and unchanged; it is the skin of living thought and may vary greatly in colour and content according to the circumstances and the time in which it is used."[49]

So we must accept the limitations of language[50] and of our understanding of it. It usually takes at least a decade for the real problems of a statute or code to surface and for latent ambiguities and inconsistencies to become patent. Let us not expect the impossible. Finally, we must not strive too ambitiously for perfection. The best is the enemy of the good; there is always the prospect of a revision, and indeed, a need to ensure ongoing editorial supervision of a code, so that every ten years or so it can be revised and updated.

I hope you will feel that I have made out the case for the codification of commercial law as an integrated body of principles and rules governing commercial transactions. In a sense my task was unnecessary; the case was made out long ago by Karl Llewellyn and his colleagues, whose labours ultimately found expression in one of the finest pieces of law making in the history of the common law. It is for us to summon the resources and the will to do likewise.

[49] *Towne* v. *Eisner*, 245 U.S. 418, 425 (1918). See also Frank Maher, "Words, Words, Words," (1984) 14 M.U.L.R. 468.

[50] And we can thus sympathise with the perplexity of George Moore, the philosopher in Tom Stoppard's *Jumpers*. "Does God exist?" he asked, and then realised that this formulation is logically illegitimate, for it implies that there *is* a God who may not exist! Hence his reformulation: "Is God?"