



CONTRACTUAL LIABILITY OF SUPPLIERS OF DEFECTIVE SOFTWARE: A COMPARISON OF LAW OF THE UNITED KINGDOM AND UNITED STATES

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Abstract

The objectives of this article are twofold: (1) to compare U.K. and U.S. contract law (i.e., general statutory controls, express and implied warranties, limitation of remedies, and impact of using standard forms) affecting suppliers' liability for defective software; and (2) to draw conclusions and to make recommendations for change in the law.

Contractual Liability of Suppliers of Defective Software: A Comparison of Law of The United Kingdom and United States

The statutory controls are different: U.K. law has the more potent reasonableness test, and U.S. law has the less stringent unconscionability doctrine. U.K. law tends to offer more protection for the relatively weak bargaining party; U.S. law does not consider disparity in bargaining power as a relevant factor

Because of the stringent reasonableness test, it is more difficult to disclaim either an express warranty or an implied warranty under U.K. law. Express warranties are also difficult to disclaim in the U.S., but it is relatively easier to do so because the reasonableness test is not present. Implied warranties, however, are relatively easy to disclaim in the U.S., so long as the language and format requirements are met.

Under U.K. law, limitation of remedies clauses are also subjected to the reasonableness test. Limitation to amount of contract price may be reasonable. In the U.S., however, just about any amount of liquidated damages will be upheld by the courts.

The U.K. provides for more controls over standard form contracts. For example, shrink-wrap contracts' disclaimer and limitation of remedies clauses are relatively more scrutinized. The U.S. is more tolerant of standard form contracts if there was an opportunity to attain an understanding of the terms, and the conspicuousness requirements are met. U.S. shrink-wrap contracts are relatively more supplier-friendly, e.g., UCITA sometimes allows them to be modified by the supplier in the middle of the contract period. The U.S. would do well to emulate the consumer protections of U.K. law. The U.K. would do well to consider adoption of a computer-specific UCITA-style statute.

Overcharging Considerations: Reasonableness and Unconscionability

United Kingdom: The Reasonableness Test

In the U.K., an unreasonable contract will not be enforced. **1** The Unfair Contract Terms Act of 1977 ("1977 Act") requires the court to consider the following factors in making a determination of reasonableness: whether the goods were purchased in a special order by the customer; the relative amount of bargaining power between the parties; the degree of the customer's understanding of the terms contained in the standard form contract, and whether he/she should have understood them; whether the customer received an inducement to agree to the terms of the contract; and, if the contract limits liability if a specific condition is not complied with, whether it was reasonable at the time of the agreement to expect that compliance with that condition would be practicable. **2**

United States: The Unconscionability Doctrine

In the U.S., an unconscionable contract will not be enforced. **3** The test of unconscionability is whether the contract is so one-sided as to be unconscionable under the circumstances existing at the time the contract is entered into. **4** The doctrine seeks to prevent one party from using oppression and unfair surprise against the other. **5**

The doctrine does not seek to alter the parties' relative allocation of risks created by one party's superior bargaining power; **6** this is one of the significant differences between the U.K. and U.S. positions. Accordingly, weak negotiating parties in the U.K. are better off than their U.S. counterparts.

The Uniform Computer Information Transactions Act ("UCITA") is a model statute written in an attempt to achieve greater consistency in the law of the fifty states of the U.S. **7** U.K. law does not have a comparable "computer-specific" statute. **8A** UCITA is applicable to "standard software licenses, contracts for the custom development of computer programs, licenses to access online databases, website user agreements, and agreements for most Internet-based information." **8B** UCITA section 803(d) states that a disclaimer of consequential damages for personal injury in a consumer contract for software is *prima facie* unconscionable; this provision does not apply, however, to a non-consumer contract. **8C**

It is more common for a U.K. court to find a situation unreasonable than it is for a U.S. court to find a situation unconscionable. It takes a more extreme situation to trigger the unconscionability doctrine than it does to trigger the unreasonableness test.

Express Warranties

In both countries, if the seller promises to provide a specific result—either in terms of performance of the software, or its suitability to the customer—the existence of an express warranty will be recognized. **9** The promise may have been made within the agreement itself or outside of it. **10** An important consideration is whether it was reasonable for the buyer of the software to rely on the statements of the supplier. **11** If it is determined that a contract contains an express warranty, the next consideration is whether the warranty has been qualified or disclaimed.

United Kingdom

1. Categories of Promises: Result vs. Process. The case law often distinguishes result-oriented promises and process-oriented promises. **12** The former pertain to warranties concerning the achievement of positive outcomes for the buyer of the software. **13** The latter pertain to warranties related to how the work is to be done, e.g., the degree of expertise of the personnel assigned to carry out the installation of the software. **14**

a. Result-Oriented Promises. The *St. Albans* **15** case is a classic one with explicit, result-oriented warranties. Plaintiff City entered into an agreement with defendant software supplier. The software was required to be capable of maintaining a reliable database of the names of the City's taxpayers, i.e., it had to be reasonably fit for its intended purpose. However, the defective software underestimated the number of taxpayers in the community, and the City charged each taxpayer less it should have, resulting in a loss of tax revenues to the City coffers. Since the computer program was not fit for its intended purpose, the software provider was held liable for the amount of the lost revenue. **16**

b. Process-Oriented Promises. *Salvage Associates v. Cap Financial Service Ltd.* **17** recognized that a supplier's promise to use special-trained personnel must be kept; this is a significant difference in comparison with U.S. law. Cap had expressly warranted that that each person assigned to the project would exercise skills appropriate to a competent person. Cap failed to assign sufficiently competent personnel to the project, breach of contract occurred when Cap failed to deliver a proper computer system, and Salvage was entitled to termination of the contracts. **18**

2. Disclaimer Clauses. Disclaimer clauses are often added to contracts by negotiating parties in an attempt to avoid or to limit obligations. **19** Express warranties are difficult to disclaim, however, if they pertain to the fitness of software for its intended purpose. **20**

a. Statutory Controls. Several U.K. statutes limit the effect of disclaimer clauses in software contracts; **20** U.S. law has relatively less statutory control over disclaimer clauses. The 1977 Act requires that, where a party is a consumer or relies on the other's written standard terms of business, the contract term must satisfy the requirement of reasonableness if it attempts to limit liability for breach of contract. **21**

b. Integration Clauses. The purpose of an integration clause is to invalidate any representations made outside the written contract. **22** In *Mackenzie Patten & Co. v. British Olivetti Ltd.*, **23** an integration clause excluded all other liabilities, obligations, warranties, and conditions. In applying the reasonableness test, the court held it was not reasonable to allow the supplier to exclude liability for breach of contract. The reasonableness test trumped the supplier's attempted disclaimer using an integration clause. **24**

United States

American law does not require express warranties to be contained within the "four corners" of the contract; they may be oral. **25** Express warranties may be created by any affirmation of fact or promise or description of goods which becomes part of the bargain; this may include affirmations made in brochures or in demonstrations. **26**

1. Case Law Recognizing Express Warranties. In *USM v. Arthur D. Little Systems, Inc.*, **27** the supplier of a computer system made an express warranty that the system would have no design defects and would have acceptable response time. The actual response time, however, was substantially greater than the time promised by the supplier and the express warranty was held to have been breached. **28**

2. Disclaimer of Express Warranties

a. Relevant Statutes. It is an "uphill battle" to disclaim an express warranty because it is ordinarily considered to incorporate the "essence of the bargain." **29** Uniform Commercial Code ("UCC") section 2-316 states that "words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed whenever reasonable as consistent with each other."

b. Inconsistency. Inconsistency between the express warranty and the disclaimer clause often leads the court to rule against the applicability of the disclaimer. **30** In *Consolidated Data Terminals v. Applied Digital Data Systems, Inc.*, **31** the court held that very specific language contained in an express warranty prevailed over a general disclaimer of warranty liability. The computer equipment manufacturer made an express warranty in its brochure that the computer terminals would operate at high speed and were reliable. *Held*, the express warranty was breached because the terminals were not high-speed and were unreliable. The disclaimer clause, invalid because of inconsistency, stated: "There is no warranty, express or implied, other than a ninety-day guarantee covering materials and workmanship." **32**

c. Integration Clauses. U.S. courts sometimes find that the writing was not meant to be a complete statement of the terms of the agreement. If so, the written contract may be supplemented by the parties' course of dealing, usage of trade, course of performance, or by evidence of consistent additional terms. **33** Some courts have stated that a disclaimer clause combined with an integration clause may be enough to override the existence of an express warranty. **34**

Before considering anything outside the written contract, the threshold question is whether the parties intended the writing to be the complete statement of their agreement. All of the documents must be considered by the court. **35** In *Sierra Diesel Injection Service v. Burroughs Corp.*, **36** the court had to decide on the validity of the integration clause. Burroughs sent a letter to Sierra, making an express warranty regarding computer performance. Sierra was unknowledgeable of computers and relied upon Burroughs' representations. The sales contract was on a pre-printed form prepared by the seller and presented to the buyer without negotiations. The contract contained an integration clause, but the court ruled it was invalid because it was overridden by the express warranty in the letter. **37**

d. Parole Evidence Rule. This Rule may prevent the admission of any of the supplier's representations made in a prior agreement or in a contemporaneous oral agreement. **38** In *Jaskey Finance & Leasing v. Display Data Corp.*, **39** defendant sold a computer to plaintiff. The seller had orally represented in advertisements that the computer and software would only require routine maintenance and was suitable for plaintiff's type of business. The written sales contract, however, did not make these representations. At trial, the court refused to admit the oral evidence, stating that to do so would be in violation of the parole evidence rule. **40**

3. UCITA's Treatment of Express Warranties. UCITA allows a licensor to create an express warranty to a licensee with an affirmation or promise; this may be part of an advertisement. **41** Samples, models, or demonstrations may also become the basis of express warranties. **42** Language pertaining to an express warranty and language attempting to disclaim an express warranty must be construed whenever reasonable as consistent with each other. **43**

Implied Warranties

United Kingdom

1. Reasonable Care & Skill Required. Section 13 of the Supply of Goods and Services Act of 1982 provides that a business supplying a service must do so "with reasonable care and skill." This is an implied warranty, but it is subject to the reasonableness test. In *Salvage*, **44** *supra*, the court found that the supplier had the obligation to carry out its service with reasonable care and skill. **45**

2. Software Quality Must Be “Satisfactory”. In 1994, the Sales of Goods Act of 1979 and the Supply of Goods and Services Act of 1982 were amended to require that the quality of software provided must be “satisfactory.” **46** The following factors should be taken into account in determination of quality of goods: fitness for purposes for which these goods are commonly supplied, appearance and finish, freedom from minor defects, safety, and durability. **47**

3. Fitness For Intended Purpose. In *St. Albans*, **48** *supra*, the court ruled that, since the supplier knew of the necessity of the software to achieve a specific function, there was an implied term in the contract that the program would be reasonably fit for that purpose. In *Saphena*, **49** *supra*, the court held the contracts contained a term of implied fitness for the intended purpose because the buyer had communicated the purpose to the seller. However, the court also recognized it is not an automatic breach to deliver software with defects in it; a reasonable period of time must be given to cure the defects. **50**

4. Disclaimer of Implied Warranties. Compared to the U.S., it is more difficult in the U.K. to exclude implied warranties because of the reasonableness test. **51**

a. Relevant Statutes. In a sale to a consumer, the implied conformity of goods with a description or sample or as to their quality of fitness for a purpose, cannot be overridden by reference to a disclaimer. **52** In a sale to a non-consumer, any attempt to override the same implied warranties is subject to the reasonableness test. **53**

The Sale of Goods Act of 1979 states that an implied obligation can be “negated or varied by express agreement.” **54** It also provides that “an express term does not negative an implied term unless inconsistent with it.” **55** Likewise, the Supply of Goods and Services Act of 1982 allows that an implied term can be overridden or changed by express agreement. **56**

b. Inconsistency. In *Salvage*, **57** *supra*, the court ruled that the seller had successfully disclaimed implied terms of merchantability and fitness for purpose, but not the implied term pertaining to reasonable care and skill. The court found the latter term was not inconsistent with the express term in the contract to carry out the service with reasonable care and skill. **58**

United States

1. Implied Warranty of Merchantability. If a seller is a merchant in goods of a particular kind, there is a mandatory implied warranty of merchantability. **59** The UCC establishes standards for determination of whether goods are merchantable: passing without objection in the trade; fit for ordinary purposes; even kind, quality and quantity in each unit; adequately packaged and labeled; conformity with the label’s specifications; and, fungible goods must be of fair average quality. **60**

In *Neilson Business Equipment Center v. Monteleone*, **61** the court found an implied warranty that the computer system be “merchantable,” and held that the warranty was breached because it was not fit for the ordinary purpose for which it was intended. **62**

2. Implied Warranty of Fitness for a Particular Purpose. This warranty attaches at time of sale if seller has reason to know any particular purpose intended for the goods, and buyer relies on seller’s expertise to provide suitable goods. **63** In *Neilson*, **64** *supra*, the court found such a warranty because buyer depended on seller to provide a suitable computer. **65A** This case is comparable to the U.K. cases of *St. Albans* **65B** and *Saphena Computing*. **65C**

3. Exclusion of Implied Warranties. Compared to the U.K., it is relatively easier for the U.S. seller to disclaim implied warranties; there is no reasonableness test. **66** However, the requirements must be followed to the letter. **67**

Relevant Statutes. In order to exclude the implied warranty of merchantability, the UCC mandates that the word “merchantability” must be mentioned, and if in writing, it must be conspicuous; an oral exclusion is also allowed. **68**

Exclusion of an implied warranty of fitness for a particular purpose must be in writing, and it must be conspicuous. **69** The *Jaskey* **70** court found the following sufficient to exclude all implied warranties of fitness: “There are no warranties which extend beyond the description on the face hereof.” **71**

4. UCITA’s Treatment of Implied Warranties. UCITA provides that a licensor merchant of a particular kind of software supply a product which is “fit for the ordinary purposes for which such computer programs are used.” **72** The software is not required to be completely free of defects, but it must comply with the average standards for programs having a particular type of use. **73** UCITA also recognize an implied warranty of fitness for a particular purpose. **74** The requirements for disclaiming warranties are comparable to those of the UCC and facilitate easy disclaimer.

Limitations of Remedies

There are four methods of limiting remedies: (a) limitation of situation in which a supplier’s obligation will be incurred; (b) limitation of the cure the buyer is entitled to; (c) limitation of damage for which compensation is payable; and (d) limitation of money payable on breach. **76**

United Kingdom

In the U.K., if suppliers attempt to limit damages to a fixed maximum, the court will determine whether that amount is reasonable. **77** In evaluating the validity of monetary damages, U.K. courts take various factors into account, e.g., insurance coverage of the parties **78A** and relative degree of bargaining power. **78B** Ordinarily, courts award damages based on what was foreseeable when the contract was created. **79**

The *Salvage* **80** case, *supra*, involved situations (b), (c), and (d). **81** The contract restricted the cure, the damage for which compensation was payable, and the money payable on breach. **82** *Held*, the limitation of damages to 25,000 pounds was unacceptable under the reasonableness test. **83**

In the U.K., lost profits are not considered as part of consequential damages; they are treated as a direct loss flowing directly and naturally from the breach. **84** See, e.g., *British Sugar Plc. v. NEI Power Projects Ltd.* **85** This differs from U.S. law, which does treat lost profits as consequential. **86**

United States

U.S. suppliers can limit remedies more easily because they don't have to contend with the reasonableness test. **87** American courts tend to accept the amount of liquidated damages which was agreed to by the parties. **88** A plaintiff may pursue all available remedies whenever circumstances cause an exclusive remedy to fail in its essential purpose. **89** Contractual limitations on consequential damages are acceptable, unless the limitation is unconscionable. **90** UCITA sects. 803(b) and 803(d) are comparable to the UCC provisions.

In *Fargo*, **91** *supra*, the contract limited buyer's remedy to either repair or replacement of defective parts and excluded consequential damages. *Held*, the remedy was invalid because it failed in its essential purpose, since the repairs would not cure all defects, and buyer was awarded damages. **92**

Standard from Contracts

Both countries have statutes designed to offer protection for contracting parties who are offered a standard form contract on a "take it or leave it" basis. **93A** It is recognized that such situations are often characterized by unequal bargaining power between the parties. **93B** Both nations resolve any ambiguity in the contract against the party who wrote it; this rule is especially important for standard form contracts. **94**

United Kingdom

1. Unfair Contract Terms Act of 1977. The 1977 Act protects both consumers and any business that is not computer-related. The seller's implied warranties pertaining to conformity of goods, or to their quality of fitness for a particular purpose, cannot be disclaimed in a standard form contract. **95** The reasonableness requirement applies to every situation involving a standard form contract, even if both parties are business firms. **96**

2. Unfair Terms in Consumer Contracts Regulations of 1999. This statute **97** implemented The Council Directive on Unfair Terms in Consumer Contracts. **98** Unlike the 1977 Act, the 1999 Regulations only apply to consumers; they don't apply to a firm making a business

purchase. **99** Standard form contracts are “unfair” if they are not written in good faith and “cause a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer.” **100**

United States

Unlike the U.K.’s 1977 Act, the U.S. UCC and the Magnuson-Moss Act **101** allow implied warranties to be disclaimed in consumer transactions in some situations. However, the Magnuson-Moss Act restricts disclaimers in contracts for the purchase of “consumer products,” defined as “any tangible personal property that is distributed in commerce and which is normally used for personal, family, or household purposes.” **102**

A Special Type of Standard Form Contract: the Shrink – Wrap License

The shrink-wrap license is a standard form contract which may be delivered with software. Its purpose is to protect the intellectual property rights of the owner of the software. Typically, the agreement is on the outside of the software’s package, and its purpose is to achieve implied acceptance of the agreement if the package is opened.**103** The license terms may include: limitation of liability, limitation of use, limitation of warranty, or designated law to govern the contract. **104** Since it is a standard form contract offered on a “take it or leave it” basis, it is debatable as to whether the person opening the package has entered into a contract. **105**

In both the U.K. and the U.S., all terms in the shrink-wrap license are enforceable if the terms are clearly readable and the person accepted them before buying the software. **106**

United Kingdom

Warranty disclaimers in shrink-wrap licenses are subject to the statutory control of the 1977 Act. **107** The terms of the agreement must pass the reasonableness test. An attempt to later change the terms of the license after the date of its creation will ordinarily fail. **108**

United States

Case law exists to support the notion that opening a shrink-wrap package usually is considered to imply acceptance of the license agreement. **109** Pursuant to the UCC, a purchaser must agree to any proposed changes to an existing contract. **110** UCITA differs from the UCC on this point, however. UCITA allows new, modified terms proposed after the commencement of performance to become enforceable if the party had reason to know at the time of purchase that such new terms might be proposed, and later assents to them. **111** In the case of mass-market licenses, though, the requirements imposed for later changes are more stringent. **112** A number of commentators have severely criticized UCITA, emphasizing their contempt for its allowance of later modifications to the agreement. **113** Only a few have defended UCITA. **114**

Conclusions

The two nations take different approaches in statutory control of contractual terms. U.K. law has the more potent reasonableness test; U.S. law has the less stringent unconscionability doctrine. U.K. courts offer relatively more automatic statutory protection when the buyer is weak, i.e., has significantly less bargaining power than the supplier. By contrast, U.S. law does not accept disparity in bargaining power as a relevant factor and does not attempt to protect a weak party. It is more supplier-oriented and focuses on whether the buyer had sufficient sophistication to understand the terms of the contract and to evaluate the quality of the software. If the buyer had an understanding of the terms of the agreement and the degree of the software's quality, automatic statutory protection is ordinarily unavailable, even if the buyer's bargaining power was low.

Express warranties are often made by the supplier regarding the suitability of the software in fulfilling the buyer's needs. Under U.K. law, any terms in the contract which seek to disclaim express warranties are subject to the reasonableness test; this makes it relatively more difficult in the U.K. to disclaim an express warranty. In the U.K., an express warranty of fitness for buyer's intended purpose is especially difficult to disclaim. In the U.S., express warranties are also difficult to disclaim, since the express warranty and the disclaimer must be construed as being consistent with each other. However, U.S. law does not subject disclaimers to the reasonableness test and is therefore relatively more supplier-oriented in this respect.

Both countries have statutes providing for implied warranties as to the quality of the software and fitness for buyer's purpose. The actual impact of implied warranties, however, depends upon whether the law allows them to be disclaimed by agreement of the parties. U.K. law offers relatively more protection for the buyer of the software because it applies the reasonableness test to any attempt of the supplier to disclaim implied warranties. On the other hand, U.S. law offers less protection for the buyer of the software. Both the UCC and UCITA ordinarily permit easy disclaimer of implied warranties, so long as the specific language and format requirements are met.

The two countries differ in terms of limitation of remedies. In the U.K., the reasonableness test is used to assess the appropriateness of the limitation. If monetary damages are to be restricted, a relevant factor is whether the user of the software could have obtained insurance coverage. In some cases, limitation of damages to the amount of the contract price has been considered reasonable. In the U.S., liquidated damages clauses are generally held to be valid if the language and conspicuousness requirements are met. However, courts may rule that the limitation of remedies is invalid if the remedy fails in its essential purpose, or is unconscionable.

The U.K. is relatively less tolerant of standard form contracts and has more statutory control of contractual terms. By comparison, the U.S. is more accepting of standard form contracts, provided the buyer had an opportunity to attain an understanding of the agreement and its significant terms were conspicuous and noticeable.

U.K. shrink-wrap license law provides relatively more protections for the buyer of the software by making it more difficult for suppliers to disclaim express or implied warranties or to limit remedies. By comparison, U.S. law is more supplier-friendly. UCITA, for example, sometimes allows a shrink-wrap license to be modified by the supplier during the middle of the contract period.

Recommendations

U.S.: Needs More Consumer Protections

The U.S. can learn from the U.K.'s relatively greater penchant for protection of consumer rights. As a long-time supporter of consumer empowerment, this writer finds that U.S. law is deficient in its consumer protections. Shrink-wrap agreements are presently too one-sided in favor of the supplier. For example, UCITA could be amended by adding a clause comparable to U.S. Restatement (Second) of Contracts section 211 (3) (1979), which reads: "Where the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement." This would protect the non-lawyer buyer who hurriedly purchases software online without bothering to read an often lengthy agreement containing legalese.

U.K.: Should Consider a UCITA-style Statute

Perhaps the U.K. should consider adoption of a computer-specific statute comparable to UCITA, modified to incorporate more consumer rights protections. Granted, UCITA is flawed in its present form but it is a work-in-progress, still being amended. Over time, more and more states of the U.S. are expected to embrace it. The world now finds itself in a Digital Millennium and contract law needs to be modified to accommodate the unique aspects of electronic contracting. Consideration of a UCITA-style statute would be a good first step for U.K., a step in the right direction.

Endnotes

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2. 1977 Act, sect. 112; and Photo Production Ltd. 1 [1980] A.C. at 843.
3. Uniform Commercial Code ("UCC") section 2-302(1).
4. UCC section 2-302 (1).

5. Id.
6. Id; and Restatement (Second) of Contracts sect. 211 (1979).
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- 8A. University of Strathclyde School of Law, Glasgow, Scotland (U.K.), *Course: Liability in the Information Society, Notes for Theme Two (Software Contracts and Quality)*, page 23.
- 8B. Sandy T. Wu, Comment, “Uniform Computer Information Transactions Act: Failed to Appease Its Opponents in Light of the Newly Adopted Amendments,” 33 SW. U. L. REV. 307, 308 (2004).
- 8C. UCITA sect. 803(d).
9. Jeffrey C. Selman, et al., “Steering the Titanic Clear of the Iceberg: Saving the Sale of Software from the Perils of Warranties,” 31 U.S.F.L. REV. 531, 542 (1997)
10. Noriko Kawawa, Contractual Liability for Defects in Information in Electronic Form,” 8 U. BALT. INTELL. PROP. J. 69, 124 (1999).
11. Note 1, supra.
12. Note 10, supra at 125.
13. Id.
14. Id.
15. *St. Albans City and District Council v. International Computers Ltd.*, [1995] F.S.R. 686; [1996] 4 All E.R. 481.
16. Id.
17. *Salvage Association v. CAP Financial Services Ltd.*, [1995] F.S.R. 654.
18. Id.
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- 20A. E.g., Note 1, *supra*.
21. Note 1, *supra*.
22. Note 19, *supra*.
23. (Q.B. 11 January 1984) unreported, 1 C.L.&P. 92 (1984); 48 M.L.R. 344 (1985).
24. *Id.*
25. UCC sect. 2-313. See generally, Joel R. Wolfson, The Uniform Commercial Code Proposed Article 2B Symposium, “Express Warranties and Published Information Content Under Article 2B: Does the Shoe Fit?,” 16 J. MARSHALL J. COMPUTER & INFO. L. 337 (1997).
26. UCC sect. 2-313.
27. 546 N.E. 2d 888 (Mass. App. 1989).
28. *Id.*
29. UCC sect. 2-316.
30. Note 10, *supra* at 133.
31. 708 F.2d 385 (9th Cir. 1983).
32. *Id.*
33. UCC sect. 2-202 (1998).
34. E.g., *Jaskey Finance & Leasing v. Display Data Corp.*, 564 F. Supp. 160, 163 (E.D. Pa. 1983).
35. *L.S. Heath & Son, Inc. v. AT&T Information Systems, Inc.*, 9 F.3d 561 (7th Cir. 1993).
36. 565 F. Supp. 426 (D. Nev. 1987), *aff’d* 874 F.2d 653 (9th Cir. 1989), amended and superceded, 890 F.2d 108 (9th Cir. 1989).
37. *Id.*
38. Note 10, *supra* at 136.

39. Note 34, *supra*.
40. *Id.*
41. UCITA sect. 402
42. UCITA sect. 402(a)(3)
43. UCITA sect. 406(a)
44. Note 17, *supra*.
45. *Id.*
46. Sale of Goods Act of 1979 sect. 14(2) (amended 1994); Supply of Goods and Services Act of 1982 sect. 4(2) (amended 1994).
47. Sale of Goods Act of 1979, sect 14 (2)(b).
48. Note 15, *supra*.
49. *Saphena Computing Ltd. v. Allied Collection Agencies Ltd.*, [1995] F.S.R. 616.
50. *Id.*
51. Note 1, *supra*.
52. Note 1, *supra* at sect. 6(2).
53. Note 1, *supra*.
54. Sale of Goods Act of 1979, ch. 54, sect. 55(1).
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57. Note 17, *supra*.
58. *Id.*
59. UCC sect. 2-314. See generally, Robert W. Gomulkiewicz, *The Uniform Commercial Code Proposed Article 2B Symposium, "The Implied Warranty of Merchantability in Software Contracts: A Warranty No One Dares to Give and How to Change That,"* 16 J. MARSHALL J. COMPUTER & INFO. L. 393 (1997).

60. Id.

61. 524 A.2d 1172 (Del. 1987).

62. Id.

63. UCC sect. 2-315.

64. Note 61, *supra*.

65A. Id.

65B. Note 15, *supra*.

65C. Note 49, *supra*.

66. Note 1, *supra*.

67. UCC sect 2.

68. UCC sect. 2-316.

69. Id.

70. Note 34, *supra*.

71. Id.

72. UCITA sect. 403.

73. UCITA comment 3(a).

74. UCITA sect. 405.

75. UCITA sect. 406.

76. Note 10, *supra* at 154.

77. Note 1, *supra*.

78. Note 17, *supra*.

78A. Note 15, *supra*.

79. *Hidley v. Baxendale* [1854] 9 Exch. 341.

80. Note 17, *supra*.

81. Note 76, *supra*.
82. Note 17, *supra*.
83. *Id.*
84. Note 10, *supra* at 158.
85. [1998] 14 Const. L.J. 365.
86. Note 84, *supra*.
87. Note 1, *supra*.
88. See, e.g., *Colonial Life Insurance Co.*, 817 F. Supp. 235 (D.N.H. 1993).
89. UCC sect. 2-719(2).
90. UCC sect. 2-719(3).
91. *Fargo Machine & Tool Co. v. Kearney & Trecker Corp.*, 428 F. Supp. 364 (E.D. Mich. 1977).
92. *Id.*
- 93A. Leo L. Clarke, "Performance Risk, Form Contracts and UCITA," 7 MICH. TELECOMM. TECH. L. REV. 1, 20 (2000).
- 93B. *Id.*
94. Restatement (Second) of Contracts sect. 2111 (1979).
95. Note 1, *supra*.
96. *Id.*
97. Unfair Terms in Consumer Contracts Regulations of 1999, S.I. 1999/2083.
98. Council Directive (EEC) 93/13 on Unfair Terms in Consumer Contracts.
99. Note 97, *supra*.
100. Note 97, *supra* at sects. 5(1) and 5 (2).

101. 15 U.S.C.
102. *Id.* at sect. 2301(1).
103. Batya Goodman, Note, "Honey, I Shrink-Wrapped the Consumer: The Shrink-Wrap an an Adhesion Contract," 21 CARDOZO L. REV. 319, 320 (1999).
104. David L. Hayes, "Shrinkwrap License Agreements: New Light on a Vexing Problem," 9 THE COMPUTER LAWYER 1, 2 (1992).
105. Garry L. Founds, Note, "Shrinkwrap and Clickwrap Agreements: 2B or Not 2B?," 52 FED. COMM. L.J. 99, 101 (1999).
106. Clive Gringas, "The Validity of Shrink-Wrap Licenses," 4 INT'L J. L. & INFO. TECH. 77 (1996).
107. Note 10, *supra* at 172, citing sects. 3 and 6(2) of the 1977 Act.
108. Note 10, *supra* at 172.
109. *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996). See, Joseph C. Wang, Casenote: "ProCD, Inc. v. Zeidenberg and Article 2B: Finally, the Validation of Shrink-Wrap Licenses," 16 J. MARSHALL J. COMPUTER & INFO. L. 439 (1997).
110. UCC sect. 2209.
111. UCITA sect. 208(3)
112. UCITA sect. 209(a), and sect. 209, comment 2(a). If the license is for a "mass-market," the licensee must be told the potential terms to be modified no later than the initial use of the information, and the person has a right of refund if he/she refuses to accept.
113. E.g.: Roger C. Bern, "'Terms Later' Contracting: Bad Economics, Bad Morals, and a Bad Idea for a Uniform Law, Judge Easterbrook Notwithstanding," 12 J.L. & POL'Y 641 (2004); Jean Braucher, Symposium: Amended Article 2 and the Decision to Trust the Courts, "The Case Against Enforcing Mass-Market Terms, Especially for Software," 2004 WIS. L. REV. 753 (2004); and Ajay Ayyappan, Note, "UCITA: Uniformity at the Price of Fairness?," 69 FORDHAM L. REV. 2471 (2001).
114. E.g., Erika E. Schinler, Comment, "Trouble at the Sausage Factory: Has the Uniform Computer Information Transactions Act Been Unjustly Stigmatized?," 75 TUL. L. REV. 507 (2000).