

**THE INFLUENCE OF THE CONSUMER PROTECTION ACT 68 OF
2008 ON THE COMMON LAW OF SALE**

by

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SUMMARY

The purpose of this thesis is to investigate to what extent the Consumer Protection Act 68 of 2008 (CPA) influences the common law of sale in South Africa. “Common law of sale” refers to the *essentialia* of sale (the minimum characteristics that parties must have consensus on to conclude a valid sale). The parties must have consensus on the intention to buy and sell, the things sold and the purchase price. The common law of sale also refers to the common law duties of the parties, the duties of the seller in particular (conversely therefore the rights of the buyer). The primary duties of the seller which will be investigated are:

- a. the duty of safe-keeping (including and investigation into the passing of benefit and risk doctrine);
- b. the duty of delivery and transfer of ownership;
- c. the warranty against eviction; and
- d. the warranty against latent defects.

The primary common law duties of the buyer to pay the purchase price and accept the thing sold are included in the investigation as well. The formalities required in certain sale agreements, that wording must be in plain language as well as the buyer’s cooling-off rights are also investigated.

An investigation into the influence of the CPA on the common law of sale in South Africa warrants a systematic framework and *modus operandi* which are:

- a. an investigation into the historical background of the common law of sale and its principles in the Roman law and Roman-Dutch law;
- b. a critical analysis of the position where the CPA is not applicable (the common law position);
- c. an extensive analysis and critical evaluation of the relevant provisions of the CPA and the influence thereof on the common law of sale;
- d. a comparative analysis of the appropriate provisions in Scotland and Belgium;
- e. a conclusion of the influence of the CPA on the common law of sale (whether the particular common law of sale principle is confirmed, amended or excluded in terms of the Act); and

- f. recommendations (taking into account the comparative analysis) regarding the rectification of uncertainties and ambiguities that arose as a result of the investigation.

It is also important to remember that the existing principles of the common law of sale will still be applicable for transactions and agreements which fall outside the application of the Act.

The golden rule to keep in mind when investigating the influence of the CPA on the common law of sale is to determine which approach and interpretation will be most beneficial to the consumer.

FOREWORD

First and foremost I give all thanks and praise to our Heavenly Father for His patience, blessing and grace. Nothing is possible without Him and this thesis would also not have been possible had it not been for His loving guidance.

It is said that it takes a village to raise a child. Throughout the writing of this research contribution I have come to the conclusion that it certainly takes more than that to complete a doctoral thesis.

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1 INTRODUCTION

“The main response to the inequitable results of virtually unlimited freedom of contract has been the invention of the concept of ‘the consumer’, and the gradual introduction of consumer legislation in order to provide protection for weaker contracting parties. The consumer was introduced as the unwilling, unwitting contracting party in dealings with multi-national producers and distributors who outstrip her in knowledge, power and resources. However, the development of consumer law holds serious implications for traditional contract law, since it recognises that the latter constitutes an inadequate reflection of the reality of the circumstances in which contracts are concluded.”¹

The above statement by Hawthorne is a very accurate summary of the legal position in the case of consumer sales. It has always been a balancing act between entrenched common law principles on the one hand (such as the freedom of contract)² and protecting the vulnerable party (in the case of unequal bargaining positions) on the other.

The Consumer Protection Act³ tips the scale in favour of the consumer. From the outset it is clear that the legislator also had the protection of a particular kind of consumer in mind. The preamble and the purpose of the Act provide that vulnerable consumers in particular should be protected.⁴ In terms of section 3(1)(b) vulnerable consumers include low-income consumers, consumers living in isolated or low-density areas, minors and the elderly.

Though the concept of consumer protection is definitely not new to South Africa, and the CPA is certainly not the first piece of legislation to provide for consumer protection provisions,⁵ it is the most extensive Act regarding consumer protection up to date.⁶

¹ Hawthorne 2008 440.

² For a discussion on the concept of “freedom of contract in a new South Africa” see Van der Walt 367-387.

³ 68 of 2008. Hereinafter referred to as the CPA or Act.

⁴ S 3(1)(b).

⁵ Woker 2010 219. See also chapter 3 Part A of this thesis.

⁶ Du Preez 58. See also chapter 3 Part B of this thesis.

The consumer is provided with eight compelling fundamental consumer rights⁷ as well as enforcement guidelines and routes of redress with regard to these rights.⁸ It is also the first time that legislative guidance is provided for franchise agreements in South Africa.⁹

It is clear that the preservation and development of the common law plays a starring role within the CPA. In fact, section 2(10)¹⁰ provides that no provision of the CPA must be interpreted so as to preclude a consumer from exercising any rights afforded to him in terms of the common law. The question remains however to what extent will the Act influence the common law? It is important to note that this question is answered within the framework of a sale agreement between a seller and a buyer for purposes of this thesis. Formulating the question another way therefore would be: “What is the influence of the CPA on the common law of sale?”

Perhaps it is then also necessary to be reminded of the fact that common law principles not only provide rights to consumers but also certain obligations. The common law principles in terms of South African law of contract include the freedom of a party to conclude a contract and the principle of *pacta servanda sunt*.¹¹ These principles are also applicable to sale agreements. In terms of the common law of sale the principle of *caveat emptor*¹² is also well established.¹³ These principles provide that parties are bound to the agreements they make and in the case of sale agreements, the buyer must be “aware” and “beware” of the provisions (including the rights and duties he obtains) of the contract he concludes.

The reality of the situation is however that consumer protection also developed within the sphere of a free market. The foundation of a free market (and one of the main principles of the classical law of contract) is freedom of contract.¹⁴ As seen by the

⁷ Chapter 2 CPA; see also chapter 3 Part B 3.3 of this thesis.

⁸ Chapters 3 & 6 CPA.

⁹ S 7 & regulations 2 & 3 CPA.

¹⁰ S 2 of the CPA contains provisions regarding the interpretation of the Act.

¹¹ Hiemstra & Gonin 251: “Agreements are to be observed”.

¹² *Idem* 163: “Let the buyer beware”.

¹³ Kerr 330.

¹⁴ Hawthorne 2008 441.

remarks of Hawthorne above, in the case of consumer sales, parties are often on an unequal footing.¹⁵

The purpose of this thesis is to investigate to what extent the CPA influences the common law of sale. “Common law of sale” refers to the *essentialia* of sale being the minimum characteristics that parties must have consensus on to conclude a valid sale.¹⁶ It also refers to the common law duties of the parties, the duties of the seller in particular (conversely therefore the rights of the buyer).¹⁷

An investigation into the influence of the CPA on the common law of sale in South Africa warrants a systematic framework and *modus operandi* which are:

- a. an investigation into the historical background of the common law of sale and its principles in the Roman law and Roman-Dutch law;
- b. a critical analysis on the position where the CPA is not applicable (the common law position);
- c. an extensive analysis and critical evaluation of the relevant provisions of the CPA and the influence thereof on the common law of sale;
- d. a comparative analysis of the appropriate provisions in Scotland and Belgium;
- e. a conclusion of the influence of the CPA on the common law of sale (whether the particular common law of sale principle is confirmed, amended or excluded in terms of the Act); and
- f. recommendations (taking into account the comparative analysis) regarding the rectification of uncertainties and ambiguities that arose as a result of the investigation.

It is also important to remember that the existing principles of the common law of sale will still be applicable for transactions and agreements which fall outside of the application of the Act.

¹⁵ *Ibid.* See also Hawthorne 2012 346.

¹⁶ Nagel *ea* 193. The *essentialia* of sale means that the parties have consensus on the following: The intention to buy and sell; the thing sold and the purchase price.

¹⁷ Kerr 159-219; 221-229.

The golden rule to keep in mind when investigating the influence of the CPA on the common law of sale is to determine which approach and interpretation will be most beneficial to the consumer.

2 RESEARCH AREA

1. Research statement and objective

The main aim of this thesis is to investigate and critically evaluate the influence of the CPA on the South African common law of sale. The objective is to establish to what extent the Act confirms, amends or excludes the common law. Where such an investigation identifies uncertainties, ambiguities or conflicts between provisions within the CPA, between the provisions of the CPA and other statutes or between the CPA and the common law, interpretive guidelines as well as legislative amendments are recommended.

In order to validate such an investigation, a historical overview and critical analysis of the common law position in South Africa where the CPA is not applicable are imperative.

Practical and credible recommendations cannot be made without a relevant comparative study. The relevant law of sale (consumer law in particular) of both Scotland and Belgium is therefore investigated.

2. The choice of Scotland and Belgium

The reasons for selecting Scotland and Belgium, respectively a common law and civil law jurisdiction, for comparative research purposes are briefly explained below.

It should be noted that both these countries form part of the European Union (EU). Although Scotland and Belgium chose different routes of integration, it is compelling to mention the relevant EU Directives upon which certain legislative measures in both these jurisdictions are based.¹⁸ One such example would be the EU Consumer Sales Directive¹⁹ and the different ways in which it was integrated into the national law of both Scotland and Belgium.²⁰

¹⁸ See Parts E of chapters 4-11 where the EU Directive relevant to each chapter-subject is discussed.

¹⁹ Directive 1999/44/EC of the EP and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees OJ L 171.

²⁰ See chapter 7 as part of the discussion of cooling-off rights.

2.1 Scotland

Both South Africa and Scotland have mixed legal systems.²¹ Scotland as a comparative jurisdiction was chosen for two primary reasons.

Firstly, the development of Scots law and Roman-Dutch law (the primary source of common law (“*gemenereg*”) in South Africa)²² displays certain characteristic similarities.²³ Both legal systems have been decisively moulded by the reception of Roman law.²⁴ Although both Scots law and South African private law have remained uncodified,²⁵ there has been statutory intervention in a number of specific matters including consumer protection.

The second primary reason why Scots law was chosen is its statutory regulation of sales and consumer sales in particular. The style of statutory drafting and the rules of interpretation of statutes have always been remarkably uniform in the different parts of the United Kingdom (thus including Scotland) and South African law has adopted this approach as well.²⁶ Law commissions have also been established in both Scotland and South Africa in order to remedy deficiencies in the law.²⁷

Enactments relating to Scotland, whether in the form of statutes applicable to the United Kingdom as a whole or implemented by the Scottish Parliament are relevant to this study.²⁸

As regards consumer protection in South Africa, there has also been legislative intervention prior to the implementation of the CPA,²⁹ though none so extensive as the CPA. Certain statutes applicable to sales and consumer sales in Scotland (for example SOGA³⁰ and the UK CPA 1987)³¹ have very similar wording to their South African

²¹ Zimmermann (2004) 16.

²² Nagel *ea* 12.

²³ Zimmermann (2004) 12.

²⁴ *Ibid.*

²⁵ *Idem* 18.

²⁶ *Ibid.*

²⁷ See for example the important role the Scottish Law Commission regarding consumer remedies for faulty goods in chapter 11 Parts E & F of this thesis.

²⁸ See Part E of chapters 4-11.

²⁹ For example the National Credit Act 34 of 2005 and the Electronic Communications and Transactions Act 25 of 2002.

³⁰ Sales of Goods Act 1979.

³¹ Consumer Protection Act 1987.

counterpart (CPA) and the interpretation thereof by the courts and legal writers is therefore investigated.³²

2.2 Belgium

The regulatory framework of sales and consumer sales in Belgium are remarkably similar to those regulating sales and consumer sales in South Africa.³³

In South Africa, the law of sale is regulated by the general principles of contract law, the common law of sale as well as legislation (for example consumer sales in terms of the CPA).³⁴

The situation is very similar in Belgium in that sale agreements are regulated by the provisions of the Civil Code with regard to the general principles of contract law³⁵ (“gemeen contractenrecht”), the provisions with regard to the common law of sale³⁶ (“gemeen kooprecht”) and consumer sales (“consumentenkooprecht”).³⁷

Samoy confirms that the law of sale is no longer regulated only by the Belgian Civil Code but is also greatly influenced by European and international trends.³⁸ The most relevant result thereof is the establishment of a separate regulation of consumer sales provided for in both the Civil Code³⁹ and separate legislation.⁴⁰

The interpretation of the provisions in Belgium is therefore most relevant for purposes of this thesis and also becomes clear in the recommendations given at the end of each particular chapter. It should however be noted that since the implementation of provisions regulating consumer sales, an approach more in favour of full integration and harmonisation is supported and followed.⁴¹

³² See Part F of chapters 4-11.

³³ Otto 2011 531.

³⁴ See chapter 4 Parts A, B & E for a comprehensive discussion on the subject.

³⁵ Arts 1101-1369.

³⁶ Arts 1582-1701.

³⁷ Arts 1649*bis*-1649*octies*.

³⁸ Samoy 247.

³⁹ Regulated in general by Book III Chapter IV: Sales of the Civil Code but more specifically arts 1649*bis*-1649*octies*. See also chapter 11 part E of this thesis.

⁴⁰ Act 2004 governing the protection of consumers in respect of the sale of consumer goods.

⁴¹ Tilleman (2012) 579-580.

3. Delineation and limitations

The concepts of “sale agreement” and “consumer protection” form part of many topics, takes many forms and are regulated by many pieces of overlapping legislation. Certain limitations and delineations are therefore necessary to keep the topic on point and any discussion that forms part of this thesis in line with the research statement and main objective as indicated in paragraph 1 above. The following must be noted in this regard:

- a. An in-depth discussion of credit agreements in terms of the NCA⁴² does not form part of this thesis and the provisions of the NCA are only referred to where relevant.⁴³
- b. Although immovable property forms part of the definition of “goods” in terms of the CPA,⁴⁴ a discussion and investigation into the legal position of consumer sales of immovable property does not form part of the comparative discussion or the conclusions or recommendations unless specifically indicated. Immovable property is however included in the comprehensive overview of the common law position in South Africa where the CPA does not apply. Immovable property is also mentioned in the evaluation of the South African position where the CPA is applicable, where appropriate, and relevant to do so.
- c. Contracts of bailment, carriage, donation, lease, agency and hire-purchase fall outside the scope of this thesis.
- d. Only Chapter 1 (interpretation, purpose and application) and Chapter 2 (fundamental consumer rights) of the CPA and the regulations published in addition thereto, are relevant for purposes of this thesis and a discussion of the remaining parts of the Act falls outside the scope of the investigation.
- e. With regard to the comparative jurisdictions (Scotland and Belgium) an in-depth discussion regarding the legal framework of each country is unnecessarily burdensome and only the most relevant and applicable legal position in terms of each country is therefore included and investigated.

⁴² National Credit Act 34 of 2005.

⁴³ See for example chapter 7 Part B s 64 of the NCA as discussed as part of plain language.

⁴⁴ S 1 def “goods”.

- f. Only the most relevant provisions of the Alienation of Land Act (ALA),⁴⁵ the Competition Act⁴⁶ and the Electronic Communications and Transactions Act (ECTA)⁴⁷ are mentioned throughout this study and an in-depth discussion thereof falls outside the scope of this thesis.
- g. An in-depth discussion of all the general common law principles applicable to consumer protection in South Africa warrants a thesis on its own and therefore falls outside the scope of this investigation. The common law principles regarding sales agreements (the common law of sale) are, however, discussed. This includes the *essentialia* of sale and the duties of the parties (seller and buyer).⁴⁸
- h. Though the marketing of goods is governed by the CPA,⁴⁹ the marketing of goods as part of sales agreements fall outside the scope of this thesis and is not discussed.
- i. Franchise agreements fall outside the scope of this thesis.
- j. Unfair terms in consumer contracts (Part G to the CPA) warrants a thesis of its own and a discussion thereof is more appropriate in relation to the general principles of contract law in South Africa. A comprehensive discussion thereof does not form part of this thesis and the provisions regulating unfair terms will only be referred to where relevant to the investigation.⁵⁰
- k. A comprehensive discussion of exemption clauses and unexpected terms in consumer contracts are excluded from the scope of this thesis.
- l. The supply of “services” in terms of section 1 of the CPA is excluded from this discussion.

4. Overview of Chapters

4.1 Chapter 1

Chapter 1 is a general introduction to the aim, purpose and relevance of the thesis. It also explains the research objective and the manner in which the conclusion and recommendations are obtained.

⁴⁵ 68 of 1981.

⁴⁶ 89 of 1998.

⁴⁷ 25 of 2002.

⁴⁸ See overview of chapters paragraph 4 below.

⁴⁹ S 1 CPA.

⁵⁰ See for example Part D, E & F chapter 6: Purchase price.

4.2 Chapter 2

Chapter 2 includes the research statement, research objective and research methodology. It also discusses the framework of the thesis by giving a list of delineations, structure of the conclusions and recommendations, reference techniques as well as a brief overview of each chapter.

4.3 Chapter 3: Brief historical overview of consumer protection in South Africa and an introduction to the CPA

In this chapter a historical overview of consumer protection in South Africa prior to the implementation of the CPA is given as well as an introduction and brief overview of the CPA itself.

4.4 The influence of the CPA on the common law of sale

Chapters 4 to 11 set out the common law principles applicable to sale agreements otherwise referred to as the common law of sale. These principles are the *essentialia* of sale (the minimum characteristics on which the parties must reach consensus) and the common law duties of the both the seller and the buyer. In certain instances, formalities will also affect the validity of a sale agreement and are therefore included in the discussion.

The *essentialia* of sale are complied with were the parties have consensus on the intention to buy and sell, the thing sold and the purchase price.

The most important duties of the seller include safe-keeping of the thing sold, delivery and transfer of ownership, providing the buyer with a warranty against eviction and a warranty against latent defects.

The primary duties of the buyer are taking delivery of the thing sold and payment of the purchase price.

It is important to note that the framework of chapters 4 to 11 are the same throughout and each chapter is divided into the following parts:

Part A: An Introduction.

- Part B: The Legal position where the Consumer Protection Act 68 of 2008 is not applicable (common law position).
- Part C: Legal position in terms of the Consumer Protection Act 68 of 2008.
- Part D: Evaluation.
- Part E: Comparison (Part E 1: Scotland and Part E 2: Belgium).
- Part F: Conclusion and recommendations.

Apart from the framework and overview as set out above, the main elements of each chapter are mentioned below.

4.4.1 Chapter 4: *Essentialia* of sale: The intention to buy and sell

The general principles and definitions relating to the nature of sales and consumer sales are discussed. This includes the relevant provisions in terms of the appropriate legislation.

4.4.2 Chapter 5: *Essentialia* of sale: The thing sold

The general principles and definitions relating to the types of goods sold in terms of sales, and consumer sales in particular, are discussed. This includes the relevant provisions in terms of the appropriate legislation. The types of goods discussed in this chapter include future goods, goods sold as part of generic sales and goods sold by description or sample or both. *Res aliena* as well as a comparative discussion of unsolicited goods are included in this chapter.

4.4.3 Chapter 6: *Essentialia* of sale: The purchase price

One of the objectives of this chapter is to confirm that parties must have consensus on the purchase price in order to conclude a valid consumer sale. As part of this, the discussion on the display of a purchase price is also included.

The main objective of the chapter however, is to determine whether the doctrine of *laesio enormis* is reintroduced by the CPA. The common law position prior to the implementation of the Act is discussed. Section 48 of the CPA dealing with unfair, unjust and unreasonable terms in consumer contracts as it pertains to the main objective of

the chapter is discussed as well as the counterparts of section 48 in the comparative jurisdictions.

The buyer's common law duty to pay the purchase price and the influence of the CPA on this duty are also included in this chapter.

4.4.4 Chapter 7: Formalities and plain language

Formalities as a requirement for the valid conclusion of certain sale agreements is discussed and includes a discussion on the requirements that the sale must be reduced to writing and signed by the parties. Standard-form contracts are briefly discussed as well as the formal requirements regarding the sale of immovable property in South Africa.

The legislative cooling-off rights available to buyers where the CPA is not applicable as well as the cooling-off right in terms of section 16 of the CPA are investigated. The relevant cooling-off rights in both Scotland and Belgium are included in this chapter.

The historical development of the concept of "plain language" and the application thereof in terms of the CPA as well as in the comparative jurisdictions are discussed.

4.4.5 Chapter 8: Duty of safe-keeping and the passing of benefit and risk doctrine

A discussion of the common law duty of a seller to keep the thing sold safe until delivery is included in this chapter. The common law duty of safe-keeping manifests itself in the provisions and regulation of lay-by agreements in terms of the CPA in South Africa and is discussed in Part D of this chapter. The duty of safe-keeping as it applies to Scotland and Belgium is discussed in Part E of chapter 8.

The common law doctrine of risk and benefit and the influence of the CPA are investigated.

4.4.6 Chapter 9: Delivery and transfer of ownership

A discussion of the common law duty of the seller to make the thing sold available to the buyer, to deliver the thing sold as well as the buyer's common law duty to take delivery thereof are included in this chapter. The forms of delivery as well as the transfer of

ownership in South Africa, Scotland and Belgium are also discussed in the case of consumer sales.

4.4.7 Chapter 10: Warranty against eviction

The application of the warranty against eviction and the limitation on the claim for damages where the buyer is evicted in terms of South African common law are discussed in Parts A and B. The influence of the CPA in terms of section 44 and the implication thereof on the common law position are discussed in Parts C and D of this chapter.

The comparative positions regarding the warranty against eviction are investigated in Part E followed by a conclusion and recommendations.

4.4.8 Chapter 11: Warranty against latent defects

Chapter 11 is the most extensive and longest chapter in this thesis and it can be argued that the CPA has the most far-reaching influence on this common law duty of the seller. The definition of a latent defect, the remedies available to the buyer as well as the exclusion of the warranty by agreement (also referred to as the voetstoets clause) are comprehensively discussed in Parts A and B. This includes a discussion of trade-in agreements on motor vehicles prior to the implementation of the CPA.

The influence of the CPA (Chapter 2, Part H: The consumer's right to fair value, good quality and safety) on the common law principles relating to the warranty against latent defects is examined and ambiguities and interpretational problems are identified.

A thorough investigation is made into the comparative provisions of Scotland and Belgium in an attempt to provide solutions and recommendations regarding the South African position in terms of the CPA.

4.5 Chapter 12: Summary of conclusions and recommendations

Due to the comprehensive conclusion and recommendations at the end of each chapter, a summary thereof is given in table form as part of chapter 12.

5. Format and structure of conclusions and recommendations

A comprehensive evaluation is made of the South African position where the CPA is applicable (prior to the comparative investigation) in each chapter as indicated above.⁵¹

The evaluation of the CPA is followed by a comparison and investigation of the appropriate provisions and law in both Scotland and Belgium.

Each chapter⁵² is completed by a comprehensive conclusion and recommendations taking into account the comparative position in the relevant jurisdictions.

For this reason and to prevent unnecessary repetition a summary of the conclusions and recommendations is given in table form as part of chapter 12.

6. Reference Techniques

- a. For the sake of convenience the masculine form is used throughout this thesis to refer to a natural person.
- b. Certain words are used interchangeably throughout this thesis. Unless otherwise indicated, these include:
 - I. “transaction”, “agreement” and “contract”.
 - II. “seller”, “vendor”, “supplier”, “business” and “trader”.
 - III. “supplier” in terms of the CPA will also be used as an “umbrella term” for other sellers in the supply chain including “producers”, “importers”, “retailers” “distributors” and “service providers”.
 - IV. “consumer” and “buyer”.
 - V. “*merx*”, “thing sold”, “goods” and “products”.
 - VI. “*pretium*” and “purchase price”.
 - VII. “doctrine” and “rule”.
 - VIII. “the doctrine of passing of risk and benefit” and “the risk rule”.
 - IX. “to take delivery” and “acceptance”.
- c. The full titles of the sources referred to in this study are provided in the bibliography, together with an abbreviated “mode of citation”. This mode of citation is used to refer

⁵¹ Part E of chapters 4-11 of this thesis.

⁵² *Ibid.*

to a particular source in the footnotes. However, legislation and court decisions are referred to in full.

- d. The law as stated in this thesis reflects the position as at 31 December 2012.
- e. Reference to the Minister is reference to the Minister of Trade and Industry in South Africa.
- f. Reference to the DTI is reference to the Department of Trade and Industry in South Africa.
- g. Reference to the National Consumer Tribunal or Tribunal or NCT refers to the Tribunal in South Africa as established in terms of South African statutes.⁵³
- h. Reference to the National Consumer Commission or NCC refers to the Commission in South Africa as established in terms of the CPA.⁵⁴

⁵³ NCA & CPA.

⁵⁴ NCA & CPA.

3 BRIEF HISTORICAL OVERVIEW OF CONSUMER PROTECTION IN SOUTH AFRICA AND AN INTRODUCTION TO THE CONSUMER PROTECTION ACT 68 OF 2008

- A. HISTORICAL OVERVIEW OF CONSUMER PROTECTION LAW IN SOUTH AFRICA**
- B. INTRODUCTION TO AND BRIEF OVERVIEW OF THE CONSUMER PROTECTION ACT 68 OF 2008**

A. HISTORICAL OVERVIEW OF CONSUMER PROTECTION LAW IN SOUTH AFRICA

1. Introduction

“Another fallacy that wide-eyed consumer lawyers may labour is that consumer protection is a twentieth-century phenomenon which should be nurtured in the twentieth century. The Romans, and other ancient societies, may not have used the term “consumer protection”, but they nonetheless had solid rules protecting their citizens.”¹

Otto rightly argues that the concept of protecting consumers has been around since Roman times.² He gives the example of the warranty against latent defects given by a seller in the case of a sale agreement.³

Principles protecting consumers that have developed over a long period of time, and which have become part of our common law should, in addition, be protected by legislation.⁴ The writer suggests that the Roman edicts by the *aediles curules* establishing the *actio quanti minoris* and the *actio redhibitoria* (also referred to as the aedilician actions) are prime examples of legislative intervention to protect consumers when the common law of the day was found wanting.⁵

¹ Otto 2010 258.

² *Ibid.*

³ *Ibid.*

⁴ *Ibid.*

⁵ *Ibid.*

The aedilician actions discussed above, are also part of South African common law⁶ and Otto rightly remarks that there is nothing new under the sun, even “*ex Africa*”.⁷

As both national and international trade and financial markets developed in South Africa, so did the need for the protection of the “weaker” contracting party, consumers in particular. Legislation as a form of consumer protection is therefore extremely relevant. Consumer protection in terms of industry self-regulation as well as in terms of our common law also deserves discussion.

Twenty-three years prior to the implementation of the CPA, the underlying reasons for consumer protection were identified⁸ and are, ironically, echoed in the purpose of the CPA (section 3).⁹ Badenhorst points out that the advent of mass consumption has resulted in consumers facing an information gap when they enter into transactions involving the purchase of products.¹⁰ The writer gives the following reasons as an argument in favour of more stringent consumer protection:

- a. products are not only complex, requiring evaluation in many more dimensions, but are also being marketed in such a number that it is more difficult for a consumer to judge their qualities adequately;¹¹
- b. expert knowledge seems to be required to appreciate the features of many products and such a high level of knowledge falls below the thresholds of perception of the ordinary consumer;¹²
- c. standard-form contracts result in sellers offering their goods in terms of seller-orientated provisions drafted by seller-orientated attorneys;¹³
- d. advertising fails to inform consumers, and in addition raises expectations beyond what can be fulfilled by a product or service;¹⁴

⁶ *Ibid.*

⁷ *Idem* 259.

⁸ Badenhorst 1985 74-76.

⁹ See Part B below for a discussion of the purpose of the CPA ito s 3.

¹⁰ Badenhorst 1985 74.

¹¹ *Idem* 74-75.

¹² *Idem* 75.

¹³ *Ibid.*

¹⁴ *Ibid.*

- e. the inequality of bargaining powers of consumers because of their disparity in knowledge and resources;¹⁵
- f. the rise of self-service retailing, the declining ability of sales employees, the intervention of the computer (and the introduction of the “world wide web”) into the relations between the consumer and the supplier, and the inherent difficulties of dealing with bureaucracies, all contribute to dissatisfaction;¹⁶
- g. the problem of enforcement of rights against the larger entrepreneur, where goods are defective;¹⁷ and
- h. the capacity to cope with the problems of the average consumer is much less in the case of the vulnerable groups in society.¹⁸

2. Consumer Protection measures prior to the implementation of the CPA in South Africa

2.1 Legislation

According to Otto very few legislative developments regarding consumer protection took place in the second half of the twentieth century in South Africa.¹⁹

Legislative protection regarding consumer credit law for example, only gathered momentum in 1980 with the implementation of the Usury Act²⁰ and the Credit Agreements Act.²¹ The Usury Act covered financial aspects of *inter alia* the rendering of services and the sale of movable goods.²² The Credit Agreements Act covered contractual aspects including the sale of movable goods on credit.²³ Otto argues that the aim of the legislature with the implementation of the abovementioned statutes was for them to apply concurrently and supplement each other.²⁴ Unfortunately, the application of the statutes caused an extremely difficult situation in the field of consumer

¹⁵ *Ibid.*

¹⁶ *Idem* 76.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ Otto 2010 258.

²⁰ 73 of 1968. Hereinafter referred to as the Usury Act.

²¹ 75 of 1980. Hereinafter referred to as the Credit Agreements Act.

²² Otto 2010 266.

²³ *Ibid.*

²⁴ *Ibid.*

credit law.²⁵ Conflicting interpretations of the provisions of the Usury Act and the Credit Agreements Act, as well as the difficulty in the application of the provisions of the respective statutes in practice, necessitated a complete overview of consumer credit law in South Africa. As a result, both the Usury Act and the Credit Agreements Act were replaced by the voluminous National Credit Act.²⁶

There are two other statutes worth mentioning which furthered the surge in the development of consumer protection during the 1980s.

The Alienation of Land Act²⁷ governs the sale of immovable property and provides protection to consumers by, for example, providing a cooling-off right to a buyer in certain instances²⁸ and regulating the formal requirements for the conclusion of a valid sale of immovable property.²⁹

The Consumer Affairs (Unfair Business Practices Act)³⁰ is also relevant. The main purpose of the Act (as the title suggested)³¹ was to provide for the prohibition or control of unfair business practices.³² The Act allowed for drastic measures in that the Act authorised the Consumer Affairs Committee (CAFCOM) to investigate business practices and report to the Minister of Trade and Industry. Unfortunately CAFCOM had no power to order redress in terms of the Act.³³

In terms of section 13(1) of the Unfair Business Practices Act, Consumer Affairs Courts could be established in the various provinces. The MEC for Economic Affairs and Finance established a Consumer Affairs Court for the province of Gauteng.³⁴ Such a court could investigate an unfair business practice and declare it unlawful or void.³⁵ To ensure compliance with the Consumer Court, the Act introduced a number of offences³⁶

²⁵ *Ibid.*

²⁶ 34 of 2005. Hereinafter referred to as the NCA.

²⁷ 68 of 1981. Hereinafter referred to as the ALA.

²⁸ S 29A of the ALA. For a comprehensive discussion see chapter 7 of this thesis.

²⁹ S 2(1) of the ALA. For a comprehensive discussion see chapter 7 of this thesis.

³⁰ 71 of 1988. Hereinafter referred to as the Unfair Business Practices Act.

³¹ The Act has been repealed by s 121 of the CPA.

³² Woker 2010 219.

³³ A comprehensive discussion of the Unfair Business Practices Act falls outside the scope of this thesis.

³⁴ For a comprehensive discussion of the Consumer Affairs Court in Gauteng see Hawthorne 1998 290-300.

³⁵ S 24(1)(b) of the Unfair Business Practices Act.

³⁶ Ss 8 & 10 of the Unfair Business Practices Act.

and penalties.³⁷ However, the Consumer Affairs Court did not prove to be successful.³⁸

Hawthorne warned that the powers of the court were awesome, and an indiscriminate exercise of such powers could severely damage business confidence.³⁹ The Unfair Business Practices Act was repealed by the CPA and the Consumer Affairs Court of Gauteng is now governed by the CPA.

The Competition Act⁴⁰ and the Electronic Communications and Transactions Act⁴¹ were implemented in the period leading up to the CPA and also provide legislative protection to consumers.

Woker argues that consumer protection measures have existed for many years in industry specific legislation as well as national and provincial legislation prior to the implementation of the CPA.⁴² Unfortunately, the statutory provisions aimed at protecting consumers are scattered around in a multitude of statutes each with its own scope of application.⁴³ It would therefore be impractical to include a detailed discussion of every statute providing some form of consumer protection as part of this thesis.

The research done by the South African Law Reform Commission (SALRC) contributed greatly to the development and eventual implementation of consumer protection legislation in South Africa. The “Discussion Paper on Unreasonable Stipulations in Contracts and the Rectification of Contracts”⁴⁴ and “The Report on the Recognition of Class Actions and Public Interest Actions in South African Law”⁴⁵ are two of many examples of the contribution made by the SALRC in this regard.

³⁷ Ito s 31(a): A maximum fine of R200 000 or a maximum imprisonment of five years or both.

³⁸ Hawthorne 1998 300.

³⁹ *Ibid.*

⁴⁰ 89 of 1998.

⁴¹ 25 of 2005. Hereinafter referred to as ECTA.

⁴² Woker 2010 218-219.

⁴³ See Du Preez 58 fn 8 for a comprehensive list.

⁴⁴ Discussion Paper 65, Project 47 April 1998.

⁴⁵ Project 88, August 1998.

2.2 Other forms of consumer protection

Woker discusses two other forms of consumer protection which existed prior to the implementation of the CPA, namely, industry self-regulation and protection provided at common law.⁴⁶

Woker refers to the Advertising Standards Authority (ASA) as an effective industry body for the advertising industry in South Africa.⁴⁷ The primary reason for the ASA being successful is the powerful sanction which may be implemented in the case of a transgression.⁴⁸

The writer argues, however, that most other self-regulatory bodies have not had the advantage of such an effective sanction and self-regulatory codes have not been sufficient to control abuses.⁴⁹ Debt collectors for example, were governed primarily by a code of conduct but because of numerous complaints from consumers regarding harassment, debt collectors themselves lobbied government for regulation and the industry is now governed by the Debt Collectors Act.⁵⁰ Despite the fact that industry codes have not been successful in South Africa, Woker argues that it remains a useful mechanism for advancing consumer protection.⁵¹

The common law has always provided some form of protection to consumers, especially regarding the conclusion of contracts. As was indicated in the introductory chapter,⁵² only the common law principles relating to the common law of sale are discussed in this study.

It is, however, worth mentioning that the general principles of the law of contract have also played a role in consumer protection. The application of the principles of good faith (*bona fides*) or declaring agreements to be against public policy are prime examples. Factors influencing consensus such as duress, misrepresentation or undue influence will also have an effect on the validity of an agreement (particularly in the case of consumer agreements where parties are in unequal bargaining positions). An in-

⁴⁶ Woker 2010 222.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.* The sanction entails withholding advertising time and space.

⁴⁹ Woker 2010 222.

⁵⁰ 114 of 1998.

⁵¹ Woker 2010 222.

⁵² See chapter 1 of this thesis.

depth discussion of all the common law principles applicable to consumer agreements warrants a study of its own and therefore falls outside the scope of this thesis.

Woker refers to an examination of consumer complaints by the CAFCOM and the Department of Trade and Industry (DTI) which reveals that most consumer complaints relate to defective consent,⁵³ the deception of consumers, unfair contract terms and the sale of defective goods.⁵⁴ Though it would be possible to resolve most of these complaints by applying common law principles, the unequal bargaining positions between the parties warrant additional legislative protection.

B. INTRODUCTION TO THE CONSUMER PROTECTION ACT 68 OF 2008

1. Introduction

Though the CPA did not introduce the concept of consumer protection, it does lay the foundation for a new era for consumers in South Africa by introducing a single, comprehensive legal framework for consumer protection.⁵⁵ It clearly spells out the entitlements of consumers and the responsibilities of suppliers of goods or services. According to Du Preez, it is far-reaching, ambitious and the first legislation of its kind in South Africa.⁵⁶

A brief discussion of the origin and background of the Consumer Protection Bill is included. Though the focus of this thesis is on Chapter 2 of the CPA containing the fundamental consumer rights and the influence of its provisions on the common law of sale, a concise explanation of the structure, purpose and interpretation of the Act is necessary to provide a proper background and context to the research topic.

2. Consumer Protection Bill and the CPA: Origin and background

Du Preez states that the Consumer Protection Bill was the result of the DTI's intention to create and promote an economic environment that supports and strengthens a culture of consumer rights and responsibilities.⁵⁷ The DTI initially commissioned a

⁵³ Woker 2010 224: Where the writer discusses the situation where suppliers put improper pressure on consumers and the consumer agreement may be set aside due to undue influence.

⁵⁴ *Idem* 223.

⁵⁵ Du Preez 58. See also Van Eeden 1-22.

⁵⁶ *Ibid.*

⁵⁷ Du Preez 59.

research project to recommend a new consumer protection regime for South Africa.⁵⁸ This process included consultations with various stakeholders and interested parties and resulted in the National Consumer Survey and a Draft Green Paper on the Consumer Policy Framework.⁵⁹ The recommendations for a new comprehensive consumer protection framework were subsequently presented to the parliamentary portfolio committee on trade and industry and tabled at the National Economic Development and Labour Council (Nedlac).⁶⁰

A pilot regulatory impact assessment of the policy was conducted and in 2006 the DTI published the first draft of the Bill for public comment.⁶¹ The first and second drafts of the Bill were amended considerably and the final revised version of the Consumer Protection Bill was published in 2008.⁶²

Du Preez remarks that the DTI, as part of its activities in relation to consumer policy and legislation, actually addressed two other issues together with consumer protection,⁶³ namely, company law (in the form of the Companies Act) and competition law (in the form of the Competition Act).⁶⁴ The interaction between the three abovementioned statutes does not form part of this thesis and is therefore not discussed.

3. The CPA

3.1 Commencement and implementation

The CPA was signed by the President of South Africa on 24 April 2009 and was published in the *Government Gazette* on 29 April 2009. The Act came into effect incrementally. Chapters 1⁶⁵ and 5⁶⁶ of the CPA, as well as section 120 and any other provision authorising the Minister to issue regulations, as well as Schedule 2,⁶⁷ came

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

⁶⁰ *Idem* 60.

⁶¹ *Ibid.*

⁶² *Ibid.*

⁶³ CPA.

⁶⁴ Du Preez 60. See also Van Eeden 1-23 & 35-56; Sharrock (2011) 570-575; Melville 1-15.

⁶⁵ Governing interpretation, purpose and application of the CPA.

⁶⁶ Governing national consumer protection institutions.

⁶⁷ Sched 2: Transitional provisions. See also Sched 2 item 3(2) and the table referred to therein regarding the extent of application of the Act to pre-existing agreements.

into operation on the so called “early effective date”, which is one year after the President signed the Act and thus 24 April 2010.⁶⁸ The remainder of the provisions of the Act (including Chapter 2 dealing with fundamental consumer rights) came into operation on 31 March 2011, referred to as the “general effective date”. The regulations issued in terms of the Act were published on 1 April 2011. The CPA also repealed certain Acts or parts thereof.⁶⁹

3.2 Interpretation and purpose

The preamble to the CPA states that it is necessary to develop and employ innovative means to fulfil the rights of historically disadvantaged persons and to promote their full participation as consumers; protect the interests of all consumers; ensure accessible, transparent and efficient redress for consumers who are subjected to abuse or exploitation in the marketplace; and to give effect to internationally recognised customer rights.

The preamble further states that recent and emerging technological changes, trading methods, patterns and agreements have brought, and will continue to bring, new benefits, opportunities and challenges to the market for consumer goods and services within South Africa. It is further desirable to promote an economic environment that supports and strengthens a culture of consumer rights and responsibilities, business innovation and enhanced performance.

For the reasons stated above, the CPA was enacted in order to:⁷⁰

- a. promote and protect the economic interests of consumers;
- b. improve access to, and the quality of, information that is necessary so that consumers are able to make informed choices according to their individual wishes and needs;
- c. protect consumers from hazards to their well-being and safety;
- d. develop effective means of redress for consumers;

⁶⁸ Nagel *ea* 705.

⁶⁹ Ss 2-13, 16-17 of the Merchandise Marks Act 17 of 1941, the Business Names Act 27 of 1960, the Price Control Act 25 of 1964, the Sales and Service Matters Act 25 of 1964, the Trade Practices Act 76 of 1976 and the Unfair Business Practices Act.

⁷⁰ Preamble to the CPA.

- e. promote and provide for consumer education, including education concerning the social and economic effects of consumer choices;
- f. facilitate the freedom of consumers to associate and form groups to advocate and promote their common interests; and
- g. promote consumer participation in decision-making processes concerning the marketplace and the interests of consumers.

Chapter 1 Part A of the Act deals with definitions and interpretation. Section 1 explains the definitions of applicable words and concepts as contained in the Act. The relevant definitions are discussed separately as part of each chapter in this thesis.

Section 2 governs the interpretation of the Act and provides that the Act must be interpreted in a manner that gives effect to the purposes set out in section 3.⁷¹

When interpreting or applying the CPA a person, court, NCT⁷² or the NCC⁷³ may consider:⁷⁴

- a. appropriate foreign and international law;
- b. appropriate international conventions, declarations or protocols relating to consumer protection; and
- c. any decision of a consumer court, ombud or arbitrator in terms of the Act to the extent that such a decision has not been set aside, reversed or overruled by the High Court, the Supreme Court of Appeal or the Constitutional Court.

Sections 2(3) and 2(4) deal with the signing or initialling of a document and includes the signing by way of an advanced electronic signature or an electronic signature⁷⁵ as well as the duties of the supplier in this regard.⁷⁶

Section 2(6) of the CPA governs the calculation of business days as provided for between the happening of one event and another.

⁷¹ S 2(1).

⁷² National Consumer Tribunal. Hereinafter referred to as the NCT or Tribunal.

⁷³ National Consumer Commission. Hereinafter referred to as the NCC.

⁷⁴ S 2(2)(a)-(c).

⁷⁵ In terms of ECTA.

⁷⁶ For a comprehensive discussion on signatures see chapter 7 of this thesis.

Unless the context indicates otherwise, any use of the word “includes” or “including” in relation to a defined or generic word or expression, on the one hand, and one or more enumerated examples or specific items, on the other, is not to be construed as limiting the defined or generic expression to the examples or items so enumerated.⁷⁷

If there is an inconsistency between any provision of Chapter 5 of the CPA and a provision of the Public Finance Management Act,⁷⁸ or the Public Service Act,⁷⁹ as the case may be, the latter two Acts will prevail.⁸⁰

If there is an inconsistency between any provision of the CPA and any other Act not contemplated in section 2(8), the provisions of both Acts apply concurrently, to the extent that it is possible to apply and comply with one of the inconsistent provisions without contravening the second.⁸¹ If the former cannot apply, the provision that extends the greater protection to a consumer prevails over the alternative provision,⁸² provided that in the case of hazardous chemical products only the provisions of the CPA relating to consumer redress will apply.⁸³

3.2.1 Preservation of common law rights and interpretation.

Section 2(10) provides that no provision of the CPA must be interpreted so as to preclude a consumer from exercising any rights afforded in terms of the common law. This is a clear preservation of the common law but only with regards to the common law rights of consumers and not suppliers.

The importance of this section for purposes of this study cannot be overstated and, together with section 3(1)(b) of the Act as discussed below,⁸⁴ forms the key concepts to keep in mind when interpreting other provisions of the Act as well as provisions that form part of consumer sale agreements.

⁷⁷ S 2(7).

⁷⁸ 1 of 1999

⁷⁹ 103 of 1994.

⁸⁰ S 2(8).

⁸¹ S 2(9)(a).

⁸² S 2(9)(b).

⁸³ S 2(9).

⁸⁴ See 3.2.2 below.

3.2.2 Purpose

The purposes of the CPA⁸⁵ are the promotion, advancement and protection of the economic welfare and economic interests of consumers by:

- a. establishing a legal framework for the achievement and maintenance of a consumer market that is fair, accessible, efficient, sustainable and responsible;
- b. reducing and ameliorating any disadvantages experienced in accessing any supply of goods or services by aggrieved consumers such as low-income, isolated, young, elderly or illiterate persons;
- c. promoting fair business practices;
- d. protecting consumers from unconscionable, unfair, unreasonable, unjust or other improper trade practices and deceptive, misleading, unfair or fraudulent conduct;
- e. improving consumer awareness and information, enhancing informed consumer choice and behaviour;
- f. promoting consumer confidence, empowerment and responsibility through education;
- g. providing a system of consensual dispute resolution and efficient system of redress for consumers; and
- h. protecting consumers against discriminatory marketing.

Special mention should be made of section 3(1)(b) which is also in line with the preamble to the Act. This particular provision (as will be shown throughout this thesis) must be kept in mind when interpreting other provisions of the CPA. Section 3(1)(b) provides that particular protection should be given to certain groups of consumers who:

- a. are low-income persons or persons comprising low-income communities;⁸⁶
- b. live in remote, isolated or low-density population areas or communities;⁸⁷
- c. are minors, seniors or other similarly vulnerable consumers;⁸⁸ or

⁸⁵ S 3.

⁸⁶ S 3(1)(b)(i).

⁸⁷ S 3(1)(b)(ii).

⁸⁸ S 3(1)(b)(iii).

- d. whose ability to read and comprehend any advertisement, agreement, mark, instruction, label, warning, notice or other visual representation is limited by reason of low literacy, vision impairment or limited fluency in the language in which the representation is produced, published or presented;⁸⁹

3.3 Concise summary of the CPA and fundamental consumer rights

The CPA consists of seven chapters. Customary, Chapter 1 deals with the interpretation, definitions, purpose and application of the Act. Fundamental consumer rights are addressed in Chapter 2. The protection of a consumer's rights is set out in Chapter 3. Business names and the industries' codes of conduct are covered by Chapter 4. National consumer protection institutions (the NCT⁹⁰ and the NCC⁹¹) fall under Chapter 5. Chapters 6 and 7, respectively, manage the enforcement and general provisions of the Act.

As mentioned earlier the fundamental consumer rights are contained in Chapter 2 of the Act and constitute the main focus of this thesis. These rights are:

- a. the right to equality in the consumer market;⁹²
- b. the right to privacy;⁹³
- c. the consumer's right to choose;⁹⁴
- d. right to disclosure and information;⁹⁵
- e. right to fair and responsible marketing;⁹⁶
- f. right to fair and honest dealing;⁹⁷
- g. the right to fair, just and reasonable terms and conditions;⁹⁸ and
- h. the right to fair value, good quality and safety.⁹⁹

⁸⁹ S 3(1)(b)(iv).

⁹⁰ National Consumer Tribunal.

⁹¹ National Consumer Commission.

⁹² Part A ss 8-10.

⁹³ Part B ss 11-12.

⁹⁴ Part C ss 13-21.

⁹⁵ Part D ss 22-28.

⁹⁶ Part E ss 29-39.

⁹⁷ Part F ss 40-47.

⁹⁸ Part G ss 48-52.

⁹⁹ Part H ss 53-61.

3.4 Realisation of consumer rights

Section 4(1) provides that any of the following persons may, in the manner provided for in terms of the CPA, approach a court, the NCC or NCT alleging that a consumer's right has been infringed, impaired or threatened, or that prohibited conduct has occurred or is occurring:

- a. a person acting on his own behalf;
- b. an authorised person acting on behalf of another person who cannot act in his own name;
- c. a person acting as a member of, or in the interest of, a group or class of affected persons;
- d. a person acting in the public interest, with leave of the Tribunal or court, as the case may be; and
- e. an association acting in the interest of its members.

In any matter brought before the NCT or a court in terms of the CPA, the court or Tribunal must develop the common law as necessary to improve the realisation and enjoyment of consumer rights generally, and in particular by persons contemplated in section 3(1)(b);¹⁰⁰ and the NCT or court must promote the spirit and purposes of the Act.¹⁰¹ The NCT or court must make appropriate orders to give practical effect to a consumer's right of access to redress,¹⁰² including, but not limited to any order provided for in terms of the CPA; and any innovative order that better advances, protects, promotes and assures the realisation by consumers of their rights in terms of the Act.¹⁰³

If any provision of the CPA, read in its context, can reasonably be construed to have more than one meaning, the NCT or court must prefer the meaning that best promotes the spirit and purposes of the Act, and will best improve the realisation and

¹⁰⁰ See Part B 3.3 above.

¹⁰¹ S 4(2).

¹⁰² For a comprehensive discussion on the redress for consumers in terms of the CPA see Naudé 2009 (Part 1) 515-547; Van Heerden & Barnard 131-144; Cassim & Sibanda 586-608.

¹⁰³ *Ibid.*

enjoyment of consumer rights generally, and in particular by persons contemplated in section 3(1)(b).¹⁰⁴

Section 4(4) deals with ambiguities, restrictions and limitations in standard forms, contracts or other documents prepared by or on behalf of the supplier, or required by the Act to be produced by a supplier. These are the general provisions regarding the interpretation of consumer contracts and supplemented by the particular fundamental consumer right applicable, for example section 48 (consumer's right to fair, just and reasonable terms and conditions). Such documents must always be interpreted to the benefit of the consumer.

In any dealings with a consumer in the ordinary course of business, a person must not engage in any conduct contrary to or calculated to frustrate or defeat the purposes and policy of the Act; engage in any conduct that is unconscionable, misleading or deceptive, or that is reasonably likely to mislead or deceive; or make any representation about a supplier or any goods or services, or a related matter, unless the person has reasonable grounds for believing that the representation is true.¹⁰⁵

3.5 Scope of application: General¹⁰⁶

3.5.1 Transactions that fall within the scope of application of the CPA

The CPA applies to:¹⁰⁷

- a. every transaction occurring within the Republic;¹⁰⁸
- b. the promotion of any goods or services, or the supply of any goods or services, within the Republic, unless those goods or services could not reasonably be the subject of a transaction to which this Act applies or where the promotion of those goods or services has been exempted in terms of sections 5(3) and 5(4);
- c. goods or services that are supplied or performed in terms of a transaction to which this Act applies, irrespective of whether any of those goods or services are offered or

¹⁰⁴ S 4(3).

¹⁰⁵ S 4(5).

¹⁰⁶ See also chapter 4 Part C & D of this thesis regarding the scope of application of the CPA and relevant definitions.

¹⁰⁷ S 5(1)(a)-(b).

¹⁰⁸ Unless it is exempted to s 5(2), (3) or (4).

supplied in conjunction with any other goods or services, or separate from any other goods or services; and

- d. goods that are supplied in terms of a transaction that is exempt from the application of the CPA, but only to the extent that those goods and the importer or producer, distributor and retailer of those goods, respectively, are nevertheless subject to sections 60 and 61 of the Act relating to safety monitoring recall and strict product liability.¹⁰⁹

3.5.2 Transactions that fall outside the scope of application of the CPA

The CPA does not apply to any transaction:

- a. in terms of which goods or services are promoted or supplied to the State;¹¹⁰
- b. in terms of which the consumer is a juristic person whose asset value or annual turnover, at the time of the transaction, equals or exceeds the threshold value determined by the Minister in terms of section 6;¹¹¹
- c. if the transaction falls within an exemption granted by the Minister in terms of subsections (3) and (4);¹¹²
- d. that constitutes a credit agreement under the National Credit Act, but the goods or services that are the subject of the credit agreement are not excluded from the ambit of the CPA;¹¹³
- e. pertaining to services to be supplied under an employment contract;¹¹⁴
- f. giving effect to a collective bargaining agreement within the meaning of section 23 of

¹⁰⁹ S 5(1)(d) read together with s 5(5).

¹¹⁰ S 5(2)(a). Thus the State is not protected in its capacity as a consumer. It is, however, subject to the provisions of the CPA in its capacity as a supplier in the ordinary course of business.

¹¹¹ S 5(2)(b). Threshold determination: R2 million.

¹¹² S 5(2)(c).

¹¹³ S 5(2)(d).

¹¹⁴ S 5(2)(e).

- the Constitution and the Labour Relations Act,¹¹⁵ or
- g. giving effect to a collective agreement as defined in section 213 of the Labour Relations Act;
 - h. an agreement or transaction that falls within the ambit of an industry-wide exemption regarding the Act,¹¹⁶ and
 - i. any agreement or transaction as regulated by the Long Term Insurance Act¹¹⁷ or the Short Term Insurance Act¹¹⁸ provided the aforesaid Acts are aligned with the consumer protection measures in terms of the CPA within 18 months after the CPA came into operation.¹¹⁹

¹¹⁵ 66 of 1995, s 5(2)(f) CPA.

¹¹⁶ S 5(3) CPA.

¹¹⁷ 52 of 1998.

¹¹⁸ 53 of 1998.

¹¹⁹ See definition of “service” s 1.

4 ESSENTIALA OF SALE: THE INTENTION TO BUY AND SELL

- A. INTRODUCTION
 - B. LEGAL POSITION WHERE THE CONSUMER PROTECTION ACT 68 OF 2008 IS NOT APPLICABLE (COMMON LAW POSITION)
 - C. LEGAL POSITION IN TERMS OF THE CONSUMER PROTECTION ACT 68 OF 2008
 - D. EVALUATION
 - E. COMPARISON
 - F. CONCLUSION AND RECOMMENDATIONS
-

A. INTRODUCTION

The first *essentiale* on which the parties must have consensus in a contract of sale is the intention to buy and sell. Consensus to buy and sell determines the true nature of the agreement between them, namely, a sale. This chapter firstly deals with the historical development and the wide application of the definition of “sale” in South African law (where the CPA is not applicable).

Thereafter the fact that sale agreements are included in the application of the CPA as well as the type of sales thus included, are briefly discussed. The intention to buy and sell in a contract of sale for consumer goods in both Scotland as well Belgium are also examined.

The purpose of this chapter is not a critical, comparative or even analytical discussion of what is meant by an agreement of sale nor what is included in this *essentiale* of sale (to buy and sell). Kahn states that any attempt to encapsulate the reciprocal obligations of this subtle and complex transaction in a succinct definition is probably futile and may even be misleading.¹ The chapter is therefore for purposes of thoroughness and completeness, reminding the reader of what is included in the terms “sale”, “contract of sale” and “consumer sale agreements”.

¹ Kahn (2010) 3.

The reader is also reminded that the focus of this thesis will be the sale of primarily *movable*² consumer goods³ in both the evaluation of the CPA as well as the comparative discussions throughout. Instances where immovable consumer goods are discussed are specifically mentioned.⁴ Though the marketing of goods is governed by the CPA,⁵ the marketing of goods as part of the sale agreement falls outside the scope of this thesis and will not be discussed.

As mentioned earlier⁶ no South African case law regarding the relevant provisions of the CPA as discussed in this thesis was decided during the writing en prior to the submission thereof and therefore not included.⁷

B. LEGAL POSITION WHERE THE CONSUMER PROTECTION ACT 68 OF 2008 IS NOT APPLICABLE (COMMON LAW POSITION)

1. Brief historical overview

Barter was according to Zimmermann⁸ the contract of sale's predecessor because the need to trade arose before money as a method of payment was established. *Mancipatio*⁹ was also seen as a predecessor of the contract of sale.¹⁰ The consideration of *bona fides* and consensus relaxed the strict application of *mancipatio*¹¹ and was the basis for all *contractus consensus*.¹² The contract of sale (*emptio venditio*) in Roman law was a reciprocal contract with consensus as its basis.¹³ At Roman law the *essentialia* of a contract of sale included the intention to buy and sell and such intention was based on consensus.¹⁴

² Own emphasis.

³ Including gas, electricity and water.

⁴ See for example chapter 7 Part E: Cooling-off rights.

⁵ S 1 CPA.

⁶ See chapters 1 & 2 of this thesis.

⁷ Up to and including 31 December 2012.

⁸ Zimmermann *Obligations* 250-252. See also Lötze 1991 (Deel 1) 218-223; Mostert *ea* 4-5.

⁹ *Mancipatio* was a formal legal act whereby ownership was transferred to Roman citizens. See Lötze 1991 (Deel 1) 219 fn 16. See also Zimmermann *Obligations* 252.

¹⁰ Lötze 1991 (Deel 1) 219-220.

¹¹ *Ibid.*

¹² Zimmermann *Obligations* 230.

¹³ Lötze 1991 (Deel 1) 220.

¹⁴ Zimmermann *Obligations* 234.

These *essentialia* as well as the duties of the parties in terms of an agreement of sale were received into Roman-Dutch law almost identically from Roman law.¹⁵ The same principles apply to the *essentialia* of a contract of sale in South African common law.¹⁶ Although consensus is a general requirement for the conclusion of a valid contract it is correctly argued that the importance thereof as an *essentiale* of an agreement of sale is to clarify the intention of the parties as well as the nature of the agreement.¹⁷ This is also of importance in order to distinguish between a valid innominate contract based on consensus and a valid nominate contract of *sale*.¹⁸

As mentioned in the introductory paragraph, there are many types of sale agreements that form part of South African law. Certain types of sale agreements are regulated by legislation, for example credit sales that form part of credit agreements and are regulated by the National Credit Act,¹⁹ the sale of immovable property in terms of the Alienation of Land Act²⁰ and auctions (regulated by the CPA and its regulations²¹). Sale agreements also include electronic sale transactions (as regulated by the Electronic Communications and Transactions Act²²) and sales in execution (regulated by provisions governing auctions and the rules of court).²³ The focus of this thesis (and this chapter in particular) is, however, on the interpretation of the first *essentiale* of a sale (being the intention to buy and sell) in relation to the type of sale agreements and transactions governed by the CPA.

2. The nature of a contract of sale

“When parties who have the requisite intention agree together that the one will make something available to the other in return for the payment of a price the contract is a sale. The one who agrees to make the thing available is the seller, and the one who agrees to pay the price is the

¹⁵ Voet 18 1 1.

¹⁶ Mostert *ea* 4-5; De Wet & Van Wyk 313. See also *Lammers & Lammers v Giovanni* 1955 3 SA 385 (A) 396.

¹⁷ Lötze 1991 (Deel 1) 222 fn 40.

¹⁸ Own emphasis.

¹⁹ 34 of 2005. Hereinafter referred to as the NCA.

²⁰ 68 of 1981. Hereinafter referred to as the ALA.

²¹ Published under GN R293 in GG 34180 of 1 April 2011.

²² 21 of 2002. Hereinafter referred to as ECTA.

²³ Magistrates' Courts Act 32 of 1944.

buyer or purchaser. The contract may include provisions on many other matters as well, but agreement on other matters is not essential.”²⁴

The above summary by Kerr encapsulates the minimum requirements for a valid sale.²⁵ Another way of defining a contract of sale would be that it is a specific, nominated reciprocal agreement to buy and sell, in terms of which the seller has the true intention to deliver a determined or determinable thing together with all his rights in the thing, undisturbed, to the buyer, and the buyer has the true intention of paying a determined or determinable price for the thing.²⁶ The fact that consensus must be reached on the *essentialia* has been supported by South African courts.²⁷ The parties must reveal their intention to buy and sell.²⁸ Where the parties only create a pretence of sale, but the true intention of the parties is in reality something else, the courts will not give effect to the pretence but rather to the true intention of the parties.²⁹ The parties must have the intention to buy and sell and cannot merely be under the impression that this intention might be present.³⁰

Mackeurtan states that there must be an agreement of the minds of the contracting parties, mutually communicated, with the intention of contracting a sale or in other words a *concursum animorum animo contrahendi*.³¹ It must therefore exist with certainty as to the subject matter of the sale and its essential characteristics; the price to be paid and any other term raised in the negotiations and expressly or impliedly regarded by the parties as material.³²

²⁴ Kerr 3.

²⁵ *Ibid.*

²⁶ Nagel *ea* 193.

²⁷ *McWilliams v First Consolidated Holdings (Pty) Ltd* 1982 2 SA 1 (A). See also *Zandberg v Van Zyl* 1910 AD 302; 308-309, 317; *Goldinger's Trustee v Whitelaw & Son* 1917 AD 66; 73-77 and *Shell SA (Pty) Ltd v Corbitt* 1986 4 SA 523 (C).

²⁸ Nagel *ea* 194.

²⁹ *Moubatten Investments (Pty) Ltd v Mahomed* 1989 1 SA 172 (D); *Vasco Dry Cleaners v Twycross* 1979 1 SA 603 (A); *Zandberg v Van Zyl* 1910 AD 302; 308-309.

³⁰ Nagel *ea* 194.

³¹ Mackeurtan's 28.

³² *Ibid.*

C. LEGAL POSITION IN TERMS OF THE CONSUMER PROTECTION ACT 68 OF 2008

1. Relevant definitions

“Transaction” is defined in section 1 and means an agreement between or among a person acting in the ordinary course of business, that person and one or more other persons for the supply or potential supply of any goods or services in exchange for consideration; or the supply by that person of any goods to or at the direction of a consumer for consideration; or the performance by, or at the direction of, that person of any services for or at the direction of a consumer for consideration; or an interaction contemplated in section 5(6) of the CPA.³³

Section 5(6) provides that for greater certainty particular arrangements must also be regarded as a transaction between a supplier and a consumer. These include the supply of any goods or services in the ordinary course of business to any of its members by a club, trade union, association, society or other collectivity,³⁴ whether corporate or unincorporated, of persons, voluntarily associated and organised for a common purpose or purposes, whether for fair value consideration or otherwise, irrespective of whether there is a charge or economic contribution demanded or expected in order to become or remain a member of that entity.³⁵

A transaction between a supplier and consumer also includes the solicitation of offers to enter into a franchise agreement, an offer by a potential franchisor to enter into a franchise agreement with a potential franchisee, a franchise agreement or an agreement supplementary to a franchise agreement and the supply of any goods or services to a franchisee in terms of a franchise agreement.³⁶

“Agreement” means an arrangement or understanding between or among two or more parties that purports to establish a relationship in law between or among them.³⁷

“Consumer agreement” means an agreement between a supplier and a consumer other

³³ S 1.

³⁴ Precise wording in s 5(6) CPA. Supposedly referring to a collective group of people with the same purpose regarding the supply of goods and services in terms of the Act.

³⁵ S 5(6)(a).

³⁶ S 5(6)(b) – (e).

³⁷ S 1.

than a franchise agreement.³⁸ Section 1 of the CPA defines “supply” when used as a verb in relation to goods to include *sell*,³⁹ rent, exchange and hire in the ordinary course of business for consideration or in relation to services, to sell the services, or to perform or cause them to be performed or provided, or to grant access to any premises, event, activity or facility in the ordinary course of business for consideration.

In terms of section 1 “service” includes, but is not limited to any work or undertaking performed by one person for the direct or indirect benefit of another, the provision of any education, information, advice or consultation,⁴⁰ the transportation of any goods and the provision of any accommodation, sustenance or entertainment. *A right of occupancy of, or power or privilege over or in connection with, any land or other immovable property*,⁴¹ other than in terms of a rental is also included.

“Goods” in terms of section 1 includes anything marketed for human consumption; any tangible object including any medium on which anything is or may be written or encoded; any literature, music, photograph, motion picture, game, information, data, software, code or other intangible product written or encoded on any medium, or a licence to use any such intangible product. Also included under the definition of “goods” is *a legal interest in land or any other immovable property*,⁴² other than an interest that falls within the definition of “service” in section 1 and gas, water and electricity.⁴³

“Consideration”⁴⁴ means anything of value given and accepted in exchange for goods or services, including:

- a. money, property, a cheque or other negotiable instrument, a token, a ticket, electronic credit, credit, debit or electronic chip or similar object;
- b. labour, barter or other goods or services;
- c. loyalty credit or award, coupon or other right to assert a claim; or

³⁸ S 1.

³⁹ Own emphasis.

⁴⁰ S 1: Except advice that is subject to regulation in terms of the Financial Advisory and Intermediary Services Act 37 of 2002.

⁴¹ Own emphasis.

⁴² *Ibid.*

⁴³ For a comprehensive discussion of goods sold in terms of the CPA see chapter 5 of this thesis. See also Melville & Palmer 272-278.

⁴⁴ S 1 CPA.

d. any other thing, undertaking, promise, agreement or assurance.

The definition of “consideration” as set out directly above is irrespective of its apparent or intrinsic value, or whether it is transferred directly or indirectly, or involves only the supplier and consumer or other parties in addition to the supplier and consumer.⁴⁵

“Consumer” in respect of any particular goods or services, means:

- a. a person to whom those particular goods or services are marketed in the ordinary course of the supplier’s business;
- b. a person who has entered into a transaction with a supplier in the ordinary course of the supplier’s business, unless the transaction is exempt from the application of the CPA in terms of sections 5(2) or 5(3);
- c. if the context so requires or permits, a user of those particular goods or a recipient or beneficiary of those particular services, irrespective of whether that user, recipient or beneficiary was a party to a transaction concerning the supply of those particular goods or services; and
- d. a franchisee in terms of a franchise agreement, to the extent applicable in terms of section 5(6)(b) to (e).⁴⁶

“Consumer agreement” means an agreement between a supplier and a consumer other than a franchise agreement.⁴⁷

“Distributor”, in relation to any particular goods, means a person who, in the ordinary course of business is supplied with those goods by a producer, importer or other distributor; and in turn, supplies those goods to either another distributor or to a retailer.⁴⁸

An “importer”, with respect to any particular goods, means a person who brings those goods, or causes them to be brought, from outside South Africa into South Africa, with the intention of making them available for supply in the ordinary course of business.⁴⁹

⁴⁵ S 1 def CPA.

⁴⁶ Franchise agreements fall outside the scope of this thesis.

⁴⁷ S 1 def CPA.

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

An “intermediary” means a person who in the ordinary course of business and for remuneration or gain, engages in the business of:

- a. representing another person with respect to the actual or potential supply of any goods or services;
- b. accepting possession of any goods or other property from a person for the purpose of offering the property for sale; or
- c. offering to sell to a consumer, soliciting offers for or selling to a consumer any goods or property that belongs to a third person, or service to be supplied by a third person.⁵⁰

An intermediary does not however include a person whose activities as an intermediary are regulated in terms of any other national legislation.⁵¹

A “juristic person” includes a body corporate, a partnership or association; or a trust. “Person” includes a juristic person.⁵²

“Producer”, with respect to any particular goods, means a person who:

- a. grows, nurtures, harvests, mines, generates, refines, creates, manufactures or otherwise produces goods within the Republic, or causes any of those things to be done, with the intention of making them available for supply in the ordinary course of business; or
- b. by applying a personal or business name, trade mark, trade description or other visual representation on or in relation to the goods.⁵³

A “retailer”, with respect to any particular goods, means a person who in the ordinary course of business, supplies those goods to a consumer and a “service provider” means a person who promotes, supplies or offers to supply any service.⁵⁴ “Supplier” means a person who markets any goods or services.⁵⁵

⁵⁰ *Ibid.*

⁵¹ See s 1 CPA as part of def of “intermediary”.

⁵² *Ibid.*

⁵³ *Ibid.*

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

“Supply chain”, with respect to any particular goods or services, means the collectivity of all suppliers who directly or indirectly contribute in turn to the ultimate supply of those goods or services to a consumer, whether as a producer importer, distributor or retailer of goods, or as a service provider.⁵⁶

Section 5(8) provides that a transaction between a supplier and a consumer will fall within the meaning of the CPA irrespective of whether the supplier:

- a. resides or has its principal office within or outside South Africa;
- b. operates on a for-profit basis or otherwise;
- c. is an individual, juristic person, partnership, trust, organ of state, an entity owned or directed by an organ of state, a person contracted or licensed by an organ of state to offer or supply any goods or services, or is a public-private partnership; or
- d. is required or licensed in terms of any public regulation to make the supply of the particular goods or services available to all or part of the public.

2. Relevant provisions

The Act does not apply to any transaction that constitutes a credit agreement under the NCA but the goods and services that are the subject of the credit agreement are not excluded from the ambit of the CPA.⁵⁷

Section 18 deals with the consumer’s right to choose or examine goods.⁵⁸ If any goods are displayed in or *sold*⁵⁹ from open stock, the consumer has the right to select or reject any particular item from that stock before completing the transaction.⁶⁰ If the consumer has agreed to *purchase*⁶¹ goods solely on the basis of a description or sample, or both, provided by the supplier, the goods delivered to the consumer must in all material respects and characteristics correspond to that which an ordinary alert consumer would have been entitled to expect based on the description or on a reasonable examination of the sample, as the case may be.⁶²

⁵⁶ S 1 def CPA.

⁵⁷ S 5(2)(d).

⁵⁸ For a comprehensive discussion of s 18 see chapters 8 and 9.

⁵⁹ Own emphasis.

⁶⁰ S 18(2).

⁶¹ Own emphasis.

⁶² S 18(3).

Section 26 provides that a supplier of goods or services must provide a written record of each transaction to the consumer to whom any goods or services are supplied and is referred to as a “sales record”.⁶³ The sales record must *inter alia* include the supplier’s information in detail, the premises at which the goods or services were supplied, the date when the transaction occurred, a description of the goods (including the quantity) as well as the total price.⁶⁴

Every consumer has a right to assume, and it is an implied provision of every transaction or agreement, that in the case of an agreement to supply goods, the supplier will have a legal right, or the authority of the legal owner, to *sell*⁶⁵ the goods at the time the title to those goods is to pass to the consumer.⁶⁶

Section 45 and regulations 18 to 33 deal with auctions and “auction” includes a *sale in execution*⁶⁷ of or pursuant to a court order, to the extent that the order contemplates that the *sale*⁶⁸ is to be conducted by an auction.⁶⁹ When goods are put up for *sale by auction*⁷⁰ in lots, each lot is, unless there is evidence to the contrary, regarded to be the subject of a separate transaction.⁷¹ A *sale by auction*⁷² is complete when the auctioneer announces its completion by the fall of the hammer, or in any other customary manner, and until that announcement is made, a bid may be retracted.⁷³

Section 62 of the CPA governs lay-by agreements.⁷⁴ If a supplier agrees to *sell*⁷⁵ particular goods in periodic instalments, and to hold those goods until the consumer has paid the full price for the goods, the amounts paid by the consumer remain the property of the consumer and the goods remain at the risk of the supplier until delivery.⁷⁶

⁶³ Heading of s 26.

⁶⁴ S 26(3)(a)-(i).

⁶⁵ Own emphasis.

⁶⁶ S 44(1)(b)(i). For a comprehensive discussion on the right of the supplier to sell goods see chapter 9 of this thesis.

⁶⁷ Own emphasis.

⁶⁸ *Ibid.*

⁶⁹ S 45(1).

⁷⁰ Own emphasis.

⁷¹ S 45(2).

⁷² Own emphasis.

⁷³ S 45(3).

⁷⁴ For a comprehensive discussion of lay-by agreements see chapter 8.

⁷⁵ Own emphasis.

⁷⁶ S 62(1).

D. EVALUATION

1. Sale transactions and agreements governed by the CPA

Both transactions and agreements are governed by the CPA. According to Melville & Palmer the definition of “transaction” in terms of section 1 indicates three discrete aspects namely: The agreement between the parties for the supply of the goods and services; the actual supply of the goods, and the performance of the services.⁷⁷ Once-off transactions are excluded from the application of the CPA.⁷⁸

It is clear from the outset of the CPA that *sale*⁷⁹ forms part of the scope and application of the Act. This is confirmed by the definitions of “supply”, “goods” and “consideration” in section 1. Both sale agreements regulated by the common law⁸⁰ as well as sale agreements regulated by other legislation⁸¹ are included in the Act. Examples are the sale of material movable goods, material immovable goods, immaterial movable goods and almost anything with economic value (including gas and electricity).⁸² The regulation of the sale of goods by description or sample,⁸³ auctions and execution sales⁸⁴ and lay-by agreements⁸⁵ are other examples.

Sale is either included as part of Chapter 1 of the CPA⁸⁶ or Chapter 2 of the CPA.⁸⁷ Although there are no case law on the CPA at the time of writing this thesis, authors interpret the CPA to include *sale*.⁸⁸

It is clear from the definitions of the parties involved in consumer transactions,⁸⁹ that the CPA regulates the marketing, relationships, transactions and agreements between producers, suppliers, distributors, importers, retailers, service providers and intermediaries, on the one hand, and consumers on the other hand, of goods and

⁷⁷ Melville & Palmer 273.

⁷⁸ *Ibid.* Take note that for purposes of this thesis “transaction” will apply interchangeably with “agreement” and “contract”.

⁷⁹ Own emphasis.

⁸⁰ S 2(10) CPA.

⁸¹ NCA (though only the goods or services that form the subject matter of the transaction); ALA; ECTA.

⁸² See s 1 definitions. See also Van Eeden 43-47; 174.

⁸³ S 18.

⁸⁴ S 45 & regs 18-33.

⁸⁵ S 62.

⁸⁶ The provisions dealing with definitions, interpretation, purpose and application in particular.

⁸⁷ As part of the fundamental consumer rights.

⁸⁸ Own emphasis. See Van Eeden 174; Melville 50; Jacobs *ea* discussion of the fundamental consumer rights; Laher *passim*; Meiring 2011 *passim*; Melville & Palmer 272; Okyerebea *passim*. Refer to the mode of citation included in the bibliography for comprehensive references.

⁸⁹ See Part C 1 above.

services, provided by the aforementioned, during the ordinary course of their business, to consumers, for consideration. It should also be noted that the term “supplier” will be used as a generic term to include the abovementioned list of sellers⁹⁰ unless otherwise indicated.⁹¹

2. Unfair terms in consumer sales

It should be noted that a discussion of the influence of the CPA on the common law of sale will in certain instances warrant reference to the consumer’s fundamental right to fair, just and reasonable terms and conditions (Chapter 2, Part G, sections 48-52). An in-depth discussion of this particular fundamental consumer right warrants a thesis on its own and the reader is reminded that reference to the provisions in Part G of the Act will only be made and discussed in so far as it pertains to the influence of the Act on the common law of sale.⁹²

2.1 Unfair terms in consumer sales: Additional protection for consumers who are natural persons

As explained above, a comprehensive discussion on the provisions governing unfair terms in consumer sales will not form part of this thesis. However, regulation 44 to the CPA does provide additional protection to consumers who are natural persons and buys goods for private purposes or, conversely, not for professional or business purposes.⁹³ Regulation 44 provides a list of contract terms which are presumed to be unfair unless the supplier can prove the contrary. Some of the regulations in terms of regulation 44(3) are relevant and discussed as part of each individual chapter.⁹⁴

⁹⁰ Producers, distributors, importers, retailers, service providers.

⁹¹ See for example discussion of “producer”, “supplier” and “retailer” as part of chapter 11 Parts C,D and F.

⁹² See for example discussion of ss 48 & 52 as part of chapter 6 (Parts C,E & F), s 50 as part of chapter 7 (Parts C,D & F); s 49 as part of chapter 8 (Parts E & F).

⁹³ Reg 44(1) CPA.

⁹⁴ See for example reg 44(3)(g) discussed as part of chapter 8 (Parts D & F) and reg 44(3)(x) discussed as part of chapter 10 (Parts D & F).

E. COMPARISON

1. Scotland

1.1 Introduction

Various statutes and regulations govern consumer sales in Scotland. The most relevant statutes which will be referred to and discussed throughout this thesis are the Unfair Goods and Services Act 1971,⁹⁵ the Unfair Contract Terms Act 1977,⁹⁶ the Sales of Goods Act 1979⁹⁷ and the Consumer Protection Act 1987.⁹⁸ The most relevant regulations include the Unfair Terms in Consumer Contracts Regulations of 1999,⁹⁹ the Consumer Protection (Distance Selling) Regulations of 2000,¹⁰⁰ the Sale and Supply of Goods to Consumers Regulations 2002,¹⁰¹ Cancellation of Contracts made in a Consumer's Home or Place of Work Regulations of 2008,¹⁰² the Price Marking Order of 2004¹⁰³ and the Consumer Protection from Unfair Trading Regulations of 2008.¹⁰⁴

The EU Consumer Rights Directive was agreed to by the EU Member States in October 2011. The primary aim of the Directive is to regulate distance sales contracts. The Department for Business, Innovation and Skills have released consultation seeking views on the implementation of the Consumer Rights Directive into UK law (including Scotland). The result of the consultations was the inclusion of the Directive into the proposed Consumer Bill of Rights.¹⁰⁵

1.1.1 Consumer Bill of Rights

The UK Government has proposed centralising all existing UK consumer protection laws and regulations under a new Consumer Bill of Rights. The proposed Bill aims to consolidate, clarify and strengthen consumer protection legislation throughout the UK. The Bill will include the implementation of the EU Consumer Rights Directive into UK

⁹⁵ Hereinafter referred to as UGSA

⁹⁶ Hereinafter referred to as UCTA 1977.

⁹⁷ Hereinafter referred to as SOGA.

⁹⁸ Hereinafter referred to as UK CPA 1987.

⁹⁹ SI 1999/2083. Hereinafter referred to as the UCTA Regulations 1999.

¹⁰⁰ SI 2000/2334. Hereinafter referred to as the Distance Selling Regulations 2000.

¹⁰¹ SI 2002/3044. Hereinafter referred to as the Consumer Sale Regulations.

¹⁰² SI 2008/1816. Hereinafter referred to as the Doorstep Selling Regulations 2008 which replaced the Consumer Protection Regulations (Cancellation of contracts concluded away from business premises) of 1987 (SI 1987/2117).

¹⁰³ SI 2004/102. Hereinafter referred to as the Price Marking Order 2004.

¹⁰⁴ SI 2008/1277. Hereinafter referred to as the Unfair Trading Regulations 2008.

¹⁰⁵ See discussion below 1.1.1.

law as well as the Law Commission and Scottish Law Commission's work on remedies for faulty goods.¹⁰⁶ The proposed Bill of Rights was not however implemented at the time of completion of this thesis and will not form part of the discussion.¹⁰⁷

1.2 Relevant definitions

Section 61 of SOGA provides important definitions for purposes of interpreting the Act. A “buyer” means a person who buys or agrees to buy goods and a “seller” means a person who sells or agrees to sell goods.¹⁰⁸ A “contract of sale” includes an agreement to sell as well as a sale and a “sale” includes a bargain and sale as well as a sale and delivery.¹⁰⁹

A “consumer contract” means a contract in which one party to the contract deals, and the other party (the consumer) does not deal in the ordinary course of his business.¹¹⁰ It also includes contracts where the goods sold are of a type ordinarily supplied for private use or consumption. The onus of proving that a contract *is not*¹¹¹ to be regarded as a consumer contract will be on the party so contending.¹¹² A “consumer contract” does not include a contract in which the buyer is an individual and the goods are second hand goods sold by public auction at which individuals have the opportunity of attending in person or the buyer is not an individual and the goods are sold by auction or competitive tender.¹¹³ Ervine explains that the definition of “consumer contract” will only apply to auctions of new goods and to internet auctions thus giving consumers enhanced protection in these situations.¹¹⁴

“Producer” in terms of section 61 of SOGA means the manufacturer of goods, the importer of goods into the European Economic Area or any person purporting to be a producer by placing his name, trade mark or other distinctive sign on the goods. Section 1(2) of the UK CPA 1987 broadens the definition of “producer” in relation to product liability. “Producer” in relation to a product, means: the person who manufactured it; in

¹⁰⁶ See chapter 11 Part E 1 for a comprehensive discussion of these proposed remedies.

¹⁰⁷ December 2012.

¹⁰⁸ S 61 SOGA.

¹⁰⁹ *Ibid.*

¹¹⁰ Ss 25 (1), (1A) & (1B) UCTA 1977.

¹¹¹ Own emphasis.

¹¹² S 25 UCTA 1977.

¹¹³ *Ibid.*

¹¹⁴ Ervine 79-80.

the case of a substance which has not been manufactured but has been won or abstracted, the person who won or abstracted it and in the case of a product which has not been manufactured, won or abstracted but essential characteristics of which are attributable to an industrial or other process having been carried out,¹¹⁵ the person who carried out that process.¹¹⁶

A “product” means any goods or electricity and includes a product which is comprised in another product, whether by virtue of being a component part or raw material or otherwise.¹¹⁷

“Property” means the general property in goods, and not merely a special property.¹¹⁸

Section 46 of the UK CPA 1987 gives an extensive definition of the word “Supply”.

“Supply” includes:¹¹⁹

- a. selling, hiring out or lending the goods;
- b. entering into a hire-purchase agreement to furnish the goods;
- c. the performance of any contract for work and materials to furnish the goods;
- d. providing the goods in exchange for any consideration other than money;
- e. providing the goods in or in connection with the performance of any statutory function; or
- f. giving the goods as a prize or otherwise making a gift of the goods.

The definition of “supply of goods” also includes the supply of gas or water.¹²⁰ The performance of any contract by the erection of any building or structure on any land or by the carrying out of any other building works is treated as a supply of goods in so far as it involves the provision of any goods to any person by means of their incorporation

¹¹⁵ For example in relation to agricultural produce.

¹¹⁶ Def of “producer” s 1(2) UK CPA 1987. See also chapter 11 Part E 1.

¹¹⁷ S 1(2) UK CPA 1987.

¹¹⁸ S 61 SOGA.

¹¹⁹ S 41(1)(a) - (f) UK CPA 1987.

¹²⁰ S 46(1) UK CPA 1987.

into the building, structure or works.¹²¹ The sale of immovable property is not included in the definition of “supply”.¹²²

In terms of section 45(1) “business” includes a trade or profession and the activities of a professional or trade association or of a local authority or other public authority.

“Goods” in terms of section 45(1) of the UK CPA 1987 in relation to product liability includes substances, growing crops and things comprised in land by virtue of being attached to it and any ship, aircraft or vehicle.¹²³ Section 61 of SOGA defines “goods” to include all personal chattels other than things in action and money, and in Scotland all corporeal movables except money; and in particular “goods” include emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale as well as an undivided share in goods.

1.3 The contract of sale

“A contract of sale is a contract by which the seller transfers or agrees to transfer the property in the goods to the buyer for a money consideration, called the price.”¹²⁴

According to Black there are several points to notice about this definition.¹²⁵ “Transfer or agrees to transfer” applies not only to agreements where goods are handed over but also to agreements to do so in the future.¹²⁶ “Property” in the context of section 2 of SOGA means legal title or ownership. Dobson & Stokes state that selling is the most common method by which ownership is transferred from person to person.¹²⁷ A contract which completely lacks an agreement to transfer ownership falls outside the definition of

¹²¹ S 46(2) UK CPA 1987.

¹²² S 46(4) UK CPA 1987.

¹²³ S 45(1) UK CPA 1987.

¹²⁴ S 2(1) SOGA.

¹²⁵ Black 178.

¹²⁶ See also ss 2(5) & 2(6) SOGA.

¹²⁷ Dobson & Stokes 6.

sale.¹²⁸ The wording “monetary consideration” is what distinguishes sale from barter or a gift. It also includes cash, payment by cheque and credit card. The hiring of goods is not covered by the definition “transfer of property” because the definition refers to the transfer of ownership whereas goods that are on hire do not belong to the person using them but to the person who is hiring them out.¹²⁹ The importance of the definition according to Dobson & Stokes¹³⁰ is that contracts other than contracts of sale of goods are not governed by the provisions of SOGA.

Section 2 of SOGA distinguishes between “a sale” and “an agreement to sell”. Where (under a contract of sale) the property in the goods is transferred from the seller to the buyer the contract is called a sale.¹³¹ Where (under a contract of sale) the transfer of the property in the goods is to take place at a future time or subject to some condition¹³² later to be fulfilled, the contract is called an agreement to sell.¹³³

Certain types of sale agreements are also included in SOGA such as sale by sample¹³⁴ and sale by description.¹³⁵

SOGA¹³⁶ and UCTA 1977¹³⁷ include the same definition of “contract of sale” and “a consumer contract” is included in the provisions of contracts of sale in general. It therefore also forms part of sales and more particularly consumer sale agreements which are the focus of this discussion.

¹²⁸ *Ibid.* Similar to the position in terms of South African law (See Part B of this chapter). See Dobson & Stokes 7-11 where the contract of sale is distinguished from other transactions such as hire-purchase, bailment and agency.

¹²⁹ Black 178.

¹³⁰ 11.

¹³¹ S 2(4) SOGA.

¹³² For a comprehensive discussion of sales subject to conditions (suspensive conditions) see chapter 8.

¹³³ S 2(5) SOGA.

¹³⁴ S 15.

¹³⁵ S 13.

¹³⁶ Ss 2 & 61.

¹³⁷ S 25.

2. Belgium

2.1 Introduction

Samoy confirms that the law of sale is no longer just regulated by the Belgian Civil Code but is also greatly influenced by European and International trends.¹³⁸ The most relevant result thereof is the establishment of a separate regulation of consumer sales provided for in both the Civil Code¹³⁹ and separate legislation.¹⁴⁰ Unfortunately, the field of application of the various sources for sale agreements leads to a chaotic whole.¹⁴¹ As will be shown, the reason is the uncertainty created by the wording, interpretation and application of the various sources applicable to consumer sale agreements.

It is important to note that sale agreements in Belgian law are regulated by the provisions of the Civil Code with regard to the general principles of contract law,¹⁴² the provisions with regard to the common law of sale¹⁴³ as well as the quality of goods and guarantees in the case of consumer sales.¹⁴⁴

Specific legislation should also be considered in this discussion and includes the Act of February 25, 1991 on the liability for defective products,¹⁴⁵ Act of February 9, 1994 on products and services safety,¹⁴⁶ Act of September 1, 2004 on the protection of consumers in respect of the sale of consumer goods¹⁴⁷ and Act of April 6, 2010 on the market practices and the protection of consumers.¹⁴⁸ The abovementioned sources will also be the primary sources referred to for purposes of this thesis.

¹³⁸ Samoy 247.

¹³⁹ Regulated in general by Book III Chapter IV: Sales of the Code but more specifically arts 1649*bis* - 1649*octies*. See also chapter 11 part E of this thesis.

¹⁴⁰ Act 2004 on the protection of consumers in respect of the sale of consumer goods.

¹⁴¹ Samoy 247.

¹⁴² Arts 1101-1369.

¹⁴³ Art 1582-1701.

¹⁴⁴ Arts 1649*bis* – 1649*octies*.

¹⁴⁵ *Wet tot wijziging van de wet van 25 februari 1991 betreffende de aansprakelijkheid voor producten met gebreken*. Hereinafter referred to as Act 1991.

¹⁴⁶ *Wet betreffende de veiligheid van producten en diensten*. Hereinafter referred to as Act 1994.

¹⁴⁷ *Wet betreffende de bescherming van de consumenten bij verkoop van consumptiegoederen*. Hereinafter referred to as Act 2004.

¹⁴⁸ *Wet betreffende marktpraktijken en consumentenbescherming*. Hereinafter referred to as the WMPC 2010. The Act on Market Practices and Consumer Protection has been published and came into force on 12 May 2010. This Act replaces the Trade Practices Act (TPA) of 14 July 1991.

The various sources of law governing consumer sales is a point of contention amongst Belgian writers and the manner of implementation of the consumer specific legislation as mentioned above into current Belgian law is also criticised.¹⁴⁹

According to Herbots¹⁵⁰ Belgian law does not make such a clear distinction as English law between sales of goods and sale of other kinds of property. Sale and other transactions similar to sale are discussed under one heading in the Belgian Civil Code and the general rules are to be found in articles 1582 to 1701 thereof.

2.2 The nature and form of sales: General

The general principles of contract law as contained in the Civil Code is applicable to all possible combinations of sale agreements and are applicable to both natural and juristic persons.¹⁵¹ The common law of sale as contained in the Civil Code is applicable to the sale of goods as well as consumer sales.¹⁵²

The true intention of the parties plays an important part in sale agreements. The reason for this is that in terms of the general principles regulating contracts, there is an implied duty in terms of article 1135 of the Code that the content of an agreement must express the true intention of the parties and comply with the principles of equity, usage or any other law applicable to that particular obligation.¹⁵³ Applied to a contract of sale, this obligation includes giving the other party (the buyer) appropriate information, especially regarding the risks implied in the use of the product.¹⁵⁴

The above obligation has been concretised by article 4 of the WMPC 2010¹⁵⁵ which provides that the seller must (in good faith) at time of conclusion of the contract provide the consumer with the correct and useful information on the main characteristics of the product and conditions of sale, taking into account the need for information expressed by the consumer and the usage declared by the consumer or reasonably foreseeable usage.

¹⁴⁹ Dekkers 546, Samoy 254-262, Caufmann 6-16, Peeters 2005 442-444, Tilleman & Verbeke (2009) 27-37.

¹⁵⁰ 229.

¹⁵¹ Samoy 252.

¹⁵² *Ibid.*

¹⁵³ Crabb 221.

¹⁵⁴ Otto 2011 531-533.

¹⁵⁵ Chapter 2, S 1 of the WMPC 2010 which deals with the general obligation to inform the consumer.

Article 1582¹⁵⁶ defines a “sale” as an agreement whereby one person obligates himself to deliver a thing and the other to pay for it. Consensus and the intention to buy and sell are at the core of such an agreement. A sale will come into being (and ownership acquired) as soon as the seller and the buyer have agreed on the thing sold as well as the price (even if the purchase price is not yet paid or the thing delivered).¹⁵⁷ Conditional sales¹⁵⁸ as well as the promise of a sale¹⁵⁹ are included in the nature of sales.

Dekkers¹⁶⁰ states that from the definition as provided for in terms of article 1582 of the Code there are two minimum essential elements (“wezenlijke bestanddelen”) that distinguishes a contract of sale from other agreements. These essential elements (*essentialia*) are the transfer of ownership against a certain price.¹⁶¹ The transfer of ownership must be the purpose of the sale and conversely the buyer must also want to take delivery of the thing and obtain ownership.¹⁶²

Though a comprehensive discussion on the transfer of ownership is dealt with later in this thesis,¹⁶³ it is important to note that the Belgian position differs greatly from the South African position in that the agreement of sale in Belgian law constitutes both the personal agreement as well as the real agreement.¹⁶⁴ In South African law the transfer of ownership is not established by the mere conclusion of the contract. For a valid sale in terms of Belgian law the parties must also agree on the material terms of the contract.¹⁶⁵ Article 1612 includes credit sales as part of sales in general but is not relevant for the purposes of this thesis. The same applies to instalment sale agreements,¹⁶⁶ hire-purchase,¹⁶⁷ the sale of immovable property¹⁶⁸ and auctions.¹⁶⁹ The focus of this thesis is on the sale of movable consumer goods.

¹⁵⁶ Belgian Civil Code.

¹⁵⁷ A 1583.

¹⁵⁸ Arts 1584 & 1588.

¹⁵⁹ Arts 1589 & 1590.

¹⁶⁰ 457.

¹⁶¹ *Ibid.*

¹⁶² *Idem* 457-458.

¹⁶³ See chapter 9.

¹⁶⁴ Dekkers 457-458.

¹⁶⁵ *Idem* 458.

¹⁶⁶ Act of 23 May 1946.

¹⁶⁷ A 1583.

¹⁶⁸ Arts 1186-1193, 1494-1675.

¹⁶⁹ A 1686. See also Samoy 265-274 for a short summary of each of these forms of sale.

2.3 Consumer sales

2.3.1 General provisions and important definitions in terms of the Belgian Civil Code

Provisions that specifically regulate consumer sale agreements were introduced by Act 2004¹⁷⁰ and were also received directly into the Civil Code, Book III, Title VI, Chapter IV by way of articles 1649*bis* – 1649*octies*.¹⁷¹ These provisions will be discussed only so far as to their relevance with regard to definitions and confirmation of sales as part of consumer agreements.

In terms of article 1649*bis* the inserted provisions with regard to consumer sale agreements are only applicable to the sale of consumer goods by the seller to a consumer.

A “consumer” is described as a natural person who buys goods other than for his profession or business.¹⁷² A “seller” is described as either a natural or juristic person that sells consumer goods as part of his profession or business.¹⁷³

“Consumer goods” includes all movable tangible goods but excludes property sold in execution of a court order, water, gas¹⁷⁴ and electricity.¹⁷⁵

Article 1649*bis*¹⁷⁶ provides that agreements for the delivery or manufacturing of consumer goods are also regarded as consumer sale agreements.¹⁷⁷

Tilleman & Verbeke state that it is regrettable that “sale” is not also defined.¹⁷⁸ Because of this the writers suggest that the classical definition as established by the

¹⁷⁰ Protection of consumers in respect of the sale of consumer goods.

¹⁷¹ For a comprehensive discussion of the application of these provisions see chapter 11.

¹⁷² A 1649*bis* Civil Code.

¹⁷³ *Ibid.*

¹⁷⁴ Not in a particular form.

¹⁷⁵ A 1649*bis* Civil Code . For a comprehensive discussion on the “thing sold”, “goods” and “consumer goods” see chapter 5.

¹⁷⁶ Dekkers 546-554.

¹⁷⁷ Tilleman & Verbeke (2009) 27 criticises this provision because of its uncertainty in practice. The reason being that contracts for the manufacturing of goods formed part of other transactions and the writers argue that legislative clarity is needed. See also 28 where the writers questions the inclusion of the supply of services and goods as part of consumer sales. The supply of goods and services are also included in the South African CPA (Chapter 2 Part H) but is not a point of contention as is the case in Belgium. For a detailed outline of the purpose and scope of this thesis see chapter 1.

¹⁷⁸ Tilleman & Verbeke (2009) 27. See also Samoy 255-258.

Civil Code is to be followed being an agreement whereby the seller is obliged to transfer ownership of the goods for a particular price.¹⁷⁹

Tilleman & Verbeke¹⁸⁰ refers to the opinions of other writers¹⁸¹ and case law¹⁸² to illustrate that it is sometimes very difficult to distinguish when a consumer uses goods for personal use or when it is used as part of his business. The majority opinion is that both kinds of uses should be included in the definition of “consumer” for greater certainty and protection.¹⁸³ The case discussed by the writers is a perfect example of where confusion may occur.¹⁸⁴ The plaintiff bought a laptop mainly for professional use but also used the laptop for personal matters such as the payment of accounts, taxes and levies. The plaintiff argued that he should be regarded as a “consumer” because the goods (laptop) was used for both private and business purposes.¹⁸⁵ The court found the use of the laptop to be one of “mixed use” (“gemengde gebruik”) and found that the plaintiff should be regarded as a consumer and receive protection in terms of consumer legislation.¹⁸⁶ It should however be mentioned that in recent case law it appears that the provisions on consumer sales only apply if the goods are used for *mainly*¹⁸⁷ private purposes.¹⁸⁸

2.3.1.1 Important definitions in terms of the WMPC 2010

The WMPC 2010 repealed the Trade Practices Act of 1991 and was introduced into Belgian law to comply with the EU UCC Directive.¹⁸⁹

Some definitions are relevant to consumer sales and will forthwith be discussed.¹⁹⁰ Geerts *et al.* state that the term “market practice” is not defined in terms of

¹⁷⁹ *Ibid.*

¹⁸⁰ (2009) 30-31.

¹⁸¹ Van Oevelen (2005) 11. See also Samoy 255-258.

¹⁸² Kh. Hasselt 21 November 2007, A.R. 07/0261.

¹⁸³ Tilleman & Verbeke (2009) 30.

¹⁸⁴ *Ibid.*

¹⁸⁵ *Ibid.*

¹⁸⁶ 30.

¹⁸⁷ Own emphasis

¹⁸⁸ Tilleman & Verbeke (2009) 30.

¹⁸⁹ EU Directive on unfair terms in consumer contracts 93/13/ECC of 15/04/1993. See also bibliography and mode of citation.

¹⁹⁰ See WMPC 2010 Chap 1: General definitions and principles, a 2.

the Act.¹⁹¹ The memorandum of explanation to the Act does not provide any guidance in this matter and the writers suggest that the term should be interpreted broadly to include all declarations, behaviour, representations and omissions with regard to the product being sold.¹⁹²

Article 2 § 1 defines an “enterprise”¹⁹³ as a natural or juristic person trading with an economic activity as its goal. Economic activity should be understood to include all commercial, industrial and financial activities of the natural or juristic person.¹⁹⁴ Geerts *ea* discuss the exclusion¹⁹⁵ and inclusion¹⁹⁶ of certain professional persons but an in-depth discussion thereof for purposes of this thesis is not relevant.¹⁹⁷ “Business” means any natural or legal person pursuing a commercial objective on a lasting basis, including an association of such persons.¹⁹⁸

“Consumer” means any natural person who acquires or uses, exclusively for non-professional purposes, products placed on the market.¹⁹⁹ Geerts *ea* confirm that juristic persons are not regarded as consumers in terms of the Act.²⁰⁰ The writers state that a so-called “destination criteria” (“bestemmingscriterium”) must be followed.²⁰¹ In other words determining who will be using the goods and for what purpose. Geerts *ea* remark that a natural person should not be regarded as a consumer where goods are bought for both business and private purposes.²⁰²

“Product” means goods and services, immovable property, rights and obligations²⁰³ and “goods” means any tangible movable item.²⁰⁴

“Service” means any service performed by a business in the context of its professional activity or pursuant to its object.²⁰⁵ “Placing on the market” means

¹⁹¹ Geerts *ea* 36 fn 5.

¹⁹² *Ibid.*

¹⁹³ “Onderneming”.

¹⁹⁴ Geerts *ea* 36. See also 37 where the writers give the example of a person buying or selling goods from time to time via e-bay as being excluded from the definition of enterprise and economic activity.

¹⁹⁵ Dentists.

¹⁹⁶ Advocates, notaries, medical practitioners and architects.

¹⁹⁷ Geerts *ea* 37.

¹⁹⁸ A 2 § 1 W MPC 2010.

¹⁹⁹ *Ibid.*

²⁰⁰ Geerts *ea* 37-38.

²⁰¹ *Idem* 38.

²⁰² *Ibid.*

²⁰³ Take note however that the discussion will only be regarding movable consumer goods unless specifically otherwise indicated.

²⁰⁴ The particular type of goods and their definitions are discussed in chapter 5 Part E 2.5.

importing for the purpose of sale, holding for the purpose of sale, offering for sale, sale, offering to hire goods and services, hiring of goods and services, transferring for a consideration or free of charge, where these operations are carried out by a business.²⁰⁶

“Supplier” means any business which is the contractual provider of services subject to distance contracts.²⁰⁷

“Commercial practice” means any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a business, directly connected with the promotion, sale or supply of a product.²⁰⁸

“Invitation to purchase” means a commercial communication which indicates characteristics of the product and the price in a way appropriate to the means of the commercial communication used and thereby enables the consumer to make a purchase.²⁰⁹

2.4 Critique on the implementation of consumer legislation into Belgian law

The incorporation of articles 1649*bis* to 1649*octies* into the Civil Code to regulate consumer sales, was the first time in the 200 year history of the Belgian Civil Code that amendments were directly incorporated therein.²¹⁰

Peeters refers to the incorporation of the articles as an imperfect solution (*een onvolmaakte oplossing*) to regulate consumer sale agreements.²¹¹ Tilleman & Verbeke criticise the fragmented character of the provisions²¹² and refer to the implementation of consumer sale legislation as adding another piece of material to an already large and diverse quilt (“een lapje aan de lappedeken”).²¹³ According to Peeters the incorporation of the articles are fragmented.²¹⁴ Critique from those who support full incorporation instead of pragmatism argue that the common law of sale in the Civil Code is of equal

²⁰⁵ A 2 § 1 WMPC 2010.

²⁰⁶ *Ibid.*

²⁰⁷ *Ibid.*

²⁰⁸ *Ibid.*

²⁰⁹ *Ibid.*

²¹⁰ Peeters 2005 442.

²¹¹ *Ibid.*

²¹² Tilleman & Verbeke (2009) 26-27.

²¹³ *Ibid.*

²¹⁴ Peeters 2005 442.

importance and not necessarily harmonised.²¹⁵ The writer refers to the modernising and harmonisation of the common law of sale and more particularly consumer sale agreements in other countries with a civil code such as Germany, the Netherlands and Scandinavia.²¹⁶

Peeters argues that the plea for the proper incorporation of consumer regulation in terms of consumer sales agreements and the modernisation of the common law of sale by way of incorporation and integration in the Civil Code fell on “political deaf ears”.²¹⁷ In contrast to full harmonisation, the Belgian legislator opted for a minimalistic solution by simply adding an additional section into the Civil Code and there is no mention of full integration in this regard.²¹⁸ The result of the aforementioned according to Peeters is retrogression (“teruggrype”) to the common law of sale.²¹⁹ This remark by Peeters may also be a lesson for South African consumer law, particularly with regard to the integration of the common law of sale (common law regime) into the Consumer Protection Act (legislative regime). The lack of complete integration will stand in the way of a uniform growth and development of the consumer sale regime in Belgium as well as a harmonisation evolution of sale in general.²²⁰

It should however be noted that since the implementation of provisions regulating consumer sales, an approach more in favour of full integration and harmonisation is supported and followed.²²¹

2.5 Interaction between the common law of sale and specific consumer legislation

The common law of sale as governed by the Civil Code²²² and interpreted by the courts and academic writers is in principle applicable to all sale agreements of movable and immovable goods.²²³ Sales governed by the common law include agreements between

²¹⁵ *Ibid.*

²¹⁶ *Ibid.*

²¹⁷ “Politieke dovemansoren” Peeters 2005 442-443.

²¹⁸ *Idem* 443.

²¹⁹ *Ibid.*

²²⁰ *Ibid.*

²²¹ Tilleman (2012) 579-580.

²²² *Ibid.*

²²³ Tilleman & Verbeke (2009) 34.

consumers or between suppliers and merchant sellers.²²⁴ The sale agreement between a professional seller (manufacturer or merchant seller) and a consumer is in principle governed by the common law of sale.²²⁵

It is however important to note that where consumer legislation deviates from the common law of sale, the common law of sale for that particular aspect²²⁶ will be excluded. The consumer will for example not have a choice between the remedies in terms of the common law and those provided for in terms of consumer legislation in the case of defective goods.²²⁷ The provisions governed by consumer legislation will apply exclusively.²²⁸ Tilleman & Verbeke²²⁹ argue that this is also confirmed by article 1649*octies* of the Civil Code that determines that any provision in a consumer sale agreement which purports to limit or exclude any rights of the consumer or excludes the application of consumer legislation is void.

However, because of the fragmented character of the specific consumer legislation, the common law of sale remains complimentary to the consumer legislation.²³⁰ The common law of sale will apply to aspects in a consumer sale not specifically regulated by consumer legislation, for example the warranty against eviction.²³¹

F. CONCLUSION AND RECOMMENDATIONS

1. Agreements of sale as part of the application of the CPA

As indicated in the first part of this chapter²³² it is necessary to confirm that agreements of sale are included in the application of the CPA. One cannot discuss the influence of the CPA on the common law of sale (the *essentialia*, formalities of the sale agreement or duties of the parties) before establishing the relevance thereof.

²²⁴ *Ibid.*

²²⁵ *Ibid.*

²²⁶ For example where the two main duties of the seller in terms of the common law (arts 1641-1648 Civil Code) is substituted with one duty (that the goods have to conform to the agreement between the parties) in terms of consumer legislation (arts 1649*bis* - 1649*octies* Civil Code).

²²⁷ Tilleman & Verbeke (2009) 34-35.

²²⁸ *Ibid.*

²²⁹ *Ibid.*

²³⁰ *Ibid.*

²³¹ *Idem* 25-26.

²³² See Part A of this chapter.

It is clear from the relevant definitions²³³ in section 1 of the CPA and upon inspection of the fundamental consumer rights as contained in Chapter 2²³⁴ that sale does in fact form part of the application of the CPA.

Contrary to Scottish consumer legislation,²³⁵ the CPA not only includes movable goods but also immovable goods.²³⁶ The position in Belgium is somewhat complicated by the fact that only agreements for the sale of movable goods are afforded protection in terms of the provisions in the Civil Code governing consumer agreements.²³⁷ However, in terms of the WMPC 2010 which regulates market practices and consumer protection, immovable property is included in the definition of “product”. Consumer sales of immovable property will therefore also be relevant in certain instances but will be specifically mentioned.²³⁸

In the case of Scotland and Belgium a consumer will only be afforded protection where goods are bought for private use or consumption.²³⁹ In Belgium only natural persons fall under the definition of consumer as long as goods are bought for personal use. The positions in both jurisdictions deserve criticism. As can be seen from the situation in Belgium, it can be extremely difficult to determine whether or not a person bought goods for private use.²⁴⁰ Where a person buys a laptop computer for example, it is most likely that the person will use the laptop for business purposes (drafting business proposals and account statements) as well as for recreational purposes (exploring social networks and the world wide web). It is cumbersome and unreasonable to determine the primary purpose of buying the goods. It can be argued that goods should comply with the same standards regardless of whether it is bought for private or professional use.

The position in terms of the CPA in South Africa is simplified because it is irrelevant whether the consumer buys the goods for private or business purposes, as

²³³ “Supply” and “goods”.

²³⁴ See Parts C & D above.

²³⁵ S 2 SOGA.

²³⁶ For a comprehensive discussion on the thing sold see chapter 5.

²³⁷ Arts 1649*ter* – 1649*octies* Civil Code.

²³⁸ See discussion of “product” as part of chapter 5 Part E & F.

²³⁹ See discussion Part E 1.2 above.

²⁴⁰ *Ibid.*

long as it is done in the supplier's ordinary course of business for consideration.²⁴¹ Contrary to Belgium, juristic persons are included in the definition of consumer and the definition of "juristic person" is wide enough to include a partnership, trust and body corporate not traditionally regarded as juristic persons in South Africa.²⁴²

It is also noticeable that in Scotland as well as Belgium consensus and the intention of the parties to buy and sell are at the core of consumer sale agreements²⁴³ as is the case in South African law.²⁴⁴ Consumer sale agreements in Scotland are regulated primarily by SOGA.²⁴⁵ This supports the relevance of the comparison with South Africa. Consumer legislation in Belgium is primarily regulated by the Code²⁴⁶ as well as other legislation²⁴⁷ but also specifically include both sale and consumer sale agreements.

With regard to the incorporation of consumer legislation in South Africa (the CPA) the position in Belgium deserves particular attention. As mentioned earlier²⁴⁸ Peeters argues that the plea for the proper incorporation of consumer regulation in terms of consumer sale agreements and the modernisation of the common law of sale by way of incorporation and integration in the Civil Code fell on "political deaf ears".²⁴⁹ This also seems to be the case in South Africa when one looks at the comments and concerns raised by the private sector and other interested parties during the time when the Consumer Protection Bill²⁵⁰ was published for public comment.²⁵¹

In contrast to full harmonisation, the Belgian legislator opted for a minimalistic solution by simply adding an additional section into the Civil Code and there is no mention of full integration in this regard.²⁵² The result of the aforementioned according

²⁴¹ S 1 & S 5 CPA.

²⁴² S 1 def CPA.

²⁴³ Scotland see Part E 1.2; Belgium Part E 2.1 & 2.2

²⁴⁴ See Part B.

²⁴⁵ S 2(1)

²⁴⁶ Arts 1582 & 1649*ter*.

²⁴⁷ Act 2004 & WMPC 2010.

²⁴⁸ See Part E 2.4.

²⁴⁹ "Politieke dovemansoren" Peeters 2005 442-443.

²⁵⁰ Consumer Protection Bill, Number: B19D-2008, Originator: Select Committee on Economic and Foreign Affairs, Commencement Date: 2011-03-31.

²⁵¹ See Du Preez 58-83. See also chapter 3 of this thesis.

²⁵² Peeters 2005 443.

to Peeters is retrogression (“teruggrype”) to the common law of sale.²⁵³ This remark by Peeters may also be a lesson for South African consumer law, particularly with regard to the integration of the common law of sale (common law regime) into the CPA (legislative regime). The lack of complete integration will stand in the way of a uniform growth and development of the consumer sale regime in South Africa just as is the case in Belgium.²⁵⁴

²⁵³ *Ibid.*

²⁵⁴ *Ibid.*

5 **ESSENTIALA OF SALE: THE THINGS SOLD**

- A. INTRODUCTION
 - B. LEGAL POSITION WHERE THE CONSUMER PROTECTION ACT 68 OF 2008 IS NOT APPLICABLE (COMMON LAW POSITION)
 - C. LEGAL POSITION IN TERMS OF THE CONSUMER PROTECTION ACT 68 OF 2008
 - D. EVALUATION
 - E. COMPARISON
 - F. CONCLUSION AND RECOMMENDATIONS
-

A. INTRODUCTION

The second *essentiale* on which parties to a contract of sale must have consensus is the *merx* or the thing sold.¹ The historical development of this *essentiale* is discussed briefly. The South African position where the CPA is not applicable is discussed and includes relevant case law. Thereafter, the kinds of *merx* (goods) included in the CPA and the influence of the Act on the common law position, are evaluated. Unsolicited goods are also discussed. Goods that form part of sales and consumer sales in both Scotland and Belgium are investigated, followed by a conclusion and recommendations.

As mentioned earlier,² the focus of this thesis (including the comparative analysis) will primarily be on the sale of movables goods. There are however certain situations where a very brief discussion regarding immovable consumer goods are relevant. The reason for this is that immovable goods forms part of the definition of “goods” in terms of the CPA³ and is discussed below.⁴ When analysing the position in Belgium the WMPC 2010⁵ also includes immovable goods as part of the definition of “product” but not as part of the definition of “goods”. As will be shown, the overall impact of the inclusion of immovable goods as part of the definition of “product” in Belgian law is minimal but will be highlighted where relevant throughout this thesis.

¹ For a comprehensive discussion of the intention to buy and sell see chapter 4.

² See chapter 1: Introduction and chapter 4 Part A.

³ S 1 Def CPA.

⁴ See Part C & D of this chapter.

⁵ “*Wet op Markpraktijken en Consumente Bescherming 6 April 2010.*”

B. LEGAL POSITION WHERE THE CONSUMER PROTECTION ACT 68 OF 2008 IS NOT APPLICABLE (COMMON LAW POSITION)

1. Historical overview

1.1 General

At Roman law the *merx*⁶ had to be certain and could consist of almost anything provided it formed part of the commercial trade (*in commercio*).⁷ Initially the *merx* had to be of a specific determined⁸ nature but the introduction of generic sales made the sale of goods that are only determinable at the time of conclusion of the contract permissible.⁹ In Roman-Dutch law the *merx* had to be either determined or determinable at time of conclusion of the contract.¹⁰

Where the *merx* was destroyed before conclusion of the contract or did not exist (and both the parties were unaware of this fact) no contract of sale came into being due to impossibility of performance.¹¹

The sale of a *merx* that was *re extra commercium*¹² was prohibited as it could not be the subject of a valid sale and the sale was *per se* void.¹³ An example was the sale of stolen goods where both parties had knowledge that such goods were stolen.¹⁴ There was, however, a relaxation of the strict application of the rule and the innocent, *bona fide* buyer was in certain instances awarded a claim in terms of the *actio empti* and sometimes even a claim for damages.¹⁵ This was the case for instance where the buyer purchased a slave who was in fact “free” but the buyer was *bona fide* in his belief that the slave could be bought.¹⁶ This was also the case in Roman-Dutch law.¹⁷

⁶ See Lötz 1991 (Deel 1) 223 fn 47 who argues that it is preferable to use the term *merx* rather than thing sold because of its unambiguous nature. For purposes of this thesis both “*merx*” and “thing sold” will be used interchangeably.

⁷ Zimmermann *Obligations* 234; Lötz 1991 (Deel 1) 221.

⁸ Fixed and sure.

⁹ Zimmermann *Obligations* 237; Lötz 1991 (Deel 1) 224.

¹⁰ Zimmermann *Obligations* 240-241; Voet 18 1 21, 19 1 21.

¹¹ Zimmermann *Obligations* 241.

¹² Hiemstra & Gonin 165: “Goods falling outside the area or province of commercial dealings.”

¹³ Zimmermann *Obligations* 241-242.

¹⁴ Lötz 1991 (Deel 1) 225.

¹⁵ Zimmermann *Obligations* 242.

¹⁶ *Ibid.* See also Lötz 1991 (Deel 1) 225.

¹⁷ Voet 2 14 8; Van Leeuwen *RHR* 4 17 10 & 1 4 19 21.

1.2 Particular types of *merx*¹⁸

1.2.1 Generic sale

“Things which are normally counted, measured or weighed and are therefore usually defined by reference to their genus, could, of course be sold but only if they were either specified or if a whole stock of such non-specific goods was sold.”¹⁹

As the explanation of a generic sale by Zimmermann²⁰ indicates, the *merx* in case of a generic sale was only determinable at the time of conclusion of the contract and only became determined after individualisation.²¹ In Roman law the seller was allowed to choose *merx* from the poorest of the *genus*²² or stock whereas in Roman-Dutch law the seller had to choose the *merx* of average quality.²³ In Roman-Dutch law there was uncertainty amongst legal writers whether or not the act of individualisation was a unilateral or reciprocal act.²⁴

1.2.2 Future things

1.2.2.1 *Sale ad mensuram*

In the sale *ad mensuram* particular goods were bought at a particular price per unit (for example certain amounts of hay from a hay stack).²⁵ The *merx* only became determined when it was weighed, measured or counted.²⁶ The difference between a sale *ad mensuram* and a generic sale was that the price could only be determined with a sale *ad mensuram* once the *merx* had been weighed, measured or counted.²⁷ (The sale *ad mensuram* is of particular relevance with regard to conditional sales and whether or not a sale *ad mensuram* should be regarded as a condition).²⁸ Though the sale *ad*

¹⁸ See the discussion of these types of *merx* as part of conditional sales in chapter 8. See also Floyd 470-471 for a discussion of the historical development in Roman law and Roman-Dutch law of these types of *merx*.

¹⁹ Zimmermann *Obligations* 236.

²⁰ *Ibid.*

²¹ Lötzt 1991 (Deel 1) 224. See also Mostert *ea* 25.

²² Lötzt 1991 (Deel 1) 224 fn 54.

²³ Voet 46 3 9.

²⁴ *Idem* 45 1 22, 18 6 4; Van Leeuwen 4 17 2.

²⁵ Floyd 463.

²⁶ Zimmermann *Obligations* 286-287. See also De Wet & Van Wyk 309; Mostert *ea* 85; Mackeurtan's 186; Floyd 463.

²⁷ Floyd 463-464.

²⁸ For a comprehensive discussion of conditional sales and the sale *ad mensuram* see chapter 8.

mensuram was accepted in Roman-Dutch law, there was a conflict of opinion whether or not it should be regarded as a condition or a *modus*.²⁹

1.2.2.2 *Emptio spei*³⁰

The *emptio spei* is also known as an aleatory sale.³¹ The *merx* did not exist at the time of conclusion of the contract. Because of the fact that the agreement was connected to the element of chance, and the seller would be bound regardless of whether or not the *merx* materialised, the *merx* became determined at the time of conclusion of the contract.³² Where the seller prevented the *merx* from materialising, the *actio empti* was available to the buyer for a claim for damages.³³

1.2.2.3 *Emptio rei speratae*³⁴

The *merx* did not exist at the time of conclusion of the contract but there was an expectation that it would come into existence in the future.³⁵ Whether or not the *merx* did come into existence in the future was a condition which determined whether or not the buyer was bound to the agreement in future. The *merx* therefore only became determined once it had materialised.

1.3 *Res aliena*³⁶

In Roman law it was not a legal requirement that the seller had to be the owner of the *merx* to conclude a valid contract of sale and the *merx* could also therefore be a *res aliena*.³⁷ The origin of the rule regarding *res aliena* is founded in Roman law. In order to place sale agreements between Roman citizens and persons who were not Roman citizens within the arena of legal trade a valid sale could be concluded provided that the

²⁹ Voet 18 6 4, Van Leeuwen *RHR* 4 17 2. See also Floyd 466-469.

³⁰ Hiemstra & Gonin 182: "Purchase of a pure chance" for example tomorrow's catch of fish. Even in the event of no fish being caught the price is due.

³¹ *Alea* meaning dice referring to the chance related to this type of sale: LötZ 1991 (Deel 1) 223 fn 84.

³² Zimmermann *Obligations* 248-249; Voet 18 4 9, 18 1 13. See also LötZ 1991 (Deel 1) 228.

³³ Voet 18 4 9.

³⁴ Hiemstra & Gonin 182 "purchase of an expectation, of a thing not yet in existence". Examples given are the child of a pregnant slave woman and should the object of the sale not come into existence (for example there is a miscarriage) there is no sale.

³⁵ Zimmermann *Obligations* 245-246, Voet 18 1 13.

³⁶ Hiemstra & Gonin 278: "Thing of another".

³⁷ LötZ 1991 (Deel 1) 228.

seller transfer all the rights he had over the *merx* to the buyer which only included ownership if the seller himself was owner.³⁸ A valid sale could therefore be concluded even if the seller was not the owner or could never become the owner (as was the case with non-Roman citizens). *Res aliena* applied in both Roman and Roman-Dutch law.³⁹

If both parties were aware of the fact that the *merx* was the property of a third party with a stronger title, the sale was void.⁴⁰ Where the buyer had knowledge of such fact but the seller was *bona fide*, the purchase price still had to be paid but the seller was released from all obligations.⁴¹ If the seller was aware of the fact that the *merx* belonged to a third party with a better title, a valid and enforceable contract remained.⁴²

2. South African law

2.1 Introduction

As stated by Mackeurtan,⁴³ there must be a defined and ascertained subject matter existing at time of the contract of sale or having a potential existence.⁴⁴ The *merx* does not need to be corporeal for everything can be sold which can be held, possessed or sued for.⁴⁵ Nagel⁴⁶ confirms that a *merx* must be determined or determinable at the time of conclusion of the contract to satisfy the requirement that the execution of a contract must be physically possible.⁴⁷

If the description of the *merx* is too vague to determine exactly what is sold, the contract is void.⁴⁸ In *Phone-A-Copy Worldwide (Pty) Ltd v Orkin*⁴⁹ the court had to determine the nature of the *merx* and in so doing whether or not the *merx* had been adequately described in the contract of sale.⁵⁰ The court held that the *merx* had been adequately described without the need for extrinsic evidence and that the contract

³⁸ Lötz 1991 (Deel 1) 228-229 fn 85.

³⁹ *Ibid.* See also Voet 1 1 2, 18 1 1, 18 1 14, 21 2 1.

⁴⁰ Lötz 1991 (Deel 1) 228-229 fn 85.

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ 42.

⁴⁴ See Kerr 9-11 where the writer discusses the accessories and appurtenances included where the subject matter is determined.

⁴⁵ *Ibid.*

⁴⁶ Nagel *ea* 194.

⁴⁷ Voet 18 1 21. See also *Scrutton v Ehrlich* 1908 TS 300.

⁴⁸ Kerr 22-24.

⁴⁹ 1986 1 SA 729 (AD).

⁵⁰ 731.

contained a valid formula for the *merx*'s determination.⁵¹ Lötz *ea*⁵² correctly criticise the case and argue that the *merx in casu* could only have been described adequately if the parties had intended a generic sale.⁵³ The intention to conclude a generic sale must be clear from the wording of the contract and such an inference could not have been drawn in the *Phone-A-copy* case.⁵⁴ The *merx* therefore only came into existence after the conclusion of the contract and was neither determined nor determinable at time of conclusion and the contract was thus void.⁵⁵

As was the case in both Roman law and Roman-Dutch law, different things can be sold.⁵⁶ In *Botha v Carapax Shadeports (Pty) Ltd*⁵⁷ it was held that where a restraint of trade is incidental to a business and forms part of its goodwill, it is part of the thing sold.⁵⁸

Certain things sold are regulated by legislation, such as sectional property,⁵⁹ timeshare property⁶⁰ and certain other immovable property.⁶¹ The focus of this thesis is the in-depth discussion of corporeal movable property which forms part of the application of the CPA and is of importance for purposes of comparison and eventual recommendations. These *merces* are also relevant to the discussion of generic sales, the sale of future things and the sale of *res aliena*.

2.2 Generic sales

A generic sale is described by Van Warmelo⁶² as the sale of a certain quantity or amount from particular stock (for example ten bags of grain from a particular shed). This is also the case where a certain amount or quantity is bought from a certain class of replaceable goods or from particular stock. Goods will only become determined where

⁵¹ 730-731.

⁵² 12-13.

⁵³ 12.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ See 1.1 above. See also Nagel *ea* 195 where the writers include movable corporeal things (for example a car), immovable corporeal property (for example a farm), material things (for example a dress), and immaterial things (for example books debts).

⁵⁷ 1992 1 SA 202 (A).

⁵⁸ Kerr 10-11. See also Kerr 11-18 on methods of determining the subject matter of a contract of sale.

⁵⁹ Sectional Titles Act 95 of 1986.

⁶⁰ Timeshare Control Act 75 of 1983.

⁶¹ Alienation of Land Act 68 of 1981.

⁶² 288.

they are separated, specified and individualised from the *genus* or stock.⁶³ The object of the sale is only allocated in terms of its kind or *genus* at the time of conclusion of the contract and the exact object of the sale which the seller must deliver is not yet determined. The object (*merx*) is determinable at this stage because the weight or measure must be mentioned together with the kind of *merx* sold. The *merx* changes from a determinable *merx* to a determined *merx* when it is individualised.

Where the quality of the *genus* is not described in detail, the seller may choose the quality to be delivered. According to Mostert *ea*⁶⁴ the act of individualisation consists of two elements, namely, a physical and a psychological one. The first element is where a factual act or deed takes place.⁶⁵ Specific goods from the *genus* are separated (usually by the seller) together with the intention that the goods separated will be the object of the sale. The second element includes the intention of the seller but also contains a reciprocal element in that the separation must be done in association with the buyer.⁶⁶ Examples would be where the buyer is present, the buyer's authorised agent is present or individualisation will occur at a specified time.⁶⁷

2.3 Future things⁶⁸

2.3.1 Sales *ad mensuram*

Though sales *ad mensuram* are acknowledged in South African law, many conflicting viewpoints (in terms of case law and legal writings) exist with regard to whether or not such a sale is also a conditional sale.⁶⁹

2.3.2 *Emptio spei*

Van Warmelo⁷⁰ explains it as a *merx* that does not exist at time of conclusion of the contract (for example the sale of next year's crop). The *merx* is sold with the chance or

⁶³ Mostert *ea* 25-28.

⁶⁴ 26.

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

⁶⁷ Van Jaarsveld *ea* 148-149. See also Mackeurtan's 43.

⁶⁸ Referred to by Kerr 25-26 as "things not yet in existence, bought on condition that they come into existence".

⁶⁹ For a comprehensive discussion of this point see chapter 8. See also for a summary of the conflicting viewpoints Floyd 470-471.

⁷⁰ 228.

hope that it will come into existence in the future regardless of whether it does materialise or not. Because of the element of chance related to an *emptio spei*, the *merx* is determined from the date of conclusion of the contract.⁷¹

2.3.3 *Emptio rei speratae*⁷²

In contrast to the *emptio spei*, the *emptio rei speratae* is the sale of *merx* that is expected to materialise and is not based on chance or hope. The *merx* will therefore only become determined on the proviso that next year's crop of grain does in fact materialise.⁷³ If it does not, no contract of sale exists. If it does, the sale comes into being the moment the crop materialises.⁷⁴

2.4 *Res aliena*

As explained earlier, the origin of *res aliena* is found in Roman law⁷⁵ but this concept is mostly used in modern South African law in relation to stolen goods.⁷⁶ Because the obligatory agreement (the conclusion of the contract of sale) does not necessarily occur simultaneously with the real agreement (the transfer of ownership), a seller does not need to be the owner of the *merx* to conclude a valid contract of sale.⁷⁷ The seller must, however, transfer all the rights and duties he has in the *merx* to the buyer.⁷⁸

The true owner may claim his property from the buyer based on the *rei vindicatio*.⁷⁹

Whether or not the parties have knowledge of the fact that the *merx* is a *res aliena*, plays an important role. Where the buyer possesses a *res aliena* in good faith, the true owner may only claim it from him provided it still exists but may not be able to claim the value from the buyer where he (the buyer) sold the *merx* in good faith to

⁷¹ Mackeurtan's 43; Nagel *ea* 195 & 211.

⁷² Kerr 26-28.

⁷³ *Ibid.* See also *Richtown Development (Pty) Ltd v Dusterwald* 1981 3 SA 691 (W) 700.

⁷⁴ Van Warmelo 288-289.

⁷⁵ See 1.1 above.

⁷⁶ Mackeurtan's 43-44.

⁷⁷ *Ibid.* See also Nagel *ea* 196; Kahn (1985) 19.

⁷⁸ Nagel *ea* 196.

⁷⁹ *Ibid.* The writers also explain that the right of the owner stems from the rule *nemo plus iuris in alium transferre potest quam ipse haberet* (a person cannot transfer more rights than he himself has).

somebody else.⁸⁰ Where stolen property is sold with the knowledge of the seller, it is regarded as valid to allow the buyer to claim damages.⁸¹

According to Nagel *ea*⁸² there are limitations on the true owner's right to institute the *rei vindicatio* in certain instances, for example where the object was sold in terms of a court order and the buyer acted in good faith, the buyer has by law a lien or tacit hypothec over the object sold or where the doctrine of estoppel applies.

2.5 Sales by description or sample⁸³

Mackeurtan states that a sale of unascertained goods is in all cases also a sale by description.⁸⁴ The writer defines a sale by description as one where the parties express either the nature of the goods only or their nature and their quality.⁸⁵ The nature and the quality together serve as the description of the *merx*. The nature indicates the kind or class to which the *merx* belongs and the quality indicates all the essential characteristics which the *merx* possesses.⁸⁶ The obligation of the seller in a sale by description is to deliver goods in conformity with the description.⁸⁷ If he tenders delivery of goods which differ from the description, they are not the agreed subject matter of the sale and the buyer does not have to accept them.⁸⁸

Kerr⁸⁹ describes a sale by sample as the exhibition or presentation of a sample, either alone or combined with a description in words, as the means by which a sale is achieved. Mackeurtan states that parties can add to the description (whichever form it takes) words showing the quality of the goods and it is then referable "to a sample".⁹⁰ Where the seller uses a sample to sell a certain *merx* and says no more than that he is

⁸⁰ Nagel *ea* 196. The owner will be able to claim the value of the *merx* from a negligent or intentional buyer which prevented the owner from reclaiming his property or where the buyer acted *mala fide*: *Alderson & Flitton (Tzaneen) (Pty) Ltd v EG Duffeys Spares (Pty) Ltd* 1975 3 SA 41 (T); *Van der Westuizen v Yskor Werknemers se Onderlinge Bystandsvereniging* 1960 4 SA 803 (T) 812.

⁸¹ Mackeurtan's 44 fn 15. See also *Frye's (Pty) Ltd v Ries* 1957 3 SA 575(A) 581; *Kleynhans Bros v Wessels' Trustee* 1927 AD 271 290.

⁸² 197.

⁸³ See also warranties given for the sale of such goods as discussed in chapter 11.

⁸⁴ Mackeurtan's 93.

⁸⁵ *Ibid.*

⁸⁶ *Compania Naviera v Churchill and Sim* [1906] 1 K.B. 237.

⁸⁷ Mackeurtan's 93.

⁸⁸ *Ibid.*

⁸⁹ Kerr 18.

⁹⁰ Mackeurtan's 93.

offering goods “as per sample”, Kerr is of the opinion that the seller is offering goods that correspond with the sample in kind and quality.⁹¹ As with a sale by description alone, (where goods are delivered that do not conform to the quality and or kind as offered) the buyer may refuse such goods.⁹² If the state or condition of the goods is not expressed in a sale by description, the law implies it, and where the parties refer to the quality of a sample they also to refer to the condition thereof.⁹³

Mackeurtan states that sales by sample are not dealt with in detail by the Roman or Roman-Dutch authorities and that South African courts have adopted the principles of English law which are also founded on consensus and thus correspond with the principles of South African law.⁹⁴ When goods are sold in bluk, the writer⁹⁵ sets out the three things that the seller undertakes in this regard. The seller undertakes that the quality and condition of the bulk will correspond with the sample;⁹⁶ that the buyer will have a fair opportunity of comparing the bulk with the sample;⁹⁷ and that the bulk is free from any defect which would not be apparent upon a reasonable examination of the sample.⁹⁸

Where the sale is one by description and by sample, there is an implied undertaking that the bulk shall correspond with both. It is not sufficient that it should correspond with the sample, if it does not correspond with the description.⁹⁹ The courts have on occasion considered that a description has greater weight than the sample¹⁰⁰ and *vice versa*¹⁰¹ where a sale was by description and sample.¹⁰²

⁹¹ Kerr 19.

⁹² *Ibid.* See also *Gannet Manufacturing Co (Pty) Ltd v Postaflex Co (Pty) Ltd* 1981 3 SA 216 (C).

⁹³ Mackeurtan’s 94.

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*

⁹⁶ *SA Oil & Fat Industries v Park Rynie Whaling Co Ltd* 1916 AD 400 410.

⁹⁷ *Heilbutt v Hickson* (1872) LR 7 CP 438. See also Mackeurtan’s 94 fn 11 where the writer states that this undertaking by the seller is no more than the buyer’s ordinary right to inspect before taking delivery.

⁹⁸ *Drummond v Van Ingen* 1887 12 AC 284.

⁹⁹ Mackeurtan’s 95.

¹⁰⁰ *SA Oil & Fat Industries v Park Rynie Whaling Co Ltd* 1916 AD 400 409-410.

¹⁰¹ *Drummond v Van Ingen* 1887 12 AC 284 297.

¹⁰² Kerr 20-21.

2.6 Unsolicited goods, services and communications in terms of ECTA¹⁰³

Section 45 of ECTA governs the supply of unsolicited goods and services or communications in the case of electronic transactions. Section 45 provides that any person who sends unsolicited commercial communications to consumers, must provide the consumer with the option to cancel his or her subscription to the mailing list of that person,¹⁰⁴ and with the identifying particulars of the source from which that person obtained the consumer's personal information, on request of the consumer.¹⁰⁵ The section further provides that no agreement is concluded where a consumer has failed to respond to an unsolicited communication.¹⁰⁶ Any person who fails to comply with or contravenes section 45(1) or sends an electronic communication is guilty of an offence and liable to a fine or imprisonment, on conviction, as prescribed in terms of section 89(1).¹⁰⁷ The main focus of discussions by writers is the issue of unsolicited communications rather than unsolicited goods.¹⁰⁸

C. LEGAL POSITION IN TERMS OF THE CONSUMER PROTECTION ACT 68 OF 2008

1. Definitions

As defined in section 1 of the CPA, "goods" include anything marketed for human consumption, any tangible object including any medium on which anything is or may be written or encoded, any literature, music, photograph, motion picture, game, information, data software, code or other intangible product written or encoded on any medium or a licence to use any such intangible product. The definition also includes a legal interest in land or any other immovable property,¹⁰⁹ gas, water and electricity.

"Used goods" in terms of section 1 are defined as goods when used in respect of any goods being marketed, goods that have been previously supplied to a consumer, but do not include goods that have been returned to the supplier in terms of any right of return contemplated in terms of the Act.

¹⁰³ Electronic Communications and Transactions Act 25 of 2005.

¹⁰⁴ S 45(1)(a) ECTA.

¹⁰⁵ S 45(1)(b) ECTA.

¹⁰⁶ S 45(2) ECTA.

¹⁰⁷ Ss 45(3) & (4) ECTA.

¹⁰⁸ See for example Tladi 175-192; Gereda 51-52.

¹⁰⁹ Other than an interest that falls within the definition of "service" s 1 CPA.

Section 1 provides that “special-order goods” mean goods that a supplier expressly or implicitly was required or expected to procure, create or alter specifically to satisfy the consumer’s requirements.

“Display”¹¹⁰ when used in relation to any goods, means placing, exhibiting or exposing those goods before the public in the ordinary course of business in a manner consistent with an open invitation to members of the public to inspect, and select, those or similar goods for supply to a consumer. In relation to a price, mark, notice or other visual representation, “display” means to place or publish anything in a manner that reasonably creates an association between that price, mark, notice or other visual representation and any particular goods or services.

2. Chapter 2, Part C: The consumer’s right to choose

Section 18 deals with the consumer’s right to choose or examine goods. Despite any statement or notice to the contrary, a consumer is not responsible for any loss or damage to any goods displayed by a supplier, unless the loss or damage results from an action by the consumer amounting to gross negligence or recklessness, malicious behaviour or criminal conduct.¹¹¹ If any *goods are displayed in or sold from open stock*,¹¹² the consumer has the right to select or reject any particular item from that stock before completing the transaction.¹¹³ If the consumer has agreed to purchase goods solely on the basis of a *description or sample, or both*,¹¹⁴ provided by the supplier, the goods delivered to the consumer must in all material respects and characteristics correspond to that which an ordinary alert consumer would have been entitled to expect based on the description or on a reasonable examination of the sample, as the case may be.¹¹⁵ If a supply of goods is by sample as well as by description, it is not sufficient that any of the goods correspond with the sample if the goods do not also correspond with the description.¹¹⁶

¹¹⁰ S 1.

¹¹¹ S 18(1).

¹¹² Own emphasis.

¹¹³ S 18(2).

¹¹⁴ Own emphasis.

¹¹⁵ S 18(3).

¹¹⁶ S 18(4).

Section 19 governs the consumer's rights with respect to the delivery of goods or the supply of services. When a supplier tenders delivery to a consumer of any goods, the supplier must, on request, allow the consumer a reasonable opportunity to examine those goods for the purpose of ascertaining whether the consumer is satisfied that the goods are of a type and quality reasonably contemplated in the agreement, meet the tests set out in sections 18(3) and (4) and in the case of a special-order agreement, reasonably conform to the material specifications of the special order.¹¹⁷

If the supplier delivers to the consumer a larger quantity of goods than the consumer agreed to buy, the consumer may either accept or reject delivery or only pay for the agreed quantity and treat the excess quantity as unsolicited goods in accordance with section 21.¹¹⁸

If the supplier delivers to the consumer some of the goods the supplier agreed to supply mixed with goods of a different description not contemplated in the agreement, the consumer may accept only the goods that are in accordance with the agreement and reject the rest.¹¹⁹

Section 20 deals with the consumer's right to return goods. The right contemplated in this section is additional to any other right to return goods in terms of the Act.¹²⁰ The consumer may return goods to the supplier, and receive a full refund of any consideration paid for those goods if:

- a. the consumer returns goods in accordance with his cooling-off right;¹²¹
- b. he did not have an opportunity to examine the goods before delivery and has rejected delivery of those goods for any of the reasons contemplated in section 19(5);¹²²
- c. the consumer has received a mixture of goods;¹²³ or
- d. where goods were bought to satisfy a particular purpose¹²⁴ and the goods have been found to be unsuitable for that particular purpose.

¹¹⁷ S 19(5).

¹¹⁸ S 19(7).

¹¹⁹ S 19(8).

¹²⁰ S 20(1)

¹²¹ S 20(2)(a). Cooling-off right provided for in terms of s 16.

¹²² S 20(2)(b).

¹²³ S 20(2)(c). The consumer must however refuse the goods as prescribed in s 19(8).

In the instances above the consumer may return the goods within ten business days after delivery to the consumer.¹²⁵

A consumer may not be able to return goods if a public regulation prohibits the return of those goods to a supplier once they have been supplied to a consumer or have been partially or entirely disassembled, physically altered, permanently installed, affixed, attached, joined or added to, blended or combined with, or embedded within, other goods or property.¹²⁶

A supplier has the right to impose a reasonable charge on the consumer¹²⁷ but section 20(6) provides for certain factors that must to be taken into account, for example whether or not the goods are still in its original packaging or condition, have been tampered with, partly consumed and so forth.¹²⁸

Section 21 regulates unsolicited goods or services. Goods or services are unsolicited if, during any direct marketing, a supplier has left any goods with a consumer without requiring or arranging payment for them.¹²⁹ Goods are also considered to be unsolicited if a consumer is a party to an agreement and during the course of that agreement, the supplier introduces goods that are materially different from the goods or services previously supplied;¹³⁰ or after the termination of that agreement the supplier delivers any further goods to the consumer;¹³¹ or if a supplier delivers goods at a location, date or time other than as agreed.¹³² If a supplier delivers a larger quantity of goods than the consumer agreed to buy, the excess goods are unsolicited unless the consumer has rejected the entire delivery.¹³³ If any goods have been delivered to a consumer by a supplier without the consumer having expressly or implicitly requested delivery or performance, the goods are unsolicited goods.¹³⁴

¹²⁴ S 20(2)(d). The intended purpose must be communicated to the supplier ito s 55(3).

¹²⁵ S 20(4) provides: Goods returnable in terms of s 20(2)(a) must be returned to the supplier at the consumer's risk and expense and goods returnable in terms of ss 20(2)(b) - (d) must be returned to the supplier at the supplier's risk and expense within ten business days after delivery to the consumer.

¹²⁶ S 20(3).

¹²⁷ S 20(5).

¹²⁸ S 20(6).

¹²⁹ S 21(1)(a).

¹³⁰ S 21(1)(b)(i).

¹³¹ S 21(1)(b)(ii).

¹³² S 21(1)(c).

¹³³ S 21(1)(d).

¹³⁴ S 21(1)(e).

If, however, within ten business days after delivery of any goods to a consumer, the supplier informs the consumer that the goods were delivered in error, those goods become unsolicited only if the supplier fails to recover them within 20 business days after so informing the consumer.¹³⁵ If any goods are delivered to a consumer and those goods are clearly addressed to another person, and have obviously been misdelivered or (having regard to the circumstances of the delivery) if it would be apparent to the ordinary alert consumer that the goods were intended to be delivered to another person, the goods become unsolicited goods only if the recipient informs the apparent supplier or the deliverer that the goods were misdelivered, and the goods are not recovered within the following 20 business days.¹³⁶

A consumer may not frustrate or impede any reasonable action by the supplier or deliverer to recover the goods within the time allowed in terms of section 21(2) but is also not responsible for any costs pertaining to the recovery of the goods or further delivery of them to another person. The consumer is furthermore not liable for any loss or damage to the goods during the time of the consumer's possession or control (other than loss caused by the person's intentional interference with the goods) if any.¹³⁷ The consumer will be liable for any additional costs for recovery of, or damage to, the goods arising as a result of anything done to frustrate or impede the lawful recovery of those goods.¹³⁸

If a person is in possession of any unsolicited goods, the person may retain the goods or return the goods to the apparent supplier or deliverer at the risk and expense of the supplier or deliverer, as the case may be.¹³⁹

Section 21(6) provides that if a person lawfully retains any unsolicited goods the property in those goods *passes*¹⁴⁰ unconditionally to the person, subject only to any right or valid claim that an uninvolved third party may have with respect to those goods and the person who supplied or delivered those goods is liable to any other person in respect of any right or valid claim relating to such goods.

¹³⁵ S 21(2).

¹³⁶ S 21(3)

¹³⁷ S 21(3)(c).

¹³⁸ S 21(4).

¹³⁹ S 21(5).

¹⁴⁰ Own emphasis.

If a consumer has made any payment to a supplier or deliverer in respect of any charge relating to unsolicited goods or services, or the delivery of any such goods, the consumer is entitled to recover that amount together with interest.¹⁴¹

3. Section 44: Consumer's right to assume supplier is entitled to sell goods

Section 44 provides that every consumer has a right to assume, and it is an implied provision of every transaction or agreement, that in the case of a supply of goods, *the supplier has the legal right, or the authority of the legal owner, to supply those goods.*¹⁴² In the case of an agreement to supply goods, *the supplier will have a legal right, or the authority of the legal owner, to sell the goods at the time the title to those goods is to pass to the consumer.*¹⁴³ The supplier is fully liable to the consumer for any charge or encumbrance pertaining to the goods in favour of any third party unless it is disclosed in writing to the consumer before conclusion of the agreement or *where the supplier and consumer have colluded to defraud the third party.*¹⁴⁴

The supplier also *guarantees*¹⁴⁵ that the consumer is to have and enjoy quiet possession of the goods, subject to any charge or encumbrance disclosed in writing before or as part of the agreement.¹⁴⁶ If, as a result of any transaction or agreement in which goods are supplied to a consumer, a right or claim of a third party pertaining to those goods is infringed or compromised, the supplier is liable to the third party to the extent of the infringement or compromise of that person's rights pertaining to those goods.¹⁴⁷

4. Unfair contract term: Regulation 44(3)(i)

Regulation 44(3)(i) to the CPA provides that a term of a consumer agreement is presumed to be unfair if it has the purpose or effect of enabling the supplier to unilaterally alter the terms of the agreement including the characteristics of the product or service.

¹⁴¹ S 21(9).

¹⁴² S 44(1)(a). Own emphasis.

¹⁴³ Own emphasis. S 44(1)(b)(i).

¹⁴⁴ S 44(1)(c). Own emphasis.

¹⁴⁵ Own emphasis.

¹⁴⁶ S 44(1)(d).

¹⁴⁷ S 44(2).

Regulation 44 only applies where the consumer is a natural person who bought goods for private purposes (other than for a professional or business purpose).¹⁴⁸

D. EVALUATION

1. Goods included in the application of the CPA

It is clear from the definition of “goods” in section 1 of the Act¹⁴⁹ that all the goods that could form part of a sale in terms of the common law¹⁵⁰ can also form part of a consumer sale agreement. This includes corporeal movables,¹⁵¹ immovable property¹⁵² as well as material and immaterial goods.¹⁵³ It would seem that the common law principles still apply in that any goods that form part of commercial life (are merchantable) can be sold in terms of the CPA.¹⁵⁴ Goods that are specifically ordered by the consumer from the supplier (“special-order goods”)¹⁵⁵ may also be the *merx* in terms of a consumer sale agreement. Note, however, that for purposes of this thesis and the comparative part thereof in particular, only movable goods are discussed in detail.

Goods supplied (or sold) by a supplier must conform to the agreement and where a supplier delivers a larger quantity than agreed upon the consumer may treat the part of the goods which were not part of the agreement as unsolicited goods.¹⁵⁶ It could be argued that these provisions confirm the common law position with regard to the *essentiale* of the thing sold in that the parties must have consensus thereon. Section 20 does not substitute the right that every consumer has in respect of the return of unsafe or defective goods,¹⁵⁷ nor does it substitute any other right that exists between a supplier and consumer to return goods for a refund in terms of the Act.¹⁵⁸ It provides for an additional right, to the benefit of the consumer, to return goods within ten business

¹⁴⁸ Reg 44(1) CPA. See also chapter 4 Part D 2.1.

¹⁴⁹ See Part C 1 definitions.

¹⁵⁰ See Part B 2.1.

¹⁵¹ Any “tangible object” ito s 1.

¹⁵² Any “legal interest in land or any other immovable property” ito s 1.

¹⁵³ See s 1 “goods” (c) & (e).

¹⁵⁴ See Part B 2.1.

¹⁵⁵ See s 1 definition.

¹⁵⁶ Ss 20 & 21.

¹⁵⁷ Ito s 56 CPA.

¹⁵⁸ Jacobs *ea* 327.

days. This includes goods in terms of an agreement arising out of direct marketing, in which case the consumer rescinded the agreement during the cooling-off period (goods may then be returned at the consumer's risk and expense). Goods that the consumer did not have the opportunity to examine before delivery and then rejected delivery; a mixture of goods in a case in which the consumer refused delivery, as well as the case in which goods intended to satisfy a particular purpose and was then found to be unsuitable for that particular purpose may be rejected by the consumer in terms of section 20. (In the latter three categories, goods may be returned at the supplier's risk and expense).¹⁵⁹ The provisions of section 20 also confirms the common law position¹⁶⁰ that goods not agreed upon will not form part of the *essentialia* of the sale. In these circumstances the buyer will still have the right of restitution (return of the goods).

2. Goods sold by description or sample or both:¹⁶¹ Generic sales and the sale of future goods

Upon closer inspection of the definition of goods on "display",¹⁶² it is submitted that generic sales are included in this definition. Goods on display are goods exhibited or exposed to the public and serve as an open invitation to members of the public to inspect and *select*¹⁶³ those or similar goods for supply to a consumer.¹⁶⁴ If any goods are sold (displayed) from open stock, the consumer has a right to select or reject any particular item from that stock before completing the transaction.¹⁶⁵ This description seems to refer to generic sales.

Section 18¹⁶⁶ regulates goods sold by description or sample or both. It can be argued that the wording of the section is such that it includes both generic sales as well as the sale of future goods. For example in terms of section 18 goods may be sold by description or sample or both from existing bulk of that particular goods. The goods are

¹⁵⁹ *Ibid.*

¹⁶⁰ See Part B 2.2.

¹⁶¹ See also chapter 8 with regard to the transfer of risk in such goods and chapter 11 with regard to the warranty of quality of such goods.

¹⁶² *Ibid.*

¹⁶³ Own emphasis.

¹⁶⁴ S 1.

¹⁶⁵ S 18(2).

¹⁶⁶ S 18(3).

therefore already in existence and the intention of the parties is for the consumer sale to be a generic one. The *merx* is only determinable upon conclusion of the contract (when the consumer buys the goods based on the description or sample or both) and the *merx* only becomes determined when it is individualised.

On the other hand, the description or sample (in terms of section 18) may only be an example *merx* intended to come into existence in the future. This would be the case where the consumer buys a motor vehicle based on a demonstration model of a motor vehicle still to be manufactured or imported in the future.

Van Eeden explains that whether goods are one of a kind or standardised, and whether there is an advertising or catalogue milieu or a personal sale situation, a supplier will often wish to communicate information about the nature of the properties of the goods to prospective consumers.¹⁶⁷ Methods that can be used are description and reference to samples or both.¹⁶⁸

The common law position¹⁶⁹ is confirmed by the Act in that where goods are sold by description or sample the goods must (and it is an implied term) in all material respects and characteristics correspond to what an ordinary alert consumer would have been entitled to expect, taking into account the description and the opportunity of reasonable inspection as the case may be.¹⁷⁰

The common law position with regard to goods sold by sample and description is also confirmed by section 18(4) which provides that it is not sufficient that any of the goods correspond with the sample if they do not also correspond with the description.

3. Res aliena

3.1 Unsolicited goods

The provisions of the Act regulating, and in essence preventing the sale of unsolicited goods stem from an unfair business practice that has been in existence for a long time, namely, “inertia selling”.¹⁷¹ Inertia selling is where a supplier, in an attempt to increase his profits, supplies goods to a consumer without the consumer having requested such

¹⁶⁷ Van Eeden 214.

¹⁶⁸ *Ibid.*

¹⁶⁹ See Part B 2.5.

¹⁷⁰ S 18(3). See also Van Eeden 214 & Nagel *ea* 196.

¹⁷¹ Nagel *ea* 721. See also Van Eeden 217.

goods and relies on the inertia of the consumer in order to enforce payment.¹⁷² Unsolicited goods are also relevant when dealing with ownership and discussed in the relevant chapter.¹⁷³

Jacobs *ea* state that a consumer has no obligation to pay for unsolicited goods and may retain such goods lawfully.¹⁷⁴ However, according to the writers there are uncertainties regarding section 21. In terms of the Act a supplier has ten business days in which to notify the consumer of erroneous delivery.¹⁷⁵ The goods will only become unsolicited should the supplier then fail to recover the goods within 20 business days after notification. Where goods were delivered incorrectly (for example goods are addressed to another person) goods will again not be classified as unsolicited goods immediately.¹⁷⁶ Goods only become unsolicited after the consumer informs the supplier of the apparent misdelivery and the supplier fails to recover the goods within 20 business days after being informed. I agree with the writers that the manner of the aforesaid notification is uncertain.¹⁷⁷

It is unclear from the wording of the Act whether the notification should be in writing and whether the consumer must keep record of the notification as proof.¹⁷⁸ It is, however, recommended that the consumer do so. Another concern is that section 21 does not place a duty on the consumer to inform the supplier of the apparent misdelivery, and only provides for the instance where the consumer does inform the supplier of the misdelivery.¹⁷⁹ The question therefore remains whether the goods will become unsolicited should the consumer not inform the supplier of the misdelivery.¹⁸⁰ Where goods are apparently misdelivered (clearly belonging to somebody else) not informing the supplier of this fact is indicative of a *mala fide* consumer. Jacobs *ea* also question what the exact date should be when goods will become unsolicited, giving the

¹⁷² *Ibid.*

¹⁷³ See chapter 9.

¹⁷⁴ Jacobs *ea* 328.

¹⁷⁵ S 21(2)(a).

¹⁷⁶ Jacobs *ea* 328-329.

¹⁷⁷ *Idem* 329.

¹⁷⁸ *Ibid.*

¹⁷⁹ *Ibid.*

¹⁸⁰ *Ibid.*

example of books sent by book clubs without the consumer's request or prior knowledge.¹⁸¹

Gouws focuses on cases where goods were delivered to a consumer without the consumer having either expressly or implicitly requested delivery.¹⁸² According to the writer it is clear that goods delivered erroneously are not unsolicited. The supplier must notify the consumer and the goods must be recovered within 20 business days.¹⁸³ Only after failure by the supplier to do so will the goods become unsolicited. Gouws makes particular reference to section 21(5) and claims that the legislature enables the person who receives the goods in error not only to retain possession of the goods, but also to acquire ownership of the goods by simply choosing not to return them to the supplier.¹⁸⁴ He also refers to section 25 of the Constitution which deals with situations where the State takes away an individual's property in terms of legislation (expropriation or deprivation of land or property by the State).¹⁸⁵

The question is posed whether a supplier can rely on the provisions of section 25 of the Constitution to protect its property rights in the goods that were erroneously delivered. If the supplier only realises its error after ten business days from delivery, or if the supplier does not inform the consumer at all, the goods (according to the author)¹⁸⁶ will become unsolicited. I agree that in contrast to section 21(2)(a),¹⁸⁷ a consumer is not bound by any time limits similar to the time limits placed on the supplier and this is clearly unfair.¹⁸⁸ Gouws further argues that section 21(5) of the CPA dealing with the retaining of and eventual transfer of ownership of the unsolicited goods, is an unconstitutional violation of sections 25(1) and 25(2) of the Constitution.¹⁸⁹ If section 21(5) is an expropriation of the supplier's property it is unconstitutional since the provisions regulating unsolicited goods¹⁹⁰ specifically exclude compensation, a material

¹⁸¹ *Ibid.*

¹⁸² Gouws 2009 16.

¹⁸³ *Idem* 17.

¹⁸⁴ *Ibid.*

¹⁸⁵ Gouws 2009 18-19.

¹⁸⁶ *Ibid.*

¹⁸⁷ *Ibid.*

¹⁸⁸ *Ibid.*

¹⁸⁹ *Idem* 19.

¹⁹⁰ S 21.

requirement in the event of expropriation by the State.¹⁹¹ If, on the other hand, section 21(5) of the CPA is a deprivation, it falls short of procedural and substantive fairness.¹⁹² The writer suggests legislative intervention and the amendment of section 21(2) of the CPA to provide for the institution of proceedings within 20 business days, rather than to recover the goods within the same period, or for the state to compensate the supplier.¹⁹³

Van Heerden disagrees with Gouws with regard to the unconstitutionality of section 21(5) of the CPA.¹⁹⁴ The reason is that section 21(5) also provides that ownership of the goods passes unconditionally save for a claim of a third party with a right or valid claim and that it could never have been the intention of the legislature for ownership to pass to such a consumer.¹⁹⁵ She argues that the focus of the application of section 21 regarding unsolicited goods should be the prevention of inertia selling.¹⁹⁶ The writer also argues that a supplier may only charge a certain amount in terms of section 21(4).¹⁹⁷ If a consumer made other payments, it can be reclaimed with *mora* interest and section 21 only applies to goods and not to services.¹⁹⁸ Van Heerden argues that the time frames provided for in terms of section 21 are unreasonable, unfair and that it is not practicable to recover the goods. This argument is not without merit. However, I do not agree with the writer's argument that no distinction should be made between *bona fide* misdelivery and *mala fide* misdelivery.¹⁹⁹ Van Heerden argues that this distinction places an extra unfair evidentiary burden on the supplier.²⁰⁰ The writer refers to the position in the United Kingdom²⁰¹ as giving more realistic time frames, placing more stringent duties on consumers and providing for criminal sanctions in

¹⁹¹ Gouws 2009 19.

¹⁹² *Ibid.*

¹⁹³ *Ibid.*

¹⁹⁴ Van Heerden 674-675.

¹⁹⁵ *Idem* 673-674. See *contra* Part E 2 below where it is explained that it was the purpose of the Belgian legislature in Act 2010 for ownership of unsolicited goods to transfer.

¹⁹⁶ *Ibid.*

¹⁹⁷ *Ibid.*

¹⁹⁸ *Idem* n 673.

¹⁹⁹ *Ibid.*

²⁰⁰ *Idem* 675.

²⁰¹ *Idem* 675-678.

certain instances.²⁰² She also suggests that similar criminal sanctions pertaining to unsolicited goods in particular should be introduced in South Africa.²⁰³

Though unsolicited goods are also discussed in other chapters of this thesis,²⁰⁴ it is relevant to distinguish between two situations when dealing with unsolicited goods. Firstly, where goods are apparently misdelivered and clearly belong to somebody else there can be no valid contract of sale between the supplier and the consumer to which the goods were misdelivered. It would be difficult to envisage the supplier having the intention to conclude an agreement of sale with the “wrong” consumer (there is no intention or consensus to buy and sell and the first *essentiale* for a valid sale is therefore not complied with). It would also be difficult to prove that the supplier and the consumer had consensus on the *merx*²⁰⁵ (the second *essentiale* of a valid sale is therefore also not complied with). Though (at common law) the seller does not have to be the owner of the goods to conclude a valid sale and only needs to transfer all the rights and duties he (the supplier) has to the goods, it is clear that a consumer cannot become owner of unsolicited goods. It is argued that where there is an apparent misdelivery, the consumer is aware of the identity of the true owner and that ownership cannot pass to the consumer.

On the other hand, a supplier can be guilty of inertia selling where the intention of the supplier is to deliver unwanted goods in the hope that the buyer will conclude the transaction. In such a case of *mala fide* misdelivery it is possible for the consumer to become owner of the goods after a certain period of time. The intention of the legislature with the provisions of section 21(6) was most likely to discourage suppliers from attempting inertia selling at the risk of supplying goods without remuneration. In Belgium, for example, the legislature makes specific reference to the fact that ownership does pass to the consumer in the case of unsolicited goods.²⁰⁶

²⁰² Van Heerden 679.

²⁰³ *Ibid.* See also s 111 CPA regarding penalties & s 112 regarding prohibitive or required conduct. It is uncertain whether or not these provisions may be instituted in the case of unsolicited goods.

²⁰⁴ Chapter 9: Delivery and transfer of ownership & chapter 10: Warranty against eviction.

²⁰⁵ The unsolicited goods.

²⁰⁶ See Part E 2 below. In terms of WMPC 2010.

3.2 Seller has the legal right and authority to sell goods

Section 44 of the CPA is discussed in detail in context of the seller's duty to deliver the *merx* and transfer ownership thereof²⁰⁷ as well as in context of the seller's duty to warrant the buyer against eviction.²⁰⁸ It should already be noted, however, that section 44 makes it an implied term²⁰⁹ that a seller (supplier) has the legal right and authority to sell goods and transfer ownership of those goods to the consumer.²¹⁰ The seller will also be liable for any charge or encumbrance relating to such goods if it was not disclosed to the consumer in writing. The section does not guarantee a transfer of ownership but merely that the supplier has the right or authority to supply the goods. Sharrock argues that it is unclear from the wording of section 44 whether the position regarding *res aliena* is confirmed or abandoned.²¹¹

It could be argued that the principles regarding *res aliena* still apply to consumer sales as a supplier may sell goods of which he is not the owner. However, the wording of section 44 suggests that the sale of stolen goods is not allowed because it is an implied term of the consumer sale that the supplier has the right and or authority to sell the goods. This would seem obvious when dealing with unscrupulous suppliers (in other words where they know that the goods sold are stolen). The situation is less certain where the supplier is *bona fide* in his belief that he has the authority or right to sell the goods. The common law position is confirmed in section 44(1)(c) which provides that a consumer may not rely on section 44 or claim any liability from the seller where he (the consumer) and the seller colluded to defraud a third party (both the consumer and the supplier therefore having knowledge that the *merx* is a *res aliena*).²¹²

Upon an analysis of the provisions of section 44 it is clear that it is an implied term of a consumer sale that the seller has either the legal right or the authority of the legal owner to sell the goods in question.²¹³ It can be argued that the wording includes a *res aliena* because goods may be sold by the seller even where the seller is not the

²⁰⁷ Chapter 9 of this thesis.

²⁰⁸ Chapter 10 of this thesis.

²⁰⁹ A term that is part of all consumer sale agreements where the Act is applicable and no express consensus between the parties is required.

²¹⁰ See chapter 9.

²¹¹ Sharrock (2011) 604.

²¹² See also Part B 2.3.

²¹³ See also chapter 9 & chapter 10.

owner but has authority of the legal owner to sell them. This is a confirmation of the common law position. The CPA also confirms the common law position because a third party as a supplier is not only liable to a *bona fide* buyer in these instances but also to a third party for any charge or encumbrance relating to those goods if it is not disclosed in writing or where the supplier and consumer have colluded to defraud the third party.²¹⁴

E. COMPARISON

1. Scotland

1.1 Definition of “goods”

As discussed earlier²¹⁵ a contract of sale is defined as a contract by which the seller transfers or agrees to transfer property in goods to the buyer for a monetary consideration called the price.²¹⁶ Section 61 of SOGA defines “goods” to include all personal chattels other than things in action and money, and in Scotland all corporeal movables except money. In particular “goods” include emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale, and include an undivided share in goods.²¹⁷ The provisions regulating consumer sale agreements incorporated into SOGA by the 2002 regulations provide that “goods” has the same meaning as in section 61 of SOGA.²¹⁸

The definition above suggests that property such as houses and flats (immovable property) are not goods nor are fixtures thereto.²¹⁹ The fittings are, however, regarded as goods.²²⁰ Money is excluded from the definition except in relation to antique coins and banknotes.²²¹ All tangible corporeal movables are included from books to buses and a great deal in between.²²²

²¹⁴ S 44(2).

²¹⁵ See chapter 4, Part C paragraph 1.

²¹⁶ Black 178.

²¹⁷ S 61 SOGA.

²¹⁸ Reg 2002 no. 3045 with regard to the sale and supply of goods to consumers.

²¹⁹ Black 179.

²²⁰ *Ibid.*

²²¹ *Ibid.*

²²² *Ibid.*

“Goods” are also defined in terms of section 45 of the UK CPA 1987 to include substances, growing crops and things comprised in land by virtue of being attached to it and any ship, aircraft or vehicle.²²³

1.1.2 Definition of “product”

According to Ervine²²⁴ “product” is given a very wide meaning for purposes of the UK CPA 1987.²²⁵ Buildings are therefore not products for purposes of the Act,²²⁶ but products incorporated in a building are.²²⁷

1.2 Existing or future goods

Section 5 of SOGA regulates the sale of existing or future goods. There may be a contract for the sale of goods the acquisition of which by the seller depends on a contingency that may or may not happen. Where by a contract of sale the seller purports to effect a present sale of future goods, the contract operates as an agreement to sell the goods. Black²²⁸ remarks that the subject matter of a contract may therefore be existing goods, owned or possessed by the seller or goods to be manufactured or acquired by the seller after the conclusion of the contract of sale. Goods not already in existence or requiring to be manufactured are called future goods for purposes of SOGA.²²⁹ A contract where the seller is trying to sell future goods at the moment of conclusion operates as an agreement to sell.²³⁰

1.3 Specified and unspecified goods

Dobson & Stokes discuss the sale of specified goods and the sale of unascertained goods.²³¹ The writers refer to *Kursell v Timber Operators & Contractors*²³² where the

²²³ S 45 UK CPA 1987: Interpretation.

²²⁴ 89.

²²⁵ Ito s 1(2) “product” means any goods or electricity and includes a product which is comprised in another product, whether by virtue of being a component part or raw material or otherwise.

²²⁶ UK CPA 1987

²²⁷ Ervine 89.

²²⁸ 179.

²²⁹ S 5 SOGA.

²³⁰ Black 179. See also Dobson & Stokes 28-29.

²³¹ Dobson & Stokes 28-30. See also 47-52.

²³² [1927] 1 K.B 298 CA.

court held that the particular goods were not “identified” at the time of conclusion of the contract and therefore not specific goods. This seems to be an indication of a type of generic sale where the goods were bought from a particular *genus* but were also only determinable at the time of conclusion of the contract. This argument is supported by the writers who state that an agreement to sell some unspecified goods out of a larger specified quantity is a sale of goods but not a sale of specific goods.²³³

Though SOGA does not provide a definition of unascertained goods, Dobson & Stokes argue that a contract of sale must either be for specific goods or unascertained goods to be a valid sale under SOGA.²³⁴ Two categories of unascertained goods should be distinguished. Firstly, a specified quantity of unascertained goods out of an identified bulk.²³⁵ Secondly, “purely generic unascertained goods”.²³⁶ Dobson & Stokes argue that future goods can be part of either specified or unascertained goods, depending on their description in the contract and the intention of the parties.²³⁷

It is clear from case law and the opinions of legal writers as set out above that the sale of consumer goods in Scotland include determined (“specific goods”), determinable (“unascertained goods”) and future goods.

1.4 Sale by description or sample

1.4.1 Sale by description

Section 13 of SOGA provides that where there is a contract for the sale of goods by description, there is an implied term that the goods will correspond with the description.²³⁸ If the sale is by sample as well as by description it is not sufficient that the bulk of the goods correspond with the sample if the goods do not also correspond with the description.²³⁹ A sale of goods is not prevented from being a sale by description by reason only that, being exposed for sale or hire, they are selected by the buyer.²⁴⁰

²³³ Dobson & Stokes 29.

²³⁴ *Ibid.*

²³⁵ Dobson & Stokes 30 who give the example of buying 500 tons of wheat from a specified and identified cargo. The seller can fulfil his contract only by delivery of 500 tons from the specified cargo.

²³⁶ Dobson & Stokes 30, for example 500 tons of wheat. The seller can fulfil his contract by supplying 500 tons of wheat from any source.

²³⁷ Dobson & Stokes 30-31.

²³⁸ S 13(1) SOGA.

²³⁹ S 13(2) SOGA.

²⁴⁰ S 13(3) SOGA.

Black states that sales are by description in a wide range of situations.²⁴¹ An obvious example would be a sale by way of mail order purchasing where the buyer relies on a description in the catalogue or advertisement.²⁴² The writer states that section 13(3) of SOGA makes it clear that the fact that the goods are seen and selected by the buyer does not prevent the sale from being one of description.²⁴³ The case of *Beale v Taylor*²⁴⁴ is referred to as a relevant example.²⁴⁵ The court held that even though the buyer had examined the goods, it still did not comply with a particular part of the description and that a sale by description had therefore not been complied with.²⁴⁶ Black argues that when looking at *Beale v Taylor*²⁴⁷ almost any word describing the goods will be regarded as part of the description.²⁴⁸ I agree with Black that a distinction should be drawn between the quality of goods (including the defects related thereto)²⁴⁹ and when goods will be regarded as forming part of the description.²⁵⁰ An important case is *Harlingdon and Leinster Enterprises Ltd v Christopher Hull Fine Art Ltd*²⁵¹ where the Appeal Court held that it must be the intention of the parties that the description should be relied on.

Micklitz *ea* state that case law has refined the scope of section 13 of SOGA.²⁵² Not every description applied to particular goods is regarded as a description for the purposes of this section and it has been held that it requires a broad commercial definition of the goods, but should at the same time not be approached in an excessively technical manner.²⁵³ The description should identify the essential commercial characteristics of the goods.²⁵⁴

²⁴¹ Black 187.

²⁴² *Ibid.*

²⁴³ *Ibid.*

²⁴⁴ [1967] 1 W.L.R. 1193.

²⁴⁵ Black 187-188.

²⁴⁶ 1200.

²⁴⁷ [1967] 1 W.L.R. 1193.

²⁴⁸ Black 188.

²⁴⁹ S 14 SOGA. See also *Border Harvesters Ltd v Edwards Engineering (Perth) Ltd* 1985 S.L.T. 128.

²⁵⁰ S 13 SOGA.

²⁵¹ [1990] 3 W.L.R. 13 CA. See also Black 188.

²⁵² Micklitz *ea* (2010) 322.

²⁵³ *Ashington Piggeries Ltd v Christopher Hill Ltd* [1972] A.C. 441.

²⁵⁴ *Reardon Smith Line v Hansen-Tangen, Hansen-Tangen v Sanko Steamship Co* [1976] 1 W.L.R. 989 HL.

1.4.2 Sale by sample

Section 15 of SOGA provides that a contract of sale is a contract for sale by sample where there is an express or implied term to that effect in the contract.²⁵⁵ In the case of a contract for sale by sample there is an implied term that the bulk will correspond with the sample in quality and that the goods will be free from any defect, making their quality unsatisfactory, which would not be apparent on reasonable examination of the sample.²⁵⁶ Black gives the sale of wallpaper and carpets as examples where the buyer chooses the particular design from a book of samples.²⁵⁷ The writer further states that a sale by description and sample in terms of SOGA provides for implied terms in relation to the duties of the seller.²⁵⁸

1.5 *Seller not the owner*²⁵⁹

1.5.1 Introduction

No text can be found to support any suggestion that the principle of *res aliena* is applied in the sale of goods in Scotland. In fact, SOGA makes specific provision for the general principle of the law relating to movable property that someone who buys from a person who is not the owner can get not better title than that person has.²⁶⁰ The principles of *nemo dat quod non habet*²⁶¹ and *nemo plus iuris*²⁶² therefore apply. These principles are of course not unfamiliar to South African law but the question remains whether a valid contract of sale can be concluded in Scotland (as is the case in South African law) even though ownership can never transfer. The provisions discussed below are also important with regard to the transfer of ownership and the seller's warranty against eviction.²⁶³ It will be evident from the discussion below that a valid contract of sale may be concluded but that this is not the absolute rule. The facts of each case and the

²⁵⁵ S 15(1) SOGA.

²⁵⁶ S 15(2) SOGA. See also chapter 11, Part C 1 for a discussion of warranties wrt sales by description and sample.

Very similar to the wording of s 18 of CPA in South Africa.

²⁵⁷ Black 194.

²⁵⁸ *Ibid.* See also *Frost v Aylesbury Dairy* [1905] 1 K.B. 608 CA.

²⁵⁹ See also chapter 9: Delivery and transfer of ownership; chapter 10: Seller's warranty against eviction.

²⁶⁰ S 21(1) SOGA: "Subject to this Act, where goods are sold by a person who is not their owner, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell."

²⁶¹ Hiemstra & Gonin 234: "No one can give that which he does not possess."

²⁶² *Idem* 236: "No one can transfer more rights to another than he himself has."

²⁶³ *Supra* fn 241.

circumstances surrounding the sale (including the parties and their capacities) will have to be taken into account.

Ervine correctly states that although the *nemo dat* rule is logical, it can be extremely inconvenient and unjust in some circumstances.²⁶⁴ Dobson & Stokes argue that some element of roguery may be involved and the rogue is most likely to disappear and, if found, will probably be penniless.²⁶⁵ Ownership does not have the same meaning as possession and in Scottish law three words all mean the same thing, namely, “ownership”, “property” and “title”.²⁶⁶ It would seem therefore that where the seller is not the owner of the goods sold the law has to choose between upholding the sanctity of property or giving effect to a commercial transaction.²⁶⁷ The solution is to apply the general principle (the *nemo dat* rule) in favour of the original owner with a number of exceptions in favour of the innocent buyer.²⁶⁸

1.5.2 The general principle: *Nemo dat* rule

No person may transfer more rights than he himself possesses. The application of the *nemo dat* rule was confirmed in *Greenwood v Bennet*.²⁶⁹ Similar to the *rei vindicatio* available to the true owner in South African law, an owner who wishes to bring a claim to recover possession of his goods can bring a claim for conversion.²⁷⁰ There are however exceptions to the general rule which will briefly be discussed below for purposes of completeness.

1.5.3 Personal Bar Exception²⁷¹ or *Estoppel*²⁷²

Ervine states that there are no Scottish cases on this exception but provides some valuable examples of this exception to the general principle of *nemo dat*.²⁷³ The writer refers to both section 21 of SOGA as well as the UK case of *Eastern Distributors Ltd v*

²⁶⁴ Ervine 41.

²⁶⁵ Dobson & Stokes 65.

²⁶⁶ *Ibid.*

²⁶⁷ *Ibid.*

²⁶⁸ *Ibid.*

²⁶⁹ [1972] 3 W.L.R 691.

²⁷⁰ Dobson & Stokes 66.

²⁷¹ *Idem* 68-71.

²⁷² Ervine 41-42.

²⁷³ *Idem* 41.

*Goldring*²⁷⁴ to illustrate the exception of *estoppel* and its application. The principle of *estoppel* is interpreted narrowly by the courts as is evident from *Moorgate Mercantile Co Ltd v Twitchings*.²⁷⁵ Ervine argues that the Scottish courts are not bound to the decision of the *Eastern Distributors* case and that it would be more than appropriate for Scottish courts to come to a different conclusion.²⁷⁶ The writer argues that the approach of the Court of Session in *Mitchell v Z. Heys & Sons*²⁷⁷ should rather be followed.²⁷⁸

1.5.4 Other exceptions to general principle: Sale by a mercantile agent

The exception to the general principle dealing with mercantile agents and the Factors Act²⁷⁹ is beyond the scope of this discussion and comparison.²⁸⁰

1.6 *Unsolicited goods*

Unlike the position in South Africa, unsolicited goods are regulated by a separate piece of legislation in Scotland and UGSA 1971²⁸¹ must also be interpreted together with The Consumer Protection Regulations with regard to distance selling.²⁸²

“Unsolicited” in terms of UGSA 1971 in relation to goods means goods sent to any person and that they are sent without any prior request made by him or on his behalf.²⁸³ As explained earlier²⁸⁴ the sale and supply of unsolicited goods are also referred to as inertia selling. Regulation 24 deals with inertia selling and applies where unsolicited goods are sent to a person with a view to his acquiring them and where the recipient has no reasonable cause to believe that they were sent with a view to their being acquired for the purposes of a business and the recipient has neither agreed to acquire nor agreed to return them.²⁸⁵

²⁷⁴ [1957] 2 Q.B. 600.

²⁷⁵ [1977] A.C. 890 HL.

²⁷⁶ Ervine 41.

²⁷⁷ 1894 21 R 600.

²⁷⁸ Ervine 42.

²⁷⁹ 1889.

²⁸⁰ For a comprehensive discussion see Dobson & Stokes 72-77.

²⁸¹ Unsolicited Goods and Services Act 1971. Hereinafter referred to as UGSA 1971.

²⁸² No. 2334. Hereinafter referred to as the Regulations of 2000.

²⁸³ S 6(1) UGSA 1971.

²⁸⁴ See Part C 1.2 above. See also Dobson & Stokes 16 fn 17 who describe inertia selling as the situation where goods are sent without prior request.

²⁸⁵ Reg 24(1) Regulations 2000.

Where unsolicited goods are sent to a consumer, he may use, deal with or dispose of the goods as if they were an unconditional gift to him,²⁸⁶ and the rights of the supplier (sender) to the goods are extinguished.²⁸⁷ These rights are, however, subject to a number of conditions that have to be satisfied, *inter alia* that during the period of six months beginning with the day on which the recipient received the goods, the sender did not take possession of them and the recipient did not unreasonably refuse to permit the sender to do so. The recipient must serve a notice in writing to the sender, stating that the goods were unsolicited and give the address where they could be collected, and during a period of 30 days from the giving of the notice the sender did not take possession and the recipient did not unreasonably refuse to permit him to do so. Suppliers who send unsolicited goods are guilty of an offence and liable, on summary conviction, to a fine.²⁸⁸ Where unsolicited goods are unintentionally destroyed while in the *bona fide* possession of the consumer (recipient) the consumer will not be held liable.²⁸⁹

Ervine warns that a limitation to the approach as provided for in the Regulations of 2000 (to include both civil and criminal consequences in the supply of unsolicited goods) may provide scope for traders to devise methods to circumvent the law.²⁹⁰

2. Belgium

2.1 *The object and subject matter of contracts: General*

The Civil Code²⁹¹ provides that only things that are determined or determinable and subject to commercial law may be the objects of agreements.²⁹² An obligation must have as its object a thing determined at least as to its kind.²⁹³ Dekkers confirms that goods (or objects) must be determined or determinable at the time of conclusion of the agreement.²⁹⁴

²⁸⁶ Reg 24(2) Regulations 2000.

²⁸⁷ Reg 24(3) Regulations 2000.

²⁸⁸ Reg 24(4) Regulations 2000.

²⁸⁹ Van Heerden 676.

²⁹⁰ Ervine 227.

²⁹¹ Book 3, Title III, a 1128.

²⁹² Herbots 136 adds that this includes anything lawfully obtainable in open commercial trade. See also Dekkers 468.

²⁹³ A 1129.

²⁹⁴ Dekkers 468.

Herbots explains that because Roman law was thought by jurists in terms of specific contracts which required agreements as to certain necessary elements,²⁹⁵ the provisions of the Civil Code (and in particular the provisions regarding obligations in general) were drafted in similar terms as those applied in Roman law. The Roman law approach to the Civil Code is, however, shifting.²⁹⁶ The subject matter of the contract is found in the obligations which it creates.²⁹⁷

Dekkers refers to the situation where goods did not exist at the time of conclusion of the contract (neither determined nor determinable) and states that in such a case the sale is void.²⁹⁸

2.2 Things sold: General

2.2.1 Generic sales and future things

The subject of a sale may be two or more things in the alternative.²⁹⁹ Article 1585 of the Civil Code provides that when merchandise is sold not by chance (“de hoop”), but by weight, count or measure, the sale will only be perfected (and therefore be determined, fixed and sure)³⁰⁰ when the goods are in fact weighed, counted or measured. Consumable things such as wine and oil will not be regarded as sold until the buyer has tasted *and*³⁰¹ accepted them.³⁰²

The general provisions regulating contract law confirm that future things may be the object of an obligation.³⁰³ Future things may include things to be manufactured (provided they are sufficiently determinable) as well as future claims.³⁰⁴ In discussing the sale of future goods, Dekkers gives the examples of selling an animal still to be born or a crop still to be harvested.³⁰⁵ What is of importance is that the goods must at least

²⁹⁵ Herbots 138. The writer gives the example of a contract of sale and the certainty with regard to the thing sold and the price.

²⁹⁶ *Ibid.*

²⁹⁷ *Ibid.* Where for example (as in a contract of sale) the obligation consists in a conveyance, the object is a physical thing.

²⁹⁸ Dekkers 469.

²⁹⁹ A 1584.

³⁰⁰ See chapter 8 for a comprehensive discussion of when a contract of sale is *perfecta*.

³⁰¹ Own emphasis.

³⁰² A 1587.

³⁰³ A 1130.

³⁰⁴ Herbots 139.

³⁰⁵ Dekkers 469.

be determinable at the time of conclusion of the contract. Dekkers states that article 1586 concerns a “chance sale” and that the thing sold becomes determined at the time of conclusion of the contract and ownership in the goods transfers upon conclusion of the contract.³⁰⁶ The writer is also of the opinion that the *emptio rei speratae* falls under article 1585.³⁰⁷ Goods to be weighed, counted or measured will only become fixed and sure and ownership will only pass when the goods are weighed counted or measured.³⁰⁸ This may include things that are already in existence but are still to be weighed, counted or measured or future things that can only be weighed, counted or measured in future.³⁰⁹

2.2.2 Sale by description or sample

When a buyer buys goods per sample, (as per the sample having been considered by him prior to the conclusion of the sale) the agreement is concluded once the sample has been displayed and the goods must comply with the quality and condition of the sample.³¹⁰ If the goods do not correspond or comply with the sample (as shown), delivery of the goods boils down to malperformance and the buyer is not even compelled to base his claim on latent defects.³¹¹

The principles regulating a sale by sample also regulate a sale by description.³¹²

2.3 Consumer goods: Civil Code

The Civil Code provides that consumer goods include all movable, corporeal goods,³¹³ including animals.³¹⁴ The sale of immovable property, incorporeal rights and services are excluded.³¹⁵ Contrary to South African law, electricity is not regarded as consumer

³⁰⁶ Dekkers 512.

³⁰⁷ *Idem* 512-513.

³⁰⁸ *Ibid.*

³⁰⁹ *Ibid.*

³¹⁰ *Idem* 513.

³¹¹ *Ibid.*

³¹² *Ibid.*

³¹³ A 1649*bis*.

³¹⁴ Cauffman 797. See also Dekkers 547.

³¹⁵ Tilleman & Verbeke (2009) 31. See also Cauffman 799.

goods and is specifically excluded from the definition in the Civil Code.³¹⁶ Water and gas that have not been determined in a fixed volume or quantity are excluded as well.³¹⁷ Peeters argues that the exclusion of electricity, water and gas in this manner does not conform to a free market system for the sale of goods.³¹⁸ The transfer of ownership in the case of electricity is at the moment of specification. This means in practice that ownership is transferred the moment the amount of electricity is indicated on the consumer's account.³¹⁹

Goods sold in terms of judicial execution or public auction are also not consumer goods.³²⁰ Though the EU Consumer Sales Directive excludes second-hand goods bought by a consumer at a public auction (not as part of their business) as being consumer goods, Belgium did not incorporate this provision in its national law.³²¹ Such goods will still be considered to be consumer goods in terms of Belgian law.³²²

Where movable goods are bought with the intention to install or incorporate them as part of immovable goods; such goods must still conform to the agreement and will be regarded as consumer goods at the time of delivery.³²³ (Possible examples would be windows as part of a house or perhaps roof tiles.) However, if movables are incorporated which are not normally incorporated or built in, the consumer will have to bear the repair or replacement costs of such goods because of its incorporation.³²⁴ (The example of a built-in sound or television system comes to mind.) Computer software bought on a disc or CD-ROM would be regarded as movable, corporeal consumer goods.³²⁵ Non-standardised computer programmes bought by consumers on the basis of a development programme would fall under the definition of consumer goods.³²⁶

³¹⁶ A 1649*bis*. See also s 1 of the CPA (South Africa) where electricity is specifically included in the definition of "goods".

³¹⁷ *Ibid.*

³¹⁸ Peeters 2005 444 fn 38.

³¹⁹ Cauffman & Sagaert 224.

³²⁰ *Ibid.* This provision coincides with s 1 of the CPA in South Africa.

³²¹ Cauffman 798.

³²² *Ibid.*

³²³ Tilleman & Verbeke (2009) 32.

³²⁴ *Ibid.*

³²⁵ *Ibid* 32; Van Oevelen 9.

³²⁶ An example would be "beta software". After an initial round of in-house testing, software publishers often release new programmes to be tested by the public, i.e. beta software (usually denoted by a 'b' in the version number, e.g., Firefox 3.1b2). Since the publisher cannot possibly test the software under all possible conditions, it is

Cauffman points out that standardised computer programmes made available on the basis of a licensing agreement are not so obvious to categorise as consumer goods.³²⁷ Standardised computer programmes where the license is made available on the basis of a lease agreement would not be considered consumer goods.³²⁸ This would also be the case where computer programmes are made available for use via the internet.³²⁹

2.4 Selling the things of another

In Belgian law the personal (obligatory) agreement (the conclusion of the contract of sale) and the real agreement (transfer of ownership) occur simultaneously and the one cannot occur without the other. Article 1583 provides that a sale is perfected between the parties *and*³³⁰ ownership is acquired by law by the buyer as soon as the thing sold and the price are agreed upon (although the thing has not yet been delivered, nor the price paid).

Article 1599 provides that the sale of another's goods is null and void and ownership can never pass. It further makes out a ground for a claim for damages provided the buyer was unaware of his lack of ownership. However, it should be pointed out that Dekkers³³¹ refers to the fact that article 1599 has been the subject of great contention. In this regard the following should be mentioned:³³²

- a. the sale of *res aliena* is null and void and the buyer may still be evicted by the true owner;
- b. the voidness is relative as only private interests³³³ are protected;
- c. tying in with the aforesaid, it should be kept in mind that only the buyer may raise the voidness (even if the buyer is *mala fide*),³³⁴ as it is only the buyer whose rights are protected and not the seller (even if the seller is *bona fide*);³³⁵

reasonable to expect that wider use of the software may uncover problems that were not discovered during in-house testing. See also Cauffman 799.

³²⁷ Cauffman 799.

³²⁸ *Ibid.*

³²⁹ *Ibid.*

³³⁰ Own emphasis.

³³¹ Dekkers 460.

³³² *Ibid.*

³³³ Being the specific true owner whose right of ownership is protected.

³³⁴ Where the buyer is *mala fide* he loses his right to claim damages.

- d. the agreement of sale can be rectified into a valid contract of sale with the consent of the true owner or by the fact that the seller may become owner.

Mention should be made of article 2279 of the Civil Code which enables a third party in good faith to acquire property received from a person who is not its owner.³³⁶ Details are discussed in chapter 9.³³⁷

2.5 Relevant definitions and provisions WMPC 2010³³⁸

2.5.1 Introduction and definitions

The importance of the WMPC 2010 with regard to the thing sold in consumer sale agreements lies in the provisions of Chapter 4³³⁹ of the Act and aggressive market practices in particular.³⁴⁰ The definitions of “consumer”, “supplier” and “commercial practice” are comprehensively discussed elsewhere³⁴¹ and will not be repeated here.

“Product” is a generic definition in the Act and includes goods and services, immovable property, rights and obligations³⁴² whereas “goods” means any tangible movable item. “Product” is only applied in certain parts of the Act and only the most relevant provisions will be discussed.

“Goods sold in bulk” means goods which are not packaged and are measured or weighed by the consumer or in his presence.³⁴³ “Goods sold individually” means goods which cannot be split without changing their nature or properties.³⁴⁴ “Packaged goods” means goods which have been split, weighed, counted or measured, even during the manufacturing process, whether or not followed by wrapping, for the purpose of rendering these operations superfluous when they are offered for sale.³⁴⁵ “Pre-

³³⁵ Third parties may also not destroy the thing sold.

³³⁶ Cauffmann 244.

³³⁷ Chapter 9: Transfer of ownership.

³³⁸ “*Wet op Markpraktijken en Consumente Bescherming 6 April 2010.*”

³³⁹ Prohibited market practices.

³⁴⁰ A 94 WMPC 2010.

³⁴¹ See chap 4 Part E 2.3.1.1.

³⁴² Take note however that the discussion will only be regarding movable consumer goods unless specifically otherwise indicated.

³⁴³ Def A 2 WMPC 2010.

³⁴⁴ *Ibid.*

³⁴⁵ *Ibid.*

packaged goods” means packaged goods which are wrapped before they are offered for sale and includes pre-established as well as pre-packed quantities.³⁴⁶

Chapter 3, section 6 of the WMPC 2010 governs unfair terms in consumer contracts. Article 74 provides that a contract term is unfair where the seller has the right to unilaterally alter characteristics of the product or altering the time of delivery thereof.

2.5.2 Aggressive market practices in terms of article 94 and the sanction contained in article 41 (unsolicited goods)

Chapter 4, section 1 regulates prohibited market practices against consumers. Marketing practices can either be unfair,³⁴⁷ misleading³⁴⁸ or aggressive.³⁴⁹

Article 94 § 6 provides that it is in all circumstances considered to be an unfair and aggressive marketing practice to request immediate or deferred payment or request the sending back or storage of products sent to the consumer without the consumer requesting them. This includes the prohibition of unsolicited goods or inertia selling as well as negative option marketing.

Where unsolicited goods³⁵⁰ were delivered to consumers in terms of article 94 § 6, the court may, aside from the common law sanctions available, order the repayment to the consumer of any amount without the consumer having to return the goods.³⁵¹ Article 41 provides further that the consumer is exempted from payment or any other form of counter-performance. The fact that the consumer does not respond to the delivery does not mean that the consumer consents thereto.³⁵² Even where the consumer was coerced into paying and later finds out about his rights in terms of article 41, the consumer may still claim back the amount paid and treat the goods as unsolicited.³⁵³ Geerts *ea* state that the enterprise (supplier) may not request the consumer to take care or conserve the goods, return the goods or even leave the goods

³⁴⁶ *Ibid.*

³⁴⁷ A 84-87.

³⁴⁸ A 88-91.

³⁴⁹ A 92-94.

³⁵⁰ A 94 § 6: “nie-gevraagde levering van goedere”.

³⁵¹ A 41 WMPC 2010. The discretion given to the court in a 41 is subject to common law sanctions.

³⁵² *Ibid.*

³⁵³ Geerts *ea* 39.

at other premises.³⁵⁴ The consumer becomes owner of the goods without any payment required.³⁵⁵

As is the case in South Africa,³⁵⁶ the supply of unsolicited goods is prohibited and the courts in Belgium will have a broad discretion on the type of order made in terms of article 41.³⁵⁷ This is the case regardless of the sanctions available in terms of the Belgian common law.³⁵⁸ In terms of Belgian common law³⁵⁹ (the law of obligations in particular) the protection against unfair and prohibited market practices is very limited.³⁶⁰ Only two remedies are available in terms of the common law, namely, a claim for damages and declaring the agreement void because of the lack of consensus.³⁶¹ An unfair market practice that caused damage to the consumer is considered to be a wrongful (tortious or delictual) act and the following elements must be proven:³⁶² Damages, the existence of the unfair market practice and a causal link between the two.³⁶³

Geerts *ea* criticise the fact the Belgian legislature excluded the regulation of substitutive goods as provided for in the EU UCC Directive.³⁶⁴ Should the consumer want to claim damages he has to prove that the damages incurred were due to the unfair market practice.³⁶⁵

A penalty of between 250 euros and 10 000 euros is payable in terms of article 124 for supplying unsolicited goods to a consumer in terms of article 94.

³⁵⁴ *Ibid.*

³⁵⁵ *Ibid.* See also Steennot (2010) 64-65.

³⁵⁶ Ss 51 & 52 CPA.

³⁵⁷ Geerts *ea* 41.

³⁵⁸ *Ibid.*

³⁵⁹ A 1382 Civil Code.

³⁶⁰ Geerts *ea* 50.

³⁶¹ *Ibid.*

³⁶² *Ibid.*

³⁶³ A discussion thereof falls outside the scope of this thesis.

³⁶⁴ Geerts *ea* 41.

³⁶⁵ *Ibid.*

F. CONCLUSION AND RECOMMENDATIONS

1. Consumer goods

The type of goods that can form part of a sale in terms of our common law, and therefore described as the *merx* of a contract of sale, can also be the *merx* of a consumer sale in terms of the CPA.³⁶⁶ Although the CPA in South Africa includes tangible movables, tangible immovables as well as gas and electricity,³⁶⁷ the discussions in this thesis exclude immovable goods unless otherwise specifically indicated.

In Scotland “goods” include tangible corporeal movables,³⁶⁸ and exclude immovable property.³⁶⁹

In Belgium consumer goods include all corporeal movables.³⁷⁰ The exclusion in Belgium of electricity, water and gas in certain instances is criticised with merit.³⁷¹ In this regard the South African position should be commended in that it is irrelevant for which purpose the consumer uses the goods.³⁷² Whether or not the goods are sold (supplied) in the ordinary course of the supplier’s business is the determining factor. Technical distinctions in terms of the South African position are therefore not necessary. In South Africa (and worldwide) the supply of water, gas and electricity to consumers have become an area of contention. The protection of consumers and the proper regulation of such supply are crucial.

It is clear from regulation 44(3)(i) of the CPA that in cases where the consumer is a natural person who bought goods for a private purpose, the parties must have consensus on the thing sold and any provision in a consumer sale agreement where the seller (supplier) is entitled to unilaterally amend the characteristics of the goods is presumed to be unfair.³⁷³ A similar provision exists in Belgian law³⁷⁴ and confirms the argument that consensus still plays a very important role.

³⁶⁶ See s 1 CPA as well as Part B 2.2.

³⁶⁷ S 1 CPA definition of “goods”. See also Part D 1.

³⁶⁸ S 61 SOGA. See also Part E 1.1.

³⁶⁹ *Ibid.*

³⁷⁰ A 1649*bis* Civil Code. See also Part E 2.3.

³⁷¹ Peeters 2005 444. See also Part E 2.3.

³⁷² S 1 CPA.

³⁷³ Unless the supplier can prove the contrary.

³⁷⁴ A 74 WMPC 2010. See also Part E 2.5.1 above.

1.1 WMPC 2010 Belgium: “Product” includes immovable property

The provisions regarding consumer sales in the Belgian Civil Code and the remedies that are available to consumers where the goods do not conform to the agreement only provides protection to consumers where movable goods are bought. The situation is somewhat complicated by the WMPC 2010 which includes immovable property in the definition of “product”. The interpretation thereof seems simple enough in that immovable property should be included in the application of the particular provision of the Act where the term “product” is used. There are however certain instances in the Act where the wording is ambiguous.

Steennot states that the legislature most likely incorporated both the terms “goods” and “product” to be more in line with the EU UCC Directive.³⁷⁵ The writer argues however that the use of the terms may cause confusion.³⁷⁶ For example, in the case of the cooling-off right available to a consumer where a distance contract is concluded,³⁷⁷ both the terms “goods” as well as “product” are used. This, according to Steennot, is an oversight by the legislature and most likely due to the fact that the predecessor of the WMPC 2010 (WHPC 1991) used the term “product” which had a narrower meaning.³⁷⁸ The cooling-off right in terms of a distance contract should therefore be interpreted to apply to movables only.³⁷⁹

2. Generic sales and future goods

Generic sales and the sale of future goods are governed by the common law of sale in South Africa³⁸⁰ and are regarded as consumer sales for purposes of the CPA.³⁸¹

The definition of “display” refers to generic sales.³⁸² Section 18³⁸³ of the CPA regulates goods sold by description or sample or both. It can be argued that the wording of the section is such that it includes both generic sales and the sale of future goods. In

³⁷⁵ Steennot (2010) 11.

³⁷⁶ *Ibid.*

³⁷⁷ Chapter 3, Section 2 WMPC 2010.

³⁷⁸ Steennot (2010) 11.

³⁷⁹ *Ibid.*

³⁸⁰ See Part B 2.2 & 2.3 above.

³⁸¹ See Part D 1 & 2 above.

³⁸² See Part D 2.3 above.

³⁸³ S 18(3).

South Africa,³⁸⁴ Scotland³⁸⁵ and Belgium³⁸⁶ generic sales and the sale of future goods can be the subject of a consumer agreement. The importance of including these types of goods in consumer sales is relevant in determining which party (the supplier or consumer) bears the risk of the goods until delivery. The same applies to the determination of who bears the risk at time of acceptance or rejection of such consumer goods.³⁸⁷

3. Sale by description or sample or both

A sale by description or sample or both forms part of the common law of sale in South Africa³⁸⁸ and is specifically regulated by the CPA.³⁸⁹ It is argued that the wording of the relevant provisions of the CPA³⁹⁰ that regulate sales by description or sample also include generic sales as well as the sale of future consumer goods.³⁹¹

The position in Scotland should be taken into consideration which provides that where consumer goods are sold by description and sample and there is a difference between the description and the sample, the intention of the parties should be taken into consideration and the agreement should be interpreted against the supplier of the goods.³⁹²

4. Seller not the owner (*res aliena*)

It is an implied term of any consumer sale agreement in South Africa that the seller has the legal right or authority to sell the goods.³⁹³ This could mean that a valid consumer sale agreement can be concluded even where the seller is not the owner but ownership will never pass. As discussed above³⁹⁴ a valid sale is possible because in South African law the obligatory and real agreement are two separate agreements. It is submitted that

³⁸⁴ S 18-20 CPA. See also Part D 2.

³⁸⁵ S 5 SOGA. See also Part E 1.2 & 1.3.

³⁸⁶ A 1585 & A 1649*bis* Civil Code. See also Part E 2.2 & 2.3.

³⁸⁷ See chapter 8 for an in-depth discussion in this regard.

³⁸⁸ See Part B 2.5.

³⁸⁹ S 18-20 CPA.

³⁹⁰ *Ibid.*

³⁹¹ See Part D 2.

³⁹² See Part E 1.5.

³⁹³ S 44 CPA.

³⁹⁴ Part B 3.2.

no valid consumer sale agreement can be concluded where the seller does not have the legal right to sell the goods (and the sale of stolen consumer goods is therefore excluded).

In Scotland a similar approach is followed and the *nemo dat* rule is followed³⁹⁵ (as is the case in South African law) but also with certain exceptions.³⁹⁶

Because ownership transfers upon the conclusion of consumer agreements in Belgium, the seller may not sell the goods of another and article 1599 of the Civil Code provides that the sale of another's goods is null and void and ownership can never pass. It further makes out a ground for a claim for damages provided the buyer was unaware of the lack of ownership. Article 1599 has been the subject of great contention in Belgium³⁹⁷ and provides more questions that answers in relation to the South African position. What complicates matters even more is the application of article 2279 of the Civil Code in certain instances. Article 2279 enables a third party acting in good faith to acquire property received from a person who is not its owner,³⁹⁸ the details of which are discussed in chapter 9.³⁹⁹

5. Unsolicited goods

Prior to the conclusion of the CPA, the term unsolicited goods is used in section 45 of ECTA governing electronic transactions.⁴⁰⁰ The heading of the section is however misleading due to the fact that the content of the section only deals with unsolicited communications rather than unsolicited goods and therefore does not provide any guidance regarding unsolicited goods in the case of consumer sales. The only instance where section 45 of ECTA could provide assistance is in the case of the marketing of goods and services in the case of consumer sales, the content of which falls outside the scope of this discussion.

³⁹⁵ *Supra* 372.

³⁹⁶ *Ibid.*

³⁹⁷ Part E 2.4.

³⁹⁸ Cauffmann 244.

³⁹⁹ Chapter 9: Transfer of ownership.

⁴⁰⁰ See Part B 2.6 above.

The regulation of unsolicited goods forms part of the CPA in South Africa and gives greater protection to consumers than prior to the implementation of the Act.⁴⁰¹ The type of consumer goods that will be regarded as unsolicited goods are very similar to those regarded as such in Scotland and Belgium. The purpose of the provisions regarding unsolicited goods in South Africa, Scotland and Belgium is to prevent inertia selling of unwanted goods to consumers as well as the prohibition of negative option marketing.

Section 1 of the CPA defines “goods” to include immovable goods. The question may be asked whether immovable property can also become unsolicited goods in terms of section 21 of the CPA. The wording of section 21 seems to suggest that only movable goods can become unsolicited. For example where section 21(1)(a) refers to situations where “...[a] supplier has *left*⁴⁰² any goods with a consumer...”. It would be impossible to “leave” immovable goods with a consumer.

When looking at the comparative positions, the position in Scotland is clear: Only movable goods can become unsolicited.⁴⁰³ In the case of Belgium article 41 read together with article 94 § 6 of the WMPC 2010 makes it clear that only movables can become unsolicited goods. It is therefore recommended that only movable consumer goods will become unsolicited goods in terms of section 21 of the CPA.

There is no obligation in terms of article 94 § 6 of the WMPC 2010 in Belgium on the consumer to pay for, return or even conserve unsolicited goods. Ownership passes unconditionally to the consumer without any obligation as to payment.⁴⁰⁴ As discussed earlier uncertainty does exist in South Africa about section 21(5) of the CPA and whether “retain” means a transfer of ownership as is the case in Belgium. Van Heerden⁴⁰⁵ correctly argues that the position in terms of Scottish law⁴⁰⁶ should be followed. It is further recommended that the Minister of Trade and Industry publish a practice directive or guideline with regard to section 21 and the treatment of unsolicited

⁴⁰¹ S 21 CPA.

⁴⁰² Own emphasis.

⁴⁰³ See Part E 1 above.

⁴⁰⁴ Geerts *ea* 41. See also Part E 2.5.2.

⁴⁰⁵ Van Heerden 673-675.

⁴⁰⁶ As part of the applicable law in the United Kingdom.

goods for greater certainty in practice. Criminal sanctions as provided for in Scotland should also be introduced in South Africa.⁴⁰⁷

⁴⁰⁷ S 6(1) UGSA 1971.

6 **ESSENTIALIA OF SALE: THE PURCHASE PRICE**

- A. INTRODUCTION
 - B. LEGAL POSITION WHERE THE CONSUMER PROTECTION ACT 68 OF 2008 IS NOT APPLICABLE (COMMON LAW POSITION)
 - C. LEGAL POSITION IN TERMS OF THE CONSUMER PROTECTION ACT 68 OF 2008
 - D. EVALUATION
 - E. COMPARISON
 - F. CONCLUSION AND RECOMMENDATIONS
-

A. INTRODUCTION

One of the *essentialia* of the contract of sale is that the parties must reach consensus on the purchase price. This also means that the *pretium* or price must be certain at time of conclusion of the contract. This chapter¹ provides a general overview of the historical development as well as the common law position regarding certainty of price.

Of particular importance is the common law doctrine of *laesio enormis* pertaining to the purchase price. In a nutshell the doctrine determines that the buyer will have a remedy where the value of the *merx* (thing sold) is less than half of the purchase price paid. Though the doctrine has been abandoned in modern South African law, an historical overview as well as a discussion of the relevant case law regarding the doctrine is necessary. The importance of the discussion of the doctrine as part of this thesis is to investigate whether or not the CPA reintroduces the doctrine into South African law. The buyer also has a common law duty to pay the agreed purchase price. Whether or not the CPA confirms this duty forms part of the discussion as well.

The whole concept of a fair, reasonable and certain purchase price involves an investigation into the many interpretations thereof by the courts,² various statutes³ and

¹ See Part B of this chapter.

² See eg *Botha (now Griessel) v Financscredit (Pty) Ltd* 1989 3 SA 773 (A); *Brisley v Drotsky* 2002 4 SA 1 (SCA); *Afrox Healthcare; Price Waterhouse Coopers Inc v National Potato Co-Operative Ltd* 2004 6 SA 66 (SCA); *South African Forestry Co Ltd v York Timbers Ltd* 2005 3 SA 323 (SCA); *Barkhuizen v Napier* 2007 5 SA 323 (CC); *Breedenkamp v Standard Bank of South Africa Ltd* 2009 5 SA 304 (GSJ), 2009 6 SA 277 (GSJ), 2010 4 SA 468 (SCA).

³ CPA, Competition Act 89 of 1998 & Constitution.

underlying principles of the law of contract such as *pacta sunt servanda*,⁴ the sanctity of contract, good faith (*bona fides*) and unequal bargaining positions of the parties.⁵ It is not necessary, however, to have an in-depth discussion of these general contractual principles for purposes of this chapter as indicated above.

Though there are many provisions in the CPA relevant to the concept of price and purchase price (such as the prevention of price discrimination in terms of Part A⁶ or price advertising in terms of Part E⁷) only two provisions are discussed in detail. Firstly, section 23 pertaining to the disclosure of the price of goods is discussed.⁸ Secondly, certainty of price and the possible applicability of the doctrine of *laesio enormis* in the context of section 48(1)(a)(i) of the Act are investigated.

It is important to note that section 48 is included in Part G of the Act dealing with unfair contract terms. The test for determining whether a contract term is fair, reasonable and just and the role of the courts regarding contractual disputes in consumer agreements is also included in Part G. A complete and comprehensive discussion of Part G warrants a critical and comparative thesis on its own and falls outside the scope of this discussion. As indicated above, the main purpose of the investigation into section 48(1)(a)(i) is therefore to determine whether the common law doctrine of *laesio enormis* was reintroduced by the CPA.

SOGA 1979 regulates the general provisions regarding the price and price determination in Scotland.⁹ Unfair contract terms on the other hand, are regulated by a separate piece of legislation (UCTA 1977)¹⁰ and covers many unfair contract terms (the contractual term regarding price being one of many).¹¹ In Belgium, apart from the general common law provisions regarding price,¹² there are also separate statutes¹³ regulating unfair contract terms and the fairness of price. These jurisdictions and relevant legislation are only investigated in so far as to assist in the main purpose of the

⁴ Hiemstra & Gonin 251: *Pacta servanda sunt* (“agreements are to be observed”).

⁵ See introductory chapter 1 regarding the relevance of unequal bargaining positions in consumer agreements.

⁶ Consumer’s fundamental right to equality in the consumer market.

⁷ Consumer’s fundamental right to fair and responsible marketing.

⁸ Forms part of the consumer’s fundamental right to disclosure and information (Part D).

⁹ Ss 8 & 9 SOGA 1979.

¹⁰ Unfair Contract Terms Act 1977.

¹¹ See Part E 1.2.

¹² See Part E 2.

¹³ The most relevant is the WMPC 2010.

chapter: The influence of the CPA on the common law regarding the purchase price. The chapter ends with a conclusion and recommendations.

B. LEGAL POSITION WHERE THE CONSUMER PROTECTION ACT 68 OF 2008 IS NOT APPLICABLE (COMMON LAW POSITION)

1. Brief historical overview

1.1 General

In early Roman law there were two schools of thought regarding the distinction between barter and sale. The Sabiniani were of the opinion that the *pretium* of a contract of sale did not have to consist only of money. The Proculiani insisted that the *pretium* (purchase price)¹⁴ could only consist of money. Diocletianus and Maximianus clarified the matter by declaring in a *rescriptum* that the *pretium* consisted of money only.¹⁵

Because of the requirement that there had to be consensus on the *pretium*, rules developed in Roman law to provide more certainty in this regard. Firstly no sale was valid without a price;¹⁶ secondly the price had to be in money.¹⁷ The price had to be genuine or real (*verum*),¹⁸ just (*iustum*)¹⁹ and certain (*certum*).²⁰

The price had to be *verum*, true, serious and not simulated or a sham. According to Thomas²¹ the adequacy of price was initially irrelevant and the intention of the parties played the most important role. The purchase price was *certum* in the sense of being at least ascertainable by reference to some other objective standard.²²

With the devaluation of money in post-classical times and under the influence of Hebrew law and Christian ethics the doctrine that every article has a just price (*iustum*

¹⁴ The terms “*pretium*” and “purchase price” have the same meaning throughout this thesis and apply interchangeably.

¹⁵ Referred to as the *pecunia numerata*; see LötZ 1991 (Deel 1) 219.

¹⁶ *Nulla emptio sine pretio*.

¹⁷ *Pecunia numerata*.

¹⁸ For a comprehensive discussion of the historical development of the price being *verum* (genuine) see Van den Bergh 2012 67.

¹⁹ For a comprehensive discussion on the historical development of the price being *iustum* (just) see *Idem* 2012 68-71.

²⁰ For a comprehensive discussion on the historical development of the price being *certum* (certain) see *Idem* 2012 60-63.

²¹ Thomas 323.

²² Zimmermann *Obligations* 230.

pretium) was accepted in the Roman Empire.²³ Though the doctrine of *iustum pretium* later developed into the doctrine of *laesio enormis*, they should not be confused with one another. The *iustum pretium* was only applicable to land and only available to the seller. Under the said doctrine the seller was allowed to rescind the contract where the purchase price paid for the land was worth less than half of the market value of the property.²⁴ The contract could only be upheld if the buyer paid the full or actual purchase price. According to Thomas²⁵ the reason for such a doctrine was probably prompted by socio-political reasons, namely, to protect small landowners against powerful neighbours and speculators and to prevent the depopulation of agricultural areas.

1.2 Doctrine or principle of *laesio enormis*

The *iustum pretium* doctrine (influenced by the medieval church) was extended to the broader doctrine of *laesio enormis* which is discussed in detail below.²⁶

Zimmermann²⁷ explains that the concept of *pacta sunt servanda* was still the core of most sale agreements and it was only because of the exploitation of farmers in agricultural areas by urban capitalists that Justinian felt compelled to intervene and make a remedy available to the seller.

According to Van den Bergh the literary meaning of *laesio enormis* is “abnormal injury”.²⁸ Kerr defines it to mean “serious loss” or “more than ordinarily prejudiced”.²⁹

The *laesio enormis* doctrine has its origin in Roman law in the Justinian Code. The purchase price had to be *verum* or *iustum* in other words the actual value of the thing sold in relation to the purchase price.³⁰ The rule was that the seller of land for less than half its real value might get back his land on returning the price, unless the buyer

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ There is a difference of opinion regarding the original application of the *laesio enormis*. See Van Warmelo (1965) 289; Zimmermann *Obligations* 259 – 262 regarding the question of interpolation and extension of the *laesio enormis* principles.

²⁷ Zimmermann *Obligations* 261.

²⁸ Van den Bergh 2012 69.

²⁹ Kerr 40 fn 102.

³⁰ Van Warmelo (1965) 289.

preferred to pay the full value.³¹ Conversely, the buyer could cancel the sale and reclaim the purchase price where the value of the *merx* was found to be less than half of the purchase price paid.³² The *Code* dealt directly with the relief of the seller of immovable property but its scope was extended to include relief to the buyer and to cover sales of movables of considerable or substantial value.³³ It must be remembered that the law of sale in Roman law developed in a framework where it was upon the parties to regulate the agreement between them and the law had no consumer protection function.³⁴

After reception of the doctrine into Roman law, it was implemented and used throughout Europe and became part of Roman-Dutch law eventually governing almost the whole field of contract law pertaining to price.³⁵ Lee refers to the use of the doctrine in Roman-Dutch law as an indulgence allowed to a buyer who had paid more than double the value of the *merx*.³⁶ This is an indication that the doctrine became a remedy used more often by the buyer than the seller.³⁷

According to Voet³⁸ the price had to be just and suitable for the merchandise, even though the contracting parties had a natural freedom to get the better of each other in a moderate degree as to the price by “a certain shrewdness”.³⁹ Van den Bergh explains that if the price was too high or too low, if the difference was less than half the value, the parties had to be satisfied with it.⁴⁰ A person who had been prejudiced to the extent of less than half, without fraud being involved, thus could not rescind the sale. The reason for this was that if sales were annulled for every kind of inequality it would be to the prejudice of trade and the public interest, but if the disparity was more than half they could claim an annulment of the sale.⁴¹ Van den Bergh explains further that the Dutch tried to limit the doctrine’s injurious effects by determining that it does not apply in

³¹ Lee 231.

³² *Ibid.*

³³ Van Warmelo (1965) 289.

³⁴ Lötze 1991 (Deel 1) 231 fn 99.

³⁵ Hahlo & Kahn 473.

³⁶ Lee 233.

³⁷ *Ibid.*

³⁸ 18 1 21.

³⁹ Van den Bergh 2012 70.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

sales, for example, where the value of the thing was essentially uncertain and the sale was of a speculative nature, for example where next year's crop was bought or land was bought with the hope that it would contain minerals.⁴² Nor did it apply where the party who had been disadvantaged knew at the time of the sale of the disparity between the price and value of the thing, in which case he was then stopped from claiming the remedy of *laesio enormis*.⁴³ The writer argues that by the time the Dutch came to the Cape, it was seldom applied, since humanism and the law of nature spoke against it.⁴⁴

1.3 Price determination by a third party

There was a difference in opinion on whether a price determination by a third party constituted a valid sale in Roman law. The Sabiniani argued that such an agreement between the buyer and the seller was not sufficient and that no contract of sale came into being.⁴⁵ The Proculiani on the other hand held that such a price determination was valid and also gave rise to a valid contract of sale.⁴⁶ Justinian recognised such a sale and regarded it as a "conditional sale".⁴⁷ If the third party determined the purchase price, a valid sale came into being. If the third party could not or would not make a price determination, no contract came into being.⁴⁸

This view was accepted by Roman-Dutch jurists and also became part of South African law.⁴⁹ Lötz refers to the opinion of Roman-Dutch writers that the award should be corrected in goodness and fairness by *bonae fidei* judicial proceedings.⁵⁰

1.4 Duty of buyer to pay the purchase price

In terms of Roman law and Roman-Dutch law the buyer had a duty to pay the purchase price and thereby transferred ownership of the money to the seller.⁵¹ This was

⁴² *Idem* 71.

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ Van Warmelo (1965) 289.

⁴⁶ *Ibid.*

⁴⁷ Zimmermann *Obligations* 254: "Justinian settled the dispute by construing the clause as a suspensive condition."

⁴⁸ *Ibid.*

⁴⁹ Lötz 1991 (Deel 1) 231.

⁵⁰ *Ibid.*

⁵¹ Zimmermann *Obligations* 277; Voet 19 1 17, 19 1 23 & 43 3 1.

considered to be the most important duty of the buyer.⁵² The buyer had a duty to pay the full purchase price.⁵³ Based on this duty, the seller had the *actio venditi* against the buyer.⁵⁴ The seller could claim interest on the outstanding purchase price from the date of delivery as well as for the reimbursement of certain expenses.⁵⁵

Payment of the purchase price was usually upon and at the place of conclusion of the contract unless the parties agreed otherwise.⁵⁶ Where no date for the payment of the purchase price was agreed upon, the seller had to locate the buyer and claim payment.⁵⁷ The buyer who paid was entitled to a receipt and where payment was not made, the seller could withhold the *merx* until payment.⁵⁸

2. Modern South African position (common law position)

2.1 Purchase price: *Essentiale of sale*

Although trade-in agreements are also relevant to the purchase price as an *essentiale*, they are discussed comprehensively elsewhere in this thesis.⁵⁹

As part of the *essentialia* of a contract of sale, there has to be consensus on the purchase price in that there is consensus on the monetary performance owing by the buyer to the seller.⁶⁰

A valid price determination means that the parties agree on the price, the price is certain and consists of acceptable currency.⁶¹ Any currency which could be exchanged into acceptable currency of that particular country or any other method of payment frequently used in international trade (for example a letter of credit) are also acceptable.⁶²

⁵² Lötze 1992 (Deel 2) 155.

⁵³ *Ibid* fn 197.

⁵⁴ Zimmermann *Obligations* 277; Voet 19 1 17, 19 1 23 & 43 3 1.

⁵⁵ *Idem*.

⁵⁶ *Idem*. See also Voet 19 1 17.

⁵⁷ Lötze 1992 (Deel 2) 156 fn 198.

⁵⁸ *Ibid*.

⁵⁹ See chapter 11 Part B 2.3.1.

⁶⁰ Nagel *ea* 193. See also Van den Bergh 2012 58-60, 63- 68 & 71-72.

⁶¹ *Ibid*.

⁶² *Ibid*. See also *Ex parte Sapa Trading (Pty) Ltd* 1995 1 SA 218 (W).

It has been established through case law that the purchase price must be determined or at least determinable at the time of conclusion of the contract.⁶³ If it is not at least determinable at the time of conclusion, the sale is void.⁶⁴ If the price is determinable the method of determination must also be valid. Valid methods that have been recognised include fixing the price as a lump sum, price per unit, or an objective measure.⁶⁵ The current or usual price at which goods are sold may also be valid for price determination provided a valid or usual price for the particular goods exists.⁶⁶

Nagel *ea* state that a sale may be a bargain but the purchase price may not be completely out of proportion to the value of the thing sold.⁶⁷

Where a third party makes a price determination, such a determination must be valid.⁶⁸ Any discretionary power the third party had must be exercised *arbitrio boni viri*.⁶⁹ The court may correct an unreasonable price determination and in the event of such a correction, the other party should be given a choice as to whether to abide by the agreement or not.⁷⁰ Price determination by a third party is discussed more comprehensively as part of the doctrine of *laesio enormis* below.⁷¹

2.2 The rule or doctrine of *laesio enormis*⁷²

2.2.1 Historical development in South Africa and abolition

Legislation rid both the Cape⁷³ and the Free State⁷⁴ of the doctrine of *laesio enormis*. Though the doctrine was still applicable in other parts of the country, *Tjollo Ateljees v*

⁶³ *Patel v Adam* 1977 2 SA 653 (A). See also Hawthorne 1992 638-648 with regard to the contractual certainty of price.

⁶⁴ *Ibid.* See also *Cassimjee v Cassimjee* 1947 3 SA 701 (N); *Erasmus v Arcade Electric* 1962 3 SA 418 (T) as to the lack of consensus on the purchase price rendering the contract void.

⁶⁵ Nagel *ea* 198. See also Kahn (2010) 17.

⁶⁶ *Ibid.* See also Sharrock (2011) 272-273.

⁶⁷ *Ibid.* See also *Aris Enterprises (Finance) (Pty) Ltd v Waterberg Koelkamers (Pty) Ltd* 1977 2 SA 425 (A).

⁶⁸ Nagel *ea* 198. See also Mostert *ea* 8; Kerr 29-36.

⁶⁹ Hiemstra & Gonin 158: “decision (judgment) of a good man.” See also *Engen Petroleum Ltd v Kommandonek (Pty) Ltd* 2001 2 SA 170 (W).

⁷⁰ *Van Heerden v Basson* 1998 1 SA 715 (T).

⁷¹ See Part B 2.2.2 of this chapter.

⁷² The words “doctrine” and “rule” with regard to *laesio enormis* apply interchangeably.

⁷³ In 1879 in terms of the General Law Amendment Act 8 of 1879.

⁷⁴ In 1902 in terms of the General Law Amendment Ordinance 5 of 1902.

*Small*⁷⁵ led to the complete abolition thereof in terms of the General Law Amendment Act 32 of 1952.

In *Tjollo Ateljees v Small*,⁷⁶ the doctrine as a whole was condemned, while the extension to movables (with specific reference to Voet) was strongly criticised by Van den Heever and Schreiner JJA.⁷⁷ Ultimately the court urged for its repeal by way of legislation.⁷⁸ The court held that by not abolishing the doctrine, South Africa would be out of step with the *modern*⁷⁹ world with its highly developed commercial and financial organisations.⁸⁰ Ironically Hahlo & Kahn remarked the following (1960):⁸¹

“Now that an end has been put to *laesio enormis*, the weak and the ignorant must seek what statutory protection they can find in the indirect form of price and rent control and the prohibition of monopolistic practices.”

Preceding the ultimate abolition of the *laesio enormis*, however, there were some noteworthy decisions that gave a hint to its eventual downfall and indicative of problems concerning the various interpretations and applications thereof. The most relevant of these are discussed below.

In *Levisohn v Williams*⁸² for instance, the fair market value of the object was taken into consideration to determine whether or not *laesio enormis* was applicable. The case dealt with the fair value for a ring bought for £45 but only worth £20.

Problems arose where the courts had to determine to which kinds of *merx* the *laesio enormis* doctrine applied. In *Cotas v Williams and Another*⁸³ for example, the application of the doctrine was allowed in the case of a sale of movables. The court held, however, that the doctrine would not apply in those cases where speculation was inherent in the sale.⁸⁴ It was determined that goodwill in its nature is not such a

⁷⁵ *Tjollo Ateljees (Edms) Bpk v Small* 1949 1 SA 856 (A).

⁷⁶ *Ibid.*

⁷⁷ 857.

⁷⁸ *Ibid.*

⁷⁹ Own emphasis.

⁸⁰ 859.

⁸¹ Hahlo & Kahn 473 & 475.

⁸² 1875 5 Buch 108 Supreme Court of the Cape of Good Hope.

⁸³ 1947 2 SA 1154 (T).

⁸⁴ *Ibid.*

speculative thing, and the doctrine of *laesio enormis* may be applied to a sale of goodwill as well. The argument was that the basis of the exception from the doctrine was the difficulty of proving a just price, and that where that proof was likely to be too difficult, the law was that *laesio enormis* could not be invoked.⁸⁵

The impossibility of applying the doctrine to all cases of sale became manifest and numerous exceptions were granted upon the rule, and eventually wherever the element of chance prevailed, the injustice of allowing the sale to stand when the transaction turned out favourable came to be universally recognised by the courts.⁸⁶ The court confirmed that the emphasis in the application of the doctrine was on the price being unjust.⁸⁷ It seems that whenever an exception had been allowed to the application of the doctrine the thing sold might have turned out to be more or less valuable.⁸⁸ The just price of the thing could not be fixed, however, because of the very nature of the thing sold which carries with it greater or less value.⁸⁹

In *Katzoff v Glaser*⁹⁰ the court had to determine whether the doctrine was applicable to immovable property or only to movable property. In coming to its decision the court referred to *McGee v Mignon*⁹¹ and the interpretation of Voet.⁹² The court came to the conclusion that Voet could not have had in mind a sale of land at any place other than where it was situated and that Voet 18 5 7 must be understood as referring to movables only.⁹³ The court held that because the true market value at the time and place of the sale was to be taken as the norm for purposes of an action based on *laesio enormis*, evidence of market values and prices at other places and at other times before and after the sale were irrelevant or immaterial, but the value of such evidence must depend on the particular circumstances of each case.⁹⁴

It is interesting to note that even after the abolition of the doctrine the courts still had an opinion with regard to the effect of the doctrine in the South African law of sale.

⁸⁵ 1155.

⁸⁶ Mackeurtan's 19-20.

⁸⁷ *Katzoff v Glaser* 1948 4 SA 630 (T).

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*

⁹¹ 1903 TS 89, 97.

⁹² 18 5 7.

⁹³ *Katzoff v Glaser* 1948 4 SA 630 (T) 642 referring to *McGee v Mignon* 97.

⁹⁴ *Ibid.*

In *Cape Town Municipality v F Robb & co Ltd*,⁹⁵ for instance, Corbett J held that despite the wording of section 25 of the General Law Amendment Act Act 32 of 1952, the common law doctrine of *laesio enormis* never had the effect of rendering contracts, to which it was applicable, null and void *ab initio*.⁹⁶ By virtue of the doctrine the aggrieved party was entitled to offer to the other the alternative of having the contract rescinded or to submit to an equitable adjustment of the price.⁹⁷ The contract was, according to the court, more akin to a voidable than a void one.⁹⁸

In *Gangat v Bejorseth NO*⁹⁹ De Wet J held that Parliament's clear intention was to do away with *laesio enormis*, not to differentiate between one contract and the next. The court held that wherever more factors than merely the value of the thing were involved (for example delayed delivery), such factors would affect the price and such a contract was not the sort of contract to which the doctrine of *laesio enormis* could be applied.¹⁰⁰ Kilian¹⁰¹ aptly explains the inability of the judiciary to apply the doctrine properly:

“The precise scope of the extension remained in some doubt. Some of the old authorities applied the rule only to valuable movables, while others suggested no such limitation. Until 1949 the South African case law showed no hesitation in applying it to movables, but there were dicta importing the restriction to valuables. Indeed, in one case it was applied to the sale of goodwill, an incorporeal. The question of what constituted a 'valuable movable' remained unanswered. Was there a specified value, or was it relative to the means of the party? Voet, though he mentioned the limitation, did not refine it.”

2.2.2 Rescript on *laesio enormis*: Price determination by a third party

Kerr¹⁰² discusses the *laesio enormis* doctrine when dealing with price determination by a nominated third party. According to Kerr the parties may only question such a price determination where the price can be described as unjust, unfair or manifestly unjust in

⁹⁵ 1966 4 SA 345 (C).

⁹⁶ 350.

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*

⁹⁹ 1954 4 SA 145 (N).

¹⁰⁰ 146.

¹⁰¹ Kilian 2006 18.

¹⁰² Kerr 39-55.

terms of our common law.¹⁰³ Referring to case law (discussed below), Kerr argues that only two possible remedies exist and goes on to explain what the writer calls the “rescript” on the *laesio enormis* doctrine and the remedy of *bona fides* as used by the old authorities.¹⁰⁴ Kerr discusses *Gillig v Sonnenberg*¹⁰⁵ where it was agreed by the parties that an auditor would determine the price of shares sold. The court applied the general principles underlying *laesio enormis* (even though the case was heard after the abolition of the doctrine). Murray AJP referred to old authorities (Huber and Voet) and stated that even in the absence of fraud or misrepresentation a buyer (or a seller) could on the ground of equity be given relief against a serious prejudicial bargain.¹⁰⁶ Kerr criticises the judge’s view point and argues that the court’s interpretation of Huber and Voet is questionable.¹⁰⁷

In *Dublin v Diner*¹⁰⁸ the determination of a fixed price for shares was again the issue but the court made a ruling based on a manifest unjust price without referring to the *Gillig*¹⁰⁹ case.¹¹⁰

The case of *Hurwitz and other NNO v Table Bay Engineering (Pty) Ltd and another*¹¹¹ is also discussed by Kerr. The writer states that even though the courts did not *per se*¹¹² use the doctrine of *laesio enormis*, and rather made a correction of the price based on a manifestly unjust determination, the principles underlying the doctrine of *laesio enormis* were indirectly applied.¹¹³ Kerr refers to the remark made by Murray J in stating that if the general considerations underlying the abolished *laesio enormis* doctrine were applied, either party may elect to cancel the contract.¹¹⁴ Kerr argues with merit that this statement differs from the position when the rescript on *laesio enormis* actually applied because under it the disadvantaged party sued to have the contract set

¹⁰³ *Idem* 39 fn 100.

¹⁰⁴ *Ibid.*

¹⁰⁵ 1953 4 SA 675 (T).

¹⁰⁶ 677.

¹⁰⁷ Kerr 43.

¹⁰⁸ 1964 1 SA 799 (D).

¹⁰⁹ 1953 4 SA 675 (T).

¹¹⁰ Kerr 43-44.

¹¹¹ 1994 3 SA 449 (C).

¹¹² Own emphasis.

¹¹³ Kerr 47.

¹¹⁴ *Ibid.*

aside and the advantaged party could restore the property or, at his option, make up the price to the fair value.¹¹⁵

Kerr then considers the possible general *bona fides* action.¹¹⁶ The writer concludes that the basis of the action (when dealing with price determination by a third party) in modern law is equity, fairness and justice rather than the underlying principles of the doctrine of *laesio enormis* as applied in *Gillig*¹¹⁷ and *Hurwitz*.¹¹⁸ It is submitted that the recent judgments pertaining to good faith and reasonableness might change the proposed recommendations made by Kerr. This is so due to the fact that the Constitutional Court confirmed that an action based on good faith (*bona fides*) may not be elevated to a general rule.¹¹⁹

Hartzenberg J in *Van Heerden v Basson*¹²⁰ differentiates between the doctrine of *laesio enormis* and the correction of a price determination by a third person. He confirmed the *Gillig*,¹²¹ *Dublin*¹²² and *Hurwitz*¹²³ cases and held that where *laesio enormis* is concerned, the parties have freely and voluntarily, without any fraud, agreed on a price, which later turns out to be unreasonable.¹²⁴ In the case of a correction of a price determination by a third person, the price is objectively determinable and the third person merely has to make a reasonable determination.¹²⁵ Where the third person makes a reasonable determination, the parties are bound thereby.¹²⁶ Where the determination is unreasonable, a court can correct the determination.¹²⁷ In the event of such a correction, the other party should be given a choice as to whether to abide by the agreement or not.¹²⁸ Kerr briefly mentions the *Van Heerden* case and states that were a price fixed is not far off a figure which might have been expected in the

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.*

¹¹⁷ *Gillig v Sonnenberg* 1953 4 SA 675 (T).

¹¹⁸ *Hurwitz and other NNO v Table Bay Engineering (Pty) Ltd and another* 1994 3 SA 449 (C).

¹¹⁹ See also Hawthorne 2003 271-278 & Van den Bergh 2012 71.

¹²⁰ 1998 1 SA 715 (T).

¹²¹ *Gillig v Sonnenberg* 1953 4 SA 675 (T).

¹²² *Dublin v Diner* 1964 1 SA 799 (D).

¹²³ *Hurwitz and other NNO v Table Bay Engineering (Pty) Ltd and another* 1994 3 SA 449 (C).

¹²⁴ 718.

¹²⁵ 718 & 719.

¹²⁶ *Ibid.*

¹²⁷ *Ibid.*

¹²⁸ 719 & 720.

circumstances, both parties are bound to accept it.¹²⁹ Kerr criticises Hartzenberg J's approach and recommends that it not be followed.¹³⁰

“With respect, while delays and the high cost of litigation may in particular circumstances loom large in any decision on the ground of equity, such delays and cost ought not to be elevated to the status of an overriding factor or the only one to be taken into account. Many other factors may need to be considered, some of which may in the circumstances of a particular case be of greater importance than cost.”

Ledwaba J confirmed the *Van Heerden* case in *Breau Investments (Pty) Ltd v Maverick Trading*.¹³¹ The parties *in casu* could not reach an agreement on the rental. The issue of rental was accordingly referred to a third party. The lessee disputed the third party determination and issued summons against the lessor for the determination of a reasonable rental by the court. The lessor's attorneys demanded payment of rental, which demand was not met. As a result the lessor purported to cancel the contract of lease. An application for eviction was then brought by the lessor. The lessee contended that the contract could not be cancelled pending determination of a reasonable rental by the court, relying on *Van Heerden v Basson*.¹³² The court held that the use of the words “voordat litigasie ontstaan” (before litigation arises) in *Van Heerden* did not mean that *after*¹³³ litigation commenced¹³⁴ a party had no choice to cancel the agreement.¹³⁵ This, according to the judge, was clear from the fact that the lessor did not want to get involved in litigation regarding the reasonableness of the rent.¹³⁶ The court allowed the cancellation of the agreement and the eviction of the lessee because the lessor had a strong case.¹³⁷

¹²⁹ Kerr 1999 15. See also Kerr 47 fn 169.

¹³⁰ Kerr 1999 15-16.

¹³¹ 2010 1 SA 367 (GNP) 370.

¹³² 1998 1 SA 715 (T) 718.

¹³³ Own emphasis.

¹³⁴ After issue of the summons.

¹³⁵ 370 & 371.

¹³⁶ *Ibid.*

¹³⁷ 371.

Naudé¹³⁸ discusses the issue of price determination by third parties and deals with the concept of a “manifestly unjust price” which is found in the common law rule that a court may set aside a price set by a third party appointed by the parties for that purpose as long as it was manifestly unjust.¹³⁹ The writer also refers to the *Hurwitz*¹⁴⁰ and *Van Heerden*¹⁴¹ cases.¹⁴² The reasoning in *Van Heerden* is accepted and according to Naudé shows that such a situation is distinguishable from one where the parties specifically agreed on a manifestly unjust price.¹⁴³

2.3 Duty of the buyer to pay the purchase price

Where the parties do not agree on the time and method of payment, the common law position will apply.¹⁴⁴ The buyer has a common law duty to pay the purchase price and it must be in legal tender.¹⁴⁵ The intention of the parties as to a cash or credit sale will determine the date of payment.¹⁴⁶ In case of a cash sale, payment and delivery must be effected at the same time or at least on the same day.¹⁴⁷ In case of a credit sale, payment is effected on some future date after the *merx* is delivered.¹⁴⁸

Where the parties agree on payment in instalments the number of instalments, the time of payment of each and the amount of each instalment must be determined or determinable.¹⁴⁹ If the parties do not agree on the latter, the contract will be void.¹⁵⁰

Where the parties did not agree on a place of payment the purchase price must be paid where the contract was concluded or where the thing was delivered.¹⁵¹

¹³⁸ 2009 (Part 2) 515.

¹³⁹ *Ibid.*

¹⁴⁰ 1994 3 SA 449 (C).

¹⁴¹ 2010 1 SA 367 (GNP).

¹⁴² Naudé 2009 (Part 2) 533 fn 152.

¹⁴³ For a full discussion on the adequacy of price see Part D below.

¹⁴⁴ Sharrock (2011) 300.

¹⁴⁵ Nagel *ea* 234. A cheque is not legal tender and the consequences of payment by cheque will depend on the intention of the parties. See Part B chapter 10 for a discussion of payment by cheque.

¹⁴⁶ See Part B chapter 10 for a comprehensive discussion of the distinction between a cash and credit sale.

¹⁴⁷ Nagel *ea* 234. See also Sharrock (2011) 300.

¹⁴⁸ *Ibid.*

¹⁴⁹ *Ibid.*

¹⁵⁰ *Patel v Adam* 1977 2 SA 653 (A).

¹⁵¹ Nagel *ea* 234.

C. LEGAL POSITION IN TERMS OF THE CONSUMER PROTECTION ACT 68 OF 2008

1. Important definitions

Section 1 of the Act gives a very broad definition of “consideration”, which is anything of value given and accepted in exchange for goods or services including money, a cheque or other negotiable instrument irrespective of its apparent or intrinsic value, or whether it is transferred directly or indirectly, or involves only the supplier and consumer or other parties in addition to the supplier and consumer.¹⁵²

“Display” in relation to any goods, means placing, exhibiting or exposing those goods before the public in the ordinary course of business in a manner consistent with an open invitation to members of the public to inspect, and select, those or similar goods for supply to a consumer.¹⁵³

“Display” in relation to a price, mark, notice or other visual representation, means to place or publish anything in a manner that reasonably creates an association between that price, mark, notice or other visual representation and any particular goods or services.¹⁵⁴

“Price” when used in relation to a representation required to be displayed by section 23 of the Act, includes any mark, notice or visual representation that may reasonably be inferred to indicate or express an association between any goods or services and the value of the consideration for which the supplier is willing to sell or supply those goods or services.¹⁵⁵

Where “price” is used in relation to the consideration for any transaction, it means the total amount paid or payable by the consumer to the supplier in terms of that transaction or agreement, including any amount that the supplier is required to impose, charge or collect in terms of any public regulation.¹⁵⁶

¹⁵² S 1 def of “consideration”.

¹⁵³ S 1 def of “display”.

¹⁵⁴ S 1 def CPA.

¹⁵⁵ *Ibid.*

¹⁵⁶ *Ibid.*

“Unit price” means a price for any goods or services expressed in relation to a well-known measure such as quantity, weight, volume, duration or other measurable unit by which the goods or services are allocated.¹⁵⁷

2. Disclosure of price: Section 23

Section 23 forms part of Chapter 2 Part D that governs a consumer’s right to disclosure and information. Section 23 does not apply to a transaction if a supplier has provided an estimate pertaining to that transaction, or the consumer has waived such an estimate, as contemplated in section 15¹⁵⁸ or if section 43 of the ECTA¹⁵⁹ applies to that transaction.¹⁶⁰

In terms of section 23(2), price includes a unit price and (subject to subsection 23(4)) a retailer must not display any goods for sale without displaying to the consumer a price in relation to those goods.¹⁶¹

Section 23(4) provides that a retailer is not required to display a price for any goods that are displayed predominantly as a form of advertisement of the supplier, or of goods or services, in an area within the supplier’s premises to which the public does not ordinarily have access.

A price is adequately displayed to a consumer if, in relation to any particular goods, a written indication of the price, expressed in the currency of the Republic of South Africa¹⁶² is:

- a. annexed or affixed to, written, printed, stamped or located upon, or otherwise applied to the goods or to any band, ticket, covering, label, package, reel, shelf or other thing used in connection with the goods or on which the goods are mounted for display or exposed for sale;¹⁶³

¹⁵⁷ *Ibid.*

¹⁵⁸ S 15 CPA governs pre-authorisation of repair or maintenance services.

¹⁵⁹ 25 of 2002.

¹⁶⁰ S 23(1)(a) & (b).

¹⁶¹ S 23(3).

¹⁶² Currency is in Rands.

¹⁶³ S 23(4)(a).

- b. in any way represented in a manner from which it may reasonably be inferred that the price represented is a price applicable to the goods or services in question;¹⁶⁴ or
- c. published in relation to the goods in a catalogue, brochure, circular or similar form of publication available to that consumer, or to the public generally, if a time is specified in the catalogue, brochure, circular or similar form of publication as the time after which the goods may not be sold at that price, and that time has not yet passed.¹⁶⁵

A supplier must not require a consumer to pay a price for any goods or services higher than the displayed price for those goods or services; or if more than one price is concurrently displayed, higher than the lower or lowest of the prices so displayed.¹⁶⁶ Section 23(6) does not, however, apply in respect of the price of any goods or services if the price of those goods or services is determined by or in terms of any public regulation.¹⁶⁷

Section 23(8) provides that if a price that was once displayed has been fully covered and obscured by a second displayed price, that second price must be regarded as the displayed price.

If a price as displayed contains an inadvertent and obvious error, the supplier is not bound by it after correcting the error in the displayed price; and taking reasonable steps in the circumstances to inform consumers to whom the erroneous price may have been displayed of the error and the correct price.¹⁶⁸

A supplier is not bound by a price displayed in relationship to any goods or services if an unauthorised person has altered, defaced, covered, removed or obscured the price displayed or authorised by the supplier.¹⁶⁹

Section 23(11) provides that if, in addition to displaying a price in relation to any goods or services, a supplier has advertised or displayed a placard or similar device announcing that prices are, will be or have been reduced by:

¹⁶⁴ S 23(4)(b).

¹⁶⁵ S 23(4)(c)(i).

¹⁶⁶ S 23(6).

¹⁶⁷ S 23(7).

¹⁶⁸ S 23 (9).

¹⁶⁹ S 23(10).

- a. a monetary value, generally or in relationship to any particular goods or services, the displayed price for the purpose of subsection (6) must be regarded as being the price immediately displayed in relationship to the goods or services, minus the announced monetary reduction;¹⁷⁰ or
- b. a percentage value, generally or in relationship to any particular goods or services, the displayed price for the purpose of subsection (6) must be regarded as being the price immediately displayed in relationship to the goods or services, minus an amount determined by multiplying that price by the percentage shown,¹⁷¹ unless the supplier has applied two or more prices immediately to the goods or services concerned, and the difference between the highest and lower or lowest of those applied prices is equivalent to the advertised reduction in price.

3. Section 48: Unfair, unreasonable or unjust contract terms

Section 48 forms part of a consumer's right to fair, just and reasonable terms and conditions.¹⁷²

A supplier must not offer to supply, supply, or enter into an agreement to supply, any goods or services at a price that is unfair, unreasonable or unjust;¹⁷³ or on terms that are unfair, unreasonable or unjust.¹⁷⁴

Regulation 44 gives additional protection to consumers who are natural persons and buys goods for private purposes.¹⁷⁵ Regulation 44(3) contains a list of contract terms which are presumed to be unfair. Regulation 44(3)(h) provides that a consumer agreement is presumed to be unfair if it has the purpose or effect of allowing the supplier to increase the price agreed with the consumer when the agreement was concluded without giving the consumer the right to terminate the agreement.

¹⁷⁰ S 23(11)(a).

¹⁷¹ S 23(11)(b).

¹⁷² Chapter 2 Part G.

¹⁷³ S 48(1)(a)(i).

¹⁷⁴ S 48(1)(a)(ii).

¹⁷⁵ Reg 44(1). See also chapter 4 Part D 2.1.

D. EVALUATION

1. Price display: Section 23

1.1 General

In terms of our common law the parties must have consensus on the *essentialia* of sale including the *pretium* or purchase price.¹⁷⁶ The concept of consensus on the purchase price is confirmed where the CPA is applicable in terms of regulation 44(3)(h) (in the case of consumers who are natural persons) because the supplier must give the consumer the opportunity to cancel the agreement where he (the supplier) unilaterally increases the price as agreed upon.

The most relevant section governing the display of the purchase price is section 23 of the CPA. A retailer must display the price of goods on sale adequately as provided for in section 23(5). The term “price” in this context includes any mark, notice or visual representation that may be reasonably inferred to indicate an association between the goods or services and the consideration for which the supplier is willing to sell or supply those goods or services.¹⁷⁷ If a price that was once displayed has been fully covered and obscured by a second displayed price, that second price must be regarded as the displayed price.¹⁷⁸

Du Plessis¹⁷⁹ states that goods will be displayed only if they are placed before the public and provided they are displayed in the ordinary course of business as an open invitation to the public to inspect and select the goods. The writer correctly argues that it would not seem to indicate that the retailer must make an offer to sell, and that a mere invitation to buy would suffice, therefore including all advertisements and forms of marketing used for most goods.¹⁸⁰

A supplier is not bound by a displayed price if it contains an obvious error¹⁸¹ or has been tampered with.¹⁸² A price has been tampered with, for example, where an unauthorised person has removed or altered the price. Jacobs *et al* state that it is

¹⁷⁶ For a comprehensive discussion on the common law position see Part B above.

¹⁷⁷ S 1.

¹⁷⁸ S 23(8).

¹⁷⁹ Du Plessis LLM 100.

¹⁸⁰ *Ibid.* See also Sharrock (2011) 630.

¹⁸¹ S 23(9).

¹⁸² S 23(10).

uncertain whether the situation where a consumer (or any unauthorised person) moves bar-coded goods to another shelf where a lower price has been displayed, also forms part of the exemptions in terms of section 23 and correctly argue that section 23(6) would apply to such an instance.¹⁸³

A supplier is not entitled to charge a higher price than the displayed price¹⁸⁴ and if more than one price is concurrently displayed, the supplier is bound by the lowest price.¹⁸⁵ A displayed price will take precedence over a bar-coded price.¹⁸⁶ Section 23(11) prescribes the format of display for price reductions.

A retailer is not required to display the price of goods that are displayed predominantly as a form of advertisement of the supplier, or of goods that are not ordinarily accessible to consumers.¹⁸⁷ *Jacobs ea* give the examples of the display window of a shop or the dispensary section of a pharmacy.¹⁸⁸ Although section 23(4) refers to both retailers and suppliers, Du Plessis argues that it should be construed to mean the same person (the seller) to avoid unnecessary confusion.¹⁸⁹

Du Plessis discusses a further uncertainty with regard to the wording of section 23(4) and argues that the legislature intended a difference in meaning between placing “goods before the public in the ordinary course of business in a manner consistent with an open invitation to members of the public to inspect, and select, those or similar goods for supply to a consumer” and goods displayed “predominantly as a form of advertisement”.¹⁹⁰

1.2 Section 23: Confirmation or amendment of the common law position?

A difference of opinion exists as to whether the provisions of section 23 of the CPA confirm or amend the common law position regarding price display.

On the one hand Sharrock argues that section 23 has not amended the common law rule that a display of goods with a price is only an invitation to the customer to

¹⁸³ *Jacobs ea* 332.

¹⁸⁴ S 23(6)(a).

¹⁸⁵ S 23(6)(b).

¹⁸⁶ S 23(3).

¹⁸⁷ S 23(4).

¹⁸⁸ *Jacobs ea* 331. See also Du Plessis LLM 100 who states that goods not placed before the public include goods specifically requested by the consumer or special-order goods.

¹⁸⁹ Du Plessis LLM 101. The writer suggests that reference to the supplier should also be a reference to the retailer.

¹⁹⁰ *Idem* 102 .

submit offers.¹⁹¹ He argues that if a seller requires a consumer to pay a higher price than the displayed price this would constitute a contravention of section 30(1) of the CPA and should be dealt with accordingly.¹⁹² Section 30(1) prohibits a supplier from using bait marketing. Bait Marketing is prohibited in terms of the CPA. Bait marketing is where a supplier advertises any particular goods or services as being available at a specified price in a manner that may result in consumers being misled or deceived in any respect relating to the actual availability of those goods or services from that supplier, at that advertised price.¹⁹³ According to Sharrock the seller should not be compelled to sell at that displayed price.¹⁹⁴

On the other hand Du Plessis argues that the common law position has been amended extensively.¹⁹⁵ The writer argues that where the CPA is applicable, the price must be fixed by the seller prior to the sale being concluded, and the buyer has the right to insist on paying this price.¹⁹⁶ According to the writer this would seem to exclude the possibility that the price can be determined by the seller exercising an objective or reasonable discretion¹⁹⁷ and could be problematic where the price might be subject to escalation due to factors outside the control of the seller.¹⁹⁸ The example is given of a supplier supplying goods to a small business which may need to include a price escalation clause in the supply agreement to make provision for possible fluctuations in delivery costs.¹⁹⁹ The writer further argues that by using the word “bound”, the legislature intended for the seller to be bound to the displayed price.²⁰⁰

The arguments of Du Plessis are supported and seem to be more in line with the purposes and aim of the Act.

¹⁹¹ Sharrock (2011) 631-632.

¹⁹² *Idem* 631.

¹⁹³ S 30(1) CPA.

¹⁹⁴ Sharrock (2011) 632.

¹⁹⁵ Du Plessis LLM 105.

¹⁹⁶ *Ibid.*

¹⁹⁷ *Ibid.*

¹⁹⁸ *Ibid.*

¹⁹⁹ *Ibid.* The writer refers to s 48(1)(c) in terms of which a consumer may waive a right provided it is not on terms that are unfair, unreasonable or unjust.

²⁰⁰ *Idem* 105 fn 671.

2. The right to a fair, reasonable and just price

2.1 Introduction

Section 48 forms part of the consumer's fundamental right to fair, just and reasonable terms and conditions.²⁰¹ Section 48 deals with unfair, unreasonable or unjust contract terms and should be read not only in conjunction with the rest of part G but also with regulation 44 that lists contract terms which are presumed to be unfair. Regulation 44 only applies however where the consumer is a natural person who bought goods for private purposes.²⁰² Part G also consists of section 49 dealing with the notice required for certain terms and conditions, section 50 regulating written consumer agreements,²⁰³ section 51 (prohibited transactions, agreements, terms and conditions)²⁰⁴ and finally section 52 regulating the powers of the court to ensure fair and just conduct, terms and conditions. Part G deals in particular with contractual disputes.

In their initial briefing to Parliament on the Consumer Protection Bill, the Department of Trade and Industry explained that the Bill gives exclusive jurisdiction to the courts over "contractual disputes" due to a compromise reached with the Department of Justice, which was concerned that the courts' jurisdiction was eroded by the creation of various tribunals in terms of the CPA.²⁰⁵

Because of the direct role of the courts regarding contractual disputes in terms of Part G as well as the wide implication of this consumer right, much has been written on the subject already.²⁰⁶ In fact, an in-depth critical analysis of Part G warrants a full thesis on its own to do it justice. This is not necessary for purposes of this discussion which is an investigation into the influence of the CPA on the common law of sale. The focus of the discussion is therefore on whether or not section 48(1)(a) establishes a return of the *laesio enormis* doctrine.

²⁰¹ Part G ss 48-52.

²⁰² Reg 44(1) CPA.

²⁰³ S 50 CPA comprehensively discussed in chapter 7.

²⁰⁴ S 52 CPA.

²⁰⁵ Naudé 2009 (Part 2) 526.

²⁰⁶ Van Eeden 181-195, Naudé 2009 (Part 1 & 2), Jacobs *ea* 353-362, Du Plessis LLM 108-129.

2.2 *Unfair price*

Section 48(1)(a) states that a supplier must not offer to supply, supply or enter into an agreement to supply, any goods or services at a price that is unfair, unreasonable or unjust or on terms that are unfair, unreasonable or unjust.

Naudé confirms that all terms in all the agreements covered by the CPA are subject to review for unfairness. This means that specifically negotiated terms, including core terms relating to the contract price or definition of the main subject matter, may also be challenged under the Act.²⁰⁷ Naudé refers to other jurisdictions regarding the grounds on which the terms as to the price and definition of the main subject matter of the contract are excluded from review.²⁰⁸ It seems that they will be excluded where they are “transparent”, in other words, expressed in clear and intelligible language.²⁰⁹

Section 48(2) sets out a test for unfairness but writers such as Du Plessis,²¹⁰ Sharrock²¹¹ and Van Eeden²¹² correctly argue that it is not applicable to price. Because the Act itself does not provide for a fairness test for price, Van Eeden argues that the courts will have to create such a test themselves taking into account the factors listed in section 52(2) of the Act.²¹³

The factors listed under section 52(2) are:

- a. the fair value of the goods or services in question;
- b. the nature of the parties to that transaction or agreement, their relationship to each other and their relative capacity, education, experience, sophistication and bargaining position;
- c. those circumstances of the transaction or agreement that existed or were reasonably foreseeable at the time that the conduct or transaction occurred or agreement was made, irrespective of whether the Act was in force at that time;
- d. the conduct of the supplier and the consumer, respectively;

²⁰⁷ Naudé 2009 (Part 2) 531.

²⁰⁸ *Ibid.*

²⁰⁹ *Ibid.*

²¹⁰ LLM 126.

²¹¹ (2011) 308.

²¹² 184.

²¹³ Van Eeden 185-186.

- e. whether there was any negotiation between the supplier and the consumer, and if so the extent of that negotiation;
- f. whether, as a result of conduct engaged in by the supplier, the consumer was required to do anything that was not reasonably necessary for the legitimate interests of the supplier;
- g. the extent to which any documents relating to the transaction or agreement satisfied the requirements of section 22;
- h. whether the consumer knew or ought reasonably to have known of the existence and extent of any particular provision of the agreement that is alleged to have been unfair, unreasonable or unjust, having regard to any custom of trade; and any previous dealings between the parties;
- i. the amount for which, and circumstances under which, the consumer could have acquired identical or equivalent goods or services from a different supplier; and
- j. in the case of supply of goods, whether the goods were manufactured, processed or adapted to the special order of the consumer.

Van Eeden argues that the factors listed in section 52(2) deals primarily with procedural rather than substantive fairness but states that some of the factors could provide guidance as to when a price would be considered to be unfair.²¹⁴ The writer gives the example of taking into account the fair value of the goods in terms of section 52(2)(a).²¹⁵

Van Eeden²¹⁶ and Naudé²¹⁷ both express the view that where courts have to determine the adequacy of price it will be done with caution. The test according to Naudé should be whether the price is manifestly unjust as in terms of the common law:

“It would also create uncertainty if courts are willing to set aside a contract simply on the basis that the price exceeds what is ultimately found to be the market value and is therefore ‘unfair’. In my view core terms should rather have been explicitly excluded from review on the basis of their fairness, provided the aforesaid qualifications are met. Of course, the stricter common-law and

²¹⁴ *Idem* 191-193.

²¹⁵ *Ibid.*

²¹⁶ *Idem* 185.

²¹⁷ Naudé 2009 (Part 2) 533.

constitutional control mechanisms and s 40 of the Act on unconscionability would still provide control over unjust core terms.”²¹⁸

According to Van Eeden, although the CPA does not contain any direct price control mechanisms, it does make provision for remedial steps to be taken into account regarding prices that are unfair unreasonable and unjust.²¹⁹ Van Eeden is of the opinion that it would have been inappropriate for the legislature to provide for a price control mechanism in the Act, as the control of price levels would appropriately fall within the ambit of the fiscal and monetary authorities.²²⁰ The writer predicts that when applying section 48(1)(a) on the issue of fair price the courts will most likely use a market price as the yardstick but adds that a relevant market price for goods and services can arguably be established based on market analysis.²²¹ A determination as to whether the market price itself is “fair, reasonable or just” could also be used.²²² Another alternative measure may be a margin by which an “unfair, unreasonable or unjust” price must deviate from such a market price.²²³

2.3 Applicability of the doctrine of *laesio enormis* to consumer sales

Writers such as Van den Bergh²²⁴ and Jacobs *ea*²²⁵ are uncertain as to whether section 48(1)(a) reintroduces (or should reintroduce) the doctrine of *laesio enormis*.

Van Eeden²²⁶ correctly states that the price at which goods or services are sold constitutes one of the terms of a contract. A price is meaningless unless it is considered in relation to and in conjunction with other terms.²²⁷ Before any significance can be ascribed to a given price it must first be considered in relation to the other terms and conditions of the transaction.²²⁸ These terms may have a fundamental impact on the price. Unequal bargaining positions as well as the degree of competitiveness in the

²¹⁸ *Ibid.*

²¹⁹ Van Eeden 185.

²²⁰ *Ibid.*

²²¹ *Idem* 186.

²²² *Ibid.*

²²³ *Ibid.*

²²⁴ 2012 71-72.

²²⁵ 355 fn 361.

²²⁶ Van Eeden 186.

²²⁷ Kerr 29.

²²⁸ *Ibid.* (For example other terms regarding risk, ownership, defects, warranties and credit).

relevant market could also be relevant to fair price determination.²²⁹ By referring to the important role of competition law and policy Van Eeden correctly argues against section 48(1)(a) being a price control mechanism.²³⁰ Instead it is submitted that the section is aimed at situations where a market practice affects a consumer (or even multiple consumers) by virtue of conduct that involves deception, unfairness and unconscionability.²³¹

Zimmermann²³² remarks that besides the practical problems in the application of the *laesio enormis* doctrine,²³³ another primary reason why it deteriorated and was abolished was because of the natural human ability of a contracting party to take care of his own interests. This was also because a party was bound to the agreement he concluded (the *pacta sunt servanda* principle which is still part of our common law).

The CPA aims to promote a fair, accessible and sustainable marketplace for consumer products and services and for that purpose to establish national norms and standards relating to consumer protection.²³⁴ Such protection presupposes the regulation of fair price (although a monetary price mechanism is not provided for in the Act).²³⁵

Naudé argues with merit that all prices attacked in terms of section 48(1)(a)(i) of the Act should be proven to be *manifestly unfair*²³⁶ and not just unfair.²³⁷ The test for fairness in consumer sales should be limited to standard terms, and not be extended to core or negotiated terms such as the price and the courts should therefore refrain from interfering with the price unless it is manifestly unjust.

Ultimately one cannot ignore the concerns raised by the courts with regard to the application of the doctrine of *laesio enormis* prior to the implementation of the CPA.²³⁸

²²⁹ Van Eeden 186.

²³⁰ *Ibid.*

²³¹ *Idem* 187.

²³² Zimmermann *Obligations* 267-268.

²³³ See Part B above.

²³⁴ Preamble to CPA.

²³⁵ Van Eeden 202-204.

²³⁶ Own emphasis.

²³⁷ Naudé 2009 (Part 2) 532-533.

²³⁸ See Part B 2.2 of this chapter.

One can also not ignore the concerns raised by writers with regard to using a market value as an objective guideline.²³⁹

As mentioned earlier, the surrounding circumstances and other factors such as unequal bargaining positions have to be taken into consideration when determining a fair price. It is clear that more factors than merely the value of the thing will always apply. To take the argument further, De Wet J held in *Gangat v Bejorseth NO*²⁴⁰ that wherever more factors than merely the value of the thing were involved, such factors must affect the price and such a contract was not the sort of contract to which the doctrine of *laesio enormis* could be applied.²⁴¹ If this is the correct position, the doctrine of *laesio enormis* does not (and should not) form part of consumer sales. It would also therefore not be possible to apply the general considerations underlying the doctrine of *laesio enormis* “excluding all the ramifications that caused the criticisms in the first place” as Kerr suggests (mentioned earlier in this chapter).²⁴²

2.4 Searching for answers in terms of the Competition Act²⁴³

2.4.1 Possibly relevant provisions and concepts

The question may be asked whether the provisions of the Competition Act might be able to provide assistance with the interpretation of section 48 of the CPA and whether or not the *laesio enormis* doctrine should be included in the interpretation of the latter provision. The rationale for investigating the provisions of the Competition Act is because it was implemented in the period leading up to the CPA and part of the Department of Trade and Industry’s attempt to update South Africa’s existing consumer protection laws.²⁴⁴ Competition law contains provisions or rules which aim to ensure and sustain a market where vigorous (but fair) competition will result in the most efficient allocation of economic resources and the production of goods and services at the lowest price.²⁴⁵

²³⁹ Van Eeden 186, Naudé 2009 (Part 2) 533.

²⁴⁰ 1954 4 SA 145 (N).

²⁴¹ 146.

²⁴² Kerr 48.

²⁴³ 89 of 1998.

²⁴⁴ See chapter 3 Part A 2.1 for a comprehensive discussion of the introduction of consumer protection legislation in South Africa prior to the implementation of the CPA.

²⁴⁵ Neuhoff 12.

The Competition Act aims to achieve the traditionally accepted competition law goals of lower prices and greater choice for consumers.²⁴⁶ The Act also aims to regulate pricing behaviour.

The Competition Act further aims to regulate prohibited practices and merger control.²⁴⁷ With regard to pricing, the following concepts will briefly be discussed; price fixing, resale price maintenance, price discrimination and excessive pricing.

Price fixing is regulated by section 4(1)(b) of the Competition Act which deals with restrictive horizontal practices. A restrictive horizontal practice is a practice between competitors (suppliers) which are prohibited.²⁴⁸ It is prohibited for competitors to “fix” or agree on prices. The fixing of prices occurs wherever a contract, arrangement or understanding has the effect or likely effect of fixing, controlling or maintaining prices or discounts in relation to goods bought or sold by any party in competition with another.²⁴⁹

Section 5 regulates resale price maintenance. Minimum resale price maintenance refers to any attempt by a supplier to control or maintain the minimum price at which the product is resold by its customer (retailers who sell the product to the consumer are considered to be the customer in terms of section 5).²⁵⁰ Section 5(2) provides that the resellers of a particular product may sell it at any price, even below cost. Minimum resale price maintenance is absolutely prohibited in terms of the Competition Act.²⁵¹ Setting a maximum resale price is not absolutely prohibited. However, where a supplier sets a maximum resale price it may be scrutinised under the general prohibitions in terms of section 5(1) of the Act.

It should be noted that the Competition Act does not prohibit price discrimination.²⁵² In other words the Act does not prohibit charging different buyers

²⁴⁶ *Idem* 13.

²⁴⁷ S 1 Competition Act. See also Neuhoff 15.

²⁴⁸ Neuhoff 15, 63 & 64.

²⁴⁹ *Ibid.*

²⁵⁰ S 5(2) Competition Act.

²⁵¹ *Ibid.*

²⁵² See Neuhoff 132-139 for the economist’s view of price discrimination. The content thereof is not relevant to this discussion.

dissimilar prices for the same goods. Price discrimination only prohibits illegal price discrimination if the following four conditions are met, namely:²⁵³

- a. the discriminator (supplier) must be dominant in a relevant market;
- b. the price differential must relate to equivalent transactions;
- c. the different prices must be charged to competing buyers for the same product; and
- d. the price discrimination must lead to a substantial lessening or prevention of competition between buyers of the product.

An “excessive price” means a price for goods which bears no reasonable relation to the economic value of the goods and is higher than the reasonable economic value.²⁵⁴ Section 8 provides that the abuse of the dominant position that a firm (supplier) may hold is prohibited. It is prohibited for a dominant firm²⁵⁵ to charge an excessive price to the detriment of consumers.²⁵⁶

Mbana explains that where a dominant firm charges an excessive price, such a firm harms consumers by charging higher prices, restricting innovation, or reducing the array of choices that consumers would face under more competitive conditions.²⁵⁷ In the case of *Mittal Steel South Africa Limited and Others v Harmony Gold Mining Company Limited and Another*,²⁵⁸ the Competition Tribunal²⁵⁹ formulated a two stage approach to determine whether a dominant firm was guilty of excessive pricing.²⁶⁰ According to Mbana, the approach followed by the Competition Tribunal can be paraphrased into two questions.²⁶¹ Firstly, does the structure of the market in question enable those who participate in it to charge excessive prices? The market structure should show that the

²⁵³ S 9(2) of the Competition Act.

²⁵⁴ S 1 def Competition Act. See also Neuhoff 113 for a discussion on “the economics of a product”. The cost of research and development; manufacturing and distributing and the price of the product in different geographical markets are taken into account.

²⁵⁵ See s 7 of the Competition Act for the legal requirements for when a firm will be considered dominant. See also Neuhoff 107-108.

²⁵⁶ S 8 Competition Act.

²⁵⁷ Mbana 24.

²⁵⁸ (70/CAC/Apr 07) [2009] ZACAC 1 (29 May 2009).

²⁵⁹ Mbana 24.

²⁶⁰ *Ibid.*

²⁶¹ *Ibid.*

dominant firm is not a “mere” dominant firm but a “super-dominant” firm.²⁶² Secondly, has the “super-dominant” firm abused its structural opportunities by imposing excessive prices on its customers? If both questions are answered in the affirmative, the dominant firm has engaged in excessive pricing in contravention of section 8(a) of the Competition Act.²⁶³

On appeal,²⁶⁴ the Competition Appeal Court replaced the two stage approach formulated by the Competition Tribunal with the following four enquiries:²⁶⁵

- a. the actual price of the goods or services which is alleged to be excessive must be determined;
- b. the economic value of the goods or services in monetary terms must be determined;
- c. if the actual price is higher than the economic value, a determination must be made as to whether the relationship between the price of the goods or services and its economic value is reasonable; and
- d. if there is no reasonable relation, a value judgement must be made as to whether the charging of the excessive price is to the detriment of consumers.

Mackenzie criticises that the lack of guidance the Competition Appeal Court gives as to how the overly broad concepts of “economic value” and the “reasonable relation” between that value and price, combined with the implications for the role of competition enforcement, should be interpreted.²⁶⁶ The writer argues that the uncertain results of the Competition Appeal Court’s decision will make the application of the latter concepts very difficult in practice.²⁶⁷

²⁶² *Ibid.*

²⁶³ *Ibid.*

²⁶⁴ *Mittal Steel South Africa Limited and Others v Harmony Gold Mining Company Limited* (70/CAC/Apr 07) [2009] ZACAC 1 (29 May 2009).

²⁶⁵ Par 32.

²⁶⁶ Mackenzie 13.

²⁶⁷ *Ibid.*

2.4.2 Inference: No guidance provided by either the Competition Act or its interpretation by the courts

The concept of price fixing is explained above.²⁶⁸ Because the provisions regarding price fixing governs the relationship between competitors (suppliers) and does not contribute to the argument regarding fair, just and reasonable prices and the doctrine of *laesio enormis*, it falls outside the scope of this thesis and no further discussion thereof is necessary.

The absolute prohibition of a minimum resale price or the possibility of scrutinising a maximum resale price does not contribute to the investigation into a fair, just or reasonable price either.²⁶⁹ Competitors may resell goods at any price even if it is below cost and the relation between the value of the goods and the purchase price is irrelevant in this regard.

The provisions regarding price discrimination in terms of the Competition Act is contrary to the principles underlying the *laesio enormis* doctrine in that charging different buyers dissimilar prices for the same goods does not amount to price discrimination.²⁷⁰ Price discrimination only prohibits illegal price discrimination which will only occur if the specific four conditions as explained in the Act itself are met.²⁷¹

At first glance it would seem that the provisions governing the charging of an “excessive price” could be helpful in the search for answers. The definition of “excessive price” means a price for goods which bears no reasonable relation to the economic value of the goods and is higher than the reasonable economic value.²⁷² This seems to support the inclusion of the *laesio enormis* doctrine into the interpretation of the CPA. Unfortunately the interpretation of the provisions in the Competition Act regarding excessive pricing by the courts²⁷³ raised more questions than answers and prevented proper application of the provisions in practice.²⁷⁴ To complicate matters even further

²⁶⁸ See 2.4.1 above.

²⁶⁹ *Ibid.*

²⁷⁰ *Ibid.*

²⁷¹ *Ibid.*

²⁷² S 1 Competition Act.

²⁷³ *Mittal Steel South Africa Limited and others v Harmony Gold Mining Company Limited* 70/CAC/Apr 07.

²⁷⁴ Mackenzie 12-13.

the test to determine an excessive price in terms of the Competition Act differs from the test endorsed by the courts.²⁷⁵

3. Duty of the buyer to pay the purchase price

The common law duty of the buyer to pay the purchase price is confirmed by the provisions of the CPA in that the Act is applicable²⁷⁶ to the supply (sale) of goods in the ordinary course of business of the supplier *for consideration*.²⁷⁷ It is also apparent from the definition of “consideration” in terms of section 1 of the Act that many forms of payment but money in particular are included in the application of consumer sales. The issue of whether a consumer sale for movable goods is either for cash or credit is discussed elsewhere in this thesis.²⁷⁸

4. Partial conclusion

The common law principles that there must be consensus between the parties regarding the price, that the price must be fair, just en certain and that consensus on the purchase price is one of the *essentialia* of consumer sales, are all confirmed in terms of the CPA as discussed above. In the search for clarity regarding the display of a price and how the provisions of section 48²⁷⁹ regarding a fair, just an reasonable price should be interpreted, an analysis of the most relevant provisions in Scottish and Belgian law are discussed below.

E. COMPARISON

1. Scotland

1.1 General

Section 8 of SOGA provides that the price in a contract of sale may be fixed by the contract, or may be left to be fixed in a manner agreed in the contract, or may be determined by the course of dealing between the parties.²⁸⁰ Where the price is not

²⁷⁵ *Ibid.*

²⁷⁶ S 5 CPA.

²⁷⁷ Own emphasis.

²⁷⁸ See chapter 9: Delivery of the thing sold and transfer of ownership.

²⁷⁹ CPA.

²⁸⁰ S 8(1) SOGA.

determined as mentioned in section 8(1), the buyer must pay a reasonable price.²⁸¹ What amounts to a reasonable price is a question of fact and depends on the circumstances of each particular case.²⁸²

Tookey states that the basic position is that the parties are free to fix their own price but that the “fall back position” is that if they fail to do so, the price will be a reasonable one.²⁸³

The problem with section 8 is that if the parties have not yet agreed on such a basic term as the price, the court may conclude that the parties did not make, and have not made, a valid contract.²⁸⁴

In most circumstances the parties will agree on the price even if it is, for example, by using a price list, by way of quotation or even negotiation.²⁸⁵ The contract of sale should provide that the price is fixed or, if not, how the price changes between the signing of the contract and delivery will be dealt with.²⁸⁶

Section 9 of SOGA regulates price determinations by third parties. It provides that where there is an agreement to sell goods at a price that is to be fixed by the valuation of a third party, and the third party cannot or does not make the valuation, the agreement is void. If, however, the goods or any part thereof have been delivered to and appropriated by the buyer he must pay a reasonable price for them.²⁸⁷

Section 9(2) further provides that where the third party is prevented from making the valuation by the fault of the seller or buyer, the party not at fault may maintain an action for damages against the party at fault.

1.2 Price in consumer sales

According to Ervine, the price does not usually give rise to problems in consumer sales.²⁸⁸ It is usually perfectly clear what the price is because it is marked on a ticket, on

²⁸¹ S 8(2) SOGA.

²⁸² S 8(3) SOGA.

²⁸³ Tookey 14.

²⁸⁴ *Ibid*, Dobson & Stokes 19. See also *May & Butcher v R* [1934] 2 K.B. 17. This is also referred to as “an agreement to agree” which is not enforceable in terms of English law.

²⁸⁵ Tookey 14. Dobson & Stokes 20.

²⁸⁶ Tookey 14. See also *LG International (UK) Ltd v GB International Ltd* [2005] EWHC 801 Q.B.

²⁸⁷ S 9(1) SOGA.

²⁸⁸ Ervine 39.

the goods itself or on the shelf. According to the writer the provisions of section 8 which refer to the methods of ascertaining the price have little relevance to consumer sales.²⁸⁹ This is so, according to Ervine, because if the price has not been explicitly agreed upon in a consumer sale, it is indicative that there has not yet been an agreement on the price and negotiations are still continuing.²⁹⁰

1.2.1 Price marking

The Price Marking Order 2004 is intended to increase price transparency in the market, thus enabling consumers to know what the price of goods are and to make comparisons.²⁹¹ Though the order applies to a wide range of goods for retail, it does not apply to goods supplied in the course of a provision of a service.²⁹²

Where a trader indicates that a product is or may be for sale to a consumer, its selling price must be indicated.²⁹³ In certain circumstances the unit price must also be indicated (for example where fruit and vegetables are sold in bulk).²⁹⁴

The requirement to indicate a unit price does not apply to cinema or television advertisements or, in the case of pre-packaged products, to sales in small shops, by itinerant traders or from vending machines.²⁹⁵

Whatever price must be indicated, it must be indicated in a way that is “unambiguous, easily identifiable and clearly legible” as must be any charges for postage, package or delivery.²⁹⁶ It must be placed in close proximity to the products to which it relates and in such a way as to be available to consumers without the need for them to seek assistance from the trader to ascertain it.²⁹⁷

²⁸⁹ *Ibid.*

²⁹⁰ *Ibid.*

²⁹¹ *Idem* 278.

²⁹² A 3 Order 2004 (e.g. food sold in a restaurant).

²⁹³ Excluding goods sold in bulk or by way of certain advertisements.

²⁹⁴ Ervine 279.

²⁹⁵ A 5 Sch 2 Order 2004.

²⁹⁶ Ervine 279.

²⁹⁷ A 7 Order 2004.

1.3 Fair, just and reasonable terms in consumer contracts

Two legislative instruments deal with the fairness of contractual terms in Scotland. Firstly, UCTA 1977 deals with exemption and limitation clauses in both consumer and commercial contracts and UCTA Regulations 1999 deal with the fairness of most contract terms in consumer contracts.

In 2005, the English and Scottish Law Commissions investigated both these instruments and proposed that they be replaced by one Act. The result of this investigation is the Unfair Contract Terms Bill of 2005 which falls outside the scope of this discussion.²⁹⁸ The guidelines published by the Office of Fair Trading²⁹⁹ are also briefly mentioned.

It is important to take note of regulation 7(2)³⁰⁰ which provides that where the meaning of a term is unclear, it must be interpreted in favour of the consumer. UCTA Regulations 1999 do not apply to negotiated terms but are rather aimed at controlling the fairness of terms contained in standard-form contracts.

As Naudé³⁰¹ and Du Plessis³⁰² point out, regulation 6(2) excludes terms relating to the “definition of the main subject matter of the contract” and “the adequacy of the price”, provided such terms are drafted in plain, intelligible language (also referred to as core terms). The exclusion of core terms reflects the point of view that the focus should be on unfair terms as opposed to unfair contracts and should not cover the appropriateness of the price. If the price were subjected to the test of unfairness, it would conflict with the fundamental principle of a free market economy where contracting parties can mould their principal rights and obligations as they see fit.³⁰³

As a result, the focus should rather be on ensuring that prices are transparent, which would ensure that the consumer could compare prices in the market in order to obtain the best contract under the circumstances.³⁰⁴

²⁹⁸ For a comprehensive discussion of the Bill and its relevance to South African consumer law see Du Plessis LLM 155-165.

²⁹⁹ OFT.

³⁰⁰ UCTA Regulations 1999.

³⁰¹ 2009 (Part 2) 531.

³⁰² LLM 147.

³⁰³ *Ibid.*

³⁰⁴ *Ibid.*

However, the exclusion of price terms relates to the adequacy of the price only, and a price term may be subject to the test for unfairness according to other criteria.³⁰⁵

Naudé³⁰⁶ gives the example of the Unfair Terms Directive 149 of the European Union and the Report of the English and Scottish Law Commissions which place qualifications on the exclusion of core terms from review by the courts. The definition of the main subject matter must be substantially the same as the definition the consumer reasonably expected, and the price must be payable in circumstances substantially the same as those the consumer expected and calculated.³⁰⁷

The test for unfairness is detailed in regulation 5(1),³⁰⁸ which provides that a term shall be unfair if it is contrary to the requirement of good faith and causes a significant imbalance in the parties' rights arising under the contract, to the detriment of the consumer. Two requirements must therefore be met, namely, that a contract must be contrary to the requirement of good faith and that it must cause a significant imbalance in the parties' rights and obligations to the detriment of the consumer.³⁰⁹

Regulation 6(1)³¹⁰ requires that certain factors be considered when assessing whether a term is unfair, namely, the nature of the goods, the circumstances when the contract was concluded as well as other terms of the contract or a dependent contract.³¹¹

Similar to regulation 44(3) of the CPA in South Africa, the UCTA Regulations 1999 contain an indicative and non-exhaustive list of terms that may be regarded as unfair.³¹² A term will be regarded as unfair where it allows the seller to alter the contract terms unilaterally without a valid reason, which is specified in the contract.³¹³ Du Plessis refers to the exceptions which include where the price of the goods is linked to fluctuations in the stock exchange or financial markets outside the supplier's control or

³⁰⁵ *Ibid.* See also Ervine 204-205, 210-217.

³⁰⁶ 2009 (Part 2) 531 fn 533.

³⁰⁷ *Ibid.*

³⁰⁸ UCTA Regulations 1999.

³⁰⁹ Ervine 217-223. See also *Director of Fair Trading v First National Bank Plc* [2000] 2 All E.R. 759 CA.

³¹⁰ UCTA Regulations 1999.

³¹¹ Ervine 215.

³¹² Reg 5(5) read with Schedule 2 UCTA Regulations 1999. See also Du Plessis LLM 151.

³¹³ Para 1(j) of Schedule 2 UCTA Regulations 1999.

where the goods sold are in foreign currency, traveller's cheques or international money orders denominated in foreign currency.³¹⁴

Paragraph 2(b) of Schedule 2 of the regulations provides for terms under which a seller or supplier reserves the right to alter unilaterally the conditions of a contract of indeterminate duration, provided that he is required to inform the consumer with reasonable notice and that the consumer has a choice to cancel the contract.

The second term³¹⁵ in Schedule 2 of the regulations is relevant and provides that a term will be unfair where it provides for the price of goods to be determined at the time of delivery or allowing a seller of goods to increase their price without in both cases giving the consumer the corresponding right to cancel the contract if the final price is too high in relation to the price agreed when the contract was concluded.

The OFT has published helpful guidelines that can be used when applying the above terms to a specific case.³¹⁶ Guideline 57 of the OFT Guidelines provides for example that a price variation clause is not automatically fair because it is not discretionary. The reason is that suppliers are in a better position to foresee and control changes in their own costs than the consumer could ever be.³¹⁷ As such, the consumer is particularly vulnerable because he does not have the knowledge or skill to confirm that the increases actually match the cost increases.³¹⁸

Unfair terms are not binding on the consumer.³¹⁹ However, if a contract can exist without the unfair term it remains in force.³²⁰

1.4 Duty of buyer to pay the purchase price

In terms of section 27 of SOGA it is the buyer's duty to pay the purchase price. The time for payment of the purchase price is *prima facie* when the goods are delivered but the parties may agree otherwise.³²¹ Tookey states that unless the parties agree otherwise,

³¹⁴ Du Plessis LLM 151.

³¹⁵ Para 1(l) of Schedule 2 UCTA Regulations 1999.

³¹⁶ OFT Guidelines. See also Du Plessis LLM 152.

³¹⁷ OFT Guideline 57.

³¹⁸ *Ibid.* See also Du Plessis LLM 152-153.

³¹⁹ Reg 8(1) UCTA Regulations 1999.

³²⁰ Reg 8(2) UCTA Regulations 1999.

³²¹ S 28 SOGA.

the seller is not bound to accept anything but cash.³²² The writer gives the example of a consumer buying goods in a shop: The customer gives the shopkeeper the money, and the customer takes the goods away.³²³

Only payment in full will discharge the buyer's liability to pay the purchase price unless a discount price was agreed upon. Where the discount is only applicable upon prompt payment within a stated time, failure to do so will leave the buyer liable to pay the full purchase price.³²⁴

Because payment by cheque is a conditional payment in terms of Scottish law,³²⁵ the seller may sue the buyer for the purchase price where the cheque is not honoured.³²⁶

The time for payment in terms of section 10 of SOGA is usually upon completion of the contract (delivery) unless otherwise agreed by the parties.

2. Belgium

2.1 *Common law principles regarding the purchase price*

The purchase price must be in money for a valid contract of sale to come into being.³²⁷ This means that the price must be determined or determinable at the time of conclusion of the contract.³²⁸ The purchase price must be fixed and sure and may not be left to be determined by either the buyer or the seller in his sole discretion.³²⁹ However, an objective criterion to determine the price which forms part of the contract of sale is valid, provided the criterion is not left to the sole discretion of one of the parties.³³⁰

Price determinations that have been found to be valid and certain include a nominal price³³¹ and a market price.³³² Where the parties agree that the price be

³²² Tookey 20. See also *Gordon v Strange* (1847) 1 Exch 477.

³²³ *Ibid.*

³²⁴ *Ibid.* See also *Whitecap Leisure Ltd v John H Rundle Ltd* [2008] EWCA Civ 429.

³²⁵ See the South African position in Part B 2.1 of this chapter.

³²⁶ Tookey 20.

³²⁷ Dekkers 461.

³²⁸ A 1591 Civil Code.

³²⁹ *Ibid.*

³³⁰ Dekkers 462.

³³¹ *Ibid.*

³³² Cass 4 May 1922, *Pas.* 1922 I, 269.

determined at a later date, the courts have found such a price not to be determinable at the time of conclusion of the contract and invalid.³³³

Articles 1592 and 1593³³⁴ regulate price determination by a third party. Dekkers states that two situations should be distinguished in this regard.³³⁵ Where the third party accepts the request to determine the price, the parties will be bound to his decision.³³⁶ The sale will then be concluded on the day on which the third party determines the price.³³⁷ Where, however, the third party refuses the request, no sale comes into being due to a lack of consensus on the purchase price.³³⁸ Where the price determination is manifestly unreasonable, a court may modify it on the basis of article 1134 of the Civil Code.³³⁹

In certain instances the State determines tariffs and prices for certain goods (for example food), especially in times of economic difficulty.³⁴⁰ According to Dekkers, sellers do have a right to negotiate prices that are lower than the prescribed maximum.³⁴¹ The courts apply a very strict interpretation of legislation regulating price and will not for example apply prescribed tariffs when considering a claim for damages where the goods are destroyed.³⁴²

2.1.1 Bargain price³⁴³

Dekkers criticises the general view that the purchase price should be reasonable and in accordance with the value of the thing sold thereby preventing the sale of goods at a bargain price.³⁴⁴ The writer refers to article 1134 of the Code and argues that a bargain price is not excluded in terms of the common law.³⁴⁵ Article 1134 provides that agreements legally concluded should take precedence over applicable law due to the

³³³ Brussel 2 Nov 1889, *Pas.* 1890 II, 278.

³³⁴ The Civil Code.

³³⁵ Dekkers 463.

³³⁶ *Ibid.*

³³⁷ *Ibid.*

³³⁸ *Ibid.*

³³⁹ Herbots 139.

³⁴⁰ Dekkers 463.

³⁴¹ *Ibid.*

³⁴² Cass 25 March 1943. *Pas.* 1943, I, 110.

³⁴³ Dekkers 463 “spotprijs”.

³⁴⁴ *Ibid.*

³⁴⁵ *Ibid.*

sanctity of contract. The terms of the agreement between the parties may (according to article 1134) only be amended or excluded by way of valid consensus between the parties and must be executed in good faith. According to Dekkers article 1134 confirms the freedom of contract between the parties and that they may agree to sell goods at a bargain price.³⁴⁶ The latter confirms that a bargain sale based on consensus is also a valid sale. This, according to the writer, is not the case where the parties never had the intention of concluding a sale in the first place.³⁴⁷ In such instances the unrealistic purchase price (in relation to the value of the goods) is an indication of the true intention of the parties being one of donation rather than one of sale.³⁴⁸ Bargain prices are now also extensively regulated as part of “price promotions”³⁴⁹ and “sales below costs”³⁵⁰ in terms of the WMPC 2010 which is discussed below.

2.2 Duty of the buyer to pay the purchase price

The main common law duty of the buyer is to pay the purchase price.³⁵¹ This must be done at the place and on the date agreed upon between the parties.³⁵² Where the parties did not agree on a place and time of payment, it must be done on the date and at the place of delivery.³⁵³ The sale is for cash unless the parties agree otherwise.³⁵⁴ Article 1652 provides instances where the buyer will be liable for interest (usually upon the payment of a deposit in the case of a credit sale). The buyer is not compelled to pay the full purchase price where there has been a breach on the part of the seller.³⁵⁵

Tilleman states that where the date of delivery has not been agreed upon in a sale between a seller and consumer, article 1651 of the Code should apply.³⁵⁶ Article 1651 provides that the date of payment is the date of delivery.

³⁴⁶ *Ibid.*

³⁴⁷ *Ibid.*

³⁴⁸ *Idem* 263-264.

³⁴⁹ S 6 WMPC 2010.

³⁵⁰ S 4 (prohibited practice) a 101 § 1 WMPC 2010.

³⁵¹ Dekkers 499. See also Tilleman (2012) 811-816 for a comprehensive discussion on the common law duty of the buyer to pay the purchase price.

³⁵² A 1650 Civil Code.

³⁵³ A 1651 Civil Code.

³⁵⁴ A 1247. For a comprehensive discussion on cash and credit sales see chapter 9 Part E 2.

³⁵⁵ Dekkers 500.

³⁵⁶ Tilleman (2012) 838.

2.3 Regulation of price in terms of WMPC 2010

2.3.1 Price indication

Chapter 2 of the Act (WMPC 2010) governing market information regulates the indication of price by way of section 2. Article 5 § 1 provides that (except in the case of a public sale) any business which offers goods for sale to the consumer must indicate the price unambiguously and it must be in writing. If the goods are displayed for sale, the price shall also be indicated legibly and conspicuously. The price indicated shall be the total price payable by the consumer, inclusive of value added tax, all other taxes, and the cost of all services which the consumer is obliged to pay as a supplement.³⁵⁷ Article 8 provides that all consumer advertising showing a price shall indicate such a price in accordance with the requirements set out in article 6 of the Act.³⁵⁸

2.3.2 Price promotions³⁵⁹

Article 20 provides that a business may proceed to announce a price reduction to the consumer compared to a price applied previously for the same product only where the new price is lower than the reference price. When there is mention of the new price, the announcement shall also mention the reference price or the information given shall enable the average consumer to calculate this reference price immediately and easily.³⁶⁰

Where the business applies a uniform percentage reduction on products or categories of products, it may mention only the reference price.³⁶¹ The announcement shall indicate whether the reduction has already been applied.³⁶²

Except in the case of a clearance sale, a price reduction may be announced only for a period not exceeding one month prior to the promotion. The date from which the reduced price is applicable shall continue to be indicated throughout the period of sale as a reduced price.³⁶³

³⁵⁷ S 6 WMPC 2010.

³⁵⁸ WMPC 2010.

³⁵⁹ S 6 WMPC 2010.

³⁶⁰ A 20 WMPC 2010. See also Steennot (2010) 90-133;187.

³⁶¹ *Ibid.*

³⁶² *Ibid.*

³⁶³ A 21 WMPC 2010.

2.3.3 Sale below cost³⁶⁴

It is a prohibited practice for any seller to sell goods below cost.³⁶⁵ A sale below cost shall be considered to be any sale at a price which is not at least equal to the price at which the seller purchased the goods or that the seller would have to pay on restocking, after certain deductions.³⁶⁶ Where a combination of goods is sold (regardless of whether they are identical) the offer as a whole must constitute a sale below cost.³⁶⁷

The prohibition provided for in article 101 will not apply in the case of clearance sales or seasonal sales; where goods can no longer be stored; where the seller on account of external circumstances can no longer reasonably sell at a price equal to or above their purchase price or where the selling price of goods have been aligned (for the necessities of competition) with the price asked by competitors for the same goods or for competing goods.³⁶⁸

2.3.4 Unfair terms in consumer contracts

Chapter 3 Section 6 governs unfair terms in consumer contracts. The unfairness of a contractual term shall be assessed, taking into account the nature of the products for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances surrounding the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent.³⁶⁹

In determining unfairness the requirement of plain, intelligible language will be taken into account.³⁷⁰ Similar to the provisions of Scotland,³⁷¹ the assessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration in so far as these terms are in plain, intelligible language.³⁷²

³⁶⁴ Also referred to as “predatory pricing” in terms of South African Competition Act. See discussion Part D 2.4 above.

³⁶⁵ S 4 (prohibited practice) a 101 § 1 WMPC 2010.

³⁶⁶ *Ibid.*

³⁶⁷ A 101 § 2 WMPC 2010.

³⁶⁸ A 102 WMPC 2010.

³⁶⁹ A 73 WMPC 2010.

³⁷⁰ A 40 § 1 WMPC 2010. See chapter 7 Part E 2 for a comprehensive discussion. See also Steenot (2010) 197-198.

³⁷¹ Reg 6(2) Unfair Contract Terms Regulations 1999.

³⁷² A 73 WMPC 2010.

Article 74 provides that the terms and conditions in an agreement between a seller and a consumer will be unfair if they have the object of providing, in contracts of indeterminate duration, for the price of the products to be determined at the time of delivery, or allows the seller to increase the price unilaterally or to modify the conditions to the detriment of the consumer on the basis of factors which depend on the sole discretion of the seller, without giving the consumer the right to cancel the contract (without payment of costs or damages and without leaving the consumer a reasonable period in which to do so). Price-indexation clauses are valid provided that the method by which prices vary is explicitly described in the consumer contract. A term that provides for the increase in the announced price of a product on account of the consumer's refusal to pay by direct debit or the consumer's refusal to receive invoices by electronic mail is also held to be unfair.³⁷³

Article 77 § 1 gives the Unfair Terms Committee the authority to examine the terms and conditions used in offers for sale and sales of products between businesses and consumers.

F. CONCLUSION AND RECOMMENDATIONS

1. Certainty of price: Price display

I agree with Du Plessis³⁷⁴ that the provisions of section 23 of the CPA governing price display are confusing and unclear. This is also apparent from the critical discussion of the section above.³⁷⁵

The provisions regulating price display in Scotland can provide some guidance. Du Plessis argues with merit that the Unfair Price Regulations 1999 are very clear in respect of when a supplier (seller) would be required to display a price.³⁷⁶ The Price Marking Order 2004 can also provide guidelines on price display. The approach in Scotland of criminalising the contravention of the Price Marking Order 2004 is more

³⁷³ A 74 WMPC 2010. See also Steennot (2010) 198-201;208.

³⁷⁴ LLM 101.

³⁷⁵ See Part D 1.1 & 1.2 above.

³⁷⁶ Du Plessis LLM 105.

practical than the enforcement guidelines in terms of the CPA³⁷⁷ and ensures better protection for consumers at large.³⁷⁸

With regard to price display in Belgium, article 5 of the WMPC 2010 focuses on the fact that the price should be displayed unambiguously, conspicuously and legibly to the consumer.

Perhaps it is relevant at this stage to mention the requirements of section 22 of the CPA regarding the consumer's right to plain and understandable language. The section is discussed comprehensively elsewhere³⁷⁹ but is relevant to price display even though it is not included in the provisions of section 23 of the CPA. Any notice, document or *visual representation*³⁸⁰ will be in plain and understandable language if it is reasonable to conclude that an ordinary consumer of the class of persons for whom the visual representation is intended, with average literacy skills and minimal experience as a consumer of the relevant goods or services, could be expected to understand the content, significance and import of the visual representation without undue effort.³⁸¹

Apart from the arguments above as to *what*³⁸² is included under the requirements of section 23 regarding "the display of a price",³⁸³ consideration should also be given to *how*³⁸⁴ the price is displayed (in other words in plain and understandable language in terms of section 22).

1.1 Section 23: Confirmation or amendment of the common law position?

As discussed earlier,³⁸⁵ a difference of opinion exists as to whether the provisions of section 23 of the CPA confirms or amends the common law position regarding price display.

³⁷⁷ Chapters 3 – 6 CPA & The Final Enforcement Guidelines published in terms of the Act (GN 492 in GG 34484 of 25 July 2011). A comprehensive discussion of the enforcement procedures & guidelines falls outside the scope of this thesis.

³⁷⁸ Du Plessis LLM 101.

³⁷⁹ See chapter 7 Part C & D.

³⁸⁰ Own emphasis.

³⁸¹ S 22(2) CPA.

³⁸² Own emphasis.

³⁸³ See Part D 1.1 & 1.2 above.

³⁸⁴ Own emphasis.

³⁸⁵ See part D 1.2 above.

On the one hand Sharrock argues that section 23 has not amended the common law rule that a display of goods with a price is only an invitation to the customer to submit offers.³⁸⁶

However, the arguments of Du Plessis that the common law position has been amended extensively³⁸⁷ merit support. The writer argues that where the CPA is applicable, the price must be fixed by the seller prior to the sale being concluded, and the buyer has the right to insist on paying this price.³⁸⁸ According to the writer this would seem to exclude the possibility that the price can be determined by the seller exercising an objective or reasonable discretion³⁸⁹ and could be problematic where the price might be subject to escalation due to factors beyond the control of the seller.³⁹⁰ The example is given of a supplier supplying goods to a small business which may need to include a price escalation clause in the supply agreement to make provision for possible fluctuations in delivery costs.³⁹¹ The writer further argues that by using the word “bound”, the legislature intended for the seller to be bound to the displayed price.³⁹²

2. Fair, just and reasonable price and the doctrine of *laesio enormis*

2.1 *Unfair, unjust and unreasonable price and price as core term of a consumer sale*

Section 48(1)(a) states that a supplier must not offer to supply, supply or enter into an agreement to supply, any goods or services at a price that is unfair, unreasonable or unjust or on terms that are unfair unreasonable unjust.

Naudé confirms that all terms in all the agreements covered by the CPA are subject to review for unfairness.³⁹³ This means that specifically negotiated terms, including core terms relating to the contract price or definition of the main subject matter, may also be challenged under the Act.³⁹⁴ This is correctly criticised by the writer.

³⁸⁶ Sharrock (2011) 631-632.

³⁸⁷ Du Plessis LLM 105.

³⁸⁸ *Ibid.*

³⁸⁹ *Ibid.*

³⁹⁰ *Ibid.*

³⁹¹ *Ibid.* The writer refers to s 48(1)(c) which provides that a consumer may waive a right provided it is not on terms that are unfair, unreasonable or unjust.

³⁹² *Idem* 105 fn 671.

³⁹³ Naudé 2009 (Part 2) 531.

³⁹⁴ *Ibid.*

Price is a core term or definition of the main subject matter and should be excluded from review in terms of the CPA. Where the price in a consumer sale is therefore expressed in clear and intelligible language (taking into account section 22 of the CPA) it should be excluded.³⁹⁵

Section 48(2) sets out a test for unfairness but writers such as Du Plessis,³⁹⁶ Sharrock³⁹⁷ and Van Eeden³⁹⁸ correctly argue that it is not applicable to price. Because the Act itself does not provide for a fairness test for price, Van Eeden argues that the courts will have to create such a test themselves taking into account the factors listed in section 52(2) of the Act.³⁹⁹

Van Eeden,⁴⁰⁰ Naudé⁴⁰¹ and Du Plessis⁴⁰² correctly express the view that where courts have to determine the adequacy of price it will be done with caution and the test should be whether the price is manifestly unjust as in terms of the common law.⁴⁰³

The test for fairness in consumer sales should therefore be limited to standard terms, and not be extended to core or negotiated terms such as the price.

The arguments above to exclude price as a core term of a consumer sale is supported by the positions in both Scotland and Belgium.

Regulation 6(2) of UCTA Regulations 1999 in Scotland, for example, excludes terms relating to the “definition of the main subject matter of the contract” and “the adequacy of the price” (also referred to as core terms), provided such terms are drafted in plain, intelligible language. The exclusion of core terms reflects the point of view that the focus should be on unfair terms as opposed to unfair contracts and should not cover the appropriateness of the price; and that if the price were subjected to the test of unfairness, it would conflict with the fundamental principle of a free market economy that contracting parties can mould their principal rights and obligations as they see fit.⁴⁰⁴

³⁹⁵ *Ibid.*

³⁹⁶ LLM 126.

³⁹⁷ 2010 308.

³⁹⁸ 184.

³⁹⁹ Van Eeden 185-186.

⁴⁰⁰ *Idem* 185.

⁴⁰¹ Naudé 2009 (Part 2) 533.

⁴⁰² Du Plessis LLM 150.

⁴⁰³ See Part D 2 above.

⁴⁰⁴ *Ibid.*

In Belgium article 73 of the WMPC 2010 provides that in determining unfairness the requirement of plain, intelligible language will be taken into account.⁴⁰⁵ Similar to the provisions of Scotland,⁴⁰⁶ the assessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration in so far as these terms are in plain, intelligible language.⁴⁰⁷

2.2 Price and the doctrine of *laesio enormis* in terms of the CPA

The statement by Hahlo & Kahn⁴⁰⁸ referred to earlier in this chapter⁴⁰⁹ was made over 50 years ago and expressed the hope that the abolition of the doctrine of *laesio enormis* will force the “weak and ignorant” party to seek statutory protection in the form of price control. Ironically, it seems that the statutory protection prior to the implementation of the CPA was so insufficient that writers and perhaps the legislature seek to reintroduce a common law principle (*laesio enormis*) to equalise the unequal position between consumers and suppliers regarding price.

In terms of Scottish law, regulation 7(2) of the UCTA Regulations 1999 the meaning of a term which is unclear, must be interpreted in favour of the consumer. The same applies to consumers in South Africa as section 2(9) of the CPA provides that the interpretation most beneficial to the consumer must prevail. In Belgium the same interpretation in favour of a consumer is provided for in terms of article 40 § 2 of the WMPC 2010.⁴¹⁰

2.3 Arguments in favour of and against the application of the *laesio enormis* doctrine in consumer sales

2.3.1 Arguments in favour of the doctrine

Perhaps the arguments for and against the application of the *laesio enormis* doctrine should be listed in an attempt to arrive to a logical conclusion and worthwhile recommendations.

⁴⁰⁵ See chapter 7 Part E 2 for a comprehensive discussion.

⁴⁰⁶ Reg 6(2) of the UCTA Regulations 1999.

⁴⁰⁷ A 73 WMPC 2010.

⁴⁰⁸ 473 & 475.

⁴⁰⁹ See Part B 2.2.1 above.

⁴¹⁰ See also Steennot (2010) 197.

An argument in favour of including the doctrine of *laesio enormis* in the wording of section 48(1)(a)(i) of the CPA could be that the aim of the Act is to protect vulnerable consumer's in particular. This kind of consumer needs protection against unscrupulous suppliers exploiting them by selling goods at a price that is unfair, unreasonable and unjust. Due to vulnerability of these consumers, they would either not realise that they have paid an unfair price or would not be able to protect themselves due their position even if they do realise a price is unfair. These consumers therefore need additional consumer protection in terms of the CPA and therefore the doctrine of *laesio enormis* should apply. This argument is further strengthened by the wording of section 2(9) which states that where a term is ambiguous the interpretation most beneficial to the consumer should prevail.

The provisions governing “excessive pricing” in terms of the Competition Act suggest that there should be a link between the price and the fair economic value of the goods.⁴¹¹ As explained earlier,⁴¹² though this may seem like an argument for the inclusion of the *laesio enormis* principle, the interpretation of the provisions by our courts⁴¹³ complicates the matter and does not contribute to the argument.

2.3.2 Arguments against the doctrine (preferred viewpoint)

If one were to look at the meaning and interpretation of the doctrine; daily occurrences in the consumer market such as bargain sales, discounted sales and seasonal sales all have to potential to amount to an unfair, unreasonable and unjust price. Though vulnerable consumers must be protected, a balance needs to be struck between protecting such consumers and an interpretation of the Act that is beneficial to the consumer market, economy and legal competition.

Price determination (the determination of a *fair*⁴¹⁴ price in particular) has been notoriously difficult and complex as can be seen in the discussion of the case law above.⁴¹⁵

⁴¹¹ Ss 1 & 8 Competition Act.

⁴¹² See Part D 2.4 of this chapter.

⁴¹³ *Mittal Steel South Africa Limited and others v Harmony Gold Mining Company Limited* 70/CAC/Apr 07.

⁴¹⁴ Own emphasis.

⁴¹⁵ See part B 2.2 above.

Though it may seem that the doctrine of *laesio enormis* might be applicable to consumer sales and the determination of a fair price, it should not be interpreted as such.

Naudé correctly argues that all prices attacked in terms of section 48(1)(a)(i) of the Act should be proven to be *manifestly unfair*⁴¹⁶ and not just unfair.⁴¹⁷ In other words, proving that the purchase price is *unfair*⁴¹⁸ in terms of the doctrine of *laesio enormis* is not sufficient when dealing with consumer sales; it should be *manifestly unfair*.⁴¹⁹ The test for fairness in consumer sales should furthermore be limited to standard terms, and not be extended to core or negotiated terms such as the price and the courts should therefore refrain from interfering with the price unless the price is manifestly unjust.

Ultimately one cannot ignore the concerns that were raised by our courts with regard to the application of the doctrine of *laesio enormis* prior to the implementation of the CPA.⁴²⁰ One can also not ignore the concerns raised by writers with regard to using a market value as an objective guideline.⁴²¹

As mentioned earlier,⁴²² the surrounding circumstances and other factors such as unequal bargaining positions have to be taken into account when determining fair price and it is clear that more factors than merely the value of the thing will apply to consumer sales.

It could be argued that the focus should not be on an unfair, unjust or unreasonable price *per se*, but rather avoiding excessive pricing which amounts to a purchase price being unfair. Unfortunately “excessive pricing” is only regulated and interpreted against the background of competition law and does not provide concrete answers.

⁴¹⁶ Own emphasis.

⁴¹⁷ Naudé 2009 (Part 2) 532-533.

⁴¹⁸ Own emphasis.

⁴¹⁹ Own emphasis.

⁴²⁰ See Part B 2.2 of this chapter.

⁴²¹ Van Eeden 186, Naudé 2009 (Part 2) 533.

⁴²² See Part D 2.3 above.

3. Duty of the buyer to pay the price

As discussed earlier⁴²³ the common law duty of the buyer is confirmed in terms of the CPA.⁴²⁴

The duty of the buyer to pay the purchase price is also core to the sale in both Scottish and Belgian legislation.⁴²⁵

⁴²³ See Part D 3 above.

⁴²⁴ S 1 CPA.

⁴²⁵ For Scotland see s 27 UCTA 1977; see also Part E 1.4 above. For Belgium see a 1652 of the Civil Code; see also Part E 2.2 above.

7 FORMALITIES AND PLAIN LANGUAGE

- A. INTRODUCTION
 - B. LEGAL POSITION WHERE THE CONSUMER PROTECTION ACT 68 OF 2008 IS NOT APPLICABLE (COMMON LAW POSITION)
 - C. LEGAL POSITION IN TERMS OF THE CONSUMER PROTECTION ACT 68 OF 2008
 - D. EVALUATION
 - E. COMPARISON
 - F. CONCLUSION AND RECOMMENDATIONS
-

A. INTRODUCTION

This discussion of formalities and plain language in the case of consumer sales is restricted to three primary topics.

Firstly the formal requirements for sales where the CPA is not applicable are discussed. Particular reference is made to the general common law requirements regarding formalities in sales as well as a discussion of the *relevant*¹ legislative provisions (specifically as they relate and are relevant to consumer sales where the CPA is applicable). The discussion of formal requirements includes a brief explanation of standard-form sale contracts.

Secondly, the concept of plain and understandable language is dealt with. In the discussion of the plain language requirement, the focus is on the interpretation and meaning of the relevant provision (also in case of Scotland and Belgium) and very importantly, what the benchmark for the ordinary or average consumer should be. The whole issue regarding the use of official languages falls outside the scope of this discussion.

Thirdly, the buyer's cooling-off rights are discussed. Although not part of the South African common law, cooling-off rights are legislative measures enacted to protect the vulnerable buyer (consumer). They do affect the rights of the buyer to a large extent and are therefore included in the discussion.

¹ Own emphasis.

Due to the broad application of the CPA, only certain aspects are examined as part of the comparative study. Only the cooling-off rights in case of doorstep selling and distance selling (in both Scotland and Belgium) are discussed because of their close comparison to the definition of direct marketing in terms of the CPA. The cooling-off rights available to consumers in case of credit agreements, electronic transactions, financial services and insurance fall outside the scope of this thesis.

1. Brief historical overview: Formalities (sale agreements)

The *contractus consensu* in terms of Roman law was a contract that came into being through consensus alone and therefore no formal requirements for this kind of contract were required.² Since the time of Justinian a contract of sale was regarded as a *contractus consensu*. With regard to formalities in sale agreements other contracts in terms of Roman law deserves discussion.

In Roman times a *contractus verbis* was a contract that came into being through consensus and the use of formal words (*verbis solemnibus*).³ One of the oldest contracts in Roman times was the *sponsio* (a *contractus verbis* containing sacral and magical elements).⁴ The *sponsio* was later replaced with the *stipulatio* and both of these contracts were derived from the *ius civile* and therefore *negotia stricti iuris*.⁵ This means that originally only the formalities were important and whether or not there was in fact consensus between the parties was irrelevant.⁶ It was only in the late classical period that consensus also became a requirement for the *contractus verbis*.⁷

The formal words to be used in terms of the *stipulatio* was referred to as *verbis solemnibus* and consisted of a question and answer.⁸ The same verb had to be used in both the question and the answer.⁹

The *contractus litteris* were contracts that required both consensus as well as

² Thomas 117.

³ Van Warmelo (1965) 268. See also Thomas 114-115.

⁴ *Ibid.*

⁵ *Ibid.*

⁶ *Ibid.*

⁷ *Ibid.*

⁸ Thomas 116.

⁹ *Ibid.*

formal writing to be valid.¹⁰ Van Warmelo explains that the *contractus litteris* was a very old form of contract and even Justinian referred to it as such.¹¹ The *contractus litteris* was a formal inscription made in the codex and occurred in a formal manner.¹² Parties who already concluded a contract of sale could make an inscription of the sale in the *codex*.¹³ The inscribed agreement substituted the original agreement by way of novation and an *obligation ex contractu litteris* was established.¹⁴

Voet acknowledged that Roman-Dutch law did not recognise the earlier Roman doctrine that some formality was required to establish an agreement.¹⁵ In terms of Roman-Dutch law the only requirements for a valid contract (in general) was consent, a voluntary and deliberate agreement, a person capable of contracting and an agreement physically possible and not contrary to the moral sense of the community.¹⁶

2. Brief historical overview: Plain language

According to Cornelius, the oldest Roman contracts were formal contracts that owed their validity to the fact that they were expressed in a certain way and emphasis was whether or not the particular contract was in accordance with the prescribed form.¹⁷ In the course of time however the intention of the parties became the most important requirement rather than the actual word written.¹⁸ The writer explains that in Roman law, even the course of negotiations between the parties was an admissible aid in the interpretation of contracts and consequently there was not much need for clear and unambiguous language in contracts.¹⁹ The parties could attest to what their intentions were at the time of conclusion of the contract.²⁰

¹⁰ Van Warmelo (1965) 283. See also Thomas 117.

¹¹ *Ibid.*

¹² *Ibid.*

¹³ *Idem* 284.

¹⁴ *Ibid.*

¹⁵ Louw 95.

¹⁶ *Ibid.*

¹⁷ Cornelius 7.

¹⁸ *Idem* 8.

¹⁹ *Idem* 15.

²⁰ *Ibid.*

In time, the old formalism in terms of Roman law disappeared so that the parties were free to formulate their transactions in whatever words they chose.²¹ Words came to bear the meaning which they had in common speech and which encapsulated the common grammatical meaning thereof. Interpretation was therefore not confined to the context of the document but the meaning that parties would have attributed to the words, had they uttered them.²²

The rules of the interpretation of contracts devised by Roman-Dutch jurists were derived from the rules applied for this purpose by Roman law.²³ Cornelius argues, however, that reliance was mostly placed on Roman authorities who looked favourably on the role of equity and mildness of interpretation.²⁴ The acceptance of the requirement of good faith (*bona fides*) in all contracts and the role of reasonableness in the interpretation of contracts illustrate the latter.²⁵

With regard to the language used in contracts, the Roman-Dutch law took over the Roman law approach that words and terms had to be read in their context.²⁶ The Roman-Dutch law, however, differed from Roman law in that it was admissible to deviate from the ordinary meaning of a word to give effect to the clear intention of the parties.²⁷

B. LEGAL POSITION WHERE THE CONSUMER PROTECTION ACT 68 OF 2008 IS NOT APPLICABLE (COMMON LAW POSITION)

1. General

The rule regarding formalities as it applies to the general law of contract, also applies to sales of movable goods.²⁸ Formalities are not a requirement for the conclusion of a valid sale unless the parties agree thereto or the law provides thus.²⁹

²¹ *Idem* 8.

²² Louw 16.

²³ Louw 17.

²⁴ Cornelius 8.

²⁵ *Ibid.*

²⁶ Voet 34 5 4 5. See also Cornelius 22.

²⁷ Voet 1 3 44. See also Cornelius 22.

²⁸ Kerr 76.

²⁹ *Ibid.* See also Nagel *ea* 199.

Where the parties agree on formalities as part of the conclusion of the contract, the intention of the parties will determine whether or not the formalities will also be a formal requirement for validity.³⁰ The parties may have already concluded a valid contract of sale but agrees on formalities to confirm what has already been agreed upon.³¹ On the other hand the intention of the parties may be that no valid contract of sale comes into being unless the formalities have also been complied with.³²

Prior to the implementation of the CPA, various statutes already required formalities for particular types of sales. These include the NCA,³³ ECTA³⁴ and the sale of immovable property in terms of the ALA.³⁵

Formalities in terms of the ALA and ECTA are discussed below.

2. Formalities in terms of the ALA (sale of immovable property)

Section 2(1) provides for the formalities where immovable property is sold in terms of the ALA. The contract of sale will be void and of no effect unless it is in writing and signed by either the parties or their relevant agents with written authority.

The requirement of section 2(1) relating to signature by the agent with written authority is not applicable to the agents of pre-incorporated contracts of a company or close corporation or partners of a partnership.³⁶ The deed of alienation shall contain the right of a buyer or prospective buyer to revoke the offer or terminate the deed of alienation in terms of section 29A.³⁷

It is important to note that the formalities in terms of section 2(1) are not applicable to immovable property sold by way of public auction.³⁸

A deed of alienation cannot be concluded by way of electronic means in terms of ECTA.³⁹

³⁰ *Ibid.*

³¹ *Ibid.*

³² *Ibid.*

³³ National Credit Act 34 of 2005.

³⁴ Electronic Communications and Transactions Act 25 of 2002.

³⁵ Alienation of Land Act 68 of 1981.

³⁶ Nagel *ea* 200.

³⁷ S 2(3) ALA.

³⁸ Nagel *ea* 200.

³⁹ Schedule 2 & s 4(4) ECTA.

Section 2(1) of the ALA has been the subject of interpretation in many court decisions. The courts have held that the deed of alienation (and therefore the minimum terms that need to be in writing) include the *essentialia* of the contract as well as any term expressly raised or implied in the negotiations and regarded as material by the parties.⁴⁰ Terms that are *naturalia* of a contract of sale do not have to be material to the contract because they are already part of the agreement *ex lege* unless specifically excluded.⁴¹

Where the *essentialia* are in writing as part of the deed of sale, the requirements of section 2(1) of the ALA will be complied with if the thing sold,⁴² the purchase price⁴³ and parties⁴⁴ are clearly defined.⁴⁵

Though the alteration of any stipulation must also comply with the requirements of section 2(1) of the ALA, the cancellation or reinstatement thereof does not.⁴⁶

Section 2(1) also requires that the written deed of alienation be signed either by the seller or the buyer themselves or by their authorised agents (with written authority). Parties must sign all the documents that constitute the complete deed of sale⁴⁷ and extrinsic evidence is admissible to determine the identity of the signatory.⁴⁸ The signature itself can be a mark or initial that identifies the party sufficiently.⁴⁹

The agent must have authority to sign a deed of sale on behalf of the party thereto.⁵⁰ The authority does not have to be signed by the principal, resulting in the possible tarnishing of the authenticity thereof.⁵¹ A declaration of an agent's authority,

⁴⁰ *Herselman v Orpen* 1989 4 SA 1000 (SE). See also *Jones v Wykland Properties* 1998 1 SA 355 (C) where the court laid down the test to determine whether or not a term is material.

⁴¹ *Botha v Swanepoel* 2002 4 SA 577 (T). *Fraser and another v Viljoen* 2008 4 SA 106 (SCA).

⁴² *Phone-a-Copy Worldwide (Pty) Ltd v Orkin* 1986 1 SA 722 (A); *Van Aardt v Galway* 2012 2 SA 312 (SCA). See also *Clements v Simpson* 1971 3 SA 1 (A); *Heddermans (Vryburg) Pty Ltd v Ping Bai* 1997 3 SA 1004 (SCA) where guidelines were laid down to determine whether an object sold was defined correctly in law. See also *Lombaard v Droprop CC and others* 2010 5 SA 1 (SCA) where the description of the property was found to be too vague.

⁴³ *Patel v Adam* 1977 2 SA 653 (A). See also *Chretien and Another v Bell* [2010] 2 All SA 428 (SCA).

⁴⁴ *Scheepers v Strydom* 1994 3 SA 101 (A).

⁴⁵ See Nagel *ea* 202-203 for a summary.

⁴⁶ Nagel *ea* 203. See also *Stalwo (Pty) Ltd v Wary Holdings (Pty) Ltd and Another* 2008 1 SA 654 (SCA); *Rockbreakers & Parts (Pty) Ltd v Rolag Property Trading (Pty) Ltd* 2010 2 SA 400 (SCA) wrt the formal requirements of an insertion into the deed of sale.

⁴⁷ *Herselman v Orpen* 1989 4 SA 1000 (SE). See also *Pillay and Another v Shaik and Others* 2009 3 SA 74 (SCA).

⁴⁸ *Pretoria East Builders CC v Basson* 2004 6 SA 15 (SCA); *SA Investments v Van der Schyff* 1999 3 SA 340 (N).

⁴⁹ *Chisnall and Chisnall v Sturgeon and Sturgeon* 1993 2 SA 642 (W).

⁵⁰ See wrt written authority to trustees acting on behalf a trust: *Thorpe v Trittenwein* 2007 2 SA 172 (SCA). A comprehensive discussion thereof falls outside the scope of this thesis.

⁵¹ S 2(1) ALA.

written in the presence of his principal, is sufficient.⁵² The nature of the writing and the document containing the authority is irrelevant.⁵³ It is not necessary to identify the agent by name in the authority.⁵⁴ If the agent initially had written authority to enter into the deed of sale, written authority is not required anew for the amendment thereof.⁵⁵

Upon examination of the interpretation of section 2(1) of the ALA by our courts, I agree with Lötzt & Nagel⁵⁶ that it is difficult to understand how a document of such poor quality can accord with the legislature's original intention with the Act. The purpose of the ALA is to prevent uncertainties, exclude disputes and avoid malpractices.⁵⁷

2.1 Printed standard-form contracts

In case of printed standard-form contracts (or standard-form contracts) for the sale of immovable property, such a contract will be void if it is printed in such fine print as to render it illegible.⁵⁸

Parties may leave certain terms or spaces in a printed standard-form contract open. The court in *Johnston v Lea*⁵⁹ held that in such instances three possible constructions may be possible:⁶⁰

- a. the intention of the parties to the contract is that the (blank) clause concerned should not form part of the contract of sale. This scenario seems unlikely to arise in case of an essential term. While taking this proviso into account, the court held that in such a case, the clause should be regarded as *pro non scripto* (unwritten). Provided that the contract otherwise complies with the requirements for validity, a valid contract of sale comes into being regardless of the non-completion of the clause.
- b. the intention of the parties to the contract is that the (blank) clause concerned should form part of the contract of sale. In this scenario, the clause was left blank because

⁵² *Van der Merwe v DSSM Boerdery BK* [1991] 3 All SA 837 (T), 1991 2 SA 320 (T).

⁵³ *Chief Registrar of Deeds v Hamilton-Brown* 1969 2 SA 543 (A); *Hugo v Gross* [1989] 1 All SA 145 (C), 1989 1 SA 154 (C).

⁵⁴ *Odendaal v Maartens* [1979] 4 All SA 716 (T), 1979 4 SA 237 (T).

⁵⁵ *Menelaou v Gerber* [1988] 3 All SA 460 (T), 1988 3 SA 342 (T).

⁵⁶ 612-612. See also Lötzt *ea* 23.

⁵⁷ Nagel *ea* 201.

⁵⁸ *Sentrachem Ltd v Prinsloo* 1997 2 SA 1 (A); *Fourie v Hansen & another* [2000] 1 All SA 510 (W). See also Nagel *ea* 203-204.

⁵⁹ 1980 3 SA 927 (A).

⁶⁰ 940-941.

at the time of conclusion and signing of the contract, the parties had as yet not reached consensus on its contents. Since, in this instance, the non-completion of the clause indicated that the parties regarded the term as material, no valid contract of sale comes into being because not all the material terms had been reduced to writing.

- c. the parties agree on the (blank) clause but for some inexplicable reason, the clause is never completed. In this case, rectification might be possible, but until such time as rectification does take place, the contract will be invalid.

The parol evidence rule and the exception thereto (rectification) are of particular relevance when dealing with a deed of alienation contained in a standard-form contract. The parol evidence rule provides that if a contract is in its entirety reduced to writing, the written document is the exclusive memorial of the contract between the parties.⁶¹ The parties are bound to the contract they conclude and restricted to the “four corners of the written contract”⁶² between them. No extrinsic evidence to vary or supplement the terms of the written deed of sale is therefore admissible as a general rule.⁶³ The purpose of written contracts is to prevent uncertainties and evidence that might contradict the original written contract.⁶⁴

The only relevant exception to the parol evidence rule for purposes of this discussion is rectification. *Nagel ea* refer to it as a remedy often used in practice with its main purpose to prevent the unfair application of the parol evidence rule.⁶⁵ The gist of the remedy provides that parties may claim a correction or rectification of the written agreement to reflect the correct preceding oral agreement or true intention between the parties if the true intention is not reflected in the written document due to a *bona fide* error.⁶⁶ Rectification is possible even in the case where the law requires formalities but the contract may only be rectified if it is *prima facie* valid and cannot be used to validate a clearly invalid contract.⁶⁷

⁶¹ *Nagel ea* 104. For comprehensive discussion on formalities on the sales of land see also Kerr 76 -103.

⁶² *Ibid.*

⁶³ *Ibid.*

⁶⁴ *Ibid.*

⁶⁵ *Idem* 105.

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

In relation to the rectification of blank spaces, it is only possible if it appears from the written document that it is a valid deed of sale in the first place.⁶⁸ In *Smit v Walles*⁶⁹ it was held that if a term is material, the contract of sale is invalid and not susceptible to rectification. The court pointed out that it may sometimes be impossible to determine *ex facie* the document itself whether or not a term was material.⁷⁰ The court held that evidence may be heard in order to determine whether or not a term was material.⁷¹ Should the term be found to be material, the contract of sale would be void because of non-compliance with the statutory formalities and rectification would not be allowed.⁷² Should the term be found not to be material, the contract of sale would be valid and susceptible to rectification.⁷³ In the latter instance, the parties did not necessarily intend the term to be *pro non scripto* (unwritten) and evidence could be heard on the contents of the term.⁷⁴

3. Formalities in terms of ECTA

Section 4(4) read together with Schedule 2 of ECTA provides that a contract for the sale of immovable property may not be concluded electronically.

Section 12 of ECTA determines what is meant by a document being in writing. A requirement in law that a document or information must be in writing is met if the document or information is in the form of a data message⁷⁵ and accessible in a manner usable for subsequent reference.⁷⁶ Section 19(2) of ECTA must, however, also be taken into account. It provides that an expression in a law, whether used as a noun or verb, including the terms “document”, “record”, “file”, “submit”, “lodge”, “deliver”, “issue”, “publish”, “write in”, “print” or words or expressions of similar effect, must be interpreted so as to include or permit such form, format or action in relation to a data message.

⁶⁸ *Smit v Walles* 1985 2 SA 189 (T). See also *Swanepoel v Nameng* 2010 3 SA 124 (SCA) at para 16 where the court reaffirmed the principle that it was permissible to rectify the deed of alienation by substituting the correct description of the property sold.

⁶⁹ 1985 2 SA 189 (T).

⁷⁰ 191.

⁷¹ 191-192.

⁷² *Ibid.*

⁷³ *Ibid.*

⁷⁴ *Ibid.*

⁷⁵ It is s 1 ECTA “data message” means data generated, sent, received or stored by electronic means and includes voice, where the voice is used in an automated transaction; and a stored record.

⁷⁶ S 12(a) & (b) ECTA. See also Lötze & Du Plessis 2004 (Deel 2) 239; Sharrock (2011) 866.

Sharrock states that for the signature of an electronic transaction which is in writing to be valid, the signature must take the form of an “advanced electronic signature”.⁷⁷ Section 1 of ECTA defines an “advance electronic signature” as an electronic signature which results from a process which has been accredited by the Authority as provided for in section 37.⁷⁸ Section 13(1) provides that where the signature of a person is required by law and such law does not specify the type of signature, that requirement in relation to a data message is met only if an advanced electronic signature is used. Where an advanced electronic signature has been used, such signature is regarded as being a valid electronic signature and to have been applied properly, unless the contrary is proved.⁷⁹

An “electronic signature” is not without legal force and effect merely on the grounds that it is in electronic form. Section 1 of ECTA defines an “electronic signature” as data attached to, incorporated in, or logically associated with other data and which is intended by the user to serve as a signature. Where an electronic signature is required by the parties to an electronic transaction and the parties have not agreed on the type of electronic signature to be used, that requirement is met in relation to a data message if:

- a. a method is used to identify the person and to indicate the person's approval of the information communicated; and
- b. having regard to all the relevant circumstances at the time the method was used, the method was as reliable as was appropriate for the purposes for which the information was communicated.⁸⁰

Lötz & Du Plessis explain that the above requirements regarding authenticity are complied with by the use of cryptography whereby the whole document including the advanced electronic signature is secured through encryptions and passwords.⁸¹ This is

⁷⁷ Sharrock (2011) 866.

⁷⁸ *Ibid* where the writer explains that an advanced electronic signature is an electronic signature which results from a process which has been accredited by the Department of Communications in accordance with certain minimum standards provided for by ECTA and involves *inter alia* coded and passwords only known to the owner of the electronic signature. See also Löt & Du Plessis 2004 (Deel 2) 240 fn 157.

⁷⁹ S 13(4) ECTA.

⁸⁰ S 13(3) ECTA.

⁸¹ Löt & Du Plessis 2004 (Deel 2) 241.

usually done in terms of a cryptography product by a certified and registered cryptography provider.⁸² The writers also mention authentication and certification service providers who install authentication products or services designed to identify the holder of an electronic signature to other persons.⁸³

Despite the service providers and programmes which are used in an attempt to secure electronic transactions and more specifically electronic signatures, Löt & Du Plessis argue that many security problems still exist in this regard.⁸⁴

4. Relevant cooling-off rights applicable to sales in terms of legislation

4.1 Section 29A: ALA (sale of immovable property)

Section 29A regulates the right of a buyer of immovable property to revoke an offer or terminate a deed of alienation. The buyer may cancel the agreement within five days after the deed of sale was signed (either by the buyer himself or his authorised agent acting on his written authority). The notice of cancellation must be by way of written notice delivered to the seller or his or her agent within the five-day period.⁸⁵

The period of five days is calculated with the exclusion of the day upon which the offer was made or the deed of alienation was entered into as well as any Saturday, Sunday or public holiday.⁸⁶ The notice must be signed by the buyer or his authorised agent, identify the offer or deed of alienation that is being revoked or terminated and be unconditional.⁸⁷ The seller must refund the buyer the full purchase price within ten days after notification by the buyer.⁸⁸

Section 29A(5) of the ALA, however, places restrictions on the buyer's cooling-off right. The cooling-off right will not be applicable if the purchase price exceeds R250 000, the buyer is not a natural person, the property was bought at a public auction or if the parties have previously entered into a deed of alienation of the same land on substantially the same terms.

⁸² See s 1 def ECTA.

⁸³ See s 1 def ECTA. An in-depth discussion of these service providers and products falls outside the scope of this thesis.

⁸⁴ Löt & Du Plessis 2004 (Deel 2) 242.

⁸⁵ S 29A(1) ALA.

⁸⁶ S 29A(2) ALA.

⁸⁷ S 29A(3) ALA.

⁸⁸ S 29A(4) ALA.

The cooling-off right in terms of section 29A will also not be applicable where the buyer nominated another person to take over his rights and obligations in terms of the deed of alienation in question,⁸⁹ or if the buyer exercised an option which was open for a period of at least five days as prescribed in section 29A(2).⁹⁰

Any provision in any document or agreement stipulating that the buyer waives his cooling-off right or where a penalty fee is directly or indirectly imposed or levied should the buyer exercise is cooling-off right, is void.⁹¹

As mentioned earlier,⁹² the deed of alienation shall contain the right of a buyer or prospective buyer to revoke the offer or terminate the deed of alienation in terms of section 29A.⁹³

In *Section Three Dolphin Coast Medical Centre CC v Gowar Investments (Pty) Ltd*,⁹⁴ the court found that the intention of the legislature with section 2(2A) was to bring the cooling-off right to the buyer's attention. As embodied in section 29A, this cooling-off right is of a limited duration which is independent of the buyer's knowledge thereof and is not affected thereby and a certain class of buyers (natural persons in the market for smaller and cheaper properties) was identified for special protection in terms of section 29A.⁹⁵

According to the judge, it is also conceivable that the legislature, in its attempt to protect hesitant and uncertain buyers of smaller properties, would have been willing to run the risk of causing unfairness to more decisive buyers in the same category.⁹⁶ The court therefore held that it would be more logical that the legislature intended that non-compliance with section 2(2A) would result in the contract being voidable at the instance of the party for whose benefit it was enacted, namely, the buyer.⁹⁷

⁸⁹ S 29A(5)(e) ALA.

⁹⁰ S 29A(5)(f) ALA.

⁹¹ S 29A(6) & (7)(b) ALA.

⁹² See Part B 2 of this chapter.

⁹³ S 2(2) ALA. See also *Sayers v Kahn* 2002 5 SA 688 (C).

⁹⁴ 2006 2 SA 15 (D) 21.

⁹⁵ 22.

⁹⁶ *Ibid.*

⁹⁷ 23.

The court further held that section 2(2A) does not create rights, but aims to bring those rights that already exist pursuant to section 29A to the attention of an ignorant buyer.⁹⁸ The Supreme Court of Appeal confirmed the court *a quo*'s decision.⁹⁹

In his discussion of the *Section Three Dolphin Coast* case,¹⁰⁰ Stoop remarks that for proper protection of a buyer who is also a consumer the ALA (and other consumer protection legislation) must be clear regarding *who* is to be protected and *when* they can rely on the protection in terms of section 29A of the Act.¹⁰¹ The profile of the consumer must be determined more accurately.¹⁰² According to the writer the kind of consumers the legislature envisaged are those persons for whom legal relief is not accessible and who buy low-cost housing.¹⁰³ The time period in which the cooling-off right is applicable will depend on whether or not the property is capable of registration, the date of occupation or whether or not financing is possible.¹⁰⁴ Stoop argues that where the cooling-off right is also applicable to renovations to property, all three the abovementioned stages should be applicable and taken into consideration (whichever of the stages are applicable in the particular set of facts and occurs last).¹⁰⁵

4.2 Section 44: ECTA (electronic transactions)

In terms of section 44(1) of ECTA¹⁰⁶ a consumer is entitled to cancel any transaction and related credit agreement without reason or penalty for the supply of goods or services within seven days either after the date of the receipt of the goods or the date of the agreement (in case of services).

The only charge that may be levied on the consumer is the direct cost of returning the goods.¹⁰⁷ If payment for the goods or services has been effected prior to a consumer exercising his cooling-off right, the consumer is entitled to a full refund of

⁹⁸ 24.

⁹⁹ *Gowar Investments (Pty) Ltd v Section 3, Dolphin Coast Medical Centre CC* 2007 3 SA 100 (SCA).

¹⁰⁰ 2006 2 SA 15 (D) 21.

¹⁰¹ Stoop 2008 755. See also Löt & Nagel 335.

¹⁰² *Ibid.*

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*

¹⁰⁶ For a comprehensive discussion on the influence of ECTA and electronic sales see Löt & Du Plessis 2004 (Deel 1 & 2).

¹⁰⁷ S 44(2) ECTA.

such payment, which must be made within 30 days of the date of cancellation of the agreement.¹⁰⁸ Section 44(4) provides that the consumer's cooling-off right in terms of section 44 may not be construed as prejudicing the rights of a consumer provided for in any other law.¹⁰⁹

4.3 Section 121: NCA (credit agreements)

In case of credit agreements in terms of the NCA, section 121(1) immediately restricts the consumer's (buyer's) cooling-off right.¹¹⁰ Section 121(1) only applies to an instalment agreement¹¹¹ entered into at any location other than the registered business premises of the credit provider.¹¹²

A consumer may terminate a credit agreement within five business days after the date on which the agreement was signed by the consumer,¹¹³ by delivering a notice in the prescribed manner¹¹⁴ to the credit provider; and tendering the return of any money or goods, or paying in full for any services, received by the consumer in respect of the agreement.¹¹⁵

Regulation 37 to the NCA provides that the notice by the consumer should be given in writing and delivered by hand, fax, e-mail or registered mail to an address specified in the agreement, alternatively the credit provider's registered address.

The credit provider has seven days after delivery of the notice to refund any money the consumer has paid in terms of the instalment agreement but may also require payment from the consumer for certain reasonable costs.¹¹⁶

Where there is a dispute between the credit provider and consumer regarding the depreciation of value of the movable property, the dispute must be referred for

¹⁰⁸ S 44(3) ECTA.

¹⁰⁹ See also Sharrock (2011) 869.

¹¹⁰ For a comprehensive discussion of section 121 of the NCA see Scholtz 9.5.2.1. See also Renke LLD 565-567.

¹¹¹ Ito s 1 an instalment agreement only relates to the sale of movable goods.

¹¹² Otto 2012 34 argues that this would be the place where the parties actually reached consensus.

¹¹³ See critique of Otto 2012 34 regarding provisions of s 121(2). A comprehensive discussion thereof falls outside the scope of this thesis.

¹¹⁴ Reg 37 to the NCA.

¹¹⁵ S 121(2) NCA. See also Sharrock (2011) 666.

¹¹⁶ S 121(3) NCA.

alternative dispute resolution.¹¹⁷ Thereafter, the credit provider may apply to a court for an order to determine the fair market value thereof.¹¹⁸

5. Plain language

5.1 General

Louw states that one of the earliest rules that were expounded in South Africa with regard to language used in contracts was that parties express themselves in a language calculated to embody the agreement that has been reached by them.¹¹⁹ The writer argues soundly that the whole problem with contract language came about because parties very seldom draft their own contracts.¹²⁰ This is usually the task of a legal professional, who has the knowledge and skill required to draft a contract according to the collective intention of the parties.¹²¹ Louw states that because South Africa adopted both Roman-Dutch and English principles, the use of Latin terms as well as archaic English language has become common practice and has often led to contracts being difficult to understand by the average layperson.¹²²

In his case discussion of *Stassen v Stassen*¹²³ Viljoen comments on the need for plain and understandable language.¹²⁴ The writer refers to the judicial criticism by Wunsh J regarding the language and unnecessary complexity of the document *in casu*.¹²⁵ Viljoen further argues that the cumbersome manner in which legal professionals draft documents may hinder the ordinary citizen from his entrenched constitutional right of access to the courts guaranteed in terms of section 34 of the Constitution.¹²⁶

¹¹⁷ In accordance with Part A Chapter 7 NCA.

¹¹⁸ S 121(4) & (5) NCA.

¹¹⁹ Louw 98.

¹²⁰ *Ibid.*

¹²¹ *Ibid.*

¹²² *Ibid.*

¹²³ 1998 2 SA 105 (W).

¹²⁴ Viljoen 714-719.

¹²⁵ *Idem* 715.

¹²⁶ *Idem* 716. See also Wallis 673-693 on the interpretation of plain language and the intention of the parties by the courts.

5.1.1 The “Plain Language Movement”

Louw refers to the “Plain Language Movement”¹²⁷ and their main aim being the use of plain understandable language in the realm of (in particular) commercial contracts.¹²⁸ The writer refers to many definitions¹²⁹ given to the term “plain language”. The most accurate description according to the writer is defining plain language as “the writing and setting out of essential information in a way that gives a co-operative, motivated person a good chance of understanding the document at first reading, and in the same sense that the writer meant it to be understood”.¹³⁰

The writer discusses the plain language principles that have developed since the inception of the Plain Language Movement.¹³¹ Examples given by the writer include using a simple, clear structure in the overall document being drafted, concise and simpler sentence structure and language and structure within the sections or parts of the document.¹³²

Louw further makes out an argument in favour of plain language because of its increased efficiency, the fact that it is more productive and will reduce errors and thereby also the need to litigate.¹³³ The result of using plain language will be a better image for the legal profession in the eyes of the public (and the courts).¹³⁴

5.1.1.1 Criticism of the Plain Language Movement

The Plain Language Movement is of course not without criticism. One of the main points of criticism is that plain language is not suited to all consumer contracts and that common law doctrines as well as reasonableness are more flexible.¹³⁵ Plain language can also have the effect of a disproportionate granting of benefits to selected consumers. In other words, more highly educated and skilled individuals will have an

¹²⁷ *Ibid.*

¹²⁸ Louw 98 where the writer explains that the Plain Language Movement is followed throughout the world including Canada, the European Union and in particular South Africa.

¹²⁹ See Louw 99-100.

¹³⁰ Louw 99.

¹³¹ *Idem* 103.

¹³² *Idem* 103-104.

¹³³ *Idem* 115-117.

¹³⁴ *Idem* 117.

¹³⁵ *Idem* 104.

increased benefit more due to their higher level of understanding of plain language documents.¹³⁶

Another valid criticism of the Plain Language Movement is that it is too focused on the language of the document and the contracting parties and drafters have to consider every possible angle and problem.¹³⁷ The interpreting judiciary and the lawyers who will be involved in drafting the contracts are left out of the equation.¹³⁸

5.2 Plain language: Section 64(3) NCA¹³⁹

Section 64 of the NCA governs the consumer's right to information in plain and understandable language in case of credit agreements. Where a producer of a document delivers such a document to a consumer the document must be in plain language, if no form has been prescribed for that document.¹⁴⁰ Section 22 of the CPA has very similar wording to section 64 of the NCA and will be discussed in detail below.¹⁴¹

A document is in plain language if it is reasonable to conclude that an ordinary consumer of the class of persons, for whom the document is intended, with average literacy skills and minimal credit experience, could be expected to understand the content, significance, and import of the document without undue effort.¹⁴² The following must also be taking into account:¹⁴³

- a. the context, comprehensiveness and consistency of the document;
- b. the organisation, form and style of the document;
- c. the vocabulary, usage and sentence structure of the text; and
- d. the use of any illustrations, examples, headings, or other aids to reading and understanding.

¹³⁶ *Idem* 105.

¹³⁷ *Ibid.*

¹³⁸ *Ibid.*

¹³⁹ Take note that plain language provisions do exist in other statutes such as the Equality Act 4 of 2000, the Long-term Insurance Act 52 of 1998 and the Short-term Insurance Act 53 of 1998. The provisions of the NCA are, however, most relevant regarding the position of consumers in sale agreements for the purposes of this thesis.

¹⁴⁰ S 64(1)(b) NCA. For a comprehensive discussion of section 64 of the NCA see Scholtz 6-7 to 6-8.

¹⁴¹ See Part D & E of this chapter.

¹⁴² S 64(2) NCA.

¹⁴³ S 64(2)(a)-(d) NCA.

In *African Bank Ltd v Myambo NO and others*¹⁴⁴ Du Plessis J held that a notice¹⁴⁵ will be in plain language having regard to the circumstances of each case as well as the “class of persons” of which the consumer is part and must be meaningful and understandable.¹⁴⁶

C. LEGAL POSITION IN TERMS OF THE CONSUMER PROTECTION ACT 68 OF 2008

1. Important definitions

Section 1 defines a “mark” when used as a noun to mean any visual representation, name, signature, word, letter, numeral, shape, configuration, pattern, ornamentation, colour or container for goods or other sign capable of being represented graphically, or any combination of those things, but does not include a trade mark.

“Sms” in terms of section 1 means a short message service provided through a telecommunication system.

“Electronic communication” means a communication by means of electronic transmission, including by telephone, fax, sms, wireless computer access, email or any similar technology or device.¹⁴⁷

In terms of regulation 1(2) to the CPA which deals with definitions “in writing” includes any electronic means recognised in terms of ECTA.

2. Section 2: Interpretation

Section 2(3) provides that if a provision of the CPA requires a document to be signed or initialled by a party to a transaction, that signing or initialling may be effected in any manner recognised by law, including by use of either an “advanced electronic signature” or “electronic signature” as defined in terms of ECTA.¹⁴⁸

¹⁴⁴ 2010 6 SA 298 (GNP).

¹⁴⁵ *In casu* the s 129 notice in terms of the NCA 34 of 2005.

¹⁴⁶ 314.

¹⁴⁷ S 1 CPA.

¹⁴⁸ S 1 def ECTA: “advanced electronic signature” means an electronic signature which results from a process which has been accredited by the Authority as provided for in section 37. “[E]lectronic signature” means data attached to, incorporated in, or logically associated with other data and which is intended by the user to serve as a signature.

The supplier must take reasonable measures to prevent the use of a consumer's electronic signature for any purpose other than the signing or initialling of the particular document that the consumer intended to sign or initial.¹⁴⁹

Section 2(9) regulates inconsistencies between provisions of the CPA and other legislation. If there is an inconsistency between any provision of the CPA and a provision of another Act¹⁵⁰ the provisions of both Acts apply concurrently, to the extent that it is possible to apply and comply with one of the inconsistent provisions without contravening the second.¹⁵¹ Where the latter cannot apply, the provision that extends the greater protection to a consumer prevails over the alternative provision.¹⁵²

If any provision of the CPA can reasonably be construed to have more than one meaning, the Tribunal or court must prefer the meaning that best promotes the spirit and purposes of the Act,¹⁵³ and will best improve the realisation and enjoyment of consumer rights generally, and in particular by vulnerable consumers as contemplated in section 3(1)(b).¹⁵⁴

To the extent consistent with advancing the purposes and policies of the CPA, the Tribunal or court must interpret any standard-form, contract or other document prepared or published by or on behalf of a supplier, or required by this Act to be produced by a supplier, to the benefit of the consumer in such a manner that any ambiguity that allows for more than one reasonable interpretation of a part of such a document is resolved to the benefit of the consumer.¹⁵⁵

3. Consumer's cooling-off right: Section 16

The consumer's cooling-off right in terms of section 16 will not apply if the consumer can exercise the cooling-off right afforded to him in terms of section 44 of ECTA.¹⁵⁶

¹⁴⁹ S 2(4) CPA.

¹⁵⁰ S 2(8), except in cases where the Public Finance Management Act 1 of 1999 or the Public Service Act 103 of 1994 is applicable. A discussion of s 2(8) falls outside the scope of this thesis.

¹⁵¹ S 2(9) CPA.

¹⁵² *Ibid.*

¹⁵³ Preamble & s 3 CPA.

¹⁵⁴ S 4(3) CPA.

¹⁵⁵ S 4(4)(a) CPA.

¹⁵⁶ S 16(1) CPA.

The consumer's cooling-off right in terms of section 16 is also in addition to and not in substitution of any right to rescind a transaction or agreement that may otherwise exist in law between a supplier and a consumer.¹⁵⁷

Section 16(3) provides that a consumer may rescind a transaction resulting from any direct marketing without reason or penalty, by notice to the supplier in writing, or another recorded manner and form, within five business days after the later of the date on which the transaction or agreement was concluded; or the goods that were the subject of the transaction were delivered to the consumer.

A supplier must return any payment received from the consumer in terms of the transaction within 15 business days after receiving notice of the rescission, if no goods had been delivered to the consumer in terms of the transaction; or receiving from the consumer any goods supplied in terms of the transaction.¹⁵⁸ The supplier may not attempt to collect any payment in terms of a rescinded transaction.¹⁵⁹ Annexure C to the regulations set out the prescribed format of the notice setting out the consumer's cooling-off right to the supplier.

4. Section 22: Plain & understandable language

The producer of a notice, document or visual representation that is required, in terms of the CPA or any other law, to be produced, provided or displayed to a consumer must produce, provide or display that notice, document or visual representation in the form prescribed in terms of the CPA or any other legislation, if any, for that notice, document or visual representation;¹⁶⁰ or in plain language, if no form has been prescribed for that notice, document or visual representation.¹⁶¹

Section 22(2) provides that a notice, document or visual representation is in plain language if it is reasonable to conclude that an ordinary consumer of the class of persons for whom the notice, document or visual representation is intended, with average literacy skills and minimal experience as a consumer of the relevant goods or

¹⁵⁷ S 16(2) CPA.

¹⁵⁸ S 16(4)(a).

¹⁵⁹ S 16(4)(b): Except as permitted in s 20(6).

¹⁶⁰ S 22(1)(a).

¹⁶¹ S 22(1)(b).

services, could be expected to understand the content, significance and import of the notice, document or visual representation without undue effort.

In determining whether or not a notice, document or visual representation is in plain language the following will also be considered in terms of section 22(2):

- a. the context, comprehensiveness and consistency of the notice, document or visual representation;
- b. the organisation, form and style of the notice, document or visual representation;
- c. the vocabulary, usage and sentence structure of the notice, document or visual representation; and
- d. the use of any illustrations, examples, headings or other aids to reading and understanding.

The NCC may publish guidelines for methods of assessing whether a notice, document or visual representation is in plain language.¹⁶²

5. Section 26: Sales records

A supplier of goods or services must provide a written record of each transaction to the consumer to whom any goods or services are supplied.¹⁶³ Sales records must include the following minimum information:¹⁶⁴

- a. the supplier's full name, or registered business name, and VAT registration number, if any;
- b. the address of the premises at which, or from which, the goods or services were supplied;
- c. the date on which the transaction occurred;
- d. name or description of any goods or services supplied or to be supplied;
- e. the unit price of any particular goods or services supplied or to be supplied;
- f. the quantity of any particular goods or services supplied or to be supplied;

¹⁶² S 22(3) CPA.

¹⁶³ S 26(2) CPA.

¹⁶⁴ S 26(3) CPA.

- g. the total price of the transaction, before any applicable taxes;
- h. the amount of any applicable taxes; and
- i. the total price of the transaction, including any applicable taxes.

Persons exempted from providing sales records in terms of section 26 include hawkers, suppliers where the consumer specifically indicated that he does not require a sales record, suppliers exempted by way of public notice or where section 43 of ECTA¹⁶⁵ is applicable.

6. Written consumer agreements: Section 50

In terms of section 50(1) the Minister may prescribe categories of consumer agreements that are required to be in writing.¹⁶⁶

If a consumer agreement between a supplier and a consumer is in writing, whether as required by the CPA or voluntarily, it applies irrespective of whether or not the consumer signs the agreement¹⁶⁷ and the supplier must provide the consumer with a free copy, or free electronic access to a copy, of the terms and conditions of that agreement.¹⁶⁸ The written agreement contemplated in section 50(2) must be in plain and understandable language as prescribed in terms of section 22 and set out an itemised break-down of the consumer's financial obligations under such an agreement.¹⁶⁹

If a consumer agreement between a supplier and a consumer is not in writing, a supplier must keep a record of transactions entered into over the telephone or any other recordable form as prescribed.¹⁷⁰

¹⁶⁵ S 43 of ECTA includes similar minimum information to be provided by sellers or suppliers to consumers.

¹⁶⁶ S 55(1) CPA.

¹⁶⁷ S 50(2)(a) CPA.

¹⁶⁸ S 55(2)(b) CPA.

¹⁶⁹ S 55(2)(b)(i) & (ii) CPA.

¹⁷⁰ S 55(3) CPA.

D. EVALUATION

1. Cooling-off right: Section 16 CPA

Otto correctly explains that a cooling-off right can only be exercised by a party to a contract where either the agreement or legislation provides for such a right.¹⁷¹ Where no cooling-off right exists, a party may not cancel the agreement simply because he has “buyer’s remorse” and will be guilty of breach of contract.

Otto states that legislative cooling-off rights have their origin in doorstep-selling.¹⁷² Section 16 is additional to any other right in law and according to Otto section 16 is worded wide enough to include cooling-off rights by way of agreements as well.¹⁷³ A consumer does not have to have or give a reason for exercising his cooling-off right.¹⁷⁴

According to Otto, the definition of direct marketing reduces the application of the consumer’s cooling-off right in terms of section 16 tremendously.¹⁷⁵ In terms of section 1 of the CPA “direct marketing” means to approach a person, either in person or by mail or electronic communication, for the direct or indirect purpose of either promoting or offering to supply (in the ordinary course of business) any goods or services to the person; or requesting the person to make a donation¹⁷⁶ of any kind for any reason.

He argues that the definition should be interpreted restrictively and although it would be hard to pin-point exact examples in practice, an advertisement in a newspaper, a road sign or even a pamphlet in the post should not be included in the definition of direct marketing.¹⁷⁷ Otto also argues that direct marketing should include some kind of an “approach” aimed at the consumer.¹⁷⁸ Direct marketing should include telephone calls, cell phone messages, electronic mail or a letter directly addressed and

¹⁷¹ Otto 2012 25.

¹⁷² *Idem* 26.

¹⁷³ *Idem* 39-40.

¹⁷⁴ *Ibid.*

¹⁷⁵ *Idem* 40.

¹⁷⁶ See Jacobs *ea* 338 for a discussion on the problems regarding the consumer’s cooling-off right in case of donations. Further discussion thereof is not relevant to this thesis.

¹⁷⁷ *Ibid.*

¹⁷⁸ *Ibid.*

sent to the particular consumer.¹⁷⁹ Only in case of the latter examples should a consumer be able to exercise his cooling-off right.¹⁸⁰

Contrary to Otto, Jacobs *ea* are of the opinion that a consumer has a right to block the receipt of flyers or brochures in his letterbox or unsolicited phone calls pre-emptively and consider the forms of marketing to fall under the definition of direct marketing in terms of the CPA.¹⁸¹ The writers correctly argue that the exercise of section 16 in case of perishable goods may prove to be problematic.¹⁸²

1.1 Rescission on date of conclusion or delivery

Section 16(3) provides that the consumer may rescind the contract within five business days from date of conclusion or date of delivery, whichever is the later.

Otto argues that exercising the cooling-off right has the same effect as a resolutive condition.¹⁸³ I agree with the writer that section 16 should contain similar provisions regarding the depreciation in value of the goods as provided for in terms of section 121 of the NCA.¹⁸⁴

1.1.1 Exercising section 16 of the CPA in case of immovable goods

It is clear that consumer sales of immovable goods may prove problematic in practice. Because of the abstract system of transfer in South Africa, ownership of immovable property transfers upon delivery, being the date of registration of such property in the Deeds Office.¹⁸⁵ It often happens that many months pass between the date that the deed of sale is concluded (signed) and actual registration. It is inconceivable that any court would allow a consumer to exercise his cooling-off right and rescind the contract within five business days after he (the consumer) became the registered owner thereof. The de-registration process is costly and would be for the account of the consumer in terms of section 20(6).¹⁸⁶ Where bonds are registered in favour of a third party (financial

¹⁷⁹ *Ibid.*

¹⁸⁰ *Ibid.*

¹⁸¹ Jacobs *ea* 321.

¹⁸² *Ibid.*

¹⁸³ Otto 2012 41.

¹⁸⁴ *Ibid.* See also Part B 4.3 ss 121(4) & (5) NCA.

¹⁸⁵ Nagel *ea* 213. See also Schutte 2012 120-151.

¹⁸⁶ At the consumer's risk and expense.

institution) the situation would be even more problematic. It would also be unnecessarily cumbersome to expect a seller (supplier) to return payment within 15 business days in the case of immovable property.¹⁸⁷

The scope of application of section 16 is significantly reduced by section 29A of the ALA. Both these legislative cooling-off rights will apply concurrently in terms of section 16(2) which provides that a consumer's cooling-off right in terms of section 16 will apply in addition and not in substitution of any other right the consumer has in law. A consumer who bought immovable property will only be able to rescind such an agreement where the property was bought in terms of direct marketing,¹⁸⁸ is worth less than R250 000, the consumer is a natural person and the property was bought for residential purposes. It could be argued that the date from which the consumer may exercise his cooling-off right should be the date of conclusion of the contract and not the date of delivery. Application of the former date would be more beneficial to the consumer rather than the extensive cost and time issues where the latter date (date of delivery) is applied. This argument is strengthened by sections 4(3) and 4(4)(a) of the CPA.¹⁸⁹

Otto argues that even though the date of occupation could be regarded as the date upon which the consumer gained physical control over the property, the date of registration will be the date upon which the legal consequences of the buyer commences.¹⁹⁰ The writer's argument that clarification by the legislature is needed in this regard is worthy of support.

1.1.2 Cooling-off rights: Section 16 CPA and section 121 NCA

Section 5(2)(d) of the CPA provides that the CPA will not apply to any transaction that constitutes a credit agreement under the NCA, but the goods or services that are the subject of the credit agreement are not excluded from the ambit of the CPA.

Melville & Palmer argue that on the face of it, there seems no difficulty in arriving at the answer as to which of the CPA provisions apply to transactions falling under the

¹⁸⁷ S 16(4) CPA.

¹⁸⁸ Defined in terms of s 1 of the ALA.

¹⁸⁹ See Part C 2.

¹⁹⁰ Otto 2012 41.

NCA.¹⁹¹ On closer consideration, however, the writers argue that the issue is not that straightforward.¹⁹² According to them, the definition of “transaction” given in section 1 of the CPA indicates three distinct aspects, namely: the agreement between the parties for the supply of the goods and services; the actual supply of the goods; and the performance of the services.¹⁹³ They argue that the CPA provisions can be classified into four categories:¹⁹⁴

- a. provisions that do not apply to credit agreements;
- b. provisions that do apply to goods and services that are the subject of credit agreements;
- c. promotional activities; and
- d. provisions not relating to credit agreements.

In order to identify those CPA provisions that do not apply to transactions falling within the NCA, a determination must be made as to whether or not a provision relates to the transaction itself (in which case the NCA will apply) or to the goods and services supplied in terms of it (in which case the CPA will apply).¹⁹⁵

If both the sale and the credit transaction are contained in the same document, Chapter 5 (Consumer Credit Agreements) of the NCA would apply to the transaction.¹⁹⁶ Melville & Palmer argue that in these cases the cooling-off right in terms of section 16 of the CPA would not apply to transactions under the NCA, although this is not expressly stated to be the case in the CPA.¹⁹⁷

The writers make the important remark that the CPA might be applicable if the sale and the granting of credit were dealt with in two separate agreements, as is sometimes the case in practice.¹⁹⁸ Then the NCA would apply to the credit transaction, and the CPA could notionally apply to the sale agreement and the goods and

¹⁹¹ Melville & Palmer 273.

¹⁹² *Ibid.*

¹⁹³ *Idem* 274.

¹⁹⁴ *Ibid.*

¹⁹⁵ *Ibid.*

¹⁹⁶ *Idem* 275.

¹⁹⁷ *Ibid.*

¹⁹⁸ *Ibid.*

services,¹⁹⁹ resulting in section 16 being applicable to the sale agreement of the goods and services.

2. Written consumer agreements

2.1 General

Van Eeden correctly argues that while many consumer agreements are in writing, consumers do not necessarily receive agreements or copies thereof, and consumers often experience frustration in actually obtaining either a copy of the signed agreement or a copy of the standard printed forms.²⁰⁰ More importantly, a consumer who signed or assented to such a consumer document will clearly be disadvantaged should he wish to take action but does not have a copy of the document.²⁰¹

2.2 Signature by consumer

Melville correctly states that where an electronic signature is used by the consumer, the supplier has a duty to ensure that the signature is not used by the supplier or other third parties to authorise other transactions to which the consumer did not agree.²⁰²

2.3 Section 50(2): Validity of written consumer sale agreement in the absence of consumer's signature

Section 50(2) provides that if a consumer agreement is in writing (whether required by the CPA or as between the parties) such a written agreement applies irrespective of whether the consumer signs it (section 50(2)(a)) *and*²⁰³ the supplier must provide the consumer with a free copy or electronic access to a copy thereof (section 50(2)(b)).

Van Eeden states that the effect of section 50(2) is that the provisions of both sections 50(2)(a) and (b) will apply to a particular agreement or understanding between or among two or more parties, provided, however, that it can be inferred from the context, surrounding circumstances and conduct of the parties (determined on a balance of probabilities) that such an arrangement or understanding purports to

¹⁹⁹ *Ibid.*

²⁰⁰ Van Eeden 174.

²⁰¹ *Ibid.*

²⁰² Melville 76.

²⁰³ Own emphasis.

establish a relationship in law between them.²⁰⁴ The mere fact that such a document is not signed by the consumer will not, according to Van Eeden, detract from its character as a contract.²⁰⁵

Sharrock states that the purpose of section 50(2)(a) is unclear and suggests that perhaps the legislature wanted to prevent either party from avoiding liability purely on the ground that the consumer has not signed the document containing the agreement.²⁰⁶ If the wording of the section is not amended by the legislature it may be relied upon by either the consumer or the supplier to establish the existence of an agreement when none has been concluded in the first place.²⁰⁷ Van Eeden also supports the latter and gives the example of the conclusion of a telephonic agreement between the consumer and a call centre representative of the supplier.²⁰⁸ Even though suppliers invite this form of contracting, in practice, consumers have limited access to such recordings and are faced with the difficult task of acquiring them.²⁰⁹ If the supplier does not send the consumer an unsigned document in confirmation of the terms of the contract via e-mail, ordinary mail or fax, the consumer will be largely dependent on the supplier for the integrity of the document.²¹⁰ Melville correctly adds to the argument by stating that it is possible to imagine situations where section 50(2)(a) could be abused by suppliers.²¹¹

I agree with Van Eeden that while the legislature must have had particular situations in mind, it is not readily apparent why the absence of the consumer's signature and not also the absence of the supplier's signature may result in an enforceable agreement.²¹²

Gouws argues that the proviso contained in section 50(2)(a) which provides that the plain language requirement will apply to a written consumer agreement, whether or not the consumer signs the agreement, indicates that an agreement, signed by both the

²⁰⁴ Van Eeden 175.

²⁰⁵ *Ibid.*

²⁰⁶ Sharrock (2011) 584.

²⁰⁷ *Ibid.*

²⁰⁸ Van Eeden 175.

²⁰⁹ *Ibid.*

²¹⁰ *Ibid.*

²¹¹ Melville 74.

²¹² Van Eeden 175.

consumer and the supplier is contemplated.²¹³ If this were not so, according to Gouws, subsection (2)(a) would be superfluous.²¹⁴ If an unsigned agreement is envisaged by the legislature, obtaining the signatures of both the consumer and the supplier would be unnecessary, thus effectively creating a “ticket case” and would be contrary to the plain language requirement in terms of section 22(2) of the CPA. Section 22(2) provides that a consumer must, in addition to reading the agreement, be able to *understand*²¹⁵ its contents, import and significance.²¹⁶ Though there may be some merit in Gouws’s point of view the writer is, with respect, giving the application of ticket sales too broad an application. It should be noted that ticket contracts (and therefore also the common law rules regarding ticket contracts) will only be applicable where some form of risk is involved, usually where the seller or supplier transfers liability or risk to the buyer or consumer.²¹⁷ It would therefore be more appropriate to include the discussion of ticket contracts and sales under the consumer’s fundamental right to fair, just and reasonable terms and conditions²¹⁸ and more particularly section 49 and the notice required for certain terms and conditions.²¹⁹

Gouws argues that because the legislature intended both the supplier and the consumer to sign the agreement, if the agreement is only signed by the consumer, a supplier will be unable to escape the plain language requirement of section 22 (as referred to in section 50(2)(b)(i) of the Act) by merely failing to sign the agreement.²²⁰ The Act furthermore contemplates the protection of the consumer and not the supplier.²²¹

Naudé argues that the provisions of section 50(2)(a) must mean that the supplier wishing to rely on the contract would still have to prove that an agreement was reached on all the provisions set out in writing.²²² The consumer would still be able to dispute

²¹³ Gouws 86.

²¹⁴ *Ibid.*

²¹⁵ Own emphasis.

²¹⁶ Gouws 86.

²¹⁷ Sharrock (2011) 179.

²¹⁸ Chapter 2 Part G CPA.

²¹⁹ Sharrock (2011) 585-586. Further discussion of the provisions of s 49 falls outside the scope of this thesis.

²²⁰ Gouws 86.

²²¹ *Ibid.*

²²² Naudé 2009 (Part 2) 514.

having agreed to all the terms where the document was not signed.²²³ The writer argues that the section should ideally be reworded to state that if the agreement is in writing the consumer may rely on it irrespective of whether or not the consumer has signed it.²²⁴ Naudé's argument means that even if the document was not signed by the consumer, it still has to comply with the provisions of section 22 of the CPA regarding plain language.

The supplier will have to choose whether it wishes to transact orally or in writing; there is no middle course. If the supplier chooses to transact in writing, he must ensure that the agreement meets the plain language requirement, even if the agreement may eventually not be signed by the consumer.²²⁵

Van Eeden,²²⁶ Naudé²²⁷ and Gouws²²⁸ argue that where the formal requirements of section 50 regarding written consumer agreements are not met, section 52 of the CPA will be applicable. Section 52²²⁹ implies that non-compliance with the requirement of plain and understandable language does not render the agreement void *per se* but the result may be that the contract term is unfair, unreasonable or unjust under section 48 of the CPA.²³⁰

2.4 Sales records and records of consumer agreements not in writing

Jacobs *ea* argue that section 50(1) works against the consumer and may be exploited by fraudulent suppliers who pretend that agreements were concluded with them.²³¹ The supplier must, however, still provide a free copy of the agreement to the consumer. In terms of this section, the copy can also be free electronic access to a copy of the agreement. This can be to the detriment of vulnerable consumers who do not have

²²³ *Ibid.*

²²⁴ *Ibid.*

²²⁵ Gouws 86.

²²⁶ 175.

²²⁷ 512.

²²⁸ 85-86.

²²⁹ See Levenstein & Barnett 30-31 who discuss the adverse effect of the provisions of s 52 on the parol evidence rule. A comprehensive discussion of the rule and criticism thereon falls outside the scope of this thesis. See Part B 2.1 for a brief explanation of the gist of the rule.

²³⁰ Naudé 2009 (Part 2) 513.

²³¹ Jacobs *ea* 358.

access to computers.²³² A similar line of argument is followed by Van Eeden. The writer states that the wording of the section leaves a supplier plenty of latitude about how soon after the agreement has come into existence the consumer must be supplied with the required copy.²³³ I agree with van Eeden that the Minister²³⁴ should specify by regulation the time period within which such a copy or access to a copy is to be provided.²³⁵

If a consumer agreement between a supplier and consumer is not in writing, a supplier must keep record of such a transaction entered into over the telephone or any other recordable form.²³⁶ The consumer is not entitled to access to such a record. However, in the event of a complaint by a consumer the NCC has the power to summons a supplier to furnish a copy of such a record or to inspect it.²³⁷

As discussed earlier,²³⁸ the supplier must provide a written sales record of each transaction in terms of section 26. The record must include certain minimum prescribed information in terms of section 26(3).²³⁹ The provisions of section 26 re-enforces the consumer's fundamental right to disclosure and information contained in Chapter 2 Part D of the Act. It should, however, be noted that section 26 is not applicable to a transaction governed by section 43 of ECTA, where the consumer expressly declines a sales record or in case of hawkers.²⁴⁰

3. Plain and understandable language

3.1 Definition of plain language: Interpretation by legal writers

Gordon & Burt argue correctly that the definition of plain language in terms of section 22 not only speaks about grammar and wording but also about content, structure, design

²³² *Ibid.*

²³³ Van Eeden 176.

²³⁴ For the Department of Trade and Industry.

²³⁵ Van Eeden 176.

²³⁶ S 50(3) CPA.

²³⁷ S 102(1)(b) CPA. See also Van Eeden 174.

²³⁸ See Part C 5.

²³⁹ *Ibid.*

²⁴⁰ S 26(1) CPA. See also Sharrock (2011) 604.

and style of the document.²⁴¹ Not only must consumers understand what the document says, but also how the document applies to them and its effect.²⁴²

Stoop states that plain language is a valuable tool that can be applied in order to proactively promote procedural fairness in the law of contract and to protect consumers.²⁴³ A consumer can be placed in a better position in order to protect his own interests.²⁴⁴ Plain language aims to address technical vocabulary, archaic words, overuse of passives, complex and long sentence and poor organisation.²⁴⁵ After all, an informed consumer is central to the concept of consumer protection.²⁴⁶

Gouws defines plain language as direct and straightforward, designed to deliver its message to its intended readers clearly, effectively and without fuss or undue effort.²⁴⁷ He regards it as avoiding things like obscurity, inflated vocabulary, convoluted sentence construction and using only as many words as are necessary.²⁴⁸ It is understood by the audience the first time they read or hear it.²⁴⁹

3.2 Plain language and the provisions of section 22 CPA

Kirby²⁵⁰ is of the opinion that the scope and ambit of section 22 will in all likelihood be expanded upon and interpreted by the people who are tasked with enforcing the provisions of the CPA, including, but not limited to, the NCC.

A consumer must be able to understand a consumer document without undue effort in terms of section 22(2). Gordon & Burt state that if a consumer needs to consult a dictionary (or a lawyer) to understand the terms of a consumer sale agreement, the consumer's understanding may well be considered to be with undue effort and not in plain language.²⁵¹ Melville also suggests that "undue effort" would include difficulties regarding the translation of documents and should be addressed by way of guidelines

²⁴¹ Gordon & Burt 60. See also Stoop 2010 639.

²⁴² *Ibid.*

²⁴³ Stoop 2010 636.

²⁴⁴ *Ibid.*

²⁴⁵ *Ibid.* See also Gouws 81.

²⁴⁶ Preamble to the CPA.

²⁴⁷ Gouws 81.

²⁴⁸ *Ibid.*

²⁴⁹ *Ibid.*

²⁵⁰ Kirby 2011.

²⁵¹ *Ibid.* See also Monty & Hurwitz 58.

published in terms of the CPA.²⁵² With regard to “undue effort”, Gouws states that the effort must be undue, excessive or unwarranted before it can be held that it is unreasonable to conclude that the ordinary consumer would understand the agreement.²⁵³ Whether the effort was “undue” remains a question of fact, but the writer submits that the requirement of “effort” must be seen against the backdrop of the purpose of plain language, namely, that the consumer must be able to understand the content, significance and import of the agreement by merely reading the agreement.²⁵⁴

Kirby argues that the words “notice” and “document” do not have separate definitions in section 1 of the CPA.²⁵⁵ The result is that section 22(1) creates the first criterion in respect of plain and understandable language, namely, that it applies to legally prescribed notices or visual representations (in other words the representation or document that is required to accompany goods or services when the consumer acquires or buys such goods or services).²⁵⁶

How and when the consumer reads the document should be taken into account. The document must give as much as possible information regarding the consumer sale and elements such as terminology should be consistent throughout.²⁵⁷ Monty & Hurwitz explain that the content should at all times be consistent with the context in which the notice, document or visual representation is intended and should include all aspects necessary and intended for that consumer.²⁵⁸

With regard to the requirement of form and style, the most important information should for example be at the top of the document and not hidden in the small print. Plain words and short sentences should be used and where possible (and relevant) illustrations should also be included to make the document more understandable.²⁵⁹ Melville discusses building blocks to plain language which include structure, writing and design.²⁶⁰ Gouws comprehensively discusses plain language drafting techniques

²⁵² Melville 165.

²⁵³ Gouws 88.

²⁵⁴ *Idem* 88-89.

²⁵⁵ Kirby 2011.

²⁵⁶ *Ibid.*

²⁵⁷ *Ibid.*

²⁵⁸ Monty & Hurwitz 58. See also Melville 163-164.

²⁵⁹ Gordon & Burt 60.

²⁶⁰ Melville 166-170.

dividing it into techniques regarding vocabulary, grammar and style; structure and lastly improving readability.²⁶¹ Newman distinguishes between typographical and linguistic readability.²⁶² Under typographic readability the writer remarks that quite often a contract is physically illegible because of font size or even the colours utilised and makes suggestions as to the font size, colours, layout and headings to conform to plain language.²⁶³ According to Newman linguistic readability deals with “legal matters” and the use of “legal language”.²⁶⁴ For the average consumer a “legal” grammatical formulation may be incomprehensible and is often the greatest deterrent to consumers reading contracts.²⁶⁵ The writer discusses the use of personal nouns, reduced sentence length, simplification of legal terms, passive verb usage and the avoidance of cross-references to assist in linguistic readability and plain language.²⁶⁶

I agree with Kirby that the application of the criteria in section 22(2) is complex because the terms used are not defined in law and it would therefore be difficult to advise precisely when a particular notice, document or visual representation will have met these criteria.²⁶⁷ There is indeed a fine line between an overload of information and sufficient information to protect a consumer rather than confuse him. It is clear that the facts of each particular case should be taken into account.

Guidelines or standards for the assessment of plain language have not been published in terms of the CPA. Stoop argues correctly that because of the lack of objective assessment measures or guidelines, it is not clear whether the provisions of plain language have been implemented successfully in terms of the CPA.²⁶⁸

The writer discusses three possible assessment or evaluation methods for suppliers.²⁶⁹

The first suggested form of assessment is informal assessment.²⁷⁰ Stoop refers to informal tests that can be used to assess whether a document complies with the

²⁶¹ Gouws 91-93.

²⁶² Newman 745.

²⁶³ Gouws 738-741.

²⁶⁴ *Idem* 741.

²⁶⁵ *Ibid.*

²⁶⁶ Newman 741-745.

²⁶⁷ Kirby 2011.

²⁶⁸ Stoop 641.

²⁶⁹ *Idem* 644-647.

²⁷⁰ *Idem* 644.

requirements of plain language. Informal assessments used in practice include revising your own work, revising a colleague's work and the use of in-house checklists.²⁷¹ The disadvantage of informal assessment is that it would be difficult to regulate.²⁷²

As a second form of assessment the writer discusses is "formal assessment" and uses the Pennsylvania Plain Language Consumer Contract Act²⁷³ in the US as an example.²⁷⁴ In the Pennsylvania Act the legislator prescribes a broad and general standard as well as guidelines to determine whether the general legislative standard has been met.²⁷⁵ Stoop considers the Pennsylvania Act as a very good example of objective guidelines that could be published by both the NCR²⁷⁶ and the NCC.²⁷⁷ Such a piece of legislation should not only provide for plain language in consumer contracts but also guidelines for illustrations, examples, headings and other aids as mentioned in section 22(2).²⁷⁸ Stoop also mentions "usability testing" as an example of formal assessment.²⁷⁹ This kind of testing usually involves determining the usability of websites, which also deals with the complexity of a real document for real consumers by analysing what consumers do with a document.²⁸⁰ Because the plain language provisions in the CPA begin with the reader, suppliers should conduct user testing to ensure that their documents comply with plain language requirements.²⁸¹

The third and final form of assessment suggested by Stoop is the use of assessment software.²⁸² This would be the case where software programmes usually use well-known readability tests to test whether a document is written in plain language.²⁸³ The writer remarks that although assessment software and readability formulas can be helpful, they have limited use because they are not accurate in the

²⁷¹ *Ibid.*

²⁷² *Ibid.*

²⁷³ Pa. Stat. Ann. tit. 73 (1997) USA.

²⁷⁴ Stoop 644.

²⁷⁵ *Ibid.*

²⁷⁶ National Credit Regulator.

²⁷⁷ *Ibid.*

²⁷⁸ *Ibid.*

²⁷⁹ *Idem* 646.

²⁸⁰ *Ibid.* See also Gouws 89-90.

²⁸¹ *Ibid.* See also Melville 162 who argues that the definition of plain language in s 22 starts with a notion of a consumer and therefore documents must be written with the consumer in mind.

²⁸² *Idem* 646-647.

²⁸³ *Idem* 646.

context of law nor are they proactive.²⁸⁴ More importantly, readability formulas assume all consumers are alike, while section 22 requires that an ordinary consumer with average literacy skills and minimal experience as a consumer should be able to understand the contents without due effort, rendering such test unsuitable in a South African context.²⁸⁵ It should be noted that Melville suggests that some form of testing should be included in any guidelines published by the CPA regarding plain language as well as principles of plain language that can be used to identify consumers that might fall foul of this requirement.²⁸⁶

Section 50(2) of the CPA provides that a written agreement between the supplier and consumer must comply with the provisions of section 22 and plain language. Gouws argues that section 22 will apply only to an agreement signed by both the consumer and the supplier, an agreement not signed by the consumer by virtue of section 50(2)(a) (provided that the agreement is still signed by the supplier) and an agreement not signed by the supplier, provided that it is still signed by the consumer.²⁸⁷

3.3 Ordinary consumer with average literacy skills and minimal experience

If a document is to be sent to consumers, it must be written in a way that consumers (not only lawyers or judges) can understand.²⁸⁸

With regard to literacy in South Africa, Gouws refers to the percentages released by Statistics South Africa in 2007 and states that the average level of education in South Africa equates to Grade 7.²⁸⁹ According to the South African Institute of Race Relations, the average literacy rate since 2007 has not increased to a satisfactory level.²⁹⁰ The average literacy level in 2007 was 88,72% and increased slightly to 89% in 2012.²⁹¹ Kirby correctly remarks that the threshold is low for the consumer but high

²⁸⁴ *Ibid.*

²⁸⁵ *Idem* 647.

²⁸⁶ Melville 164.

²⁸⁷ Gouws 85.

²⁸⁸ Gordon & Burt 60.

²⁸⁹ Gouws 87.

²⁹⁰ Mail & Gaurdian, article by staff reporter "SA adults lag behind in global literacy stakes" -<http://bit.ly/XeZSOw> visited on 16/11/2012.

²⁹¹ *Ibid.*

for the supplier to meet in relation to the language used in the terms and conditions concerned.²⁹²

Gordon & Burt refer to UN statistics which determine that 82% of South Africans are functionally literate but also that so-called “functional literacy” is not enough to understand most business and legal documents.²⁹³

Kirby is of the opinion that the ordinary consumer with average literacy skills must be viewed from the point of view of the officious bystander who is able to conclude reasonably, (that is, with reference to particular objective factors pertaining to the particular consumer concerned) that the consumer understood what he was buying and the terms and conditions in respect of which the transaction occurred.²⁹⁴ According to the writer the criterion is one of reasonableness.²⁹⁵ The result is that any person adjudicating a consumer complaint will therefore need to apply a test of objective reasonableness on whether or not the language in question is plain and understandable based on the particular characteristics of the consumer concerned.²⁹⁶

Section 22(2) also seems to distinguish between ordinary consumers with the inclusion of the passage “of the class of persons for whom the agreement is intended”. According to Gouws, this distinction seems based purely upon the type of agreement the consumer intends to conclude.²⁹⁷ The writer argues that if this is correct, the inclusion of the latter distinction was unnecessary and prone to lead to confusion because it presupposes different classes of ordinary consumers, the extent of which is limited only by the number of different types of agreements which a supplier and a consumer may conclude.²⁹⁸

Gouws criticises the fact that the distinction further presupposes ascribing an average literacy to the ordinary consumer belonging to a particular class of consumers, which in all likelihood will vary from class to class.²⁹⁹ The writer correctly argues that it would be more difficult to determine the average literacy of a particular class of

²⁹² Kirby 2011.

²⁹³ Gordon & Burt 60. See also Melville 161.

²⁹⁴ Kirby 2011.

²⁹⁵ *Ibid.*

²⁹⁶ *Ibid.*

²⁹⁷ Gouws 88.

²⁹⁸ *Ibid.*

²⁹⁹ *Ibid.*

consumers as opposed to determining the average literacy of a consumer in general by relying on for example data from Statistics South Africa.³⁰⁰ What complicates the determination of an average consumer for a class or group of persons is the fact that a consumer is not restricted to entering into one particular type of agreement. The result would be that a particular type of agreement which complies with the plain language requirement based on the average literacy of the consumers belonging to a particular class will suddenly fail to satisfy the section 22(2) requirement if a consumer from another class with a lower average literacy rate enters into an agreement intended for the former class.³⁰¹ Gouws argues with merit that what is plain for one consumer is not necessarily plain for another consumer, and a distinction between classes of consumers based on literacy would not support this.³⁰² The writer takes the argument further by stating that a distinction between different classes of consumers is also contrary to what is envisaged in the preamble to the CPA, namely, eradicating the indifferences of consumers based on illiteracy and other forms of social and financial inequalities.³⁰³

On the other hand, it might be argued that in the absence of any class distinction, a situation may arise where a consumer with literacy skills that exceeds the average level of literacy of an ordinary consumer may escape contractual liability based on non-compliance with the plain language requirement.³⁰⁴ Gouws argues that this might be the case, especially because an agreement might be declared void for non-compliance with the plain language requirement in terms of section 52 of the CPA, and it remains to be seen how the courts and different forums will address this issue.³⁰⁵

³⁰⁰ *Ibid.*

³⁰¹ *Ibid.*

³⁰² *Ibid.*

³⁰³ *Ibid.*

³⁰⁴ *Ibid.*

³⁰⁵ *Ibid.*

E. COMPARISON

1. Scotland

1.1 Cooling-off right

1.1.1 Doorstep Selling

The EU Doorstep Selling Directive was implemented in Scotland by the Consumer Protection Regulations 1987 which in turn has been replaced by the Doorstep Selling Directive 2008 and the Doorstep Selling Regulations 2008. The application of the regulations is much wider than the traditional concept of doorstep selling but in essence provides a cooling-off right to a consumer who enters into a contract as a result of doorstep canvassing.³⁰⁶ Dobson & Stokes describe the cooling-off right available to a consumer as an antidote to the high pressure selling techniques sometimes employed by door-to-door salesman.³⁰⁷ The regulations are intended to protect ordinary consumers and therefore do not apply where the consumer is making the contract for business purposes.

Regulation 3 provides that the Doorstep Selling Regulations 2008 will apply where a trader (supplier)³⁰⁸ concludes a contract relating to goods and services during a visit to the home or workplace of the consumer, at another person's home or workplace or even during an excursion organised by the trader away from its business premises.

Certain contracts are excluded from the provisions of the Doorstep Selling Regulations 2008 and listed in Schedule 3 to the regulations, namely, any contract:

- a. where the price (including VAT) is £35 or less;
- b. where food, drink or other goods intended for current consumption by use in the household are supplied by a regular "roundsman" or "delivery person";
- c. for insurance;
- d. which also falls under the ambit of the Financial Services and Markets Act of 2000;
- e. for construction or the sale or rental of immovable property or a contract concerning other rights relating to immovable property.

³⁰⁶ Dobson & Stokes 21.

³⁰⁷ *Ibid.*

³⁰⁸ For purposes of further discussion of the position in the UK the words "trader" and "supplier" will apply interchangeably for the remainder of this chapter.

Certain mail order (and other) catalogue agreements will be excluded from the Doorstep Selling Regulations 2008 provided the following three conditions are satisfied:³⁰⁹

- a. its terms are set out in a catalogue which is readily available to be read by the customer in the absence of the salesman before the contract is made;
- b. there is to be continuing contact between the trader (or his representative) and the customer; and
- c. the contract expressly gives the customer the right to return any goods within seven days of receiving them and to cancel the agreement.

Where the regulations apply, a consumer has a cooling-off period of seven days from the date of receipt by the consumer of a notice of the right to cancel. The notice of cancellation must be in writing but Ervine states that it does not need to be in a particular form as long as it states the intention of the consumer to cancel the contract.³¹⁰ Dobson & Stokes state that where the consumer posts or e-mails the notice of cancellation it must be done within the cooling-off period even if it does not reach the trader until later or even if it never reaches him.³¹¹

The supplier must bring the cooling-off right to the attention of the consumer by way of an easily legible notice and must be given as much prominence as any other information contained in the document or notice.³¹² A detachable form must also be provided for the consumer's use.³¹³ The notice must be given at the time of conclusion of the contract or where the consumer offers to enter into a contract in his home, when he makes such an offer.³¹⁴ Where the trader does not comply with these provisions, the contract is unenforceable and the trader commits an offence in terms of regulation 17.

Where the consumer exercises his cooling-off right he is entitled to full repayment of any monies paid to the trader. The consumer may also exercise a lien over the goods to be returned to the trader as security for the repayment of such

³⁰⁹ See Schedule 3 to the Doorstep Selling Regulations 2008. See also Dobson & Stokes 23.

³¹⁰ Ervine 249.

³¹¹ Dobson & Stokes 24.

³¹² *Ibid.*

³¹³ *Idem* 23.

³¹⁴ Ervine 249.

money.³¹⁵ Although the consumer is under no obligation to deliver the goods to the supplier, the consumer does have a duty to take reasonable care of them pending their return to the supplier.³¹⁶ This duty, however, ceases 21 days after he cancelled the agreement unless before then he receives a written and signed request to hand them over.³¹⁷

Regulation 8 makes provision for a new category of so-called “specified contracts” which may still be cancelled by the consumer within seven days but where the consumer will be liable to pay for any goods or services supplied before the cancellation. The consumer can therefore cancel the contract but has to pay for the goods and services and cannot claim repayment or return the goods.³¹⁸ Regulation 9(4) defines a “specified contract” to include the following:

- a. the supply of newspapers, periodicals or magazines;
- b. advertising in any medium;
- c. the supply of goods where the price is dependent on fluctuations in the financial markets which cannot be controlled by the supplier;
- d. the supply of goods for an emergency, special order goods, perishable goods or consumable goods;
- e. supply of goods which have become incorporated in immovable property;
- f. the supply of goods and services relating to a funeral or any other kind.

An important point is made by Dobson & Stokes with regard to contracts that are cancellable under both the Doorstep Selling Regulations 2008 as well as the Consumer Credit Act of 1974.³¹⁹ Though the rules are very similar, the cooling-off period under the Consumer Credit Act of 1974 is longer.³²⁰ According the Dobson & Stokes from a trader’s point of view the position is straightforward where both the regulations as well as the Consumer Credit Act 1974 apply. The provisions of the Consumer Credit Act

³¹⁵ Reg 10.

³¹⁶ *Idem* 250.

³¹⁷ Reg 13. See also Dobson & Stokes 24.

³¹⁸ *Idem* 24-25.

³¹⁹ *Idem* 25.

³²⁰ A comprehensive discussion of the cooling-off rights in terms of the Consumer Credit Act of 1974 falls outside the scope of this thesis. For a comprehensive discussion see Dobson & Stokes 354-360.

1974 must be complied with, especially the provisions as to giving the consumer notice of his cancellation.³²¹ Where the Doorstep Selling Regulations are not applicable, the consumer will either be protected by the provisions of the Consumer Credit Act 1974 or the Distance Selling Regulations 2000.³²²

1.1.2 Distance Selling

Distance selling means sales where the buyer and supplier do not come face to face up to and including the moment at which the contract is concluded.³²³ Distance selling is governed by the Distance Selling Regulations of 2000. According to Dobson & Stokes the consumer protection in terms of these regulations includes both ensuring that the consumer gets good information prior to the contact being made and providing the consumer with a cooling-off right.³²⁴ Regulation 25 of the regulations provides that any contract term is void to the extent that it attempts to exclude the consumer's cooling-off right.

The Distance Selling Regulations 2000 only apply to distance contracts as defined in regulation 3(1):

- a. it must concern goods and services;
- b. it must be between a supplier (acting for commercial or professional purposes) and a consumer (a natural person acting for purposes outside his business);
- c. it must have been concluded under an organised distance sales or services provision scheme run by the supplier; and
- d. the supplier makes exclusive use of distance communication up to, and at the moment when the contract is made.

³²¹ Dobson & Stokes 25.

³²² *Ibid.*

³²³ Ervine 250.

³²⁴ Dobson & Stokes 233.

Examples of distance selling include mail order selling, telephone shopping as well as internet shopping, television or fax.³²⁵ Where the eventual contract is made face to face, the Distance Selling Regulations do not apply.³²⁶

Dobson & Stokes argue that the wording “organised distance sales or services provision scheme” is obscure and criticises the wording as leading to more uncertainties in practice.³²⁷

Regulation 5 contains a number of exemptions, such as contracts relating to the supply of financial services, certain contracts relating to land, those concluded through automated vending machines, auctions and those concluded through a telecommunications operator using a public pay phone.

Ervine criticises the limited scope of application of the Distance Selling Regulations 2000 due to the provisions of regulation 6 on contracts for the supply of groceries (food and beverages) by regular delivery and contracts for the provision of accommodation, transport, catering or leisure services. Dobson & Stokes explain that these groups include the following when ordered or booked over the telephone or internet: hotel rooms; mini-cabs; theatre tickets, home delivery of pizza or railway tickets (unless they are open dated).³²⁸ Timeshare agreements and package holidays are also exempted.³²⁹

Regulation 13 further denies the right of cancellation in certain other cases as well:

- a. a contract for the provision of services, if performance of the contract has begun with the consumer’s consent before the end of the cancellation period;
- b. the supply of newspapers, periodicals or magazines;
- c. the supply of goods where the price is dependent on fluctuations in the financial markets which cannot be controlled by the supplier;
- d. special order goods and contracts for gaming or lottery services; and

³²⁵ *Ibid.* See also Dobson & Stokes 234.

³²⁶ Dobson & Stokes 234.

³²⁷ *Ibid.*

³²⁸ *Idem* 235.

³²⁹ Reg 6. See also Ervine 252-253.

- e. a contract for the supply of audio or video recording or computer software which have been unsealed by the consumer.

Regulation 6 of the Distance Selling Regulations 2000 compels suppliers to disclose certain pre-contractual information in a certain manner. The pre-contractual information includes the supplier's identity, descriptions of the main characteristics of the goods or services, the price including taxes, the existence of the consumer's cooling-off right *et cetera*. The information must be provided in a clear and comprehensible manner appropriate to the means of distance communication used taking into account good faith and the protection of consumers.³³⁰

Dobson & Stokes state that the supplier must put the pre-contractual information in durable form.³³¹ This means putting it into writing or some other durable form which is available and accessible to the consumer. This must be provided either prior to making the contracts or in good time before or during the performance.³³²

The consumer may cancel the agreement by way of written notice to the supplier,³³³ in case of goods within seven working days after the goods were delivered or in case of services within seven working days after the contract is made.

The cancellation period is, however, extended where the supplier fails to supply the consumer with the prescribed pre-contractual information in terms of regulation 7. The cancellation period will then only expire at the earlier of the following times:³³⁴

- a. the end of a period of seven working days after the supplier complies with the requirements to provide the required information in a durable form; or
- b. the end of a period of three months and seven working days after delivery (in case of goods) or after making of the contract (in case of services).

³³⁰ Dobson & Stokes 236. See also Ervine 250-252.

³³¹ *Idem* 237.

³³² *Ibid.*

³³³ Dobson & Stokes 238-239; the consumer can choose whether or not he wants to use the cancellation form provided by the supplier.

³³⁴ Regs 11 & 12.

The consumer is entitled to recover any monies already paid and is under a duty to allow the supplier to recover possession of any goods supplied. Dobson & Stokes explain that in this regard the position is very similar to the position in terms of the Doorstep Selling Directive 2008.³³⁵

1.2 Plain and understandable language

Marus remarks that plain language has been widely supported throughout the United Kingdom.³³⁶ The National Consumer Council (which was formed in the mid-seventies) promotes plain language in all consumer-related interactions.³³⁷

Regulation 7(1) and (2) of the UCTA Regulations 1999 require a seller or supplier to ensure that any written term of a contract is expressed in plain and intelligible language and stipulate that if there is any doubt about the meaning of a written term, the interpretation which is most favourable to the consumer should prevail. Stoop is of the opinion that these provisions are not proactive and do not provide objective guidelines on how plain language should be assessed.³³⁸

Ervine states that regulation 7 which compels terms to be in “plain and intelligible language” makes it unclear what standard it attempts to impose.³³⁹ The writer argues that it would seem the standard is language that the average person finds intelligible.³⁴⁰ The consumer should be given the opportunity to examine all the terms and this envisages that if an average person reads the contract, he will find it plain and intelligible.³⁴¹ This is also the approach of the OFT³⁴² which states that the standard of plainness and intelligibility of contract terms must normally be within the understanding of ordinary consumers without legal advice.³⁴³

Micklitz *ea* explain that two standards are created, namely, *plainness* and *intelligibility* which need to be assessed differently.³⁴⁴

³³⁵ Dobson & Stokes 239.

³³⁶ Marus 24.

³³⁷ *Ibid.*

³³⁸ Stoop 2010 638.

³³⁹ Ervine 216.

³⁴⁰ *Ibid.*

³⁴¹ *Ibid.*

³⁴² Office of Fair Trading.

³⁴³ Ervine 216.

³⁴⁴ Micklitz *ea* (2009) 136.

Plainness refers to the legal effect of a term including its consequences.³⁴⁵ The consumer needs to know what to expect and ambiguous formulations must not put the supplier (seller) in a position that improves his legal position at the consumer's expense.³⁴⁶

Intelligibility according to Micklitz *ea*, refer to legibility, in that it purports to eliminate “small-print” from the contract which consumers do not readily understand.³⁴⁷ The result is that the drafter is required to design standard business conditions plainly from both an editing and optical point of view.³⁴⁸ The writers make the important remark that intelligibility also entails a qualitative requirement in that information needs to be provided by the supplier.³⁴⁹ Terms must not mislead the consumer about the scope of his rights and obligations.³⁵⁰

The Unfair Contract Terms Bill proposed by the English and Scottish Law Commissions also provides that “whether a contract term is fair and reasonable is to be determined by taking into account (a) the extent to which the term is transparent and (b) the substance and effect of the term and all the circumstances at the time it was agreed”. The definition of “transparent” includes whether or not the term is expressed in reasonably plain language, legible, presented clearly and readily available to any person likely to be affected by the contract term or notice in question. Naudé states that courts would probably easily strike out a term as unfair merely because it is not transparent.³⁵¹

1.2.1 Average consumer

The Unfair Trading Regulations 2008 define an “average consumer”³⁵² as one to whom the commercial practice is addressed or whom the commercial practice reaches. If the unfair commercial practice is directed at a particular group of consumers, it will be the

³⁴⁵ *Ibid.*

³⁴⁶ *Ibid.*

³⁴⁷ *Ibid.*

³⁴⁸ *Ibid.*

³⁴⁹ *Ibid.*

³⁵⁰ *Ibid.*

³⁵¹ Naudé 2009 (Part 2) 513-514.

³⁵² Reg 2 Unfair Trading Regulations 2008.

average member of that group that is relevant.³⁵³ Ervine gives the following examples to illustrate this point.³⁵⁴ Firstly, the example of children in case of television advertisements during children's programmes (in which case the standard would be that of the average child).³⁵⁵ Secondly, the example of a group of readers of a soccer magazine in which case the test would be that of the average soccer fan.³⁵⁶

The test of who is an average consumer in Scotland is taken from case law decided by the European Court of Justice in relation to matters dealing with free movement of goods and misleading advertising.³⁵⁷ The test in a nutshell takes as a benchmark the consumer who is reasonably well-informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors.³⁵⁸

Ervine refers to recital 18 of the Misleading Advertising Directive and its explanation of an average consumer.³⁵⁹ More importantly, the writer refers to the second part of the recital which makes specific reference to the particularly "vulnerable members of society".³⁶⁰ Recital 18 therefore specifically protects:³⁶¹

"The average member of a clearly identifiable group of consumers ... who are particularly vulnerable to the commercial practice or to the underlying product because of their mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee."

Ervine correctly criticises the above list of characteristics as being very limited.³⁶² The writer argues that factors such as ethnic origin, education and economic circumstances should also have been included.³⁶³ A vulnerable group of consumers could cover various people.³⁶⁴ The elderly are more vulnerable to claims about home security, for

³⁵³ Ervine 231.

³⁵⁴ *Ibid.*

³⁵⁵ *Ibid.*

³⁵⁶ *Ibid.*

³⁵⁷ *Idem* 231-232 fn 20.

³⁵⁸ *Idem* 232.

³⁵⁹ *Ibid.*

³⁶⁰ *Ibid.*

³⁶¹ *Ibid.* See also Micklitz *ea* (2009) 87-88.

³⁶² Ervine 232.

³⁶³ *Ibid.*

³⁶⁴ *Ibid.*

example.³⁶⁵ Young people would be more vulnerable on account of their inexperience.³⁶⁶

Micklitz *ea* explain that the reference in recital 18 to vulnerable groups of consumers has a normative component as it purports to evaluate the particular measure used by the trader.³⁶⁷ The yardstick of control will also vary.³⁶⁸ The writers argue that it must be differentiated whether a trader could reasonably be expected to foresee that the commercial practice can materially distort the economic behaviour not of all consumers taken as a whole, but only of a clearly identifiable group of consumers who are particularly vulnerable.³⁶⁹

1.3 Written consumer agreements and records

According to Dobson & Stokes, the law regarding the sale of goods is very easy.³⁷⁰ Section 4 of SOGA provides that a contract of sale may be in writing, or by word of mouth, or partly in writing and partly by word of mouth, or may be implied from the conduct of the parties. No particular formalities therefore exist in case of the sale of movable goods.³⁷¹

In case of distance selling as discussed in 1.1.2 above, regulation 8 of the Distance Selling Regulations 2000 requires the supplier to confirm in writing, or any other durable medium which is available and accessible to the consumer, information already given including the cooling-off right available to the consumer.

Regulations 8 to 10 of the regulations govern the consumer's cooling-off right in case of distance selling. A serious incentive to force suppliers to inform consumers of their cooling-off right is the fact that where the supplier fails to comply with the information requirement at all, the cooling-off period is extended by three months. Special order goods are excluded from the provisions of regulations 8 to 10.

³⁶⁵ *Ibid.*

³⁶⁶ *Ibid.*

³⁶⁷ Micklitz *ea* (2009) 88.

³⁶⁸ *Ibid.*

³⁶⁹ *Ibid.*

³⁷⁰ Dobson & Stokes 18.

³⁷¹ *Ibid.*

The supplier must return any monies paid by the consumer within 30 days from the date of notice. The consumer is not under an obligation to return goods to the supplier unless the contract so provides but must take care of them in the meantime.

Black explains that there are usually no special formalities that need to be complied with in case of the sales for goods.³⁷² However, the Doorstep Selling Regulations as well as the Distance Selling Regulations (as explained above)³⁷³ do prescribe and require information to be given to the consumer.³⁷⁴ Failure to do so can result in the contract being unenforceable.³⁷⁵

2. Belgium

2.1 Cooling-off rights

2.1.1 Distance contracts (distance selling)³⁷⁶

Article 2 § 21 defines a “distance contract” as any contract concerning goods or services concluded between a business and a consumer under an organised distance sales or service-provision scheme run by the business, which, for the purpose of the contract, makes exclusive use of one or more means of distance communication up to and including the moment at which the contract is concluded. As discussed earlier,³⁷⁷ distance contracts only applies to movables.

Chapter 3 Section 2 of the WMPC 2010 regulates distance contracts. Certain information must be given to the consumer at the time the offer for distance selling is made³⁷⁸ as well as at the stage of actual conclusion of the contract (where the offer is accepted).³⁷⁹ The manner in which the information in terms of article 45 and 46 is to be given is discussed below as part of the discussion of plain language.³⁸⁰

Article 47 of the WMPC 2010 governs a consumer’s cooling-off right in case of distance selling.³⁸¹ Article 47 provides that the consumer has a period of at least 14

³⁷² Black 179.

³⁷³ See Part E 1.1.1 & 1.1.2 above.

³⁷⁴ Black 179.

³⁷⁵ *Ibid.*

³⁷⁶ “Verkoop op het afstand”.

³⁷⁷ See chapter 5 Part F 1.1.

³⁷⁸ A 45 WMPC 2010.

³⁷⁹ A 46 WMPC 2010.

³⁸⁰ See Part E 2.2 Plain and understandable language below.

³⁸¹ Where purchases were made via the internet, telephone or mail.

calendar days in which to cancel the contract. The period of cancellation in case of goods commences on the day after the date of delivery. The period of cancellation in case of services commences either on the day after the conclusion of the contract or on the day certain prescribed information in terms of article 46 has been given to the consumer but may not exceed three months. The cooling-off period in which the consumer may exercise his cooling-off right is also referred to as the “bedenktermijn”.³⁸²

The consumer has to give notice of cancellation in writing or any other durable medium available and it must be accessible to the supplier. No penalty may be charged to the consumer and the consumer may cancel the contract without giving any reason. The return of the goods will, however, be at the consumer’s risk and expense.³⁸³

For goods supplied in successive deliveries, the cancellation period begins on the day following the day of the first delivery.³⁸⁴

Where the consumer has exercised his cooling-off right, any monies paid by the consumer must be repaid free of charge and must be done by the supplier within 30 days after the cancellation.³⁸⁵

The business (supplier) may however claim payment of the full amount of the goods during the cooling-off period. Steennot criticises this provision as being contrary to the purpose of the Act namely protecting the consumer.³⁸⁶

Article 47 § 4 governs certain situations in which the consumer will not be able to exercise his cooling-off right in case of distance selling.³⁸⁷

- a. for the provision of services if performance has begun, with the consumer's consent, before the end of the cancellation period;
- b. for the supply of goods made to the consumer's specifications or clearly personalised or which, by reason of their nature, cannot be returned or are liable to deteriorate or expire rapidly;

³⁸² Steennot 2011 15.

³⁸³ Unless the exception in terms of article 47 § 4 applies.

³⁸⁴ A 47 WMPC 2010.

³⁸⁵ A 47 § 3 WMPC 2010.

³⁸⁶ Steennot 2011 15. See also Steennot (2010) 158-159.

³⁸⁷ The parties may agree otherwise in terms of a 47 WMPC. See also Steennot (2010) 159-160.

- c. for the supply of audio or video recordings or computer software which were unsealed by the consumer;
- d. for the supply of newspapers, periodicals and magazines;
- e. for gaming and lottery services;
- f. for the supply of foodstuffs, beverages or other goods intended for everyday consumption supplied to the home of the consumer, to his residence or to his workplace by regular roundsmen.

If the business (supplier) has not warned the consumer, in accordance with article 46, of the absence of a cooling-off right in the abovementioned instances, the consumer shall have a cooling-off the right regardless the legislative exclusion.³⁸⁸

The onus of proof will be on the supplier to prove that it has fulfilled the obligations concerning informing the consumer, compliance with time limits, the consumer's consent to conclusion of the contract and, where appropriate, its performance during the cancellation period.³⁸⁹ Any provision where the consumer waives his cooling-off right in terms of article 47 is void.³⁹⁰

2.1.2 Contracts concluded outside the premises of the business (doorstep selling)³⁹¹

Doorstep selling is governed by Chapter 3 Section 3 of WMPC 2010 (contracts concluded outside the premises of the business). Steennot explains that in certain instances Act 25 of June 1993 regarding the ambulant activity of merchants ("ambulante aktiviteiten") must be read together with the provisions regarding doorstep selling.³⁹² For example where goods are displayed for sale at flea markets or public markets in a market place.³⁹³ In particular article 58 § 1 indicates the scope of application and includes all sales to the consumers of goods and services carried out by a business:

³⁸⁸ *Ibid.*

³⁸⁹ A 56 § 1 WMPC 2010.

³⁹⁰ A 56 § 2 WMPC 2010.

³⁹¹ "Ooreenkomst gesluit buite de lokalen van de onderneming".

³⁹² Steennot (2010) 173; 179-181.

³⁹³ An in-depth discussion thereof falls outside the purposes and scope of this thesis.

- a. at the home of the consumer or of another consumer and at the consumer's place of work;
- b. during an excursion organised by or for the business outside its sales area;
- c. at trade shows, fairs and exhibitions, provided that there is no payment on site of the total sum and the price exceeds €200.

The consumer will not be able to exercise his cooling-off right in the case of doorstep selling if he expressly invited representatives of the business to his home or workplace.

Steennot argues with merit that other scenarios may also be applicable to doorstep selling and should have been included under article 58.³⁹⁴ The writer gives the example of a consumer being approached on the street or at the station on his way home or on his way to work.³⁹⁵

Article 59 lists consumer sales that are excluded from the application of section 3:

- a. sales referred to in article 58, § 1 relating to goods or services for which the consumer has made a prior, explicit request for the visit of the business, with a view to negotiating the purchase of these goods or services,³⁹⁶
- b. sales of foodstuffs, beverages and household cleaning products by businesses serving customers by frequent, regular rounds, by means of travelling shops;
- c. public sales;
- d. distance sales;
- e. insurance sales;
- f. sales organised in the context of non-commercial events for purely philanthropic purposes; and
- g. consumer credit contracts subject to the legislation on consumer credit.

Article 60 prescribes formalities for consumer sale agreements in case of doorstep

³⁹⁴ Steennot 2011 16.

³⁹⁵ *Ibid*: "Waar de consument kan worden verrast of overrompeld". See also Steennot (2010) 175-176.

³⁹⁶ A 59 provides that consent given by the consumer to an offer of a visit proposed via telephone by the business shall not constitute a prior request.

selling which includes a clause setting out the consumer's cooling-off right.³⁹⁷ If the cooling-off right is not contained in the sales agreement as prescribed in terms of article 60, the sale will be void.

In case of doorstep selling the consumer may cancel the agreement within seven working days from the date after the date of signature of the contract of sale.³⁹⁸ The contract of sale must comply with the formal requirements as prescribed in article 60 of the WMPC 2010. Notice of cancellation by the consumer in the prescribed period must be done by way of a written registered letter. The consumer will comply with the requirements in terms of section 61 if the letter is dispatched within the cooling-off period even though it may not have reached the supplier in time.³⁹⁹

Article 61 further provides that no services may be performed before the cooling-off period has expired and no down payment or payment may be demanded or accepted from the consumer, under any pretext, in any form whatsoever, before such time as the cooling-off period has expired.

In case of sale on trial, the cooling-off period shall start on the day of the delivery of the goods and end on the expiry of the trial period, but may be not be less than seven working days.⁴⁰⁰

If the consumer withdraws from his purchase, no charges or compensation may be demanded from him on that account.⁴⁰¹

2.1.3 Is “immovable property” included in the cooling-off rights provided for in terms of the WMPC 2010?

Steennot states that the legislature most likely incorporated both the terms “goods” and “product” as part of the WMPC 2010 to be more in line with the EU UCC Directive.⁴⁰² The writer argues however that the use of the terms may cause confusion.⁴⁰³ For example, in the case of the cooling-off right available to a consumer where a distance

³⁹⁷ See Part E 2.3 regarding the formalities in case of doorstep selling contracts with consumers.

³⁹⁸ A 61 WMPC 2010.

³⁹⁹ *Ibid.*

⁴⁰⁰ A 62 WMPC 2010.

⁴⁰¹ A 63 WMPC 2010.

⁴⁰² Steennot (2010) 11.

⁴⁰³ *Ibid.*

contract is concluded,⁴⁰⁴ both the terms “goods” as well as “product” are used. This, according to Steennot, is an oversight by the legislature and most likely due to the fact that the predecessor of the WMPC 2010 (WHPC 1991) used the term “product” which had a narrower meaning.⁴⁰⁵ The cooling-off right in terms of a distance contract should therefore be interpreted to apply to movables only.⁴⁰⁶

It should also be noted that the EU Consumer Sales Directive⁴⁰⁷ regarding distance contracts expressly excludes immovable property and provides that it would not be appropriate to deal with the sale of immovable property in this manner.

In the case of doorstep selling the answer is simple enough; the provisions only discuss instances where “goods” are sold in this manner and therefore the cooling-off right in terms of article 60 (in the case of doorstep selling) only applies to movable goods.

2.2 Plain and understandable language

Chapter 3 of the WMPC 2010 governs contracts with consumers. Under section 1 (dealing with general provisions), article 40 establishes a criterion for plain and understandable language. Article 40 § 1 provides that where all or certain terms of a contract between a business and a consumer are in writing, such terms shall be drafted in plain, intelligible language. Where there is doubt about the meaning of a term, the interpretation most favourable to the consumer shall prevail.⁴⁰⁸ A contract between a business and a consumer may be interpreted in particular according to the commercial practices directly related thereto.⁴⁰⁹

The provisions of article 40 are therefore also applicable to both distance and doorstep selling.

⁴⁰⁴ Chapter 3, Section 2 WMPC 2010.

⁴⁰⁵ Steennot (2010) 11.

⁴⁰⁶ *Ibid.*

⁴⁰⁷ S 26 of the EU Consumer Sales Directive.

⁴⁰⁸ A 40 § 2 WMPC 2010.

⁴⁰⁹ *Ibid.*

2.2.1 Distance selling: Two-staged duty to inform

In terms of article 45, the first stage when the business has a duty to provide the consumer with certain important information is at the time of the offer of the distance contract. Steennot refers to this period as the pre-contractual period and the duty in terms of article 45 as a pre-contractual information duty to assure that the consumer is properly informed to make an informative decision.⁴¹⁰ Such information must be given in an unambiguous, clear and comprehensible manner, in any way appropriate to the means of distance communication used. The information includes:⁴¹¹

- a. the identity of the business and its geographical address;
- b. the main characteristics of the goods or service;
- c. the price of the goods or service;
- d. where appropriate, the delivery costs;
- e. the arrangements for payment, delivery, performance of the contract;
- f. the existence or absence of a right of withdrawal;
- g. the terms and conditions either for return or refund of the goods, including any costs relating thereto;
- h. the cost of using the means of distance communication, where it is calculated other than at the basic rate;
- i. the period for which the offer or the price remains valid;
- j. where appropriate, the minimum duration of the contract in the case of contracts for the supply of products or services to be performed permanently or recurrently; and
- k. in the case of telephone communications, the identity of the business and the commercial purpose of the call shall be made explicitly clear at the beginning of any conversation with the consumer.

⁴¹⁰ Steennot 2011 13; Steennot (2010) 148. See also Steennot (2010) 148-155 for a comprehensive discussion of article 45.

⁴¹¹ A 45 WMPC 2010.

Should the business (supplier) not comply with the duty to inform in terms of article 45 § 1, and the consumer exercises his cooling-off right, the consumer is exempt from any costs for the return of the goods.⁴¹²

The second stage where the business has a duty to inform the consumer is when the consumer accepts the offer and a distance contract is then concluded. According to Steennot the information duty in terms of article 46 of the WMPC 2010 ensures that the consumer is in possession of the relevant information after the conclusion of the agreement.⁴¹³ The writer refers to period as the “execution phase” (“uitvoeringsfase”) of the agreement.⁴¹⁴ Article 46 § 1 provides that the following information must be given to the consumer in writing or on another durable medium available and accessible to him:

- a. confirmation of the information referred to in Article 45 including the identification of the goods or service;
- b. where appropriate, the conditions and procedures for exercising his cooling-off right;
- c. confirmation of the absence of any cooling-off right as contemplated in article 47 § 4;
- d. the geographical address of the business establishment to which the consumer may address any complaints;
- e. information on after-sales services and guarantees which exist;
- f. the conditions for cancelling the contract, where it is of unspecified duration or a duration exceeding one year.

Where the consumer is informed of his cooling-off right in writing or any other durable medium, article 46 provides that the following clause, drawn up in bold print in a box separate from the text, on the first page must also be included:

"The consumer shall be entitled to notify the business of withdrawal from the purchase, without penalty and without giving any reason, within ... calendar days from the day following the day of delivery of the goods or the conclusion of the service contract."

⁴¹² A 48 § 2 WMPC 2010.

⁴¹³ Steennot (2010) 148-149.

⁴¹⁴ *Ibid.*

This clause shall be completed with the number of calendar days, which may not be less than 14 days. In the event of omission of such a clause, the goods or services will be deemed to have been supplied to the consumer without a prior request on his part and the latter will not be bound to pay for the goods or service or to return them.⁴¹⁵ Steennot argues that the consumer may also return the goods free of charge.⁴¹⁶

In the case of absence of any cooling-off right due to the fact that the agreement falls under the exclusions contained in article 47 § 4,⁴¹⁷ the following clause must appear on the first page of the agreement and must be in bold print in a box separate from the text:

"The consumer shall not be entitled to withdraw from the purchase."

Steennot explains that where article 47 § 4 is applicable and the clause directly above is not included as part of the offer, the consumer will still have the opportunity to rescind the contract within 3 months.⁴¹⁸

In the case of goods, the consumer shall receive the information referred to in terms of article 45 § 1 on delivery to the consumer at the latest. In the case of services, the information must be given before the performance of any service contract and, where appropriate, during the performance of the service contract if performance has begun, with the consumer's agreement, before the end of the period in which a consumer may exercise his cooling-off right.

2.2.2 Doorstep selling: Duty to inform

In terms of article 60 any doorstep sale to a consumer must take the form of a written contract and the following information must be contained therein:

- a. the name and address of the business;
- b. the date and place of conclusion of the contract;
- c. the precise designation of the goods or services and their main characteristics;

⁴¹⁵ A 46 WMPC 2010.

⁴¹⁶ Steennot 2011 13.

⁴¹⁷ See Part E 2.1.1 above.

⁴¹⁸ Steennot 2011 13.

- d. the time of delivery of the goods or performance of the services;
- e. the price to be paid and the arrangements for payment; and
- f. a clause regarding the cooling-off right available to the consumer which must be in bold print and in a particular prescribed wording.

In terms of article 60, the clause regarding the cooling-off right available to the consumer must be worded as follows:

“The consumer shall be entitled to withdraw from his purchase, free of charge, within 7 working days from the day following the day of the signature of this contract, on condition that he notifies the business by registered letter. Any clause by which the consumer waives this right shall be void. The notification shall be considered to be in time if it is dispatched before this time-limit expires.”

2.2.3 Plain language and unfair terms

The regulation of unfair terms in consumer contracts is discussed comprehensively as part of the discussion of the purchase price in chapter 6.⁴¹⁹ However, the provisions in terms of the WMPC 2010 regarding unfairness are also relevant in relation to plain language. Article 73 states that to assess the unfairness of a contractual term in a consumer contract, plain language (as referred to in article 40 § 1) *must*⁴²⁰ be taken into account.

The assessment of unfairness of a term will neither relate to the definition of the main subject matter⁴²¹ nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplied in exchange, on the other, in so far as these terms are in plain, intelligible language.⁴²²

⁴¹⁹ See chapter 6 Part E 2.

⁴²⁰ Own emphasis.

⁴²¹ See chapter 6 for a comprehensive discussion of so-called “core terms” or “main subject matter” of a contract.

⁴²² A 73 WMPC 2010.

2.2.4 Plain language and consumer guarantees

Article 1649*septies* of the Civil Code dealing with consumer guarantees regarding defects also mentions plain language. Article 1649*septies* § 2 provides that every guarantee regarding the quality and standard of goods must set out the rights of the consumer and must be in clear and understandable language and include the details of the supplier.

2.3 Written agreements and records

2.3.1 Introduction

Samoy explains that three types of formal requirements exist in case of sales, namely: formal requirements for the conclusion of a valid agreement, formal requirements for evidentiary purposes⁴²³ and formal requirements for the purpose of opposability.⁴²⁴

The writer refers to the provisions of article 1649*septies* of the Civil Code⁴²⁵ (the formal requirements regarding the guarantee given by the supplier pertaining to the quality and conformity of the goods and the rights of the consumer) and explains that this is an example of a formal legislative requirement as a method of opposability rather than a formal requirement for purposes of validity.⁴²⁶

Samoy confirms that there are no formal requirements for the conclusion of a valid sale as a general rule in terms of the Civil Code (not even for the sale of immovable property).⁴²⁷ There are, however, many legislative provisions that deviate from the general rule and provide for certain formal requirements in particular instances.⁴²⁸ This is particularly so in case of the vulnerable weaker contracting party.⁴²⁹

⁴²³ It is assumed that this is the situation where the parties already concluded a valid agreement and the formal requirements are a way of confirming the agreement between them.

⁴²⁴ Samoy 295.

⁴²⁵ See 2.2 directly above.

⁴²⁶ Samoy 296. It is interesting to note the argument of the writer that even the formal requirements in case of a sale of immovable property are not for the purposes of validity but rather for opposability.

⁴²⁷ Samoy 296. See also Samoy 297 where the *Woningbouwwet 9 Juli 1971* wrt immovable property as well as *De Wet Consumentenkrediet 12 Juni 1991* wrt consumer credit agreements are discussed, the content of which falls outside the scope of this thesis.

⁴²⁸ *Idem* 297.

⁴²⁹ *Ibid.*

The first two examples given by the writer are contained in the WMPC 2010 in case of distance and doorstep selling.⁴³⁰

In case of distance selling, article 46 § 1 provides that the consumer shall receive certain information⁴³¹ in writing or in another durable medium available and accessible to the consumer. Article 2 § 25 of the WMPC defines "durable medium" as any instrument which enables the consumer to store information addressed personally to him in a way accessible for future reference for a period of time adequate for the purposes of the information and which allows the unchanged reproduction of the information stored.

In case of doorstep selling, article 60 provides that any doorstep sale to a consumer must take the form of a written contract, drawn up in the same number of copies as there are contracting parties with a separate interest. If the contract is not in writing it will be void.⁴³²

F. CONCLUSION AND RECOMMENDATIONS

1. Buyer's cooling-off right(s)

Even though the cooling-off right in terms of section 44 of ECTA regarding electronic transactions is not applicable where section 16 of the CPA is applicable,⁴³³ section 44 provides for a very important distinction regarding the period in which a consumer may exercise his cooling-off right. Section 44 of ECTA provides for five business days after *conclusion of the contract in case of services*⁴³⁴ and five business days after *receipt in case of goods*.⁴³⁵ It is argued that the legislature in case of the CPA should also have made such a distinction to avoid some of the uncertainties regarding the period in which the cooling-off right in terms of section 16 should apply. This is also more in line with foreign provisions as discussed.⁴³⁶

⁴³⁰ *Ibid.*

⁴³¹ A 46 information include: identification of the goods or service; where appropriate, information regarding the consumer's cooling-off right; the geographical address of the business establishment to which the consumer may address any complaints; information on after-sales services and guarantees which exist and the conditions for cancelling the contract.

⁴³² See also Part E 2.2.2 above.

⁴³³ Ito s 16(1) CPA.

⁴³⁴ Own emphasis.

⁴³⁵ *Ibid.*

⁴³⁶ See comparative table in 1.1 below & Part E of this chapter.

It is further argued that the provisions of section 29A⁴³⁷ of the ALA in case of the sale of immovable property and section 121⁴³⁸ in terms of the NCA in case of instalment sale transactions of movable goods (credit agreements) should take precedence over the provisions of section 16 where they are applicable as their provisions are more beneficial to the consumer.

A simpler way to avoid confusion and contradictory provisions between statutes would be to exclude immovable property from the application of section 16 altogether. The consumer will not be left without any protection as protection in terms of the ALA will still be available.

1.1 Recommendations in the light of comparative analysis

Upon inspection of Scottish law and the legislative cooling-off rights available to the consumer, a distinction is made between distance selling⁴³⁹ and doorstep selling.⁴⁴⁰ A similar distinction is made in Belgium between distance contracts⁴⁴¹ and contracts concluded away from the business premises of the supplier.⁴⁴² This distinction complicates a comparative study as section 16 of the CPA seems to include elements of both doorstep and distance selling. For example, distance communications (where a consumer is approached through the internet or telephone) forms part of the application of distance selling in both Scotland and Belgium⁴⁴³ but is also part of the definition of “direct marketing” which applies to the cooling-off right in terms of section 16 of the CPA. Doorstep selling in both Belgium and Scotland applies where a consumer is approached at his home or workplace⁴⁴⁴ which also forms part of the application of section 16 of the CPA. For these reasons both distance selling and doorstep selling are relevant.

⁴³⁷ See Part B 2; 4.1 & Part C 1.1;1.1.1.

⁴³⁸ See Part B 4.3 & Part C 1.1.2.

⁴³⁹ See comparative table directly below.

⁴⁴⁰ *Ibid.*

⁴⁴¹ *Ibid.*

⁴⁴² *Ibid.*

⁴⁴³ See table below.

⁴⁴⁴ *Ibid.*

In terms of the CPA, the consumer will only have a cooling-off right in case of direct marketing.⁴⁴⁵ Direct marketing means to approach a person, either *in person or by mail or electronic communication*,⁴⁴⁶ for the direct or indirect purpose of promoting or offering to supply *any*⁴⁴⁷ goods or services or requesting the person to make a donation of any kind for any reason. To simplify a comparative discussion of the application of the cooling-off rights in each jurisdiction the following table is provided:

Country	SA	Scotland Distance Selling	Belgium Distance selling	Scotland Doorstep Selling	Belgium Doorstep Selling
Legislation	CPA S 16	Distance Selling Reg 2000	Chap 3 S 2 WMPC 2010	Doorstep Selling Reg 2008	Chap 3 S 3 WMPC 2010
Application	Direct marketing: in person/ by mail or electronic communication, promoting or offering to supply any goods or services / donation. Additional to any other right	Shopping by way of mail, telephone, internet, television or fax	Distance communication	Home or workplace of consumer/other person or excursion (away from buss premises of supplier)	Home or workplace of consumer/other person or excursion (away from buss premises of supplier) & trade shows, fairs & exhibitions
Exclusions	1. N/A where s 44 cooling-off ito ECTA applicable	1.groceries by regular delivery; 2. accommodation 3. transport; 4. catering; 5. leisure; 6. newspapers, periodicals & magazines 7. dependent on fluctuations 8. special order goods; 9. audio, video recording & comp software unsealed	1.groceries by regular delivery; 2. newspapers periodicals & magazines; 3. special order goods; 4. audio, video recording & comp software unsealed 5. rapidly consumable goods;	1. price less than £35; 2. food, drink, consumable goods ito regular delivery 3.construction or immovable property 4.catalogue sales 5. special order ctrs (see below)	1. price less than €200; 2. food, drink, consumable goods ito regular delivery
Method of cancellation	Writing or other recorded form	Written notice	Written / durable form	Writing incl email and post	Written registered letter
Cancellation period	5 business days from conclusion or delivery (in	Gen: 7 working days after delivery(goods) or	Goods:14 days from day after day of	7 working days from receipt of	7 workings days from date after date of

⁴⁴⁵ S 16(3) CPA.

⁴⁴⁶ Own emphasis.

⁴⁴⁷ *Ibid.*

	case of both goods and services)	conclusion (services) Exception: Supp fails to provide pre-ctr info, then 7 working days after compliance (may not exceed 3 months)	delivery (goods) Services: 14 days from date of conclusion or 14 days from receipt of pre-ctr info (may not exceed 3 months)	notice of right to cancel	signature
Notice of right to supplier	None	Part of compulsory pre-ctr info	Written / durable form	Easy legible notice at time of conclusion or offer is made	Written copy for each party

From a comparative perspective it is clear from the table above that the consumer's cooling-off right in terms of section 16 of the CPA is both restrictive and extremely broad at the same time. It is submitted that section 16 of the CPA is a combination of both distance selling and doorstep selling as regulated in Scotland and Belgium. The provisions in Belgium are more favourable to consumers in that the period in which a cooling-off right may be exercised in the case of distance selling is 14 days rather than seven days and the scope of application is broad.

Section 16 of the CPA is restrictive because the consumer's cooling-off period in terms of section 16 of the CPA (five days) is less than either Scotland (seven days) or Belgium (14 days in the case of distance selling) and it is submitted that the period be increased to at least seven business days, preferably 14 days.

It is also clear from the wording of both the distance selling and doorstep selling provisions in Scotland and Belgium that a distinction is made between the periods of cancellation for goods and services. The period for cancellation in case of goods is either from the date of delivery (Scotland) or from the day after the date of delivery (Belgium). No such distinction is made in South African law and it is recommended that section 16 be amended accordingly.

Certain pre-contractual information must be given to the consumer by the supplier prior to and during the conclusion of distance or doorstep sales in both

Scotland and Belgium.⁴⁴⁸ This includes informing the consumer of whether or not a cooling-off right will apply and how the consumer may exercise the right if he so wishes.⁴⁴⁹ If the supplier does not comply with these pre-contractual information requirements, it will increase the cooling-off period available to the consumer to the date that the consumer is informed of his rights. In Scotland the legislature goes as far as making it an offence by a supplier not to do so.

It is recommended that the South African legislature compels suppliers to inform consumers of their cooling-off rights in a prescribed manner either by way of regulation or by way of an inclusion in both sections 16 and 32 of the CPA. It is indeed curious why the legislature chose not to do so taking into account that such an obligation exists with regard to a credit provider in case of credit agreements. Including such provisions in the CPA should have been a logical step.

In terms of the WMPC 2010 in Belgium, article 46 contains “standard information clauses” which have to be included in any distance contract and sets out the wording and form of the consumers cooling-off right. The cooling-off right must be worded in a particular manner, in bold and separate from the rest of the text.

Taking the provisions of article 46 of the WMPC 2010 in to account, it is recommended that the Minister⁴⁵⁰ publish a similar “standard information clause” in the case of South Africa with the correct wording and in the correct format to ensure that the supplier complies with the duty to inform the consumer of his cooling-off right and doing it in such a manner that the notice also complies with the plain language provisions of section 22 of the CPA.

Section 16 is much broader than its Scottish and Belgian counterparts when it comes to the scope of application. Certain of the exclusions in case of Scotland and Belgium deserve criticism. In Scotland, in case of mail order catalogue agreements, consumers are excluded from exercising any cooling-off right provided there is a similar cancellation period provided for in the catalogue itself.⁴⁵¹ In this instance the CPA will give greater protection to consumers than in Scotland, especially vulnerable consumers.

⁴⁴⁸ See Part E 1.1, 2.1 & 2.2 above.

⁴⁴⁹ *Ibid.*

⁴⁵⁰ Department of Trade & Industry (South Africa).

⁴⁵¹ See Part E 1.1.

An argument can be made that these are exactly the kind of documents, visual representations and notices consumers do not (or cannot) read or do not read properly. The argument against the exclusion of mail order catalogues can be taken further as it would be difficult to imagine how the supplier will be able to direct the consumer's attention to his cancellation rights.

Upon examination of the cooling-off right available to consumers in Scotland (in terms of the Doorstep Selling Directive 2008), the scope has been reduced considerably by way of exceptions and exclusions within the regulations itself. While it is more practical to exclude perishable and consumable goods or goods or services supplied in case of emergencies, it would be unfair to exclude advertising in any medium or the supply of newspapers and magazines in case of South African consumers. It would be especially unfair toward consumers in the current global economic crisis to limit a consumer's cooling-off right where goods are supplied and the price of such goods is dependent on fluctuations in the financial markets which cannot be controlled by the supplier.⁴⁵² The same argument could be made for the similar exclusions in the case of Belgium.⁴⁵³

There are, however, exclusions in case of Scotland and Belgium that are referred to with merit. It is recommended that the South African legislature publish a list of the exclusions suggested below to simplify the application of a consumer's cooling-off right. Food, drink or other goods intended for current consumption by use in the household and are supplied by regular delivery should be excluded from the application of the CPA. (A good example in South Africa would be the regular delivery of monthly groceries by the local supermarket). This provision will eliminate the issues surrounding rapidly consumable goods raised by *Jacobs ea.*⁴⁵⁴

It is also recommended that section 16(2) which provides that the cooling-off right in terms of section 16 is additional to any other right be struck out as it causes more confusion and provides less protection to consumers. In the light of the comparative discussion, the consumer in South Africa should not have access to the cooling-off right contained in section 16 of the CPA in the case of special order goods. In this instance it

⁴⁵² See comparative table above.

⁴⁵³ *Ibid.*

⁴⁵⁴ 321.

is the consumer who initiates the supply of goods and services with special requirements. Wording should therefore be included in this regard by the legislature as part of the exclusions contained in section 16(1) of the CPA.

The interaction between the different cooling-off rights available to consumers in Scotland deserves discussion. The position is straightforward. Where, for example, both the Doorstep Selling Regulations and the Consumer Credit Act 1974 apply to a given situation, the provisions that better protect the consumer take precedence, namely, the Consumer Credit Act 1974. Taking into account the provisions of sections 3(1)(b) and 4(4) of the CPA, this should also be the position in terms of South Africa and the provisions which is most beneficial to the consumer should be followed.

1.2 Cooling-off right and immovable property

Due to the definition of “goods” in terms of the CPA,⁴⁵⁵ immovable property is included in the provisions of section 16 governing cooling-off rights. As discussed earlier,⁴⁵⁶ this is problematic due to the possibility that in terms of section 16 a consumer may exercise his cooling-off right within five days from either the date of conclusion of the contract or delivery, whichever date is the latest. In the case of immovable property the date of delivery is the date of registration of the property in the name of the buyer by the Registrar of Deeds.⁴⁵⁷ The complicated situation can arise that a consumer may cancel a consumer sale agreement for immovable property within five days after registration. It is submitted that the comparative study done in Part E of this chapter provides guidance in this regard and will forthwith be discussed.

Immovable property is specifically excluded from the application of the consumer’s cooling-off right in Scotland.⁴⁵⁸

In Belgium immovable property is not included in the provisions regarding doorstep selling.⁴⁵⁹ Though the use of the word “product” (which includes immovable property) is mentioned in the case of distance selling, it is clear from the arguments

⁴⁵⁵ S 1 CPA.

⁴⁵⁶ See Part D 1.1 & F 1 above.

⁴⁵⁷ See Part D 1.1 above.

⁴⁵⁸ See comparative table Part F 1.1.

⁴⁵⁹ See Part E 2.1.2 above.

discussed earlier in this chapter,⁴⁶⁰ that it was not the intention of the legislature to include immovable property in the application of the provisions regarding distance contracts and cooling-off rights.

It is recommended that section 16 be amended to exclude the sale of immovable property and section 16(2) should *not*⁴⁶¹ be in addition to any other right. This will avoid many confusing and unclear scenarios that might arise as discussed earlier in this chapter and provide an interpretation of section 16 that is much more beneficial to a consumer.⁴⁶² This is especially relevant regarding the simultaneous application of section 16 and the provisions of the ALA or the NCA.⁴⁶³

2. Written consumer contracts

As a general rule, consumer sales do not have to comply with formal requirements to be valid.⁴⁶⁴ This is a confirmation of the general position of the South African common law.⁴⁶⁵ The exceptions to the general rule are, firstly, where the parties require the agreement to comply with certain formal requirements for purposes of validity or simply for evidentiary purposes.⁴⁶⁶ Secondly, where a statute provides for formal requirements for that particular consumer sale.⁴⁶⁷

I agree with Samoy that in the case of consumer legislation one should determine what the purpose of the formal requirements in terms of the particular provision is.⁴⁶⁸ For example the information that must be provided in a sales record in terms of section 26 of the CPA is for evidentiary purposes and simply confirms what has already been agreed upon.

Where a consumer agreement is in writing it must be in plain and understandable language in terms of section 50 of the CPA. The electronic signature of a party will only be regarded as a valid electronic signature where it falls under the definition of an

⁴⁶⁰ See Part E 2.1.1 above.

⁴⁶¹ Own emphasis.

⁴⁶² See Part D above.

⁴⁶³ *Ibid.*

⁴⁶⁴ See Part B 1.

⁴⁶⁵ *Ibid.*

⁴⁶⁶ *Ibid.*

⁴⁶⁷ *Ibid.*

⁴⁶⁸ Samoy 295. See also Part E 2.3.1.

“advance electronic signature” in terms of the provisions of ECTA⁴⁶⁹ read together with the provisions of the CPA.⁴⁷⁰

From the outset it is clear that section 50(2) of the CPA must be amended as soon as possible and substituted with a provision that a written consumer agreement will only be valid where *both*⁴⁷¹ parties (the consumer as well as the supplier) has signed the agreement. The explanation given by Van Eeden as to why the legislature worded section 50(2) in this manner is noted,⁴⁷² but the protection of the vulnerable consumer outweighs the convenience to the supplier in this regard.

2.1 Formal requirements for the sale of immovable consumer goods

Even though consumer agreements may be signed by way of an electronic or advanced electronic signature in terms of the CPA, it is clear from section 4 of ECTA that the sale of immovable consumer goods may not be concluded in the form of an electronic transaction or signed by way of an electronic signature (including an advanced electronic signature).⁴⁷³

The question that does however arise pertains to the formalities for the sale of immovable property. It is possible (even though the scope of application will be small) that the provisions of section 2(1) of the ALA regarding formalities for the sale of immovable property as well as the provisions regarding formalities for written consumer agreements in terms of section 50 will apply simultaneously. These provisions are contradictory. Section 2(1) provides that a deed of sale must be *signed*⁴⁷⁴ by both parties (or their agents with written authority) and failure to do so will render the contract void while section 50(2)(a) of the CPA provides that a written consumer agreement will apply irrespective of whether or not the consumer signs the agreement.

With regard to the interpretation of contradictory provisions, section 2(9) of the CPA provides some guidance. It provides that if there is an inconsistency between any provision of the CPA and a provision of another Act, the provisions of both Acts apply

⁴⁶⁹ S 1 def; s 12 ECTA.

⁴⁷⁰ S 1 def & s 2(2); s 3(1)(b) & s 50 CPA.

⁴⁷¹ Own emphasis.

⁴⁷² Van Eeden 174-175.

⁴⁷³ S 2(3) read together with s 50 CPA.

⁴⁷⁴ Own emphasis.

concurrently, to the extent that it is possible to apply and comply with one of the inconsistent provisions without contravening the second.⁴⁷⁵ Where the latter cannot apply, the provision that extends the greater protection to a consumer prevails over the alternative provision.⁴⁷⁶

From the wording of section 2(9) the position that extends the greater protection to the consumer between section 2(1) ALA and section 50(2)(a) CPA must be determined.

As seen from the arguments discussed earlier in this chapter,⁴⁷⁷ section 50(2)(a) is not beneficial to consumers and may be manipulated by unscrupulous suppliers to enforce written contracts where no consensus existed to begin with. This would be especially risky in the case of written agreements for immovable consumer goods concluded by vulnerable consumers.

On the other hand, the argument of Lötzt & Nagel⁴⁷⁸ regarding section 2(1) and the written authority of the agent should also be taken into account. The writers argue⁴⁷⁹ that upon examination of the interpretation of section 2(1) of the ALA by our courts it is difficult to understand how a written authority of such quality can accord with the legislature's original intention with the Act being the prevention of uncertainties, the exclusion of disputes and the avoidance of malpractices.⁴⁸⁰

The opinions of property practitioners are that it would depend on what is most beneficial to consumers *in their particular circumstances*.⁴⁸¹ If a consumer does not want to be bound to a property transaction he could make out an argument in favour of section 2(1) of the ALA arguing that the agreement is void. If the consumer wants to be bound to the property transaction an argument in favour of section 50(2)(a) will be more to his benefit. It seems therefore that consumers may also use the provisions to manipulate agreements to their advantage.

Objectively speaking, the provisions of section 2(1) of the ALA will provide greater protection to consumers in property transactions, also taking into account the

⁴⁷⁵ S 2(9) CPA.

⁴⁷⁶ *Ibid.*

⁴⁷⁷ Part D 2.3.

⁴⁷⁸ Lötzt & Nagel 612-612. See also Lötzt *ea* 23.

⁴⁷⁹ *Ibid.*

⁴⁸⁰ Nagel *ea* 201.

⁴⁸¹ Own emphasis.

type of consumer the CPA attempts to protect in terms of section 3, namely, the vulnerable consumer.

Botha argues that where an estate agent is involved in the sale of immovable property which is a once-off transaction and the estate agents' printed-form contract is used, the CPA will not be applicable to the written deed of sale even if the services of the estate agent is.⁴⁸² The contractual relationship that is ultimately formed remains essentially a private once-off transaction between the seller and the buyer.⁴⁸³ The content of the contract is the result of negotiations between the parties, notwithstanding the fact that a pre-printed form may have been used as a basis for formulating the agreement.⁴⁸⁴ The writer remarks, however, that it remains to be seen how our courts will interpret these provisions.⁴⁸⁵

3. Plain language

"Plain language plays an important role in the Consumer Protection Act. After all, if one party in a relationship cannot understand what he or she is agreeing to, that person is disempowered. For a truly balanced relationship, both parties need to have equal access to understanding their relationship and how their relationship is to be governed."⁴⁸⁶

Melville states that although it may seem ironic that the term "plain language" can be interpreted in many ways, the point is that the term includes all aspects regarding a notice, document or visual representation.⁴⁸⁷

It is important to remember that section 22 does much more than merely requiring the use of plain and understandable language; it elevates the plain language requirement to a fundamental consumer right.⁴⁸⁸

I agree with Stoop that plain language provisions in both the NCA, and more particularly the CPA, are not proactive and do not provide objective guidelines on how

⁴⁸² Botha 7.

⁴⁸³ *Ibid.*

⁴⁸⁴ *Ibid.*

⁴⁸⁵ *Ibid.*

⁴⁸⁶ Melville 157.

⁴⁸⁷ *Idem* 158.

⁴⁸⁸ Gouws 85.

the use of plain language should be assessed.⁴⁸⁹ This is especially so in the absence of guidelines or standards which have not been published in terms of the abovementioned legislation. Therefore, the courts will have to decide whether a document complies with plain language requirements.⁴⁹⁰ The broad definition of plain language in terms of section 22 is subject to discretion and interpretation and can in fact not be applied proactively.⁴⁹¹ Stoop rightly argues that because of the lack of objective assessment measures or guidelines, it is not clear whether the provisions of plain language have been implemented successfully in terms of the CPA.⁴⁹²

Gordon & Burt argue with merit that plain language requirements are part of an effort to balance power between the parties to a contract.⁴⁹³ The writers argue that while bargaining powers between parties may once have been equal, it is certainly no longer so.⁴⁹⁴

The writers suggest that suppliers set up their own evaluation methods for assessing whether or not a document is in plain language and warns that this be done before suppliers embark on any large-scale rewriting project.⁴⁹⁵ The writers suggest research and user testing throughout the rewrite process, a phased approach, working steadily towards best practice and terminology tools to ensure consistency.⁴⁹⁶

Kirby argues soundly that the criteria in terms of section 22(2) of the CPA are designed to be as flexible as possible in order to take into account every possible relationship between a consumer and a supplier in respect of goods and services.⁴⁹⁷ A great deal of discretion is therefore left to persons tasked with enforcing the provisions of the CPA to determine what is or is not, in any particular circumstances, plain and understandable language.⁴⁹⁸ Jacobs *ea* express the hope that section 22 will compel

⁴⁸⁹ Stoop 2010 638.

⁴⁹⁰ *Idem* 640.

⁴⁹¹ *Ibid.*

⁴⁹² *Idem* 641.

⁴⁹³ Gordon & Burt 59.

⁴⁹⁴ *Ibid.*

⁴⁹⁵ *Idem* 60.

⁴⁹⁶ *Ibid.*

⁴⁹⁷ Kirby 2011 22-23.

⁴⁹⁸ *Ibid.*

suppliers to redraft their contracts to meet the plain language requirements and that consumers may look forward to more user-friendly agreements and representations.⁴⁹⁹

Stoop refers to the methods of assessment which may be used by suppliers to test whether or not documents are drafted in plain language.⁵⁰⁰ The methods include informal, formal and computer software assessments and while all of these assessments may be helpful in some way, the circumstances and intention of the supply of the particular goods and services to the particular consumer or group must remain at the forefront.

The provisions of section 112 of the CPA reminds one of the seriousness of non-compliance of the plain language requirement and breaching of the consumer's fundamental right to plain language.⁵⁰¹ It provides that the NCT may impose an administrative fine in respect of prohibited or required conduct to the amount of either ten per cent of the supplier's annual turnover during the preceding year but not more than R10 million. The fine payable must be paid into the National Revenue Fund.⁵⁰²

Kirby correctly argues that the provisions of section 22 must be interpreted against the backdrop of Sections 2 (interpretation) and 3 (purpose) of the CPA.⁵⁰³ Kirby remarks:⁵⁰⁴

“As always, language will remain contentious in South African law, especially when one refers to the principles of interpretation that are currently applicable. The principles applicable to the interpretation of statutes, especially in relation to the provisions of the CPA, may be weakened or lessened by the clear indication in the CPA of how consumer contracts must be drafted, interpreted and in whose favour the interpretation is to be made.”

In Scotland⁵⁰⁵ and Belgium⁵⁰⁶ the requirements for plain language are referred to as “plain and intelligible language” rather than “plain and understandable language” as is

⁴⁹⁹ Jacobs *ea* 331.

⁵⁰⁰ Stoop 2010 638.

⁵⁰¹ Marus 24. See also Marus 2011 32.

⁵⁰² S 122(5).

⁵⁰³ Kirby 2011 22-23.

⁵⁰⁴ *Ibid.*

⁵⁰⁵ See Part C 1.2.

⁵⁰⁶ See Part C 2.2.

the case in the CPA in South Africa. It is submitted, however, that the interpretation remains the same.

The views of Micklitz *ea* are supported in their explanation that two standards are created, namely, *plainness* and *intelligibility* which need to be assessed differently.⁵⁰⁷ Plainness refers to the legal effect of a term including its consequences.⁵⁰⁸ The consumer needs to know what to expect and ambiguous formulations must not put the supplier (seller) in a position that improves his legal position at the consumer's expense.⁵⁰⁹

Intelligibility, according to Micklitz *ea*, refers to legibility in that it purports to eliminate "small-print" from the contract which consumers do not readily understand.⁵¹⁰ The result is that the drafter is required to design standard business conditions plainly from both an editing and optical point of view.⁵¹¹ The writers make the important remark that intelligibility also entails a qualitative requirement in that information needs to be provided by the supplier.⁵¹² Terms must not mislead the consumer about the scope of his rights and obligations.⁵¹³

In Scotland, the consumer should be given the opportunity to examine all the terms of the sales agreement and as this envisages an ordinary person reading the contract, the kind of language used by the seller must therefore be such that he will find it plain and intelligible.⁵¹⁴ This seems to be similar to the test suggested by South African writers.⁵¹⁵

Ultimately it seems that the plain language requirement can only be properly assessed if a consumer sale is in written form. The courts will have the final word on the matter. It would be unfair to apply an objective guide to all consumer sales across the board as every transaction will be based on its own merits and circumstances.

⁵⁰⁷ Micklitz *ea* (2009) 136.

⁵⁰⁸ *Ibid.*

⁵⁰⁹ *Ibid.*

⁵¹⁰ *Ibid.*

⁵¹¹ *Ibid.*

⁵¹² *Ibid.*

⁵¹³ *Ibid.*

⁵¹⁴ *Ibid.*

⁵¹⁵ See Melville 158; Stoop 2010 638; Gouws 85; Gordon & Burt 59; Kirby 2011 22-23.

Perhaps the Department of Trade and Industry (DTI) could publish general guidelines which could be adjusted to fit into a specific industry code (the motor industry for example). Where the industry guidelines do not conform to the general guidelines suggested by the DTI, the courts will have the final word on the matter.

3.1 Standard-form consumer contracts

Though exemption clauses and unexpected terms in consumer contracts fall outside the scope of this thesis, standard-form contracts in relation to whether or not they are in plain language, deserve mentioning.

I agree with Newman that the terms and conditions contained in a standard-form contract are crucial for both the consumer and supplier as they determine the legal position of the parties to the contract, the rights and obligations of the parties and often the consequences of a breach of the terms and conditions and it is thus very important for consumers to read these documents.⁵¹⁶ However, the language used and structure of the contract often owe more to financial imperatives than to legitimise contractual principles.⁵¹⁷

Unfortunately consumers seldom read these important terms, which may appear in the actual document they sign, or on the reverse side or even on occasion in a separate document which is given to them either upon conclusion of the contract or at a later stage.⁵¹⁸ Newman gives a variety of reasons for consumers not reading important terms in standard-form contracts, including the fact that consumers are commonly more interested in obtaining the goods rather than acknowledging the consequences of the purchase; they may trust the supplier to be honest or they may simply believe they will not understand the terms and therefore do not bother reading them.⁵¹⁹

Nortje correctly argues that the main characteristic of standard-form contracts is that they are presented on a “take-it-or-leave-it basis”, with almost no opportunity for the consumer to negotiate individual terms.⁵²⁰ Gouws holds a similar opinion and states that

⁵¹⁶ Newman 736.

⁵¹⁷ *Ibid.* The writer gives the example that a decision on the layout of the contract may be determined by cost implications.

⁵¹⁸ *Idem* 736.

⁵¹⁹ *Idem* 736-737.

⁵²⁰ Nortje 2012 139.

the consumer is not in a position to bargain with the supplier, and with no real choice but to sign the agreement, is compelled to accept the proposed terms.⁵²¹ There is therefore little incentive for a consumer to read the contract, since he would not be able to change individual terms even if he found them objectionable.⁵²² The consumer's choice in case of standard-form contracts is simply to enter into the contract as is, or not at all.⁵²³ The writer correctly states that, given the lack of incentive to read standard-form contracts, any careful reading by a consumer should be regarded as the exception rather than the norm.⁵²⁴

Despite Nortje's criticism of the application and use of the *caveat subscriptor* rule⁵²⁵ by our courts (in case of standard-form contracts in particular), the writer still supports the rule.⁵²⁶ In order to mitigate the potentially harsh consequences of the *caveat subscriptor* rule, she argues that the level of vigilance expected from consumers should be relaxed somewhat and that only "reasonable" reading should be required.⁵²⁷ Nortje argues that section 22 of the CPA reinforces this argument and implies that absolute vigilance is not expected of the consumer.⁵²⁸ The consumer should not be overburdened by vigilance in standard-form consumer contracts. Newman adds to this argument by expressing the hope that the provisions of section 22 will motivate consumers to read the important terms of standard-form contracts.⁵²⁹

With regard to standard-form consumer contracts in Scotland, Ervine explains that the UCTA Regulations 1999 and the plain language requirements in terms of regulation 7 in particular will apply if an overall assessment of the contract shows that it is a pre-formulated standard contract.⁵³⁰ The burden is on the seller or supplier to show that a term was individually negotiated.⁵³¹

⁵²¹ Gouws 81.

⁵²² *Idem* 139-140.

⁵²³ Nortje 2012 140.

⁵²⁴ *Ibid.*

⁵²⁵ The signatory is expected to ascertain the terms of the contract prior to signature thereof.

⁵²⁶ Nortje 2012 144-145

⁵²⁷ *Idem* 145.

⁵²⁸ *Ibid.*

⁵²⁹ Newman 737.

⁵³⁰ Ervine 214.

⁵³¹ *Ibid.* Reg 5(2) UCTA Regulations 1999.

3.2 Ordinary consumer

Kirby describes the averagely literate and minimally experienced consumer as a “new animal” in South African law.⁵³² The experience of this consumer will dictate whether or not a particular supplier is able to achieve the obligations imposed on him by section 22(2) of the CPA. Kirby also argues that this consumer will further determine the degree to which particular language (which is to form the basis of the transaction) is plain and understandable and whether or not it is sufficient to protect both the interests of the consumer and the supplier.⁵³³

Keeping in mind that one of the main purposes of the CPA is the protection of vulnerable, low-income, illiterate consumers, business and legal writers must now write for the person with minimal experience. In other words, a first-time user of goods and services.⁵³⁴ Gouws argues that the protection of such consumers underscores the necessity for plain language.⁵³⁵

According to Kirby the level of intelligence and education of a particular consumer may very well inform what is plain and what is understandable in any particular circumstances.⁵³⁶ Section 22(2) further assumes that all consumers have average literacy skills and minimal experience as consumers of the relevant goods and services.⁵³⁷

In Scotland the term “average consumer” rather than “ordinary consumer” is used.⁵³⁸ This distinction becomes important to determine the average consumer in a particular group of consumers. Ervine gives a number of examples to illustrate this point.⁵³⁹ Firstly, the example of children in case of television advertisements during children’s programmes (in which case the standard would be that of the average

⁵³² Kirby 2011 22-23.

⁵³³ *Ibid.* The purpose of the CPA in terms of s 3 should also be taken into account: Ultimately aiming to protect the vulnerable consumer.

⁵³⁴ Gordon & Burt 60.

⁵³⁵ Gouws 82.

⁵³⁶ Kirby 2011 22-23.

⁵³⁷ *Ibid.*

⁵³⁸ See Part C 1.2.1. See also comparative table above.

⁵³⁹ Ervine 231.

child).⁵⁴⁰ Secondly, the example of a group of readers of a soccer magazine in which case the test would be that of the average soccer fan.⁵⁴¹

Ervine correctly argues that factors such as ethnic origin, education and economic circumstances should be included in the test for the average consumer and in my opinion is a paramount inclusion in case of South African consumers.⁵⁴²

The test of who is an average consumer in Scotland is taken from case law decided by the European Court of Justice in relation to matters dealing with free movement of goods and misleading advertising.⁵⁴³ The test in a nutshell takes as a benchmark the consumer who is reasonably well-informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors.⁵⁴⁴ This is also an appropriate test to apply in terms of the South African position and section 22 of the CPA.

It is further recommended that the term “ordinary consumer” in the CPA be substituted with the term “average consumer” to bring South Africa more in line with international provisions in case of plain language requirements.

It may be argued that comparing the ordinary consumer in South Africa to the ordinary consumer in Scotland or Belgium is to compare apples with pears. Surely it would be unfair to compare consumers in a developing country such as South Africa to first world countries (or close to first world countries) such as Belgium and Scotland.

The fact of the matter is that the world is becoming a global community and countries are moving “closer” together in terms of communication, technology and, more importantly, trade. People from third world or developing countries often immigrate or obtain working permits in search of a better life in first world countries. This shift in the global paradigm can no longer be ignored as it clear from the recognition of vulnerable consumers and the need to protect them in for example the European Union (Scotland and Belgium).⁵⁴⁵ This point may be illustrated by referring to recital 18 of the Misleading Advertising Directive which states that the average member of a clearly identifiable

⁵⁴⁰ *Ibid.*

⁵⁴¹ *Ibid.*

⁵⁴² *Idem* 232.

⁵⁴³ *Ibid* fn 20.

⁵⁴⁴ *Idem* 232.

⁵⁴⁵ See Part E 1 & 2 above.

group of consumers who are particularly vulnerable to the commercial practice or to the underlying product because of their mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee, deserves additional protection.

8 DUTY OF SAFE-KEEPING AND THE PASSING OF BENEFIT AND RISK DOCTRINE

- A. INTRODUCTION
 - B. LEGAL POSITION WHERE THE CONSUMER PROTECTION ACT 68 OF 2008 IS NOT APPLICABLE (COMMON LAW POSITION)
 - C. LEGAL POSITION IN TERMS OF THE CONSUMER PROTECTION ACT 68 OF 2008
 - D. EVALUATION
 - E. COMPARISON
 - F. CONCLUSION AND RECOMMENDATIONS
-

A. INTRODUCTION

The common law duty of the seller to take care of the thing sold from conclusion of the contract until delivery cannot be discussed without also discussing the legal position of the parties with regard to benefit and risk in the case of *vis maior* or *casus fortuitus*.¹ The doctrine of the passing of benefit and risk as well as the requirements thereof are discussed. The contentious position where a contract of sale is subject to a suspensive condition is included.² A brief historical overview of the above legal principles as well as the legal position in South Africa where the CPA is not applicable are discussed. A very brief overview of lay-by agreements prior to the implementation of the CPA is included but a comprehensive discussion thereof falls outside the scope of this thesis.

The common law duty of safe-keeping is confirmed by the CPA but only in respect of lay-by agreements.³ The risk of the goods in the possession of the supplier in terms of lay-by agreements is also relevant and therefore discussed. The position in

¹ Voet 18 6 1 describes risk as any disadvantage, deterioration or injury and gives examples such as the death, wounding or running away of an animal or slave; the burning or fall of a house; shipwreck of a vessel and wine becoming musty or stale. Hiemstra & Gonin 163 state that *vis maior* can be translated as an act of God and *casus fortuitous* as an accidental occurrence or chance. Damages due to no fault of any of the contracting parties and circumstances beyond the control of the contracting parties are included in these concepts.

² Although the doctrine of the passing of risk and benefit also applies to contracts of carriage as well as bailment, it falls outside the ambit of this thesis. Only the application of the doctrine in terms of sale agreements will be investigated.

³ See the discussion of the CPA in Part C & D below.

general in the case of consumer sales regarding the passing of risk is included in this chapter.

The position with regard to the transfer of risk in terms of consumer sale agreements in Scotland as well as Belgium is discussed. An investigation into the duty of safe-keeping of movable goods in terms of SOGA (in Scotland) was done but such a duty seems to be absent from the Act. The duty of safe-keeping in Belgian law is, however, briefly discussed. Neither Scotland nor Belgium recognise lay-by agreements and such agreements are not governed by consumer legislation. For the sake of completeness the confirmation of the absence of lay-by agreements in these jurisdictions are included.

B. LEGAL POSITION WHERE THE CONSUMER PROTECTION ACT 68 OF 2008 IS NOT APPLICABLE (COMMON LAW POSITION)

1. Brief historical overview

1.1 Seller's duty to take care of the thing sold

At Roman law the seller had a duty to take care of the thing sold like a diligent person (*diligens paterfamilias*).⁴ The seller was liable for any damage caused to the thing sold where it was due to his (the seller's) fault.⁵ A distinction was made between liability in the case of *culpa in abstracto*⁶ (an objective standard) and *culpa in concreto*⁷ (a subjective standard). Where the *merx* or thing sold was for example damaged or destroyed due to the negligence of the seller, the seller was liable for damages to the buyer.⁸

Voet⁹ confirmed the position in Roman law as set out above and distinguished between damages caused by the seller's negligence and damages caused where the buyer was also *in mora*.¹⁰ Where the buyer was *in mora* the liability of the seller diminished to liability only for gross negligence or fraud.¹¹ The seller's default in the

⁴ Zimmermann & Visser 373. See also De Wet & Van Wyk 329.

⁵ Zimmermann *Obligations* 281-287. See also LötZ 1992 (Deel 2) 147-148; Mackeurtan's 219-223.

⁶ *Idem* 283.

⁷ *Ibid.*

⁸ *Idem* 287.

⁹ 18 6 2.

¹⁰ Where the buyer wrongfully delays acceptance.

¹¹ Voet 18 6 2.

standard of care involved an increase in his liability for damages incurred and according to Voet the seller would then be liable for all loss howsoever it occurred.¹² Where both the seller and the buyer were *in mora* the last default or delay would usually determine where liability lay.¹³ If the *merx* was stolen by a third party the seller would not be liable but he would have to assign all actions to the buyer.¹⁴

Voet also discussed the position where the seller undertook a greater responsibility than what was expected by law and in such a case the seller would be bound by his undertaking.¹⁵ If the seller made an agreement extending his liability or responsibility, it would, according to Voet, be construed against him.¹⁶ Van den Bergh describes the measure of the duty to take care of the thing sold (in Roman-Dutch law) prior to delivery by the seller as similar to what was expected of a lessee.¹⁷

1.2 Benefit and risk

According to Zimmermann the principle *res perit domino*¹⁸ was the general rule in Roman law, namely, that the owner will bear the risk where the thing sold was damaged or destroyed in the case of *vis maior*.¹⁹ The Romans also formulated the rule *periculum est emptoris*.²⁰ Zimmermann discusses the different opinions of the Roman lawyers with regard to the possible remedies that were available.²¹ An in-depth discussion of these remedies is, however, not relevant to this thesis. The period of importance was the period after conclusion of sale but before delivery of the *merx*. The period prior to delivery but after conclusion became relevant where these actions did not take place simultaneously and could sometimes be a long period of time.²² The proviso for the risk to pass from the seller to the buyer was that the risk would transfer to the buyer (even

¹² Voet 18 6 2 and 6 1 34. The only defence would be if the seller could show that the *merx* would have been destroyed anyway (6 1 34). See also Mackeurtan's 223.

¹³ Voet 18 6 2. See also Mackeurtan's 223.

¹⁴ Voet 18 6 2. See also Van den Bergh 2008 632.

¹⁵ 18 6 2.

¹⁶ 18 6 2. See also Mackeurtan's 222.

¹⁷ Van den Bergh 2008 632.

¹⁸ "The thing is lost to the owner".

¹⁹ Zimmermann *Obligations* 281. See also Lötze 1992 (Deel 2) 147-148.

²⁰ Zimmermann *Obligations* 283. For a detailed discussion see Van den Bergh 2008 623-631. Risk transfers to the buyer after the sale has become *perfecta*.

²¹ Zimmermann *Obligations* 282-284.

²² Van Warmelo (1973) 176.

before delivery) where the sale became *perfecta*.²³ The sale became *perfecta* where the identities of the parties, the quantity and quality of the goods as well as the price became fixed and sure (determined).²⁴ The sale must also not have been conditional for it to be *perfecta*. A sale was conditional in Roman law where the sale was subject to a suspensive condition and the type of goods also had an influence on the transfer of risk.²⁵ A sale *ad mensuram*,²⁶ as well as a sale *ad gustum*²⁷ were considered to be conditional sales in Roman law and the goods had to become determined (not just determinable) before the condition related to these types of goods was fulfilled.²⁸

Van den Bergh confirms that most of the Roman-Dutch authors were almost unanimous in their acceptance of the Roman law rule that the buyer bore the risk after the sale became *perfecta* and cites authors such as Grotius.²⁹ In Roman-Dutch law no distinction was made between movables and immovables in the normal cause of events with regard to the rule of benefit and risk.³⁰

The same principles applied in Roman-Dutch law with regard to the sale being subject to a suspensive condition as in Roman law. Where the suspensive condition was not fulfilled, the sale was *imperfecta* and the risk for accidental damages or destruction of the thing sold would only transfer to the buyer where the condition was fulfilled and the sale became *perfecta*.³¹ If the condition was fulfilled the sale was valid retroactively from conclusion of the contract.³² If however, the thing sold was completely destroyed the sale could not continue because of impossibility of performance.³³

Where goods were sold *ad mensuram* the general opinion amongst Roman-Dutch authors was that the goods only became determined once they were measured, counted or weighed.³⁴ Grotius, however, was of the opinion that before the contract

²³ Zimmermann *Obligations* 281.

²⁴ *Idem* 281-282.

²⁵ Floyd 462-465.

²⁶ Goods to be weighed, counted or measured. See the discussion of the types of things sold as part of the *essentialia* of sale in chapter 5.

²⁷ Specifically relating to the sale of wine and tasting the wine prior to delivery and acceptance. See also chapter 5.

²⁸ Floyd 463-465.

²⁹ Van den Bergh 2008 632 and fn 90.

³⁰ Voet 18 6 6.

³¹ Voet 18 6 5. See also Floyd 465 and Van den Bergh 2008 634.

³² Floyd 846.

³³ Voet 18 6 5 .

³⁴ Van Leeuwen *RHR* 4 17 2; Voet 18 6 4. See also Floyd 466-469 and Van den Bergh 2008 635.

became *perfecta* in these circumstances the seller bore the risk of the thing being destroyed while the buyer bore the risk of damage thereto.³⁵

2. Seller's duty of safe-keeping

In modern South African law the common law position is very similar to the Roman and Roman-Dutch position although it has been interpreted differently in terms of case law. The relevant cases are discussed below.

The first duty of the seller is to take care of and protect the thing sold from the conclusion of the contract until delivery. The seller has a duty to exercise due diligence in the performance of his duty of safe-keeping but the degree of diligence will vary from case to case.³⁶ In *Frenkel v Ohlsson's Cape Breweries Ltd*³⁷ the duty of safe-keeping in terms of a lease agreement was compared with the principles of *depositum* (deposit) to illustrate the degree of care.³⁸ The court confirmed that the seller would be liable for any damage or loss to the thing sold caused by the seller's fault.³⁹ More importantly, the court held that the seller bears the onus of proving that the necessary diligence was applied in taking care of the thing sold or that the damage was not due to his fault.⁴⁰ The culpable conduct of the seller resulting in the damage to or destruction of the thing can take the form of either an intentional or a negligent act.⁴¹ Factors that will influence the duty of safe-keeping are for example where the buyer is in either *mora debitoris* or *mora creditoris* or where the seller is in *mora debitoris*.

The Roman-Dutch position is confirmed that where the buyer is in *mora debitoris*, the seller will only be liable for damages caused by his intentional or grossly negligent conduct.⁴² The seller will be responsible for any damage whatsoever, even in the absence of fault on his part, where the seller is in *mora debitoris*.⁴³ *Mora creditoris* will, however, have no influence on his (the seller's) duty of safe-keeping.⁴⁴ As was the case

³⁵ Grotius 3 14 35. See also Floyd 468-469 and Van den Bergh 2008 635.

³⁶ *Frenkel v Ohlsson's Cape Breweries Ltd* 1909 TS 957 965.

³⁷ 1909 TS 957.

³⁸ 966.

³⁹ 966-968.

⁴⁰ 976.

⁴¹ Nagel *ea* 211.

⁴² *Ibid.* See also *Frumer v Maitland* 1954 3 SA 840 (A) 840.

⁴³ Nagel *ea* 211.

⁴⁴ *Ibid.*

in Roman-Dutch law the seller has to cede his action for damages to the buyer where the damage to the thing sold was caused by a third party for whom the seller is not responsible.⁴⁵ Kerr remarks that although descriptions of the standard of care have varied between *bonus paterfamilias*, a diligent man (person), a custodian or even a borrower, there is little difference between them.⁴⁶ The standard of care according to the writer is that of a *bonus paterfamilias*.⁴⁷ The buyer's remedies where the seller was negligent in the performance of his contractual duties (and the buyer is not guilty of breach himself) are cancellation of the contract and damages.⁴⁸

3. Doctrine⁴⁹ of the passing of benefit and risk

The doctrine of the passing of benefit and risk⁵⁰ (also referred to as the risk rule) applies where the thing sold was damaged or completely destroyed accidentally because of an Act of God⁵¹ and not due to the fault of any of the contracting parties. It also applies only from the date of conclusion of the contract until delivery of the thing sold.⁵² The risk of damage to the thing sold in this period will be on the owner (the seller of the thing sold) unless the sale is *perfecta*.⁵³ If the sale is *perfecta* the risk will be on the buyer.

The sale will be *perfecta* if the parties have the intention to buy and sell, the things sold as well as the purchase price are determined (fixed and sure) and the

⁴⁵ Voet 18 6 2. See also Kerr 160.

⁴⁶ *Ibid.*

⁴⁷ *Ibid* 160.

⁴⁸ *Idem* 160-161. See also *Fruimer v Maitland* 1954 3 SA 840 (A) 845.

⁴⁹ The doctrine is referred to as the doctrine of passing of risk (and benefit) by authors such as Nagel (Nagel *ea* 211) and others refer to it as the risk rule (Kerr 235-242) but both apply interchangeably for purposes of this discussion.

⁵⁰ The passing of risk doctrine. Hereinafter referred to as the doctrine of risk or the doctrine.

⁵¹ For example fire, floods earthquakes or war: Nagel *ea* 212. In today's modern South African society damage caused by mass strikes or riots may also fall in this category. See also Zimmermann & Visser 383 where the words destruction and deterioration are used in a wide sense and an act of expropriation of land by the State or the imposition of a tax on the object concerned is also included. Van den Bergh 2008 637: The imposition of excise duty is also considered to be a risk as well as *periculum creditoris est* where part-payment is in something other than money (eg transfer of fixed deposit certificates of a banking institution). Kerr 237: Apart from damages caused by *vis maior* or *casus fortuitous* also included are losses like the general deterioration caused by the passing of time, loss resulting from a defective container or theft. The writer (*Ibid*) also confirms that any loss resulting from the seller's failure to observe the required standard of care is excluded.

⁵² Nagel *ea* 211-212.

⁵³ *Poppe, Schunhoff and Guttery v Mosenthal & Company* 1979 Buch 91; *Taylor & Company v Mackie, Dunn & Company* 1879 Buch 166; *Schultz v Morton & Co* 1918 TPD 343; *Horne v Hutt* 1915 CPD 331; *Fitwell Clothing v Quorn Hotel* 1966 3 SA 407 (RA).

contract is not subject to a suspensive condition.⁵⁴ Where specific types of goods or future things⁵⁵ are sold, the type of thing will determine when it becomes determined (fixed and sure). For example, the object of an *emptio rei speratae*⁵⁶ will only become fixed after being measured or weighed. In case of an *emptio spei*⁵⁷ (due to it being an aleatory sale) the thing sold will become fixed as soon as the contract is concluded whilst in a generic sale⁵⁸ the *merx* will become fixed after individualisation.⁵⁹

In *Rex v Wilde*⁶⁰ the court determined that a sale was not *perfecta* until the goods were sorted, appropriated or fixed but that a valid contract of sale was concluded.⁶¹

The doctrine is part of the *naturalia* of the contract of sale and will apply unless it is changed or excluded *inter partes*.⁶² Not only accidental damages caused but also accidental benefits are regulated by the doctrine. The doctrine determines which one of the contracting parties will acquire an accidental advantage or benefit derived from the thing sold after conclusion of the contract but before delivery.⁶³ The principles that apply to the passing of risk will also apply to the passing of any benefit.⁶⁴ According to Nagel *ea*⁶⁵ advantages may consist of natural or accessory accrual of the object of sale (for example where a cow has a calf after conclusion but prior to delivery) or substitutive benefits which form an inherent part of the thing sold (for example to bring a civil action against a thief in the abovementioned period of time). Therefore any profit, benefit, accessions or fruits including rent accruing to the thing sold go to the buyer.⁶⁶ Van den

⁵⁴ Nagel *ea* 211. See also Van den Bergh 2008 636; Floyd 470; Zimmermann & Visser 383-384; Kerr 2235-236; De Wet & Van Wyk 308.

⁵⁵ For a comprehensive discussion of things sold see chapter 5.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ Nagel *ea* 211. See *Page NO v Blieden & Kaplan* 1916 TPD 606 612 where the court declared the sale imperfecta due to the fact the thing sold (mealies) were not weighed and therefore no *certum pretium* existed.

⁶⁰ 1949 2 SA 303 (E).

⁶¹ 307-308.

⁶² *Gengan v Pathur* 1977 1 SA 826 (D) 831. For the general application of the doctrine see also *Grobbelaar v Van Heerden* 1906 EDC 229 and *Botha v Mazeka* 1981 3 SA 191 (A) 194.

⁶³ Nagel *ea* 213

⁶⁴ *Ibid.*

⁶⁵ *Idem* 212.

⁶⁶ Van den Bergh 2008 636. The author also confirms that the risk rule is applicable to both movable and immovable goods 637 (fn 131).

Bergh comments that the buyer does not obtain a real right to these benefits and will only be entitled to them once they have been ceded to him by the seller.⁶⁷

The general principle regarding the doctrine was confirmed in *Gengan v Pathur*.⁶⁸ The court held that in the absence of an express agreement to the contrary in the deed of sale the risk passes to the buyer in accordance with the Roman law principle of *periculum est emptoris*.⁶⁹ In *casu* the parties included a clause in the agreement that the risk regarding the immovable property would only pass to the buyer upon registration.⁷⁰ James JP held that by agreeing to the clause the parties contracted out of the special rules of the common law relating to the passing of risk and as a result the general common law rule regarding loss of property through ill-fortune applies, namely, that of *res perit domino*.⁷¹ The court felt it necessary to consider what the legal position would be if an article which has been sold in circumstances where the risk does not pass to the buyer is damaged or partially destroyed before delivery. The court held that where there is total destruction of the *merx* through no fault of the seller, the contract comes to an end because of impossibility of performance.⁷² But where the *merx* is only partially destroyed the buyer has certain remedies at common law.⁷³ He is entitled to accept delivery of what is left of the thing sold as proper fulfilment of the contract and claim damages.⁷⁴ Alternatively he can refuse to take delivery of the *merx* and claim either specific performance or damages as a surrogate for performance.⁷⁵

In *Fitwell Clothing v Quorn Hotel*⁷⁶ delivery of the goods was refused by the buyer because the invoiced price was higher than the agreed price. The seller did not take back the goods and the buyer refused to take delivery. In the midst of the dispute the goods were completely destroyed by an accidental fire. Macdonald JA held that if a contractual right to return goods renders the contract *imperfecta*, a right to return the

⁶⁷ *Idem* 637. See also *Meintjies v Manley & Company* 1922 CPD 151; *Van Deventer v Erasmus* 1960 4 SA 100 (T); *Nel v Bornman* 1968 1 SA 498 (T).

⁶⁸ 830.

⁶⁹ See 1.2 above.

⁷⁰ 829.

⁷¹ 831.

⁷² 831. See also Nagel *ea* 38.

⁷³ *Ibid.*

⁷⁴ *Ibid.*

⁷⁵ 831. See also Nagel *ea* 38.

⁷⁶ 1966 3 SA 407 (RA) 407.

goods stemming from a breach of contract by the seller must have the same effect.⁷⁷ According to the court if there was a repudiation of the contract and the repudiation was accepted by the other contracting party, no contract was in existence when the goods were destroyed and the risk, in these circumstances, was clearly on the seller. If, on the other hand, the contract was still in existence, it was rendered *imperfecta* by the seller's breach and the buyer's refusal to acquiesce in that breach.⁷⁸

It is clear that if the buyer bears the risk and the thing is lost or completely destroyed, the seller is not compelled to perform but the buyer still has to pay the purchase price.⁷⁹ Van den Bergh argues that this seems to be contrary to the general principles of the law of contract as well as contrary to the *res perit domino* rule which determines that the owner bears the loss if his property is destroyed.⁸⁰

Ward J held in *Montgomerie v Rand Produce Supply Company*⁸¹ that where goods are sold *ad mensuram* and the quantity of the goods are unknown and completely destroyed before it could be weighed or counted, the risk remains with the seller and no obligation to pay can arise. The general rule therefore with regard to sales *ad mensuram* is that the goods only become determined upon being weighed, counted or measured because only then can the price be determined.⁸²

Wille & Millin⁸³ state that goods which have to be measured, weighed or counted out⁸⁴ comprise a very great proportion of all goods handled in the wholesale and retail trade. It is interesting to note that Floyd criticises the acceptance of Voet's discussion on the sale of wine as a sale *ad mensuram* by South African courts.⁸⁵ The writer argues that it is accepted without question, further qualification or further inspection. Floyd argues that Voet was of the opinion that where all the wine in a wine barrel is sold and there is a proviso that the price of the wine will be amended in accordance with the eventual amounts measured, the risk of the wine becoming stale or mouldy would be on

⁷⁷ 409.

⁷⁸ 410.

⁷⁹ Van den Bergh 2008 636.

⁸⁰ *Ibid.*

⁸¹ 1918 WLD 167 171-172. See also Floyd 470; Van den Bergh 2008 639 (fn 154).

⁸² De Wet & Van Wyk 309.

⁸³ 140.

⁸⁴ Also referred to as fungibles.

⁸⁵ Floyd 468.

the buyer from the date of conclusion of the agreement.⁸⁶ This does not coincide with the general opinion of Roman-Dutch writers with regard to a sale *ad mensuram*. Floyd is of the opinion that a sale *ad mensuram* is not in itself a conditional sale but is treated as such because of the analogy drawn between a sale *ad mensuram* and conditional sales.⁸⁷ Writers such as De Wet & Van Wyk on the other hand, argue that a sale *ad mensuram* is a conditional sale.⁸⁸ When looking at the approach of the courts with regard to suspensive conditions (discussed below), it seems that a sale *ad mensuram* is regarded as a sale subject to a suspensive condition.

4. Suspensive conditions

As mentioned earlier in this chapter⁸⁹ where the sale is subject to a suspensive condition the sale will only become *perfecta* and the risk will only pass to the buyer once the suspensive condition has been fulfilled. Where the thing is lost and the condition cannot be fulfilled the risk will remain with the seller.⁹⁰ Where the thing sold is damaged but not destroyed it will have no effect on fulfilment of the suspensive condition by the buyer and he will receive the damaged *merx*.⁹¹ Where the condition is not fulfilled because of the default or wrongful act of the buyer the risk will be his.⁹²

The arguments by De Wet & Van Wyk⁹³ who regard sales *ad mensuram* and generic sales as sales subject to suspensive conditions seems logical.⁹⁴ If the thing is damaged or the quality has decreased, it can still be weighed, counted, measured or individualised and it is still possible to determine a price. It is only when the thing sold is destroyed or lost that no price can be determined and the loss will remain with the seller.

⁸⁶ *Ibid.*

⁸⁷ *Idem* 468-469.

⁸⁸ De Wet & Van Wyk 349.

⁸⁹ 4.1.2 above. See also Van den Bergh 2008 634-635.

⁹⁰ Voet 18 6 2.

⁹¹ De Wet & Van Wyk 310.

⁹² Van den Bergh 2008 638.

⁹³ 310.

⁹⁴ See also the discussion in 2.1 above.

4.1 The fulfilment of a suspensive condition

Even though the parties may by agreement amend or regulate the applicability of the doctrine of risk, a sale subject to a suspensive condition is still relevant with regard to the performance of the parties, the completion of the sale by way of performance and of course to the question regarding which party will bear the risk (after conclusion of the contract but before delivery of the *merx*) where the suspensive condition is not fulfilled.

As discussed below, our courts have interpreted the exact moment when a suspensive condition is fulfilled and the meaning thereof in various ways.

Certainly one of the suspensive conditions dealt with most in practice in modern times is where a sale of immovable property is subject to the condition that the buyer has to apply for a bank loan at a banking institution for the whole or part of the purchase price within a certain period of time.

In *De Wet v Zeeman*⁹⁵ the deed of sale provided that the sale was subject to the acquisition by the buyer of a bond. Subsequently a mortgage-secured loan was granted but after the granting of the loan (prior to the registration of transfer of the house) the house was damaged by floods. As a result, the bank withdrew the loan and upon the bank's request, the buyer refused to take transfer of the property until the seller repaired the damages caused by the floods. The seller argued that the acquisition of a loan (the suspensive condition) had been fulfilled and that the buyer (through his own conduct or breach) prevented the registration of transfer.⁹⁶ The court held that the bank had revoked the loan on its own initiative, as it was entitled to do in terms of the conditions upon which it had been granted and revocation was of the bank's own accord (the buyer had nothing to do with it).⁹⁷

The court rejected the argument that the granting and the acquisition of a loan were synonymous and held that the mere fact that the loan had been approved did not mean that it had actually been acquired. The court, however, stressed the fact that each contract (as well as the language used) has to be considered on its own merits in order to establish the intention of the parties for purposes of determining whether or not the

⁹⁵ 1989 2 SA 433 (NC).

⁹⁶ 437.

⁹⁷ *Idem*.

suspensive condition has been fulfilled.⁹⁸ Therefore, it may be possible for the contract to provide that the mere approval of a loan would cause the fulfilment of the condition. *In casu* there was no agreement as to the passing of risk and the court held that because the suspensive condition was not fulfilled, the contract did not become *perfecta* and the risk remained with the seller.

In *Remini v Basson*⁹⁹ the court had to decide whether a suspensive condition was fulfilled where the buyer had to “raise a loan” in terms of the deed of sale and whether a letter from the building society that the loan had been approved on the terms stated in the application form was a fulfilment of the suspensive condition. The building society revoked the loan subsequent to the discovery of certain defects in the property. As a result the buyer argued that the revocation of the loan had caused the condition to fail.¹⁰⁰ The court held that the mere approval of the loan in principle did not result in the fulfilment of the suspensive condition.¹⁰¹ The mere approval of the loan did not bring about any legal relationship between the buyer and the building society.¹⁰² Such a relationship would only come into being once a valid loan agreement had come into being between the parties. The onus to prove that the condition had not been fulfilled rested on the buyer and on the facts, the court held that the buyer failed to discharge this onus and the suspensive condition was regarded as fulfilled.¹⁰³

4.2 The Corondimas principle: False doctrine of fictitious fulfilment

A contract of sale subject to a suspensive condition is binding immediately upon its conclusion and only the resultant obligation thereof is suspended.¹⁰⁴

However, it is argued that contracts of sale under suspensive conditions give rise to a false doctrine of fictitious fulfilment because of the incorrect interpretation of

⁹⁸ 438.

⁹⁹ 1993 3 SA 204 (N).

¹⁰⁰ 210.

¹⁰¹ 213.

¹⁰² *Ibid.*

¹⁰³ See Nagel *ea* 70-71. Criticism of the case and the interpretation thereof by the courts are discussed in 1.4.2 below.

¹⁰⁴ Mackeurtan’s 63. See also *Odendaalsrust Municipality v New Nigel Estate Gold Mining Co Ltd* 1948 2 SA 656 (O) 666; *Alexander & others v Opperman* 1952 1 SA 609 (O); *Peri-Urban Areas Health Board v Thomaselly & Another* 1962 3 SA 346 (A).

suspensive conditions by the courts.¹⁰⁵ It was held in a long line of cases that such sales only come into being when the suspensive condition is fulfilled and not when the contract is concluded.¹⁰⁶ This is also known as the *Corondimas* principle.¹⁰⁷ In summary the courts in such cases determined that an innominate contract comes into being and not a contract of sale. Many writers have criticised the said view and rule.¹⁰⁸ I agree with Lötz *ea*¹⁰⁹ that the reason for such a fictitious doctrine is the incorrect interpretation of Voet¹¹⁰ by the courts. This passage deals with the instance where the parties have contracted on the basis that ownership would never pass to the buyer, in which case no contract of sale comes into being. According the writers this point of view is correct, since the parties never had the intention to buy and to sell.¹¹¹

In the case of a suspensive condition, however, the parties still intend ownership to pass but only upon the happening of some uncertain future event. If the uncertain future event does not happen, the contract lapses with no further liability for either party.¹¹² However, a suspensive condition should have no bearing on the existence of a contract of sale.¹¹³ I agree with the writers' objections against the positive-law view of suspensive conditions in contracts of sale.¹¹⁴ A contract of sale still exists despite a suspensive condition, it is only the transfer of ownership (not the coming into being of the contract) which is suspended.¹¹⁵ The courts seem to confuse the obligatory act (making of the contract) and the real act (transfer of ownership).¹¹⁶ A suspensive condition postpones the claimability of the performance, not the legal obligation (contract of sale) itself.¹¹⁷

¹⁰⁵ *Corondimas v Badat* 1946 AD 548 559; *Remini v Basson* 1993 3 SA 204 (N) 210.

¹⁰⁶ *Fazi Booy v Short* 1882 2 301 (EDC); *Quirks Trustee v Assignees of Liddle & Co* 1885 3 322 (SC); *Corondimas v Badat* 1946 AD 548; *Palm Fifteen (Pty) Ltd v Cotton Tail Homes (Pty) Ltd* 1978 2 SA 872 (A); *Soja (Pty) Ltd v Tuckers Land and Development Corp* 1981 3 SA 314 (A); *Tuckers Land Development Corp v Strydom* 1984 1 SA 1 (A).

¹⁰⁷ Derived from *Corondimas v Badat* 1946 AD 548 559.

¹⁰⁸ *Otto* 1981 225 & 369; *Mostert ea* 231.

¹⁰⁹ *Lötz ea* 71.

¹¹⁰ 18 1 26.

¹¹¹ *Lötz ea* 71.

¹¹² *Ibid.*

¹¹³ *Ibid.*

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid.*

Although the courts have criticised the application of the *Corondimas* principle, they nevertheless follow it based on the law of precedent. In *Tuckers Land and Development Corporation (Pty) Ltd v Strydom*¹¹⁸ the court criticised the *Corondimas* approach and held it to be directly in conflict with the common law and indicated that it should not be followed.¹¹⁹

The court held in *Melamed and Another v BP Southern Africa (Pty) Ltd*¹²⁰ that the agreement between the parties became effective immediately but its operation was suspended pending fulfilment of the condition. Whether the court should conclude that the contract of sale came about on fulfilment of the condition in accordance with the *Corondimas* principle was of no importance *in casu* because it was clear that the agreement between the parties became binding immediately, only its effect was suspended.¹²¹ The court also referred to the criticism of the *Corondimas* principle in the *Tuckers Land* case as discussed above.¹²²

In *Equistock Group CC t/a Autocity Motor Holdings v Mentz*¹²³ the court held that the payment of the balance of the purchase price by means of a cheque qualified as a suspensive condition.¹²⁴ The effect thereof is that no contractual rights had vested pending fulfilment of such a suspensive condition. Despite criticism of the *Corondimas* principle, the court considered itself bound thereto because of the precedent system.¹²⁵ Lötz *ea* criticise the court in determining that the final payment of the buyer was a suspensive condition.¹²⁶ It is argued that although payment by means of a cheque is only a conditional payment (that is, depending on the honouring of the cheque by the drawee bank) it is uncertain whether in the context of this case it can be seen as a “true” suspensive condition. Furthermore, the clause reserving ownership can also not be seen as a suspensive condition.¹²⁷ I agree with the writers that a contract comes to an end by operation of law upon non-fulfilment of a suspensive condition and that in such a

¹¹⁸ 1984 1 SA 1 (A).

¹¹⁹ 16.

¹²⁰ 2000 2 SA 614 (W) 626.

¹²¹ 626.

¹²² 626-627.

¹²³ [2004] 2 All SA 46 (T).

¹²⁴ 49.

¹²⁵ 49-50.

¹²⁶ 73. See also Nagel & Lötz 2004 528-533.

¹²⁷ *Ibid.*

case neither party has to deliver performance and each party is entitled to claim back everything that has been performed already.¹²⁸

In the most recent cases,¹²⁹ the courts, despite noting the criticism in this regard, have not rejected the *Corondimas* principle. This is to be regretted. However, because of the courts' strict adherence to principle of *stare decisis* it is doubtful whether this will happen in the near future. In *Diggers Development (Pty) Ltd v City of Matlosana and another*¹³⁰ the court upheld the *Corondimas* principle.¹³¹ The court held that the key impact of the *Corondimas* principle concerns the interpretation of legislation wherein terms such as "contract of sale" or "sale" are used and that it sustained no practical significance.¹³²

According to the court it follows that although a sale subject to a suspensive condition is characterised as not being a "sale", or as an "*imperfecta* sale", no rationale exists as to why the common law consequences should not be applied.¹³³ Nagel & Lötzt¹³⁴ criticise the courts' findings. The writers state that it would be instructive to see whether the *Corondimas* principle will be able to pass constitutional muster and expresses the hope that the appellant *in casu* approaches the Constitutional Court along the lines made in argument by its counsel.¹³⁵

5. Lay-by agreements

Sharrock¹³⁶ describes a lay-by agreement as a sale of goods in which the supplier agrees to accept payment for the goods in periodic instalments and to hold the goods until the consumer has paid the full purchase price. Otto argues that lay-by sales are not sales subject to suspensive conditions,¹³⁷ the reason being that performance is not

¹²⁸ *Ibid.*

¹²⁹ *Rockbreakers and Parts (Pty) Ltd v Rolag Property Trading (Pty) Ltd* 2010 2 SA 400 (SCA) 41; *Paradyskloof Golf Estate v Stellenbosch Municipality* 2011 2 SA 525 (SCA) 532-533.

¹³⁰ [2012] 1 All SA 428 (SCA).

¹³¹ For a full case discussion and criticism of the case see Nagel & Lötzt 2012 1-8. The writers also include a discussion of the compliance with statutory provisions where a suspensive condition is present (4-5).

¹³² 431.

¹³³ *Ibid.*

¹³⁴ Nagel & Lötzt 2012 6-8.

¹³⁵ *Idem* 7-8.

¹³⁶ 275.

¹³⁷ Otto 1992 74.

subject to an uncertain future event.¹³⁸ Prior to the introduction of the Sales and Services Matters Act,¹³⁹ lay-by's were regulated by the common law and seeing as the latter Act has been repealed by the CPA, the common law position prior to the introduction of the Act will apply where the CPA is not applicable.

Interestingly enough the position with regard to the doctrine of benefit and risk as well as the degree of safe-keeping of the goods have always been regulated by the common law. The reason for this is that the Sales and Services Matters Act as well as its regulations were silent on these matters.¹⁴⁰ Lay-by's are *perfecta* sales from the time of conclusion of the contract¹⁴¹ unless the goods are not determined but merely determinable at the time of conclusion of the contract.¹⁴² The goods will only become determined once they are, for example, individualised.¹⁴³ The degree of care and skill resting on the seller is that of a reasonable person.¹⁴⁴ Although any advantage from the goods prior to delivery will accrue to the buyer, Otto opines that the position in most cases is that the buyer still needs to pay the purchase price for goods destroyed or damage caused by *vis maior* or an act of God.¹⁴⁵ He also discusses the discrepancies with regard to lay-by's in practice as well as the need for proper legislation to prevent them.¹⁴⁶

C. LEGAL POSITION IN TERMS OF THE CONSUMER PROTECTION ACT 68 OF 2008

1. The consumer's fundamental right to choose

As discussed earlier,¹⁴⁷ "goods" governed by the CPA are given a very wide definition in section 1 of the Act. Part D of Chapter 2 sets out the consumer's fundamental consumer right to choose. Section 18 gives the consumer the right to choose or examine goods. Where goods are displayed by a supplier, the consumer will only be liable for damage

¹³⁸ *Ibid.*

¹³⁹ 25 of 1964.

¹⁴⁰ Otto 1992 76.

¹⁴¹ *Idem* 73. See also Otto 1980 250.

¹⁴² Otto 1992 74.

¹⁴³ Otto 1980 250-251.

¹⁴⁴ *Idem* 250. See also Mostert *ea* 113.

¹⁴⁵ Otto 1992 76.

¹⁴⁶ *Idem* 76-80, 82.

¹⁴⁷ See chapter 5.

caused to such goods by the consumer's gross negligence or recklessness, malicious behaviour or criminal conduct.¹⁴⁸ Section 18(2) further provides that where goods are sold from open stock, the consumer has the right to select or reject any particular item from that stock before completing the transaction.¹⁴⁹ If the consumer has agreed to purchase goods solely on the basis of a description or sample, or both, the goods delivered to the consumer must in all material respects and characteristics correspond to that which an ordinary alert consumer would have been entitled to expect based on the description or on a reasonable examination of the sample, as the case may be.¹⁵⁰ If a supply of goods is by sample, as well as by description, it is not sufficient that any of the goods correspond with the sample if the goods do not also correspond with the description.¹⁵¹

Section 19 deals with a consumer's rights with respect to the delivery of goods or the supply of services. Section 19¹⁵² does not apply to franchise agreements or a transaction in terms of section 46 of the ECTA.¹⁵³ Unless the parties agree otherwise it is an implied condition of every transaction for the supply of goods or services that the supplier is responsible to deliver the goods or perform the services and goods to be delivered remain at the supplier's risk until the consumer has accepted delivery of them, in accordance with section 19.¹⁵⁴ When a supplier tenders delivery to a consumer of any goods, the supplier must, on request, allow the consumer a reasonable opportunity to examine those goods for the purpose of ascertaining whether the consumer is satisfied that the goods are of a type and quality reasonably contemplated in the agreement, and meet the tests set out in section 18(3) and (4). In the case of a special-order agreement the goods should reasonably conform to the material specifications of the special order.¹⁵⁵

Section 20 provides that a consumer's right to return goods is in addition to the right to return unsafe or defective goods, contemplated in section 56; or any other right

¹⁴⁸ S 18(2).

¹⁴⁹ S 18(3).

¹⁵⁰ S 18(3).

¹⁵¹ S 18(4).

¹⁵² S 19 (1).

¹⁵³ 25 of 2002.

¹⁵⁴ S 19(2)(c).

¹⁵⁵ S 19(5).

in law between a supplier and consumer to return goods and receive a refund.¹⁵⁶ The consumer may return goods to the supplier, and receive a full refund of any consideration paid for those goods, if the supplier has delivered goods that the consumer did not have an opportunity to examine before delivery, and the consumer has rejected delivery of those goods for any of the reasons contemplated in section 19(5).¹⁵⁷ The consumer will lose his right to return the goods where the goods have been partially or entirely disassembled, physically altered, permanently installed, affixed, attached, joined or added to, blended or combined with, or embedded within, other goods or property.¹⁵⁸ Upon return of any goods in terms of section 20, the supplier must refund to the consumer the price paid for the goods, less any amount that may be reasonably charged for the use of the goods during the time they were in the consumer's possession, unless they are goods that are ordinarily consumed or depleted by use, and no such consumption or depletion has occurred; or any consumption or depletion of the goods, unless that consumption or depletion is limited to a reasonable amount necessary to determine whether the goods were acceptable to the consumer.¹⁵⁹

Regulation 44(3)(g) to the CPA provides that a term of a consumer agreement is presumed to be unfair if it has the purpose or effect of modifying the normal rules regarding risk to the detriment of the consumer. It is important to note that regulation 44 only applies to a natural person or persons construed by the meaning of regulation 44(1) which refers to an individual consumer or individual consumers who entered into the agreement for purposes unrelated to his business or profession.¹⁶⁰

2. Supplier's accountability to consumers

Section 62 regulates the position where goods are bought in terms of a lay-by agreement. Section 62 provides that the particular goods remain at the risk of the supplier until the goods have been delivered to the consumer. In terms of section 62(3) a failure to supply the goods is not "due to circumstances beyond the supplier's control" if the shortage results partially, completely, directly or indirectly from a failure on the part

¹⁵⁶ Ss 20(1)(a) & (b).

¹⁵⁷ S 20(2)(b).

¹⁵⁸ S 20(3)(b).

¹⁵⁹ Ss 20(5) & (6).

¹⁶⁰ See also chapter 4 Parts C & D.

of the supplier to adequately and diligently carry out any ordinary or routine matter pertaining to the supplier's business.

Section 65 expressly provides that a supplier must hold and account for the consumer's property and must not treat that property as being the property of the supplier in the handling, safeguarding and utilisation of that property and must exercise the degree of care, diligence and skill that can reasonably be expected of a person responsible for managing any property belonging to another person.¹⁶¹ The supplier is also liable to the owner of the property for any loss resulting from a failure to comply with the above care, diligence and skill.¹⁶²

Section 65(3) provides that a person who assumes control of a supplier's property as administrator, executor or liquidator of an estate has a duty to the consumer to diligently investigate the circumstances of the supplier's business to ascertain the existence of any money or other property belonging to the consumer and in the possession of the supplier; and to ensure that any such money or property is dealt with for the consumer's benefit in accordance with this section. Such a person is furthermore liable to the consumer for any loss, unless that person has acted in good faith; and without knowledge of the existence of the consumer's interest.¹⁶³

D. EVALUATION

1. The consumer's right to choose

1.1 Consumer's right to choose or examine goods, goods sold by description or sample and suspensive conditions

As mentioned in chapter 5,¹⁶⁴ the wording of section 18(3) includes both the sale of future goods and generic sales where goods are sold by sample or by description. The example of a local producer and supplier who sells grain-feed to the surrounding farmers comes to mind. Where next year's crop of grain is sold by description or where tons of grain are sold by way of a sample, such a sale is subject to the uncertain future event that the goods delivered to the consumer must in all material aspects correspond

¹⁶¹ S 65(1).

¹⁶² S 65(2).

¹⁶³ S 65(3).

¹⁶⁴ Chapter 5 Part D 2.

to that which an ordinary alert consumer would have been entitled to expect.¹⁶⁵ The examples given are clearly suspensive conditions.

Where goods are sold by sample as well as description the goods must correspond with both.¹⁶⁶ Section 19(5) qualifies sales by sample or description further by providing that where a supplier tenders delivery, the supplier must (on request)¹⁶⁷ provide the consumer with a reasonable opportunity to examine the goods. The purpose of the section is to ascertain whether the goods are of a type and quality firstly reasonably contemplated in the agreement but secondly also of a type of quality that an ordinarily alert consumer would have been entitled to expect.¹⁶⁸ Describing the ordinary alert consumer is not a simple task for the definition may vary in accordance with the type of agreement and the type of consumer.¹⁶⁹ Whether or not the buyer (consumer) will accept delivery of the goods and whether or not the goods will comply with the applicable standards are uncertain and should therefore also be regarded as suspensive conditions. Because the consumer is also given the right¹⁷⁰ to reject the goods should they not comply with section 19(5)¹⁷¹ it can be assumed that the sale of goods by sample or description are conditional sales.

Contrary to the common law doctrine of risk, should any goods become damaged or destroyed after they have been examined, rejected and returned, the supplier will incur the risk and expense thereof.¹⁷²

It should also be noted that although the provisions regarding delivery also forms part of sections 19 and 20, delivery in the case of consumer sales is discussed extensively as part of chapter 9.

¹⁶⁵ S 18(3).

¹⁶⁶ S 18(4).

¹⁶⁷ S 18(5); It would seem to be a contradiction by the legislature to compel the supplier to give the consumer an opportunity to examine the goods one the one hand but only compelling the supplier to give the consumer such an opportunity where the consumer so requests. In practice it is most unlikely that suppliers would of their own accord allow examination of the goods and would inform the consumer of the right in terms of this section.

¹⁶⁸ S 19(5)(a).

¹⁶⁹ This was discussed earlier as part of the requirements relating to formalities and the use of plain language. See chapter 7.

¹⁷⁰ S 20.

¹⁷¹ S 20(2)(b).

¹⁷² S 20(4)(b).

1.2 Amendment of the common law doctrine of risk

The fact that parties may contract out of or alter the application of the doctrine of risk is not a new phenomenon.¹⁷³ However, where the parties do not exclude or amend the application of the doctrine, the CPA has changed the common law principles discussed earlier. Where goods are sold in terms of the CPA and parties have not agreed to the contrary, the risk will *remain*¹⁷⁴ on the supplier even where the sale has become *perfecta* prior to the consumer's acceptance of delivery in terms of the contract.¹⁷⁵

The Act regards the following as acceptance of delivery; where the buyer expressly or implicitly communicates his acceptance to the seller, where the goods are delivered and the buyer does anything in relation to the goods inconsistent with the seller's ownership or after a lapse of time the buyer does not reject the goods or indicates this to the seller.¹⁷⁶

Taking occupation of immovable property prior to registration would not be regarded as an act inconsistent with the seller's ownership, while the sale by the buyer of any property or goods will be inconsistent with the seller's ownership.

Even where parties do agree to exclude the doctrine of risk and the buyer for example bears the risk for the damage or destruction of the goods, such an agreement or clause will be void where goods were sold by sample or description. The implied duty on the seller (supplier) to supply goods that in all material respects and characteristics correspond with the sample or description remains on the seller¹⁷⁷ and the consumer still has a right to reject such goods after examination. The implied warranty of quality that forms part of the consumer's right to fair value, good quality and safety¹⁷⁸ supports this argument.¹⁷⁹

Jacobs *ea*¹⁸⁰ comment that by looking at sections 18, 19 and 20 of the Act and the extensive consequences of incorrect delivery, the supplier is well advised to monitor delivery diligently in future.

¹⁷³ See B 1.1-1.4 above.

¹⁷⁴ Own emphasis.

¹⁷⁵ Ss 19(1) & 19(3).

¹⁷⁶ Ss 19(4)(a) & (b).

¹⁷⁷ S 18(5).

¹⁷⁸ Ss 55 & 56. See also the detailed discussion in chapter 11.

¹⁷⁹ Jacobs *ea* 327.

¹⁸⁰ 327.

1.2.1 Contradictory provisions regarding consumers who are natural persons: Section 19(2) *versus* regulation 44(3)(g)

Regulation 44(3)(g) is contradictory to the provisions of section 19(2). Section 19(2) provides that unless the parties agree otherwise, the risk will be on the supplier. Regulation 44(3)(g) states however that where the supplier modifies the rules regarding distribution of risk to the detriment of the consumer, such a term is presumed to be unfair. A provision in an agreement where the supplier and the consumer agree that the risk will transfer to the consumer upon conclusion of the contract (even if delivery has not been accepted by the consumer) has the potential of being unfair unless the supplier can prove the contrary.

Sections 4(3) and 4(4)(a) of the CPA can be put forward to substantiate the argument that regulation 44(3)(g) rather than section 19(2) should take precedent in the case of the distribution of risk in consumer sales where the consumer is a natural person.¹⁸¹ The result could be that such a provision would be unfair and should not apply; even if the parties agree thereon in terms of section 19(2).

Section 4(3) states that if any provision of the CPA can reasonably be construed to have more than one meaning, the Tribunal or court must prefer the meaning that best promotes the spirit and purposes of the Act, and will best improve the realisation and enjoyment of consumer rights generally, and in particular by persons contemplated in section 3(1)(b) (vulnerable consumers).

To the extent consistent with advancing the purposes and policies of the CPA, section 4(4)(a) provides that, the Tribunal or court must interpret any standard form, contract or other document prepared or published by or on behalf of a supplier, to the benefit of the consumer so that any ambiguity that allows for more than one reasonable interpretation of a part of such a document is resolved to the benefit of the consumer.

An interpretation to the benefit of the consumer would therefore be one where the distribution of risk to the detriment of the consumer is deemed to be unfair and should be precluded from a consumer sale where the natural person is a consumer.

In determining whether or not a provision distributing the risk to the detriment of a consumer is unfair, the Tribunal or court will also have to consider the provisions of

¹⁸¹ See the discussion of the interpretation of statutes by Du Plessis paras 290-293; 311-320.

section 49 of the CPA. Section 49 forms part of the consumer's fundamental right to fair, just and reasonable terms and conditions. A comprehensive discussion of section 49 and the fundamental right of a consumer to fair, just and reasonable terms and conditions, falls outside the scope of this thesis.¹⁸²

Section 49(1) provides that any provision of a consumer agreement that purports to:

- a. limit in any way the risk or liability of the supplier or any other person;
- b. constitute an assumption of risk or liability by the consumer;
- c. impose an obligation on the consumer to indemnify the supplier or any other person for any cause; or
- d. be an acknowledgement of any fact by the consumer,

must be drawn to the attention of the consumer in a manner and form that satisfies the formal requirements of sections 49(3), (4) and (5).

Section 49(3) provides that a provision contemplated in section 49(1) above, must be written in plain language, as described in section 22.¹⁸³

The fact, nature and effect of the provision or notice contemplated in section 49(1) must be drawn to the attention of the consumer in a conspicuous manner and form that is likely to attract the attention of an ordinarily alert consumer,¹⁸⁴ having regard to the circumstances; and before the earlier of the time at which the consumer:

- a. enters into the transaction or agreement, begins to engage in the activity, or enters or gains access to the facility; or
- b. is required or expected to offer consideration for the transaction or agreement.

The consumer must be given an adequate opportunity in the circumstances to receive and comprehend the provision or notice as contemplated in section 49(1).

The effect of the provisions of section 49 on the distribution of risk by way of agreement is two-fold.

¹⁸² See also chapter 4 Part D 1.2.

¹⁸³ See chapter 7 for a comprehensive discussion on plain language in consumer sales.

¹⁸⁴ S 49(4). For a comprehensive discussion on an ordinary alert consumer see chapter 7.

Firstly in the case where a consumer is also a natural person, the supplier would have to prove that:

- a. the provision in the consumer agreement distributing the risk to the detriment of the consumer is not unfair (in terms of regulation 44(3)(g));
- b. such a provision in the consumer agreement is in plain language (in terms of section 22);
- c. that the nature and effect of the provision was drawn to the attention of the consumer in a conspicuous manner and form (the test would be if it would have attracted the attention of an ordinarily alert consumer); and
- d. the consumer had adequate opportunity in the circumstances to receive and comprehend the provision.

Secondly, even if the consumer was a juristic person¹⁸⁵ within the application of the Act,¹⁸⁶ and the parties agreed on the distribution of risk in a consumer sale agreement, the provisions of section 49 and the requirements of proof as set out above, would still apply. The only requirement that would not have to be proven by the supplier is that of unfairness in terms of regulation 44(3)(g).

2. Seller's duty of safe-keeping and lay-by agreements

Contrary to section 19(3) (where the parties may agree otherwise), the risk of goods sold in terms of a lay-by agreement being destroyed or damaged will be on and remain on the supplier (seller) for the whole period that the goods remain in his possession.¹⁸⁷ This is an amendment of the common law position and the parties are not permitted to make any agreement to the contrary. I agree with Jacobs *ea*¹⁸⁸ that the result of section 62 will be that suppliers will have to insure goods sold under lay-by's until the consumer takes delivery thereof. Even though this may be cumbersome for the supplier and may

¹⁸⁵ See s 1 CPA def of juristic person: "includes partnerships, trusts and body corporates".

¹⁸⁶ See s 6 (threshold determination): juristic persons with an asset value or annual turnover of more than R2 million will fall outside the scope of application of the Act.

¹⁸⁷ S 62(1)(b).

¹⁸⁸ 390.

even deter growth in certain industries, the discrepancies of the past necessitate such a provision.¹⁸⁹

One could also argue that the instalments that the consumer has to pay will increase because of the insurance taken out on the goods (a disadvantage to the consumer and clearly an unfortunate and unforeseen result).

With regard to the duty of the supplier to hold account of the consumer's property,¹⁹⁰ Jacobs *ea*¹⁹¹ pose the question whether a trust account should be opened to keep the monies of the consumer separate from that of the supplier as directed by the Act.¹⁹² This will also have the unforeseen and negative effect of increasing the instalments payable by the consumer to include the administration costs of such accounts. The question also arises whether the interest on the amounts in such an account is payable to the consumer or whether the seller may keep it to cover the relevant bookkeeping and bank fees.¹⁹³ I agree with Jacobs *ea*¹⁹⁴ that this subsection places an unreasonable administrative burden on the supplier.

The degree of care, diligence and skill will differ between situations where the supplier manages the property or where another person manages the property of the consumer.¹⁹⁵ Jacobs *ea*¹⁹⁶ state that the care, diligence and skill expected of a person managing the property¹⁹⁷ belonging to another person could vary between a financial advisor, a trustee, administrator, executor or liquidator. I am of the opinion that the intention of the legislator was to convey a different degree of skill on ordinary suppliers where the suppliers themselves take possession of the goods¹⁹⁸ than on a professional person who assumes control of a supplier's property.¹⁹⁹ Persons who assume possession of the supplier's property in terms of section 65(3) of the CPA (such as administrators, executors or liquidators of an estate) are discussed under a separate

¹⁸⁹ Otto 1992 75 where the writer discusses the discrepancies of lay-by's and also the practical problems to safeguard such goods whilst they are in the possession of the seller.

¹⁹⁰ Ss 62(1)(a) & 65.

¹⁹¹ 394.

¹⁹² S 65(2).

¹⁹³ 394.

¹⁹⁴ 395.

¹⁹⁵ Ss 65 (2) & (3).

¹⁹⁶ 395.

¹⁹⁷ S 65(3).

¹⁹⁸ S 65(2).

¹⁹⁹ S 65(3).

subsection because the degree of knowledge, care and skill expected from those persons is higher than that of a normal supplier. Unfortunately a trustee is not mentioned and Jacobs *ea* argue that this might have been an oversight by the legislature.²⁰⁰

E. COMPARISON

1. Scotland

1.1 *Passing of risk in consumer agreements*

The common law rules with regard to the doctrine of benefit and risk, the sale becoming *perfecta* as well as suspensive conditions apply almost identically to the Scottish position regarding the sale of immovable goods or heritable property.²⁰¹ The party guilty of breach will be liable and bear the risk of damage or loss of the goods if such damage or loss was caused by his breach of the sale agreement.²⁰²

The focus of the comparison is, however, on the passing of risk in consumer contracts as regulated by the SOGA²⁰³ and the interpretation thereof by the courts. Though SOGA regulates the sale of movable goods, section 20(4) deals specifically with consumer sale contracts. The goods will remain at the seller's risk until they are delivered to the consumer. Section 32(4) provides that where the goods are in transit to the consumer the risk will remain with the seller. It seems that even where goods are destroyed or damaged prior to delivery under a consumer contract in the case of *vis maior* the risk will remain with the seller.

Ervine states that the result of these legislative changes with regard to consumer sales is that until the goods are delivered to a consumer, the risk is on the seller.²⁰⁴

Where goods are sold by description the courts have also included the examination of the goods as part of the definition of "description"²⁰⁵ and it is an implied term that the goods will correspond with the description.²⁰⁶ In the case of goods sold by

²⁰⁰ 395.

²⁰¹ Evans-Jones & Smith 296-300.

²⁰² Dobson & Stokes 27. See also Evans-Jones & Smith 296.

²⁰³ Sales of Goods Act 1979.

²⁰⁴ Ervine 46. The author does, however, mention that consumers who bought second-hand goods as individuals at an auction will not be protected.

²⁰⁵ *Beale v Taylor* [1967] W.L.R 1193.

²⁰⁶ S 13 SOGA.

sample it is an implied term that the bulk of the goods will correspond with the sample in quality. The goods bought by sample must be free from any defect which could make their quality unsatisfactory and not apparent on reasonable examination of the sample.²⁰⁷ Similar to the provision regarding the right to reject goods in South African law²⁰⁸ the consumer (buyer) will lose his right to reject in terms of section 35²⁰⁹ where the goods are accepted by him. The buyer will have accepted the goods where the buyer has intimated such acceptance to the seller, or on receiving delivery the buyer does an act inconsistent with the seller's ownership or after a lapse of reasonable time the buyer retains the goods without intimating his rejection to the seller.²¹⁰ Contrary to the CPA in South Africa, even though the buyer may still reject the goods after delivery, the right to reject is not a suspensive condition where goods are bought by description or sample.²¹¹

Thus, where the buyer purchased goods as a consumer, the risk will remain with the seller until delivery. The question to be asked is simply whether the goods have been delivered to the consumer.²¹² Dobson & Stokes²¹³ are of the opinion that the abolition of the *res perit domino* rule in consumer contracts is a very sensible change in direction and constitutes a more accurate reflection of when consumers themselves are expected to be liable for any loss or deterioration of the goods. To explain this point further the writers give the example of consumers who purchase groceries online and those groceries deteriorate in transit.²¹⁴ The risk of the goods deteriorating in transit will be borne by the seller.²¹⁵ The writers also state that many retailers already operated a similar policy prior to the amendment of the Act for greater consumer protection.²¹⁶

The writers also make the valid point that even where future goods or unascertained goods were the subject of a consumer sale, the risk will still remain with

²⁰⁷ S 15(2) SOGA.

²⁰⁸ S 20 CPA.

²⁰⁹ SOGA.

²¹⁰ S 35 SOGA. See also chapter 9 Part E 1 regarding the acceptance of goods.

²¹¹ Black 180.

²¹² Dobson & Stokes 46.

²¹³ *Ibid.*

²¹⁴ *Ibid.*

²¹⁵ S 32(4) SOGA. This section was aimed at preventing any disputes in practice with regard to delivery of goods to a carrier. It can no longer be argued that delivery of goods to a carrier is not delivery of the goods to a buyer (consumer) in terms of SOGA.

²¹⁶ Dobson & Stokes 46 fn 67.

the seller until acceptance.²¹⁷ This reform in consumer sale agreements is commended by the writers and removes many uncertainties with regard to goods that are only determinable at the time of conclusion of the contract and goods subject to suspensive conditions.²¹⁸ The argument by the writers that a seller can reasonably be expected to insure his interest in the goods, whereas the consumer cannot, is also supported.²¹⁹

The position of unascertained goods bought from an identified bulk is regulated in great detail by SOGA²²⁰ and has caused many headaches in practice. When looking at the goods described in terms of the Act it would seem to include generic sales and the sale of future goods.²²¹ These types of goods are not identified or agreed upon at the time of making the contract and in the absence of contractual intention, the exact time of transfer of ownership would have to be determined. This could be at any time between conclusion of the contract and the actual delivery of the goods depending on business practice and the nature of the goods in question.²²² As discussed earlier²²³ all of these uncertainties have been done away with in consumer sale agreements where the risk will remain on the seller until actual delivery.²²⁴

1.2 Consumers and certain types of goods

Ervine discusses a number of situations in terms of consumer sales that deserve attention.²²⁵ Section 6 of SOGA regulates the sale of specific goods and provides that where specific goods perished without the knowledge of the seller at the time the contract was concluded, the contract is void.²²⁶ The writer gives the example where the buyer and the seller agreed that the seller will sell a specific vehicle identified by make

²¹⁷ Dobson & Stokes 46.

²¹⁸ *Ibid.*

²¹⁹ *Idem* 46 fn 70.

²²⁰ S 20(A).

²²¹ Dobson & Stokes 47-48.

²²² *Idem* 46.

²²³ See previous paragraph.

²²⁴ Dobson & Stokes 46.

²²⁵ Ervine 47.

²²⁶ *Ibid.*

and registration number.²²⁷ If, unknown to the seller, the vehicle was destroyed in a fire on the day before the contract was made, the contract will become a nullity.²²⁸

Similarly, where section 7 of SOGA applies, and for example a consumer buys a vehicle which requires some work to be done on it before it is to be collected some days later, and (through no fault of the seller) the vehicle is stolen or destroyed in a fire, the sale is void.²²⁹

1.3 Safe-keeping of the thing sold

As mentioned in the introductory paragraph of this chapter,²³⁰ SOGA makes no specific mention of the duty of the seller to take care of the thing sold until delivery. It is suggested that with the sale of non-consumer goods the common law principles will apply and the seller must take care of the goods diligently. When dealing with consumer sales in terms of the Act the implied duties on the seller that the goods delivered must be of satisfactory quality and without any defects seems to include an obvious duty on the seller to take care of the goods until the date of delivery to comply with the implied legislative duties of quality.²³¹ It would also seem that the concept of lay-by agreements do not form part of consumer agreements in Scotland.²³²

2. Belgium

2.1 Impossibility of performance

2.1.1 General

Herbots states that in Belgian law the effect of changed or unforeseen circumstances on a contract of sale has traditionally been regulated by the doctrine of *vis maior*.²³³ Unless one of the parties has assumed the risk of impossibility, no liability is incurred for non-performance due to an event that could not have been foreseen by the parties at the

²²⁷ *Ibid.*

²²⁸ *Ibid.*

²²⁹ *Ibid.*

²³⁰ See Part A paragraph 1: Introduction.

²³¹ Ss 13-15 SOGA.

²³² See Part A paragraph 1: Introduction.

²³³ Herbots 352.

time of conclusion of the contract. It is interesting to note that historically difficulties of performance due to striking employees or war have not been taken into account.²³⁴

According to the writer, case law indicates a tendency of the Belgian courts to take the requirement of impossibility more relatively, interpreting it to mean practically impossible either naturally or humanly speaking.²³⁵

In terms of the general principles of the law of contract in Belgium, permanent impossibility of performance caused by *vis maior* means that the debtor is released from his obligation.²³⁶ Though he is not liable for his non-performance, he cannot claim counter-performance and if the counter-performance has already been made, he will be bound to make restitution.²³⁷ The situation is, however, different when dealing with the sale of goods as ownership transfers upon conclusion of the agreement. The sale of goods is the focus of this discussion.

2.1.2 Loss of subject matter

Article 1302 of the Civil Code provides that an obligation may be extinguished by the loss of its subject matter. The article provides that where the thing sold perishes, is put out of gainful circulation, or is lost in a manner which is absolutely unknown, the obligation is extinguished if the thing perished or was lost without the fault of the debtor, and before he was in default. The article goes further to provide that even when the debtor is in default and (the thing is lost but not due to a fortuitous event) the obligation is extinguished in the case where the thing would have perished similarly in the hands of the creditor if it had been delivered. The latter agreement is void due to supervening impossibility. A debtor is required to prove a fortuitous event which he alleges has occurred. Herbots explains that the loss may either be the destruction of the subject matter in a physical sense or its disappearance as an item of commerce.²³⁸ If the thing

²³⁴ *Ibid* where the writer states that the same applies to the sudden increase in the prices of products or the sudden change in the economic situation.

²³⁵ *Ibid*.

²³⁶ *Ibid*.

²³⁷ *Idem* 186.

²³⁸ *Idem* 184 where the writer gives the example of a commodity that is requisitioned and dealings in it become illegal.

is lost without the fault of the debtor, his obligation is distinguished provided he can prove that the loss was due to an “irresistible force which occasioned the loss”.²³⁹

In the case of a sale the situation is different. Because ownership is transferred upon conclusion of the contract in terms of Belgian law,²⁴⁰ the buyer will still be obliged to pay the purchase price as owner of the destroyed goods even though the seller is not obliged to deliver it.²⁴¹ The only exceptions are where the parties have specifically agreed to postpone the transfer of title,²⁴² or the goods sold are only determinable at the time of conclusion of the contract and will only become determined once they have been individualised.²⁴³

2.2 Contractual allocation of risk

Parties may regulate and restrict the risk of damages caused by *vis maior* by way of agreement.²⁴⁴ Herbots gives the example of businessmen who include war and the fluctuation of currency clauses in their agreements.²⁴⁵

2.3 The passing of risk

The Civil Code adopts the principle of *res perit domino*²⁴⁶ in contracts of sale in terms of article 1138.²⁴⁷ This means that the risk passes to the buyer the moment the contract is concluded even if there is no delivery yet.²⁴⁸ The only exception to this rule is where the goods are not yet determined at the time of conclusion of the contract or where the parties depart from the rule in terms of the Civil Code.²⁴⁹

Risk is regarded as any accidental loss, destruction or deterioration of the goods.²⁵⁰ Cauffman & Sagaert explain that the general rule does not apply if parties

²³⁹ *Ibid.*

²⁴⁰ See chapter 9 for a comprehensive discussion.

²⁴¹ A 1138 Civil Code.

²⁴² Herbots 184.

²⁴³ For example the sale of future goods or generic sales.

²⁴⁴ Herbots 185.

²⁴⁵ *Ibid.*

²⁴⁶ Cauffman & Sagaert 249: The creditor of the obligation will bear the risk.

²⁴⁷ Dekkers 72.

²⁴⁸ Herbots 230. See also Dekker 101.

²⁴⁹ *Ibid.*

²⁵⁰ *Ibid.*

have contractually delayed the transfer or if the transfer is delayed due to the nature of the property (for example the sale of future goods or generic sales).²⁵¹

There is, however, another exception to this rule: if the buyer has given notice to the seller with regard to his obligation of delivery and the property perishes afterwards, the seller will normally not be entitled to the purchase price, except if he can prove that the property would also have perished if he (the seller) had delivered the property according to his contractual obligations.²⁵² In other words, the notice re-transfers the risk to the seller as expressed in article 1138 of the Code.²⁵³

2.3.1 Sale becomes *perfecta*

A sale is regarded as *perfecta* between the parties and the buyer acquires ownership by law as soon as the parties have agreed on the thing sold and the purchase price, even if the thing sold has not yet been delivered nor the price paid.²⁵⁴ Where the goods are sold subject to a suspensive condition such an agreement will be regulated by the general principles of agreements.²⁵⁵

As mentioned above, certain goods are not yet determined at the time of conclusion of the contract and the risk in the goods will only pass at a later stage. For example, article 1585 provides that when merchandise is sold by weight, count or measure they are at the risk of the seller until they are weighed, counted or measured. The buyer may also claim either delivery of such goods or damages where there is an eventual non-performance on the part of the seller.²⁵⁶ Goods sold in bulk are regarded as determined at the time of conclusion of the contract regardless of whether they have been weighed, counted or measured.²⁵⁷ With regard to wine, oil and other things that are usually tasted before purchasing, there is no sale so long as the buyer has not tasted and accepted it.²⁵⁸

²⁵¹ Cauffmann & Sagaert 250.

²⁵² *Ibid.*

²⁵³ *Ibid.*

²⁵⁴ A 1583.

²⁵⁵ A 1584.

²⁵⁶ A 1585.

²⁵⁷ A 1586.

²⁵⁸ A 1587.

2.4 Sale subject to a suspensive condition

The Belgian Civil Code confirms the meaning of a suspensive condition in terms of article 1181 as being a contract which depends upon a future and uncertain event. An obligation may be executed only after the happening or fulfilment of the event. The risk will remain with the seller where goods are still under a suspensive condition and if the thing is entirely destroyed without the fault of the seller the obligation is extinguished.²⁵⁹ If, however, the thing only deteriorates or is partially destroyed without the fault of the seller, the buyer has the choice of either rescission or to demand the thing in the state in which it is found but without a claim for a reduction in the purchase price.²⁶⁰ If the thing deteriorates through the fault of the seller, the buyer has the right either to rescind the obligation or to demand the thing in the state in which it is found and claim damages.²⁶¹

Contrary to the uncertainty created by South African courts,²⁶² Dekkers²⁶³ refers to various Belgian cases²⁶⁴ which all confirm that even where a sale is subject to a suspensive condition, it does not affect the validity thereof but merely suspends its execution.

2.5 Safe-keeping of the thing sold

The duty of the seller to take care of the thing sold until delivery is provided for in article 1136 of the Civil Code. According to Dekkers the duty to deliver the thing sold brings about the additional duty on the seller to take care of the thing sold until delivery.²⁶⁵ Because of the consensual nature of the transfer of ownership in Belgian law,²⁶⁶ ownership as well as the risk usually transfer upon conclusion of the contract or in the case of generic sales, the sale of future goods and goods subject to suspensive conditions when the goods become determined or the condition has been fulfilled. Dekkers argues that the main importance of the duty to take care of the thing sold is for

²⁵⁹ A 1182.

²⁶⁰ *Ibid.*

²⁶¹ *Ibid.*

²⁶² See Part B Par 4.2 above.

²⁶³ 300.

²⁶⁴ Cass. 5 Jun 1981, *Arr. Cass* 1980-81, nr. 576, *R.C.J.B* 1983 18 Feb 1993, *Arr. Cass* 1993 nr.103, Cass 8 Dec 2003, *Arr. Cass.* 2003, nr 631.

²⁶⁵ Dekkers 475.

²⁶⁶ See chapter 9 Part E 2.2 for a detailed discussion thereof.

evidentiary purposes where the thing sold is destroyed prior to delivery.²⁶⁷ Where the goods are destroyed before delivery the onus of proof will be on the seller to prove that the destruction was not due to his fault.²⁶⁸ Article 1137 of the Civil Code provides that the seller has to take vigilant care of the thing sold.

Article 1614 of the Civil Code provides only that the thing sold must be in the condition in which it was at the time of the conclusion of the sale.

None of the legislation that deals specifically with consumer sales,²⁶⁹ make any reference to the duty of safe-keeping by the supplier. Samoy states that except where the common law provisions of sale have been specifically substituted with provisions relating to consumer sale agreements, all other common law provisions with regard to the sale agreement will be applicable to consumer sales as well.²⁷⁰ The position as set out above is therefore applicable to consumer sales.

Tilleman states that the seller will have a duty to safe-keep the thing sold for the period until delivery.²⁷¹ If the buyer does not take delivery of the goods on the date as agreed upon, the degree of duty of safe-keeping of the seller will no longer be as stringent as that of a *bonus paterfamilias* (“huisvader”) but will be reduced.²⁷² The seller may not however allow the costs of safe-keeping to accumulate to an amount that is more than the value of the thing sold.²⁷³

F. CONCLUSION

1. Passing of risk

The common law position in South Africa has been amended where the CPA is applicable but only where the parties do not agree otherwise.²⁷⁴ The risk will remain with the seller.²⁷⁵ Unfortunately in practice it is likely that suppliers will still include a provision

²⁶⁷ Dekkers 476.

²⁶⁸ *Ibid.*

²⁶⁹ Arts 1649ter-1649octies of the Civil Code & Act 2004.

²⁷⁰ Samoy 260.

²⁷¹ Tilleman (2012) 809.

²⁷² *Ibid.*

²⁷³ *Idem* 810.

²⁷⁴ S 19(1) CPA.

²⁷⁵ S 19(3) CPA.

in the consumer agreement or transaction that transfers the risk from the supplier to the consumer at the time of conclusion of the contract.

Where the consumer is a natural person and the parties agreed on the distribution of risk, regulation 44(3)(g) comes into play and creates uncertainty when read together with section 19(2). As discussed earlier,²⁷⁶ a provision that distributes that risk to the detriment of the consumer will be presumed unfair in terms of regulation 44(3)(g) unless the supplier can prove the contrary. Together with the requirements of proof in terms of regulation 44(3)(g), the supplier would also have to comply with the requirements of section 49 as discussed above,²⁷⁷ which include proving that the provision was in plain language, presented in a conspicuous manner and was brought to the attention of the consumer as early as possible.²⁷⁸

Where the supplier and consumer agreed on the distribution of the risk to the detriment of the consumer, the provisions of section 49 will still apply in situations where the consumer is a juristic person.²⁷⁹

The position with regard to consumer sales by sample and or description²⁸⁰ could provide problems in practice. It seems to be subject to the suspensive condition that the consumer must have an opportunity to examine to goods to see whether or not they comply with the sample or description. Buyers (consumers) will not be given the opportunity to examine the goods unless they request it, the reason being that the Act only compels the supplier to give the consumer an opportunity to examine the goods where the consumer so requests. It is doubtful whether the supplier will inform a consumer of his right to examine the goods of his own accord.

The Scottish position with regard to risk is commended and should be followed. The Scottish position with regard to consumer sales give much more certainty in that the risk will remain on the seller until acceptance thereof by the buyer (regardless of the type of goods or whether or not the goods are subject to a suspensive condition).²⁸¹ The

²⁷⁶ See Part D 1.2.1 above.

²⁷⁷ *Ibid.*

²⁷⁸ Ss 49 (3) & (4).

²⁷⁹ See Part D 1.2.1 above.

²⁸⁰ Ss 20 & 18 CPA.

²⁸¹ Ss 20 & 32 SOGA.

Belgium position seems to be just as (if not more) contentious than the South African common law position and does not provide any contribution in this matter.

Upon evaluation of the position in Scotland,²⁸² the correct precautionary step to take for suppliers in South Africa, would be to rather amend their policies immediately rather than wait for an interpretation of the provisions of the CPA by the courts.

2. Safe-keeping of the thing sold

Aside from lay-by agreements regulated by the CPA²⁸³ there is no direct regulation with regard to the duty of the seller (supplier) to take care of the thing sold in terms of the CPA. At most it could be argued that the implied duty on the seller (supplier) to supply goods that in all material respects and characteristics correspond with the sample or description²⁸⁴ and the fact that the consumer still has a right to reject such goods after examination indicate that a certain duty of care rests on the supplier. The implied warranty of quality that forms part of the consumer's right to fair value, good quality and safety²⁸⁵ supports this argument.²⁸⁶ The common law position must also be considered in this regard.

In case of lay-by agreements²⁸⁷ the duty of care by the seller is clear. The degree of care, skill and diligence differs between a supplier (where the test would be that of a reasonable person) and a professional person such as an administrator or executor (where a higher degree is expected). This is not a change to the common law position but rather a confirmation thereof. It is unfortunate that neither the Scottish law nor the Belgian law provide any direct guidance with regard to the duty of a supplier in the safe-keeping of the thing sold in consumer sale agreements. Provisions regulate the position of ordinary sale agreements and are presumed to be the current law on the matter.

²⁸² See Part E 1.1.

²⁸³ Ss 62 & 65 CPA.

²⁸⁴ S 18(5) CPA.

²⁸⁵ S 55 & 56 CPA. See also the detailed discussion in chapter 11.

²⁸⁶ Jacobs *ea* 327.

²⁸⁷ S 65 CPA.

9 DELIVERY AND TRANSFER OF OWNERSHIP

- A. INTRODUCTION
 - B. LEGAL POSITION WHERE THE CONSUMER PROTECTION ACT 68 OF 2008 IS NOT APPLICABLE (COMMON LAW POSITION)
 - C. LEGAL POSITION IN TERMS OF THE CONSUMER PROTECTION ACT 68 OF 2008
 - D. EVALUATION
 - E. COMPARISON
 - F. CONCLUSION AND RECOMMENDATIONS
-

A. INTRODUCTION

In South African law the transfer of ownership is not effected by the mere conclusion of a contract of sale.¹ The buyer merely obtains a right of delivery of the thing sold. This coincides with the principle that a seller does not have to be the owner of the thing sold to conclude a valid contract of sale.² The buyer only obtains a personal right or legal claim upon conclusion of the contract of sale. The common law duty of the seller in this instance is to deliver the thing sold or make the thing sold available to the buyer.³ Only where the seller is owner of the thing sold will the seller have the duty to transfer ownership based on the *nemo plus iuris* rule.⁴ Nagel *ea* correctly state that there is no duty on the seller to transfer ownership to the buyer, the reason being that ownership is not one of the requirements for a valid and binding contract of sale.⁵

The duty of the seller to deliver the thing sold and the various forms of delivery in South African law as well as the transfer of ownership are discussed in this chapter. Conversely, the buyer also has a common law duty to accept delivery of the thing sold. This duty of the buyer is very relevant to consumer sales in terms of both the CPA and

¹ Nagel *ea* 214.

² *Ibid.*

³ Kerr 161-163 where the writer refers to the duty of delivery as the duty “to make the thing sold available to the buyer”. To make the thing sold available to the buyer or to deliver the thing sold to the buyer will apply interchangeably for purposes of this discussion.

⁴ *Nemo plus iuris in alium transfere potest quam ipse haberet.* Gonin & Hiemstra 236: “No one can transfer more rights to another than he himself possesses.”

⁵ Nagel *ea* 214.

the relevant national consumer legislation of Scotland and Belgium. The forms of delivery in terms of the CPA as well as the provisions regulating the transfer of ownership are examined. The transfer of ownership in Scotland and Belgium is discussed and the chapter is concluded with a comparative summary and recommendations.

The position in the case of *res aliena* is mentioned as part of this chapter.⁶ As unsolicited goods (and the possible transfer of ownership of such goods) are discussed comprehensively in chapter 5, it is only briefly mentioned.⁷

B. LEGAL POSITION WHERE THE CONSUMER PROTECTION ACT 68 OF 2008 IS NOT APPLICABLE (COMMON LAW POSITION)

1. Brief historical overview

1.1 Duty of seller to make merx available, delivery and transfer of ownership

Since the earliest times, the seller has always had a duty to deliver the thing sold.⁸ Where the seller was not the owner, there was no obligation to transfer ownership or to make the buyer the owner of the *merx*.⁹ There was no guarantee that the seller was in fact the owner and the mere conclusion of the contract also did not make the buyer the owner.¹⁰ As a general rule, ownership transferred to the buyer where the thing sold was delivered and the purchase price paid.¹¹ The exception to this rule (where mere delivery was sufficient without payment of the purchase price) was in the case of a credit sale.¹²

Van Warmelo describes the duty of the seller to deliver the goods as the most important duty in terms of Roman law.¹³ Delivery usually occurred at the time of conclusion of the contract but the parties could agree otherwise.¹⁴ The seller also had to deliver not only the thing sold but also any profits or fruits that accrued from date of conclusion of the sale.¹⁵ Even though the seller did not have to be the owner of the thing

⁶ See also chapters 5 & 9.

⁷ See chapter 5 Parts B-F.

⁸ Van Warmelo (1965) par 849.

⁹ Zimmermann *Obligations* 272.

¹⁰ *Idem* 293; Voet 18 1 14. See also Lötze 1992 (Deel 2) 144.

¹¹ Zimmermann *Obligations* 273.

¹² *Idem* 274-277.

¹³ Van Warmelo (1965) par 849.

¹⁴ *Ibid.*

¹⁵ *Ibid.*

sold to sell it, the seller could not fraudulently sell a *merx*¹⁶ belonging to another and the buyer could claim damages with the *actio empti*.¹⁷ Van Warmelo¹⁸ remarks that this was so because the intention of the buyer was to become owner of the thing sold which usually occurred upon delivery.¹⁹

1.2 Duty of buyer to take delivery of (accept) thing sold

Unless otherwise agreed the buyer had a duty to take delivery of the thing sold as soon as the seller was able to deliver it properly.²⁰ Where the buyer refused to take delivery, the seller's duty to take care of the *merx* was substantially reduced.²¹ The seller was not obligated to bring the *merx* to the buyer (unless otherwise agreed) and the buyer had a duty to collect the *merx* from the seller.²² The buyer was liable for all expenses with regard to the maintenance, safe-keeping and delivery of the *merx*.²³

2. Delivery of thing sold²⁴

The duty of the seller to deliver the thing sold in terms of Roman law and Roman-Dutch law²⁵ forms part of modern South African law.²⁶ Delivery requires the seller to deliver undisturbed possession (*vacua possessio*) coupled with a guarantee against eviction.²⁷ These two duties should, however, not be confused. Murray CJ made it clear in *York & Co (Pvt) Ltd v Jones NO*²⁸ that a seller is obliged to give physical possession of the property (thing sold) to the buyer on or before the stipulated date. He (the seller) is also under the duty, even after giving possession, to guarantee the buyer against eviction, (that is, subsequent dispossession) total or partial, by third parties claiming a title superior to that which the buyer has obtained from the seller. According to the court

¹⁶ The terms “*merx*” and “thing sold” will apply interchangeably throughout the current chapter and thesis.

¹⁷ Van Warmelo (1965) par 850.

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ Mostert *ea* 259-260, 262-263.

²¹ Lötze 1992 (Deel 2) 156 fn 202.

²² *Idem* fn 204.

²³ Voet 18 6 3.

²⁴ Kerr 161-163.

²⁵ See discussion above Part B 1.1.

²⁶ Kerr 161-187.

²⁷ Mackeurtan's 66.

²⁸ 1962 1 SA 65 (SR) 67.

there is a clear distinction between the above duties and they should not be confused with one another.²⁹

The seller does not have to be the owner of the thing sold but is compelled to transfer ownership if he is in fact the owner.³⁰ Mackeurtan explains that the obligations of the seller is not just to deliver the thing and enable the buyer immediate use of the *merx*, but also to enable the buyer to have and to hold it (the *merx*) as his (the buyer's) own and to defend or to establish his possessory title against the world.³¹ The conclusion of a contract of sale establishes an obligatory agreement between the parties. In other words the seller has a duty to deliver the thing sold and the buyer has a duty to take delivery thereof. If the *merx* is for example not delivered, the buyer will have a personal right (legal claim) against the seller based on the agreement or obligation between the parties.³²

As Nagel *ea* explain, something more than the mere conclusion of the contract is needed to establish a real right or ownership.³³ The obligatory agreement and the real agreement in terms of which ownership is transferred do not necessarily occur simultaneously.

The seller not only has to deliver the thing agreed upon but also all accessories required for the proper use thereof as well as all benefits which might have accrued after conclusion of the contract but before delivery.³⁴

If the parties do not agree on a date or place of delivery, delivery must occur within a reasonable time after conclusion of the contract and the place of delivery will either be the place where the contract is concluded or at the business or home of the seller.³⁵ In the case of goods bought (and ordered) but still to be manufactured and no place of delivery was agreed on, it is at the option of the seller or the buyer, respectively, to choose it.³⁶

²⁹ *Ibid.*

³⁰ Nagel *ea* 214. See also Kerr 177.

³¹ Mackeurtan's 66-67.

³² Nagel *ea* 213.

³³ *Ibid.*

³⁴ Nagel *ea* 217. See also *Ayob & Co v Clouts* 1925 WLD 199; 202 where the court confirmed that the seller had a duty to deliver the specific things bought to the buyer.

³⁵ Nagel *ea* 218.

³⁶ Mackeurtan's 82.

Aside from the valid conclusion of a contract of sale of movable goods, ownership will transfer in the case of a cash sale upon payment of the purchase price and delivery.³⁷ In the case of a credit sale, ownership will transfer upon the mere delivery of the goods but the parties must have had the intention to conclude a credit sale.³⁸ For movable goods therefore, the minimum requirement for the establishment of ownership (establishing a real right) is delivery thereof. The valid forms of delivery that will establish ownership are discussed below.

2.1 Recognised forms of delivery for corporeal movable goods: Brief overview³⁹

Lubbe explains that delivery may take one of two main forms, namely, actual delivery involving a physical handing over of the article with the requisite intention, or constructive delivery where no actual handing over needs to take place and greater emphasis is placed on the intention of the parties.⁴⁰ The recognition of constructive delivery in certain cases⁴¹ is demanded by the exigencies of commercial transactions.⁴²

Actual delivery takes place where the thing sold is physically handed by the seller to the buyer.⁴³

Delivery with the short hand (*traditio brevi manu*) takes place where the buyer is already physically in possession of the thing sold and delivery takes place by the mere change of intention between the seller and the buyer.⁴⁴

Constitutum possessorium is a method of delivery opposite to delivery with the short hand. Delivery takes place through the change of intention between the buyer and the seller but the seller remains in possession of the thing sold after conclusion of the contract.⁴⁵ The true intention of the parties will, however, remain the most important factor in this form of constructive delivery.⁴⁶

³⁷ Nagel *ea* 214.

³⁸ *Ibid.*

³⁹ For a comprehensive discussion see Lubbe 17(2) *Lawsa* paras 421-423. See also Mackeurtan's 67-72.

⁴⁰ Lubbe 17(2) *Lawsa* par 421.

⁴¹ *Stratford's Trustees v The London & SA Bank* 1884 3 EDC 439.

⁴² Lubbe 17(2) *Lawsa* par 421.

⁴³ Nagel *ea* 217.

⁴⁴ *Ibid.* See also *Marcus v Stamper and Zoutendijk* 1910 AD 58.

⁴⁵ *Ibid.* See also *Nedcor Bank Ltd v ABSA Bank Ltd* 1998 2 SA 830 (W).

⁴⁶ *Vasco Dry Cleaners v Twycross* 1979 1 SA 603 (A); *Bank Windhoek Bpk v Rajie* 1994 1 SA 115 (A).

In the case of attornment the thing sold is in possession of a third party and delivery takes place through a change of intention between the seller and the buyer.⁴⁷ The third party therefore keeps the thing sold on behalf of the seller before the contract is concluded and on behalf of the buyer after the contract is concluded.⁴⁸ The mere notification to the third party of this change of intention between the seller and the buyer is sufficient and the collaboration of the third party is not required.⁴⁹

In the case of symbolic delivery the seller places the buyer in possession of a symbol by means of which the buyer gains control over the object sold.⁵⁰ Delivery therefore takes place symbolically.⁵¹ Delivery through marking takes place through the marking of the thing sold.⁵²

Delivery with the long hand (*traditio longa manu*) takes place in that the thing sold is pointed out by the seller to the buyer with the intention that ownership should pass.⁵³ In the case of delivery *traditio longa manu* the receiver of the goods must be able to take physical possession thereof.⁵⁴

2.2 Transfer of ownership of movable goods: General

Aside from the conclusion of a valid contract of sale of movable goods, ownership will transfer in the case of a cash sale upon payment of the purchase price and delivery of the thing.⁵⁵ In the case of a credit sale, ownership will transfer upon mere delivery but the parties must have intended to conclude a credit sale.⁵⁶

The intention of the parties is the primary rule by which to establish whether or not ownership has passed, irrespective of whether the proposed sale was for cash or for

⁴⁷ *Hearn & Co (Pty) Ltd v Bleiman* 1950 3 SA 617 (C).

⁴⁸ For example where a motor vehicle is sold by the seller to the buyer while it (the vehicle) is at a panel beater for repairs.

⁴⁹ *Air-Kel (Edms) Bpk h/a Merkel Motors v Bodenstein* 1980 3 SA 917 (A).

⁵⁰ For example keys to a motor vehicle or a shipload of maize placed in possession of the buyer by a bill of lading. See *Lendlease Finance (Pty) Ltd v Corporation De-Mercadeo Agricola* 1976 4 SA 464 (A).

⁵¹ *Nagel ea* 217.

⁵² *Ibid*: For example the marking of certain sheep bought from a flock of sheep by a marking on the hind leg. Delivery takes place as soon as the mark is made.

⁵³ *Ibid*. See also *Groenewald v Van der Merwe* 1917 AD 233; *Xapa v Ntsoko* 1919 EDL 177; *AXZS Industries v AF Dreyer (Pty) Ltd* 2004 4 SA 186 (W).

⁵⁴ *Eskom v Rollomatic Engineering (Edms) Bpk* 1992 2 SA 725 (A).

⁵⁵ *Nagel ea* 214.

⁵⁶ *Ibid*.

credit.⁵⁷ The fact that the sale is either for cash or for credit is simply a manifestation of the parties' intention.⁵⁸ The question whether ownership passes upon delivery is one of fact, and not one of law.⁵⁹ The fact that a sale is one for credit or one for cash is relevant to the passing of ownership, but is not decisive.⁶⁰

2.3 Transfer of ownership of movable goods: Cash sales

In *International Harvester (SA) (Pty) Ltd v AA Cook & Associates (Pty) Ltd*⁶¹ it was confirmed that a cash sale exists where the parties have the intention to effect delivery and pay the purchase price *pari passu*.⁶² *Nagel ea* state that the contract itself will determine whether it is a cash or a credit sale and a presumption exists in our law that the sale of movable goods is a cash sale unless the parties expressly agree otherwise.⁶³

Where the seller delivers the thing sold and the buyer does not pay the purchase price simultaneously the seller can reclaim the thing within a reasonable time.⁶⁴ If the seller fails to do so, it might be construed as a change of intention from cash to credit.

In *Grosvenor Motors (Potchefstroom) Ltd v Douglas*⁶⁵ the court confirmed the intention of the parties as still being the most decisive factor in determining a cash or credit sale.⁶⁶ *In casu* the court held that there was no indication that the intention was one of credit and added that a letter confirming the sale was also not a transfer of ownership.⁶⁷

⁵⁷ *Eriksen Motors (Welkom) Ltd v Protea Motors Warrenton* 1973 3 SA 685 (A) 686-687.

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

⁶⁰ *Idem* 694-697.

⁶¹ 1973 4 SA 47 (W) 49.

⁶² At the same time or at least on the same day.

⁶³ *Nagel ea* 214. See also *Lendlease Finance (Pty) Ltd v Corporation De Mercadeo Agricola* 1976 4 SA 464 (A) 490; *Eriksen Motors (Welkom) Ltd v Protea Motors Warrenton* 1973 3 SA 685 (A).

⁶⁴ *Ibid.*

⁶⁵ 1956 3 SA 420 (A).

⁶⁶ 421.

⁶⁷ *Ibid.*

2.4 Transfer of ownership movable goods: Credit sales

Nagel *ea* confirm that the intention to conclude a credit sale must be clear and all the relevant circumstances of each case must be taken into account.⁶⁸ The minimum requirement for ownership to pass in case of a credit sale is delivery of the thing sold.

2.4.1 Tacit granting of credit

There are circumstances that will constitute the tacit granting of credit.⁶⁹ These circumstances include situations where the seller accepts security for the payment of the purchase price, where interest is charged on the purchase price, where the seller accepts a post-dated bill of exchange or cheque as payment, where the seller does not insist on immediate payment or does not reclaim the thing sold within a reasonable time (and a cash sale was initially agreed upon).⁷⁰

2.4.2 Payment by cheque

A cheque is not legal tender and not by itself an indication of a cash or credit sale. The only circumstance where payment by cheque is regarded as a tacit credit sale is where the seller accepts a post-dated cheque. Payment by cheque is merely a conditional payment. The seller may refuse payment by cheque and the condition is that the amount represented by the cheque is actually paid to the seller. If a cheque is dishonoured, the seller never receives payment for the thing sold.⁷¹

In *Eriksen Motors (Welkom) Ltd v Protea Motors Warrenton*⁷² the court confirmed that payment by cheque is a conditional payment and if a cheque is dishonoured there is no payment.⁷³ The court further held that the buyer's knowledge that the seller was buying the vehicle for immediate resale indicated the inference that the parties intended ownership to pass.⁷⁴ The premise that a sale is one for cash is but one of the factors to be considered in order to determine whether or not ownership has passed.⁷⁵

⁶⁸ Nagel *ea* 214.

⁶⁹ *Idem* 215.

⁷⁰ *Ibid.*

⁷¹ For a comprehensive discussion see Nagel *ea* 215-216.

⁷² 1973 3 SA 685 (A)

⁷³ 694.

⁷⁴ 695.

⁷⁵ *Ibid.*

Van Zyl criticises the judgment and argues that the parties had been doing business for a number of years and never once in the past had a transaction between them been one for credit.⁷⁶ The mere fact that the particulars of the person to whom the buyer resold the vehicle was not provided to the original seller indicated that the sale to the buyer was for cash.⁷⁷ The writer makes the point that credit is only granted when payment has to be made at some fixed or determinable moment *after*⁷⁸ delivery, no date for payment is set or the sale was originally one for cash but the seller fails to demand payment within a reasonable time, in which case there is a change of intention towards the sale being for credit.⁷⁹

I agree with Van Zyl that although there is a common law presumption that the sale of movable goods are for cash unless the parties intend otherwise, there is no inference or presumption that a credit sale is established where the buyer has knowledge of the fact that the seller intends to resell the *merx* immediately.⁸⁰

In *Bank Windhoek Bpk v Rajie*⁸¹ the court held per Joubert JA⁸² that the registration of a vehicle was a valuable aid in establishing the identity of the owner, but that it was not necessarily conclusive proof of common law ownership. In order to transfer and to acquire ownership in a movable thing through delivery, it is required that the owner, as transferor, must show the intention to transfer ownership to the transferee. Similarly, the buyer, as transferee, must have the intention to acquire ownership. The intention of the transferor and that of the transferee can be proved in a number of ways, for example the surrounding circumstances, direct evidence or an obligatory agreement such as a contract of sale or barter. Since our courts adhere to an abstract system of passing of ownership, the validity of the transfer of ownership is completely divorced from any obligatory or underlying agreement.⁸³

⁷⁶ Van Zyl 337.

⁷⁷ *Ibid.*

⁷⁸ Own emphasis.

⁷⁹ Van Zyl 338.

⁸⁰ *Idem* 339.

⁸¹ 1994 1 SA 115 (A).

⁸² 138-143.

⁸³ *Ibid.*

2.5 Where the seller is not owner but expects to become owner and possessor

Kerr mentions the situation where the seller sells goods at a time when he is neither the owner nor the possessor but expects to become owner and possessor before the date upon which he will be bound to transfer the goods and ownership therein.⁸⁴ He gives the examples of a shopkeeper who, not having the required article in stock sells it and undertakes to send out for it or a retailer who sells goods he has ordered from a wholesaler.⁸⁵ Another example is where the manufacturer sells goods still to be made.⁸⁶ Situations where the seller therefore informs the buyer that he is not the owner at the time of conclusion of the contract or that he is unsure of whether or not he is in fact owner will exclude the seller from liability if he is unable to transfer ownership at a later stage.

3. Duty to take delivery (acceptance) by the buyer⁸⁷

The buyer has a duty to take delivery of the thing sold on the date and at the place as agreed upon between the parties.⁸⁸ If the parties did not agree on a date and time, the thing sold must be accepted within a reasonable time. Should the buyer fail to accept the thing sold he will be guilty of a breach of contract (but only where some form of fault on the side of the buyer is present).⁸⁹

There is, however, no obligation or duty on the buyer to accept goods which do not comply with the agreement or with the specifications and qualities as agreed upon.⁹⁰ In such circumstances the buyer may reject the goods without being guilty of a breach of contract.⁹¹ Where the buyer fails to accept the *merx* and as a result thereof the seller incurs expenses of a necessary or useful nature for the protection and upkeep of the *merx*, such expenses may be claimed from the buyer.⁹² Examples of such expenses would be the hiring of a truck by the seller to receive the goods or the seller may have paid duty upon goods in closed packaging upon the faith of the contract, or he may

⁸⁴ Kerr 178-179.

⁸⁵ *Idem* 179.

⁸⁶ *Ibid.*

⁸⁷ “To take delivery” and “acceptance” of the thing sold will be used as interchangeably for purposes of this thesis.

⁸⁸ Nagel *ea* 235.

⁸⁹ *Ibid.*

⁹⁰ *Ibid.* See chapter 11 for a comprehensive discussion on the warranty of quality by the seller and the buyer’s right to reject the goods.

⁹¹ Nagel *ea* 235.

⁹² *Ibid.*

have incurred storage charges.⁹³ Mostert *ea*⁹⁴ are of the opinion that the buyer's liability for expenses incurred by the seller in looking after the *merx* depends on the incidence of risk and will only arise where the buyer bears the risk for damage or destruction.⁹⁵

3.1 *Acceptance of the merx by the buyer*

"The purchaser's right to reject goods tendered to him may be lost if he has chosen, either expressly or by necessary deduction, to accept the goods, either altogether or subject to a reduction in the price, as a compliance with the seller's obligations notwithstanding the defect."⁹⁶

Mackeurtan notes that expressions such as "delivery" and "acceptance" have been used by the courts⁹⁷ to denote physical delivery and factual acceptance, and not necessarily in relation to any decision reached by the buyer as to his rights.⁹⁸ According to the writer there are in fact three different and progressive stages to consider.⁹⁹ Firstly, the mere taking of delivery or "receipt" of the *merx*, secondly the retention of the article with a reservation of a claim for relief or "retention"¹⁰⁰ and thirdly an acceptance of the *merx* as fulfilling the agreement (notwithstanding the defect if applicable) or the "acceptance".¹⁰¹

The situation with regard to defects (patent and latent) is discussed in detail elsewhere in this thesis¹⁰² but some reference will be made thereto since latent defects may arise at the delivery stage and will have an influence on the buyer's duty to accept the goods. For example, the buyer may lose his right to reject goods if he voluntarily and without protest receives them or performs unequivocal acts of ownership in certain circumstances.¹⁰³ (In other words, to determine whether or not the buyer's conduct shows an intention to accept the *merx*). The court has found true acceptance to mean

⁹³ Mackeurtan's 100.

⁹⁴ 159.

⁹⁵ For a comprehensive discussion of the rules applicable to the risk and destruction of the thing sold see chapter 8.

⁹⁶ Mackeurtan's 92.

⁹⁷ *Mostert v Noach* 1884-1885 3 SC 174.

⁹⁸ Mackeurtan's 93.

⁹⁹ *Ibid.*

¹⁰⁰ Where the buyer retains the goods in order to claim a reduction in the purchase price.

¹⁰¹ *Ibid.*

¹⁰² See chapter 11.

¹⁰³ Mackeurtan's 93.

the taking or keeping of the *merx* and thereby also satisfying the seller's contractual obligations of delivery.¹⁰⁴

3.1.1 Acts of ownership constituting acceptance and waiver of the right to reject

Where the character of the article or *merx* is completely altered or extinguished by the buyer and this prevents the return thereof substantially, it is regarded as an act of ownership constituting acceptance.¹⁰⁵

Despite this general rule, the courts have held that even where goods are resold or moved to another place by the buyer, such acts of ownership will not necessarily constitute acceptance of the goods.¹⁰⁶

Whether or not goods are accepted is significant where the *merx* has a latent defect.¹⁰⁷ The seller could argue that where the buyer has knowledge of such a defect and performs an act of ownership, he (the buyer) accepts the goods and loses any right to claim against the seller. The courts have, however, qualified this principle. For example the buyer might have exercised an act of ownership upon the seller's representation that the defect would be remedied if the thing sold is accepted by the buyer.¹⁰⁸ In the case of machinery, for example, the buyer may exercise an act of ownership by further testing the capacity of the machinery in the hope that the defect would disappear or prove capable of a simple cure.¹⁰⁹ Other examples would be divisible goods sold by description or situations where the buyer had to accept the goods because he was faced with an emergency.¹¹⁰

3.2 *Rejection of merx by buyer*

As mentioned earlier the right of the buyer to reject the goods where a latent defect is present or where the goods do not conform to the quality and purpose as agreed, is discussed elsewhere.¹¹¹

¹⁰⁴ *Kaplan v Thomas* 1918 TPD 376.

¹⁰⁵ Mackeurtan's 98.

¹⁰⁶ *Van Vuuren v Kloppers Diskontohuis (Edms) Bpk* 1979 1 SA 1053 (O).

¹⁰⁷ See chapter 11 Part A and Part B for a comprehensive discussion.

¹⁰⁸ *Vorster Bros v Louw* 1910 TPD 1099.

¹⁰⁹ *Fine & Gluckmann v Heynecke* 1915 TPD 211.

¹¹⁰ Mackeurtan's 99.

¹¹¹ See chapter 11 Part B and the discussion of the *actio redhibitoria*.

C. LEGAL POSITION IN TERMS OF THE CONSUMER PROTECTION ACT 68 OF 2008

1. Consumer's rights with respect to delivery of goods¹¹²

The provisions of section 19 of the CPA do not apply to the supply of goods in terms of a franchise agreement; or a transaction governed by section 46 of ECTA.¹¹³

Unless otherwise expressly provided or anticipated in an agreement, it is an implied condition of every transaction for the supply of goods that the supplier is responsible to deliver the goods on the agreed date and at the agreed time, if any, or otherwise within a reasonable time after concluding the transaction or agreement.¹¹⁴ The supplier further has a duty to deliver the goods at the agreed place of delivery and at the cost of the supplier.¹¹⁵ If no place of delivery is agreed upon the place of delivery will be the supplier's place of business, if the supplier has one, and if not, the supplier's residence.¹¹⁶ The goods to be delivered remain at the supplier's risk until the consumer has accepted delivery of them, in accordance with section 19.¹¹⁷

If an agreement does not provide for a specific date or time for delivery of any goods, the supplier must not require that the consumer accept delivery or performance of the services at an unreasonable time.¹¹⁸

The consumer is regarded to have accepted delivery of any goods on the earliest of the following circumstances: When the consumer expressly or implicitly communicates to the supplier that the consumer has accepted delivery of such goods,¹¹⁹ or when the goods have been delivered to the consumer and he does anything in relation to the goods that would be inconsistent with the supplier's ownership of them;¹²⁰ or after the lapse of a reasonable time, the consumer retains the goods without intimating to the supplier that the consumer has rejected delivery of them.¹²¹

¹¹² Chapter 2, Part C, S 19 CPA.

¹¹³ S 19(1).

¹¹⁴ S 19(2)(a)(i).

¹¹⁵ S 19(2)(a)(ii) & (iii).

¹¹⁶ S 19(2)(b).

¹¹⁷ S 19(2)(c).

¹¹⁸ S 19(3).

¹¹⁹ S 19(4)(a).

¹²⁰ S 19(4)(b)(i).

¹²¹ S 19(4)(b)(ii).

Section 19(6) provides that if the supplier tenders the delivery of goods at a location, on a date or at a time other than as agreed with the consumer, the consumer may either accept delivery at that location, date and time,¹²² require the delivery at the agreed location, date and time (if that date and time have not yet passed),¹²³ or cancel the agreement without penalty, treating any delivered goods as unsolicited goods in accordance with section 21.¹²⁴

2. Consumer's right to return goods¹²⁵

The rights provided for in terms of section 20 is in addition to and not in substitution of the right to return unsafe or defective goods in terms of section 56 or any other right in law between a supplier and consumer to return goods and receive a refund.¹²⁶

Subject to subsections 20(3) to 20(6), the consumer may return goods to the supplier, and receive a full refund of any consideration paid for those goods in certain circumstances as provided for in section 20(2). Goods may be returned where the consumer exercises his cooling-off right,¹²⁷ or where the consumer rejects the goods because they do not comply with the description or sample given by the supplier or do not conform to the agreement or the particular purpose for which they were bought.¹²⁸

The consumer will, however, lose his right to return goods for reasons of public health or in terms of a public regulation. The consumer may not return goods after having been supplied to, or at the direction of, the consumer, the goods have been partially or entirely disassembled, physically altered, permanently installed, affixed, attached, joined or added to, blended or combined with, or embedded within, other goods or property.¹²⁹

Where the consumer returns the goods because he is exercising his cooling-off right, the goods are returnable at the consumer's risk and expense.¹³⁰ If, however,

¹²² S 19(6)(a).

¹²³ S 19(6)(b).

¹²⁴ S 19(6)(c).

¹²⁵ Chapter 2, Part C, S 20 CPA.

¹²⁶ S 20(1).

¹²⁷ In terms of s 16.

¹²⁸ S 20(2).

¹²⁹ S 20(3).

¹³⁰ S 20(4)(a).

within ten business days after delivery to the consumer the goods are returned by the consumer because of any of the other reasons provided for in terms of section 20, it will be at the supplier's risk and expense.¹³¹ The supplier must refund the purchase price of the goods to the consumer if they are returned in terms of section 20,¹³² but may deduct certain reasonable amounts.¹³³

Section 21(6) provides that if a person lawfully retains any unsolicited goods, the property in those goods passes unconditionally to the person, *subject only to any right or valid claim that an uninvolved third party may have with respect to those goods*¹³⁴ and the person who supplied or delivered those goods is liable to any other person in respect of any right or valid claim relating to such goods.

3. Consumer's right to assume supplier is entitled to sell goods¹³⁵

Every consumer has a right to assume, and it is an implied provision of every transaction or agreement, that the supplier has the legal right, or the authority of the legal owner, to supply those goods.¹³⁶

In the case of an agreement to supply goods, it is also assumed and implied that the supplier will have a legal right, or the authority of the legal owner, to sell the goods at the time the title to those goods is to pass to the consumer.¹³⁷

As between the supplier and the consumer, the supplier is fully liable for any charge or encumbrance pertaining to the goods in favour of any third party unless such a charge or encumbrance is disclosed in writing to the consumer before the transaction or agreement is concluded¹³⁸ or the supplier and consumer have colluded to defraud the third party.¹³⁹

The supplier guarantees that the consumer is to have and enjoy quiet possession¹⁴⁰ of the goods, subject to any charge or encumbrance disclosed.¹⁴¹

¹³¹ S 20(4)(b).

¹³² S 20(5).

¹³³ S 20(6).

¹³⁴ Own emphasis.

¹³⁵ Chapter 2, Part F, S 44 CPA.

¹³⁶ S 44(1)(a).

¹³⁷ S 44(1)(b)(i).

¹³⁸ S 44(1)(c)(i).

¹³⁹ S 44(1)(c)(ii).

¹⁴⁰ S 44(1)(d).

If, as a result of any transaction or agreement in which goods are supplied to a consumer, a right or claim of a third party pertaining to those goods is infringed or compromised the supplier is liable to the third party to the extent of the infringement or compromise of that person's rights pertaining to those goods.¹⁴²

D. EVALUATION

1. Time and place of delivery

The CPA confirms the common law position with regard to the time and place of delivery in that it is an implied term that the supplier must deliver the goods at the agreed time and place.¹⁴³ If no time is agreed upon, delivery must be within a reasonable time (confirming the common law position).¹⁴⁴ If no place is agreed upon the place of delivery will either be the supplier's place of business or in the absence of such an address the supplier's residence¹⁴⁵ (also confirming the common law position).¹⁴⁶ Jacobs *ea* remark that it is uncertain why the Act refers to implied terms because such terms do not relate to terms expressly agreed upon.¹⁴⁷ It is important for a supplier to obtain proof of the time and place of delivery (for example an acknowledgement of receipt) as the risk will only pass to the consumer upon acceptance of delivery (if the parties do not agree otherwise).¹⁴⁸

Sharrock criticises the wording of section 19(2)(a).¹⁴⁹ He argues that the term "anticipated" in the context of section 19 is obscure and if it means or includes "implied by law", the implied conditions will not apply where the common law lays down a different rule.¹⁵⁰

¹⁴¹ As contemplated in s 44(1)(c)(i).

¹⁴² S 44(2). Except to the extent of a charge or encumbrance disclosed as contemplated in s 44(1)(c)(i).

¹⁴³ Sharrock (2011) 605.

¹⁴⁴ *Ibid.*

¹⁴⁵ The Consumer Protection Bill only referred to "his residence". The final Act, however, makes specific reference to the "supplier's residence". See Van Eeden 215 fn 133 where the writer comments that "his residence" surely refers to the consumer's residence which seems more appropriate to consumer agreements than the residence of the supplier.

¹⁴⁶ See Part B 3.

¹⁴⁷ Jacobs *ea* 326.

¹⁴⁸ *Ibid.*

¹⁴⁹ Sharrock (2011) 605.

¹⁵⁰ *Ibid.*

2. Acceptance or rejection of consumer goods

2.1 Acceptance of consumer goods

Acceptance of delivery of consumer goods is deemed when a consumer expressly or implicitly communicates to a supplier that he has accepted delivery of such goods, or if a consumer does anything in relation to the goods that is inconsistent with the supplier's ownership, or if a consumer keeps the goods for an unreasonable period without informing the supplier that he does not want them.¹⁵¹

Upon examination of this provision, the first question that may be asked is what is meant by the "express or implicit communication" of the acceptance of the goods by a consumer to a supplier. An express communication would be an oral or written confirmation of acceptance and may be easily construed in the circumstances. An implicit communication would be less obvious and it means that the onus of proof would be on a supplier to prove that a consumer seems to have accepted goods in this manner.

An act of acceptance by a consumer in relation to the goods that is inconsistent with the supplier's ownership would be to resell the goods. It could also be argued that where the consumer partially or entirely disassembles, physically alters, permanently installs, affixes, attaches, joins or adds to, blends or combines with, or embeds the goods bought within other goods or property,¹⁵² the consumer is acting in a manner that is inconsistent with the supplier's ownership. In these instances the consumer will also lose his right to reject the goods in terms of section 20.

Acceptance of the goods by the consumer (and the forms of acceptance) is therefore relevant not only because the consumer may lose the right to reject the goods in terms of the Act but also determines when the risk in the goods will transfer.¹⁵³

Where for example the parties intended a credit sale and the consumer accepts the delivered goods in terms of section 19, a transfer of ownership will take place and the consumer now has a real right to the goods.¹⁵⁴

¹⁵¹ S 19(4).

¹⁵² S 20(3).

¹⁵³ See chapter 8 for a comprehensive discussion on the transfer of risk.

¹⁵⁴ Nagel *ea* 213.

The consumer is regarded to have accepted goods in terms of section 19 where he keeps the goods for an unreasonable time without informing the supplier that he does not want them. What constitutes an unreasonable period of time is a factual question. An unreasonable period of time should be a period that runs beyond the periods of time provided for in the Act in which a consumer may reject the goods or institute his cooling-off right in terms of section 16. For example where goods are unsafe or defective in terms of section 56 and the implied warranty of quality applies, an unreasonable period of time will not be less than six months. The reason is that the consumer has a right to reject, replace or claim a refund within six months (from date of delivery).

Defective goods may therefore be in the possession of the consumer for a period of six months from date of delivery without it being regarded as acceptance of the goods by the consumer in terms of section 19 (merely because the consumer keeps them for six months before exercising his right to reject in terms of section 56). The six month-period should therefore not be regarded as an unreasonable period of time to keep consumer goods taking into account that the goods must be unsafe or defective for section 56 and the six month-period to apply.

2.2 Rejection of consumer goods

It is important to note that the right to return (reject) goods in terms of section 20 is additional to any common law right, any other right in law conferred on a consumer to return goods as well as the right to return unsafe and defective goods in terms of section 56 of the CPA.¹⁵⁵

The consumer will be able to reject goods where he is exercising his cooling-off right in terms of section 16 (provided the goods were supplied in terms of direct marketing).¹⁵⁶ The consumer will have a period of five days from date of conclusion of the agreement or date of delivery (the later of the two dates will apply) to return the goods and receive a full refund but it will be at the consumer's risk and expense.¹⁵⁷

¹⁵⁵ S 20(1).

¹⁵⁶ S 20(2)(a).

¹⁵⁷ For a comprehensive discussion of s 16 and the consumer's cooling-off right see chapter 7.

Where the consumer bought goods based on a description or a sample or both and he or she did not have a reasonable opportunity to examine the goods, the consumer may reject the goods in terms of section 20(2)(b). Similarly where the consumer bought special order goods in terms of section 19(5)(b) and did not have an opportunity to examine those goods, the consumer may reject them in terms of section 20(2)(b). The goods will be returned at the supplier's risk and expense.¹⁵⁸

If one reads section 20(2)(b) carefully, it becomes clear that this particular section will only apply if the goods were bought by description or sample or both, or if the goods were special order goods *and*¹⁵⁹ in either instance the consumer did not have an opportunity to examine them.

A consumer may reject goods in terms of section 20(2)(b) solely on the fact that he did not have an opportunity to examine them, without determining whether or not the goods do in fact conform to the description or sample or both or the material specifications of the special order.

Where the supplier has delivered a mixture of goods (in other words some of the goods the supplier agreed to supply mixed with goods of a different description not contemplated in the agreement), the consumer may reject those goods. This is a breach of contract by the supplier amounting to positive malperformance.¹⁶⁰

The common law position with regard to cancellation and positive malperformance is amended. In terms of the common law and in the absence of a cancellation clause, a party is only entitled to cancel a contract where the malperformance is substantial.¹⁶¹ In terms of section 20(2)(c), however, the consumer may reject the goods and claim a refund if a mixture of goods were delivered to the consumer regardless of whether the incorrect delivery of mixed goods was substantial or not. The goods will be returned at the supplier's risk and expense.¹⁶²

¹⁵⁸ S 20(2)(b).

¹⁵⁹ Own emphasis.

¹⁶⁰ See Nagel *ea* 127-128. The requirements for this form of breach in this case are a positive duty and fault.

¹⁶¹ Nagel *ea* 138. See also *The Treasure Chest v Tambuti Enterprises* 1975 2 SA 783 (A).

¹⁶² S 20(2)(b).

2.2.1 Uncertainty with regard to rejection of goods bought for particular purpose

Where goods were bought to satisfy a particular purpose, sections 20, 55 and 56 must be read together to determine how and when a consumer may reject the goods. Some uncertainty does however exist.

Goods will only be regarded as goods bought to satisfy a particular purpose where the consumer has specifically informed the supplier of the particular purpose or use.¹⁶³ The supplier must also either ordinarily offer to supply such goods or act in a manner consistent with being knowledgeable about the use of those goods.¹⁶⁴ The consumer has a right to expect that the goods are reasonably suitable for the specific purpose that the consumer has indicated.¹⁶⁵

There are two opportunities for the consumer to reject (return) the goods. Firstly, where the goods are unfit for the particular purpose for which they were bought they may be returned in terms of section 20(2)(d) within ten business days after delivery at the supplier's risk and expense. Secondly, because the implied warranty of quality is also applicable to goods bought for a particular purpose, such goods may be returned within six months after delivery at the supplier's risk and expense.¹⁶⁶

The only obvious difference between the sections¹⁶⁷ is the time periods in which to return goods sold for a particular purpose. In terms of section 20 the consumer may return the goods within ten days and in terms of section 56 the consumer may return the goods within six months. Upon closer inspection, however, the difference becomes more apparent.

Where the consumer returns goods bought for a particular purpose in terms of section 20, the general rule is that the goods may be returned to the supplier at the supplier's risk and expense and the consumer is entitled to receive a full refund.¹⁶⁸ Section 20(3), however, provides for situations where the goods may not be returned¹⁶⁹ and section 20(6) provides for situations where the supplier may deduct reasonable

¹⁶³ S 55(3). For a comprehensive discussion of s 55(3) see chapter 11 Part D.

¹⁶⁴ S 55(3)(a) & (b).

¹⁶⁵ S 55(3).

¹⁶⁶ In terms of s 56.

¹⁶⁷ S 20(2)(d) & s 55(3) read together with s 56.

¹⁶⁸ S 20(2).

¹⁶⁹ For reasons of public health or goods significantly altered by consumer.

charges.¹⁷⁰ (Suppliers will probably always find a reason to deduct a reasonable charge in terms of section 20(6)).

Where the consumer returns goods bought for a particular purpose in terms of section 55(3) (read together with section 56), the consumer may return the goods but has a choice of either claiming a full refund, or a replacement of the goods or repair thereof. There is no provision in terms of section 56 (as is the case in terms of section 20(3)) whereby the consumer is prohibited from returning the goods and a supplier may also not charge any penalty where goods are returned in terms of the same section.¹⁷¹

The difference in the wording of sections 20 and 56 is cumbersome for the consumer and a stumbling block for the proper interpretation of the consumer's rights. The ordinary alert consumer will not be aware of the subtle differences in exercising his right to return goods bought for a particular purpose in either of these sections. It is also argued that suppliers might choose to enforce the right to return particular goods in terms of section 20 rather than section 56 for the simple reason that in terms of section 20 the time in which to return the goods is shorter (ten days instead of six months).

Certain reasonable charges may also be deducted in terms of section 20(6) (*contra* section 56(2) where goods may be returned to the supplier without penalty). In terms of the Act, the consumer may still return the goods in terms of section 56 (after the ten-day period in terms of section 20 has lapsed).¹⁷² The question is whether or not the consumer will be aware of this fact and whether or not the supplier will inform the consumer thereof.

2.3 Can a consumer reject defective goods where they have been “accepted” in terms of section 19?

Suppliers may argue that where consumers have accepted goods in terms of section 19 they will lose their right to reject and return the goods even if there is a defect in the goods and may only then claim for a repair or replacement of the goods.

¹⁷⁰ For example where the goods have been opened, used or need to be restored by the supplier.

¹⁷¹ S 56(2).

¹⁷² Ito s 20(1) the right to return the goods in terms of s 20(2)(d) is in addition to any other right in terms of the Act or the common law. See also s 56(4) which has similar wording.

Though the rights of a consumer with regard to defective goods are discussed in detail in chapter 11 of this thesis, it is important to take note of the provisions of the CPA when dealing with acceptance of goods by the consumer in terms of section 19. Where defective goods are sold and the CPA applies, the consumer will still have a choice to claim a refund, or the replacement or repair of the goods in terms of section 56 within six months after delivery of those goods (and by implication also acceptance thereof). The reason is that the right to return the goods is additional to any other right in terms of the Act or the common law.¹⁷³

3. Warranty of title or authority

It is clear upon inspection of section 44 of the CPA that there is no guarantee of the transfer of ownership (confirming the common law position) but rather that the supplier has the authority to supply the goods.¹⁷⁴ It is an implied term of any consumer agreement that the supplier guarantees that the consumer will have quiet possession of the goods.¹⁷⁵ This is a confirmation of the warranty against eviction rather than a guarantee of the transfer of ownership.¹⁷⁶ Van Eeden states that section 44 merely secures the consumer's right to title against the supplier, quiet possession and the disclosure of charges or encumbrances.¹⁷⁷

The writer argues that the sale arrangements for modern consumer goods cover many different legal relationships between owners, importers, manufacturers and financiers of goods.¹⁷⁸ If the supplier (seller) is the owner of the thing sold, he is in terms of the common law obliged to transfer ownership.¹⁷⁹ There may be situations where the seller is not the owner of the goods at the time of the sale, but will, in the ordinary course of events become the owner, or obtain the seller's authority to sell the goods, and thus be in a position to transfer the ownership in the goods.¹⁸⁰

¹⁷³ Ss 20(1) & 56(4).

¹⁷⁴ Van Eeden 221.

¹⁷⁵ *Ibid.*

¹⁷⁶ See chapter 10.

¹⁷⁷ Van Eeden 220.

¹⁷⁸ *Ibid.*

¹⁷⁹ *Ibid.*

¹⁸⁰ *Ibid.*

The purpose of section 44¹⁸¹ is firstly that the consumer can assert that he legitimately assumed that the seller has the right, or the authority of the legal owner, to sell the goods.¹⁸² Secondly, the seller is not required to make a pre-contractual statement to the consumer that he is the owner or has the authority to sell, or to include a statement to such effect in the agreement itself.¹⁸³ Van Eeden explains that this is now provided for and implied by the wording “implied term” in section 44(1).¹⁸⁴

A good example given by Van Eeden is that of the supply of new motor vehicles.¹⁸⁵ The supply of certain consumer goods (such as new motor vehicles) typically flows along a supply chain involving manufacturers, importers, distributors, retailers and credit providers such as banks or financing companies, entailing sequential ownership and reservation of ownership arrangements.¹⁸⁶ Similarly second-hand motor vehicles may be subject to repossession by a financial institution, a sale by one consumer to another, and thereby the reintroduction into the trade market of stock (vehicles) available for sale with a sequence of prior owners (some of whom may be consumers and some of whom may have been registered owners).¹⁸⁷ Be that as it may, the CPA does not change the common law position that the seller does not guarantee ownership and can only transfer ownership if he himself is the owner.

Sharrock criticises the drafting of section 44 because it is unclear whether the legislature intended to reaffirm or abandon the common law rule that a person may validly sell goods of which he is not the owner.¹⁸⁸ I agree with Sharrock that a further flaw in the section is the absence of a remedy for a buyer where the required legal right or authority does not exist (or does not come into existence).¹⁸⁹ The situation is further complicated by the fact that “quiet possession” in terms of section 44 is not defined.¹⁹⁰

¹⁸¹ S 44(1)(a) & (b).

¹⁸² Van Eeden 221.

¹⁸³ *Ibid.*

¹⁸⁴ *Ibid.*

¹⁸⁵ *Idem* 222.

¹⁸⁶ *Ibid.* Also referred to as “floor plan” arrangements.

¹⁸⁷ *Ibid.*

¹⁸⁸ Sharrock (2011) 604.

¹⁸⁹ *Ibid.*

¹⁹⁰ *Ibid.*

The question with regard to the possible transfer of ownership in unsolicited goods has already been discussed.¹⁹¹ For purposes of completeness it is confirmed at this stage that section 21(6) provides that if a person lawfully retains any unsolicited goods, the property in those goods *passes unconditionally to the person, subject only to any right or valid claim that an uninvolved third party may have with respect to those goods*¹⁹² and the person who supplied or delivered those goods is liable to any other person in respect of any right or valid claim relating to such goods. Section 21(6) seems to be contradictory in itself. The consumer cannot unconditionally become owner of unsolicited goods if they are subject to a legal right that a third party might have to the goods.

The valid owner of the goods will always have a right to the goods and ownership therefore cannot pass to the consumer. The intention of the legislature with the provisions of section 21(6) was most likely to discourage suppliers from attempting inertia selling at the risk of supplying goods without remuneration. In Belgium, for instance, the legislature makes specific reference to the fact that ownership does pass to the consumer in the case of unsolicited goods.¹⁹³ The possibility therefore exists that ownership might transfer from the supplier to the consumer in the case of the inertia selling of unsolicited goods.

E. COMPARISON

1. Scotland

1.1 Delivery by seller

In terms of section 61(1) of SOGA “delivery” is defined as the voluntary transfer of possession from one person to another. Tookey explains it to mean a handing over of the goods.¹⁹⁴ The writer also warns that a clear distinction should be made between delivery (the transfer of possession) and the passing of title (ownership).¹⁹⁵ Delivery is not confined to the transfer of physical possession of the goods or the physical

¹⁹¹ See chapter 5 Part D.

¹⁹² Own emphasis.

¹⁹³ See Part E 2 below. In terms of the WMPC 2010.

¹⁹⁴ Tookey 14.

¹⁹⁵ Tookey 15.

transportation of goods from the seller's premises to another location.¹⁹⁶ According to Tookey it really means the point in time and space at which the parties can be seen to have agreed that the legal right to possession of the goods passes from the seller to the buyer (not necessarily ownership).¹⁹⁷ Section 27 of SOGA provides that there is a duty on the seller to deliver the goods.¹⁹⁸

Section 29 of SOGA will be applicable where the parties do not agree on a time and place of delivery. The place of delivery will be the place of business of the seller or if he has none, the seller's residence.¹⁹⁹ In *Galbraith & Grant Ltd v Block*²⁰⁰ it was held that a seller carries out his duty of delivery where he hands over the goods to someone whom he reasonably assumes is authorised to receive them. Dobson & Stokes refer to the example of goods received by a security guard at a security gate and subsequently handed over to the buyer.²⁰¹ The time of delivery must be within a reasonable time²⁰² and at a reasonable hour and what is reasonable will be a factual question.²⁰³ The expenses of delivery will be borne by the seller.²⁰⁴ Tookey²⁰⁵ refers to *Hartley v Hymans*²⁰⁶ where it was held that in an ordinary commercial contract for the sale of goods, the rule is that the time of delivery is of the essence. This *prima facie* rule may, however, be rebutted by the facts in a particular case.²⁰⁷

1.1.1 Delivery of the goods and payment of the purchase price

It seems that as a general rule a sale of goods in Scotland is regarded as a cash sale since section 28 of SOGA states that the delivery of the goods and the payment of the purchase price are concurrent conditions and should happen at the same time unless

¹⁹⁶ *Ibid.*

¹⁹⁷ *Ibid.*

¹⁹⁸ See also Black 186-187; Dobson & Stokes 181-182.

¹⁹⁹ S 29(2). If the sale is for specific goods at a specific place and the parties are aware of such a fact, the place of delivery will be at that specific place (s 29(2)).

²⁰⁰ [1922] 2 K.B.155 KBD.

²⁰¹ Dobson & Stokes 182-183.

²⁰² S 29(3). See also *Zenziper Grains and Feed Stuffs v Bulk Trading Corp Ltd* [2001] 1 Lloyd's Rep 357.

²⁰³ S 29(5).

²⁰⁴ S 29(6).

²⁰⁵ 17.

²⁰⁶ [1920] 3 K.B. 475.

²⁰⁷ Tookey 17.

the contract provides otherwise. According to Tookey²⁰⁸ this is the situation with a normal retail sale but the intention of the parties may indicate otherwise, for example where the buyer is given a credit period of 30 days after receiving the goods, and an invoice, before they have been paid for.

1.1.2 Forms of delivery in terms of SOGA

Part IV of SOGA provides for the forms of delivery of goods. The most obvious form of delivery is actual delivery (in other words, the physical handing over of the goods).

Other forms of delivery include the transfer of a document,²⁰⁹ delivery of an object giving control,²¹⁰ the buyer's continuance of possession,²¹¹ attornment²¹² and delivery to a carrier.²¹³

1.2 *Passing a good title to goods*

Section 12(1) of SOGA implies into the contract a term that the seller has the right to sell the goods. In terms of section 12(2) it is an implied term that the goods are free from any charge or encumbrance not already known to the buyer and that the buyer will enjoy quiet possession of the goods. Although section 12 of SOGA is discussed in depth in chapter 10 when dealing with the warranty against eviction, it is important to note that, similar to section 19 of the CPA in South Africa, the seller does not guarantee the transfer of ownership in section 12 of SOGA.

Similar to South African law, the general principle of the law relating to movable property is that a seller cannot transfer ownership of the goods unless he himself is the owner. This confirms the *nemo plus iuris* rule²¹⁴ and can be an extremely inconvenient and unjust rule in some circumstances. For that reason a number of modifications are provided for in SOGA.²¹⁵

²⁰⁸ 15.

²⁰⁹ Tookey 15 gives the example of a bill of lading that constitutes symbolic delivery. See also Dobson & Stokes 182 for the different forms of delivery.

²¹⁰ *Ibid*, for example keys to a motor vehicle.

²¹¹ Tookey 15. Where for example the buyer already holds the goods as bailee of the seller and then on the sale there is a notional delivery of the goods to the buyer.

²¹² Goods in possession of a third party on behalf of the seller and after delivery on behalf of the buyer.

²¹³ Regulated by s 32(1) of SOGA. A contract of carriage falls outside the scope of this discussion.

²¹⁴ Ervine 41. See also Black 182-185.

²¹⁵ Ervine 41. See also the discussion of situations where the seller is not the owner in chapter 5 Part E 2.1.

1.3 Buyer's duty to take delivery

Tookey argues that the provisions of sections 27 and 29 of SOGA conversely apply to the buyer in that they establish a duty on the buyer to take delivery of the goods.²¹⁶

However, delivery of the goods to the buyer does not mean that the buyer has agreed that the goods comply with the contract (nor does it mean that the buyer has accepted the goods).²¹⁷ The *prima facie* rule is, however, that delivery, acceptance and payment generally take place at the seller's premises.²¹⁸

1.4 Acceptance of goods

Section 35(1) of SOGA provides that a buyer is deemed to have accepted the goods where he intimates to the seller that he has accepted them, where the goods are delivered to the buyer and the buyer does an act in a manner that is inconsistent with the seller's ownership or after the lapse of a reasonable time the buyer retains the goods without intimating to the seller that he has rejected the goods. The wording of section 19 of the South African CPA is very similar to that of section 35(1) of SOGA.

It was held in *Hunter v Albancode Group plc*²¹⁹ that the continued use of the goods after the buyer purported to reject them, amounted to an act inconsistent with the seller's ownership and thus also an acceptance of the goods.

*Clegg v Anderson (t/a Nordic Marine)*²²⁰ concerned the sale of an ocean-going yacht and the buyer took three weeks to assess the situation before rejecting the goods. The buyer's rejection was upheld by the court which further determined that the buyer was allowed time to ascertain the actions needed to modify or repair the goods. A reasonable time in this instance was therefore many months after delivery as the seller was slow to respond to requests for information.²²¹

Section 35(5) of SOGA provides that in determining whether a reasonable time has elapsed the buyer should have had a reasonable opportunity to examine the goods.

²¹⁶ Tookey 21.

²¹⁷ *Ibid.*

²¹⁸ *Idem* 22.

²¹⁹ 1989 GWD 39-1843.

²²⁰ [2003] EWCA Civ 320.

²²¹ Tookey 25.

The buyer is not deemed to have accepted the goods merely because he asks for, or agrees to, their repair by or under an arrangement with the seller, or because the goods are delivered to another under a sub-sale or other disposition.²²²

A buyer's failure to accept the goods does not by itself allow the seller to sell the goods to someone else.²²³

1.5 Right to reject goods

Section 15B of SOGA provides that if a breach is material the buyer has a right to reject any goods delivered under the contract and treat them as repudiated. Where a contract of sale is a consumer contract, a material breach includes a breach by the seller of any term (express or implied) as to the quality of the goods or their fitness for purpose. If the goods are sold by description or sample or both, the goods have to correspond with the description or sample or both.²²⁴

In *Jones v Gallagher*²²⁵ the Court of Appeal held that the buyer's right to reject had been lost through delay. The case involved a newly-fitted kitchen and the court held that the main complaint (that the colour was incorrect) could have been raised very early as the problem was apparent upon delivery.

Section 36 of SOGA provides that where goods have been rightfully rejected by the buyer, the buyer is not obliged to return them to the seller. It is the responsibility of the seller to arrange a return of the goods. (In South Africa, section 20 of the CPA will determine at whose expense the goods are to be returned.)

In *Charles Rickards Ltd v Oppenheim*²²⁶ the defendant had ordered a motor vehicle for delivery within six or seven months. Having allowed the supplier more time on several occasions, he eventually lost patience and wrote saying that he would not take delivery after a certain date. It was held that the buyer was entitled to give reasonable notice making the time of the essence of the contract, and was thus not in breach of contract in not accepting the vehicle when it was delivered after the stipulated date.

²²² S 35(6) SOGA.

²²³ *Ibid.*

²²⁴ S 15B SOGA.

²²⁵ [2004] EWCA Civ 10.

²²⁶ [1950] 1 K.B. 616.

1.6 Transfer of movables in Scotland: Abstract or causal system?

Van Vliet refers to the writings of Voet and its influence on Scottish law.²²⁷ According to the writer Voet's approach could be described as causal.²²⁸ Van Vliet, however, argues that the writings of legal academics and not case law provide answers. He refers to writers such as Smith who concluded that the Scottish system of transfer is abstract.²²⁹ This is also referred to as the common law system of transfer of ownership.²³⁰ Contrary to this, SOGA provides for a causal system for the transfer of ownership.²³¹

As far as Scotland is concerned, Van Vliet argues that where a contract of sale of movable goods is void or has been avoided, with the result that SOGA is not applicable, the transfer may still be valid under the rules of the common law, being an abstract system of transfer requiring delivery but not a valid contract.²³²

The primary requirement is a transfer of possession to the buyer with the intention to pass ownership. According to Van Vliet the result is that a void contract or an avoided contract can pass title if followed by a transfer of possession.²³³ In other words, while the absence of a valid contract of sale necessarily bars transfer under SOGA, there might still be a valid transfer in terms of the Scottish common law where there was delivery of the goods as well as the mutual intention to transfer ownership.²³⁴

To summarise therefore, the transfer system of Scottish common law can be identified as abstract. Mere consensus does not suffice to pass ownership and delivery is also required. That the system is also abstract indicates that the validity of the transfer of property is viewed independently from the validity of the underlying contract of sale. This means that the transfer may be valid even though the underlying contract was void from the outset or was later avoided with retroactive effect. In the case of a sale, this arrangement was replaced by SOGA, which introduced a totally different system of transfer.

²²⁷ Van Vliet 2008 192-193.

²²⁸ *Idem* 193 and the writer's loose translation of Voet 1 4 3.

²²⁹ *Ibid.* See also fn 81.

²³⁰ *Ibid.*

²³¹ *Ibid.*

²³² *Ibid.*

²³³ *Ibid.*

²³⁴ *Idem* 194.

However, SOGA did not fully supersede the Scottish common law. Where the contract of sale is void or where a voidable contract has been avoided, both transfer systems operate at the same time; for where delivery has taken place, ownership may still pass on the basis of the common law, even though it cannot pass on the basis of SOGA.²³⁵ The reason is that while the Scottish common law demands delivery, it does not demand a valid underlying contract of sale.²³⁶ (The problem of two systems for the transfer of ownership overlapping is avoided in South Africa because the CPA did not (as is the case with SOGA in Scotland) introduce a new system of transfer.)

1.7 Transfer of ownership of corporeal movable goods (consumer goods) in terms of SOGA

“A ‘Real agreement’ is thus the expression of the parties’ will that ownership should pass; it is what makes transfer a legal or juridical act. The real agreement, it is true, will normally pass ownership only if additional requirements have been met, such as a valid legal ground, delivery or a deed, but the declaration of will between the parties is always the core element of any voluntary transfer of ownership.”²³⁷

Ownership of corporeal movable property can be acquired by either acquisition (where it has not been owned before)²³⁸ or by the transfer thereof from another owner.²³⁹ The existing owner (seller) must have the intention to transfer ownership and a thief will for example not acquire ownership.²⁴⁰ Evidence of the owner’s intention to transfer may be contained in the agreement of sale and may or may not involve physical transfer.²⁴¹ Transfer of ownership will as a general rule be completed upon delivery and will include the transfer of the real right of ownership from the seller to the buyer. The transfer of ownership of goods sold is governed by SOGA.²⁴²

²³⁵ *Ibid.*

²³⁶ *Ibid.*

²³⁷ *Idem* 504.

²³⁸ The discussion of acquisition falls outside the scope of this discussion.

²³⁹ Black 363.

²⁴⁰ *Ibid.*

²⁴¹ *Ibid.*

²⁴² Ss 16-18.

Black explains that different rules will apply when dealing with “specific goods”²⁴³ and “unascertained goods”.²⁴⁴ The general rule is that ownership in goods cannot pass unless goods are “ascertained goods” in terms of section 16 of SOGA. When the goods are ascertained or specified, ownership of the goods will transfer when the buyer and seller intend for it to pass.²⁴⁵ Because it may be very difficult to determine exactly what the intention between the parties is, section 18 comes to the rescue and sets out a number of rules to assist.²⁴⁶

1.7.1 Section 18 of SOGA: Rules for ascertaining intention

Unless a different intention appears, the following rules for ascertaining the intention of the parties as to the time at which ownership will transfer from the seller to the buyer will apply.²⁴⁷

Rule 1 provides that where there is an unconditional contract²⁴⁸ for the sale of specific goods in a deliverable state²⁴⁹ the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, is postponed. In *Dennant v Skinner and Collom*²⁵⁰ the court held that a term stating that ownership would not transfer until the buyer’s cheque had cleared was not a term of the contract and rule 1 applied. In *Re Anchor Line Ltd*,²⁵¹ for example, the court of appeal held that ownership did not pass under rule 1 because the written contract established an intention that transfer of ownership will only take place after the full purchase price had been paid. According to Dobson & Stokes the essence of this rule is that if the goods are identified and agreed upon and handed over, the

²⁴³ Black 180: Ascertained goods are “goods identified and agreed on at the time a contract of sale is made” for example where goods are selected by a consumer in a shop. See also Dobson & Stokes 28-39.

²⁴⁴ *Ibid* where the writer explains that unascertained goods cover three situations, namely, goods still to be manufactured or grown, generic goods and unidentified parts of a specific whole. See also Dobson & Stokes 29-31.

²⁴⁵ *Ibid*.

²⁴⁶ *Ibid*.

²⁴⁷ S 18.

²⁴⁸ Dobson & Stokes 34 interpret this to mean a contract which contains no condition preventing rule 1 from applying. An example of a “conditional contract” would be where the seller is himself not yet owner but will become owner in the near future.

²⁴⁹ S 61(5) SOGA: “in such a state that the buyer would under the contract be bound to take delivery of them”. See also Dobson & Stokes 34.

²⁵⁰ [1948] 2 K.B. 164.

²⁵¹ [1937] 1 Ch 1.

parties are taken to have intended for the buyer to become the owner immediately (the very instant that the contract is made).²⁵²

Rule 2 provides that where there is a contract for the sale of specific goods and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state, ownership does not pass until the thing is done and the buyer has notice²⁵³ that it has been done. Dobson & Stokes state that rule 2 is concerned with the situation where there is a conditional contract (the condition relating to the seller doing something to render the goods in a deliverable state).²⁵⁴

Rule 3 provides that where there is a contract for the sale of specific goods in a deliverable state but the seller is bound to weigh, measure, test or do some other act or thing with reference to the goods for the purpose of ascertaining the price, ownership does not pass until the act or thing is done and the buyer has notice that it has been done. Rule 3 will only apply where it is the seller who needs to do the weighing, measuring and so forth.²⁵⁵

Rule 4 deals with goods delivered to the buyer on approval or on sale or return or other similar terms. Ownership of the goods passes to the buyer when the buyer signifies his approval or acceptance to the seller or performs any other act adopting the transaction. If the buyer does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, ownership will transfer on the expiration of that time or if no time has been fixed, ownership will transfer on the expiration of a reasonable time. Black²⁵⁶ cites the example given in *Kirkham v Attenborough*²⁵⁷ where it was held that property passed in terms of rule 4 when the goods were pawned by the buyer because this was a way of showing that the buyer accepted the goods. The buyer may offer it as an excuse if he was unable to return the goods within the approval period due to something entirely out of his control or fault.²⁵⁸

²⁵² Dobson & Stokes 34.

²⁵³ *Idem* 35: Where the fact that goods are in a deliverable state comes to the actual knowledge of the buyer.

²⁵⁴ *Ibid.*

²⁵⁵ *Idem* 36. Where some other person than the seller is to weigh or measure the goods either rule 1 or rule 2 in terms of s 18 will apply.

²⁵⁶ 181.

²⁵⁷ [1897] 1 Q.B. 201 CA.

²⁵⁸ Dobson & Stokes 37.

Rule 5 deals with the transfer of ownership of unascertained goods or future goods sold by description. Where such goods are unconditionally appropriated to the contract, ownership passes to the buyer. According to Dobson & Stokes there are two basic requirements for property to pass in these situations: Firstly the goods complying with the contract must be unconditionally appropriated to the contract by one of the parties and secondly the other party must give his assent.²⁵⁹

Where the buyer buys goods from an identified bulk, the property in those goods passes to the buyer as soon as the goods are specifically identified.²⁶⁰

2. Belgium

2.1 *Transfer of ownership of movable goods in sale agreements*

Article 1583 of the Civil Code provides that ownership transfers to the buyer as soon as the thing sold and the purchase price are agreed upon even if the purchase price is not yet paid or the thing sold delivered. Transfer of ownership occurs at the time of conclusion of the contract but the parties may also deviate from article 1583 and postpone the transfer of ownership by way of agreement.²⁶¹ Movables and immovables, tangibles and intangibles are all principally subject to the rule of transfer by mere agreement between the parties (transfer *solo consensu*).²⁶² The transfer of ownership in Belgian law is based on a causal system. It is necessary that a valid obligation underlies the transfer of ownership in order to effect this transfer.²⁶³

According to Cauffman & Sagaert, the consensual nature of the transfer system also includes that payment is not a requirement for the passing of property rights.²⁶⁴ Except if the parties have agreed otherwise, ownership is immediately transferred. For instance, in a sales agreement, from the moment that the parties have agreed upon the object of the sale and the price. The moment of payment is irrelevant, unless the parties

²⁵⁹ *Idem* 38. See also Dobson & Stokes 37-42 for a comprehensive discussion of rule 5 of s 18 SOGA.

²⁶⁰ S 18(3).

²⁶¹ Dekkers 458.

²⁶² Cauffman & Sagaert 222. See also Herbots 229-230 on the basic rules for the transfer of ownership.

²⁶³ Cauffman & Sagaert 226.

²⁶⁴ *Ibid.*

have agreed otherwise.²⁶⁵ Dekkers gives the example of an agreement to pay the purchase price in instalments and to postpone ownership until the last payment.²⁶⁶

Article 1615 of the Civil Code provides that the obligation to deliver the goods includes its accessories and all that was destined for its perpetual use.

The *nemo plus iuris* rule is also²⁶⁷ applicable in Belgian law. It implies that a person cannot transfer more rights than he himself has. However, the impact of the *nemo plus iuris* rule is limited in various ways in matters of movables, especially by article 2279²⁶⁸ of the Civil Code and by the rules of (direct and indirect) representation.²⁶⁹

There are no formal requirements for the passing of ownership in movable goods. The signing of a written document is merely to prove the transfer of ownership if the transfer involves property of which the value exceeds €375.²⁷⁰ Delivery is not necessary either.

2.1.1 Transfer of ownership in generic sales²⁷¹

Ownership will only transfer in case of a generic sale when the generic goods become identified or at least identifiable.²⁷² Cauffman & Sagaert refer to it as the “principle of specificity”.²⁷³ If for example A sells generic goods to B, ownership will only pass after the individualisation of the goods that are being transferred.²⁷⁴

Cauffman & Sagaert also refer to “commercial law” scholars²⁷⁵ who argue that in terms of commercial sale agreements, ownership is not transferred by individualisation,

²⁶⁵ *Ibid.* See Dekkers 459 where the writer discusses the practical use for determining the moment of transfer of ownership.

²⁶⁶ Dekkers 458-459.

²⁶⁷ Similar to the position in both South Africa and Scotland.

²⁶⁸ A 2279 Civil Code: “In matters of personality, possession is equivalent to title. Nevertheless, one who has lost or from whom was stolen a thing may claim it during three years, counting from the day of the loss or theft, against the one in whose hands he finds it, saving for that one his recourse against him from whom he holds it.” A 2279 is discussed in detail as part of chapter 5 (see Part E) as well as chapter 10 (see Part E).

²⁶⁹ Cauffman & Sagaert 244.

²⁷⁰ *Ibid.*

²⁷¹ See also chapter 5 Part E.

²⁷² Cauffman & Sagaert 244. See also Dekkers 459.

²⁷³ Cauffman & Sagaert 253.

²⁷⁴ *Ibid.*

²⁷⁵ *Ibid.*

but by delivery of the sold goods.²⁷⁶ In other words: The individualisation of the sold goods would not be sufficient in a commercial sale to pass ownership and delivery would be necessary.²⁷⁷

2.1.2 Transfer of ownership in future goods²⁷⁸

An agreement with regard to the transfer of future goods is in principle valid.²⁷⁹ Article 1130 of the Civil Code provides that future goods may be the object of an obligation. If goods are sold which do not exist at time of the conclusion of the contract, transfer of ownership will only be effected at the moment the goods come into existence.²⁸⁰

2.1.3 Transfer of ownership where the sale is subject to a suspensive condition²⁸¹

If an agreement for the transfer of ownership is concluded subject a suspensive condition, it is generally acknowledged that the agreement exists but is deprived of legal effect until the condition has been fulfilled.²⁸² Not the agreement itself, but the execution of the obligations subject to the suspensive condition is suspended.²⁸³ According to Cauffman & Sagaert²⁸⁴ most authors defend the view that ownership passes immediately, even if the condition has not been fulfilled.²⁸⁵

2.1.4 Personal rights and real rights

A personal right establishes a legal relationship between two (natural or juristic) persons.²⁸⁶ One is the creditor entitled to claim compliance with the obligation and the other is the debtor bound to fulfil the obligation to which he has agreed.²⁸⁷ In contrast, a real right does not establish a relationship between two subjects, but between a subject

²⁷⁶ *Ibid.*

²⁷⁷ Cauffman & Sagaert 253.

²⁷⁸ See also chapter 5 Part E.

²⁷⁹ See chapter 5 Part E 2.2 for a comprehensive discussion of future goods.

²⁸⁰ Cauffman & Sagaert 255. See also Dekkers 458-459.

²⁸¹ For a comprehensive discussion of suspensive conditions see chapter 8 Part E.

²⁸² *Ibid.*

²⁸³ This is also the position in terms of South African common law. See chapter 8 Part E 2.2 for a comprehensive discussion.

²⁸⁴ Cauffman & Sagaert 256.

²⁸⁵ *Ibid.*

²⁸⁶ *Idem* 199.

²⁸⁷ *Ibid.*

and an object burdened with the real right.²⁸⁸ One of the main functions of possession in terms of Belgian law is its acquisitive function, in other words possession can result in the acquisition of ownership.²⁸⁹

2.2 Duty of seller to deliver thing sold

2.2.1 Common law position²⁹⁰

The seller's duty to deliver the thing sold arises as soon as the contract is concluded.²⁹¹ Delivery takes place when the goods are transferred into the control and possession of the buyer.²⁹²

Article 1604 of the Civil Code provides that delivery of the goods into the possession of the buyer entails the delivery (*traditio*) of the thing itself and includes all fruits and proceeds which materialised since the date of conclusion of the contract.²⁹³ The place of delivery is the place where the thing sold was situated at the time of conclusion of the contract unless the parties agree otherwise.²⁹⁴ Where the parties do not agree on a time for delivery it is the responsibility of a judge to determine it.²⁹⁵

Where delivery is not made by the seller, the buyer may either rescind the agreement or enforce delivery and in either case the seller might have to pay damages and interest.²⁹⁶

The seller's duty to deliver comes to an end if the buyer fails to pay or becomes insolvent.²⁹⁷

2.2.1.1 "Conforming delivery" ("conforme levering")

In terms of article 1243 of the Code, the seller will only fulfil his duty to deliver the thing sold if the thing sold complies with the description thereof in the contract concluded between the parties.

²⁸⁸ *Ibid.*

²⁸⁹ *Ibid.*

²⁹⁰ Book 3, Chapter IV Section II of the Civil Code. See also Cauffmann & Sagaert 260-272; Dekkers 459.

²⁹¹ Herbots 229.

²⁹² *Ibid.*

²⁹³ See also Dekkers 459.

²⁹⁴ A 1609 Civil Code.

²⁹⁵ Herbots 229.

²⁹⁶ *Ibid.*

²⁹⁷ *Ibid.*

Dekkers states that the seller will not comply with the duty of delivery if the goods delivered does not conform to the sample or description given by the seller prior to delivery and as agreed upon in terms of the contract of sale.²⁹⁸

2.2.2 Forms of delivery

Belgian law recognises three forms of delivery²⁹⁹ or consensual transfer of possession in which the mere consensus affects the transfer of possession. The first form is *traditio brevi manu* (delivery with the short hand). For example where B sells his motor vehicle to A, but A is already in possession thereof. A will become possessor by the mere conclusion of the agreement without any physical change in the situation being necessary.³⁰⁰

The second form of consensual transfer of possession where the mere consensus effects transfer of possession is *constitutum possessorium*. This is the converse of *traditio brevi manu* because the seller is in possession, but he transfers the possession to a third party, reserving however the detention of the asset.³⁰¹

The last exception is the so-called *traditio longa manu*. A possessor of movable goods (A) gives detention thereof to B, who is obliged to make restitution. During this detention, however, A passes possession of the goods to C. C becomes possessor by the mere sales agreement, without any change in the physical control of the asset.³⁰²

2.2.2.1 Factual handing over

Factual handing over implies co-operation between the seller who hands over the goods and the buyer who takes possession.³⁰³ This type of delivery is common for on the spot sales of goods of moderate size and weight such as sales by a retailer where the property bought is handed over to the buyer and taken away by him.³⁰⁴

²⁹⁸ Dekkers 476-477. See also discussion of delivery in consumer sales as well as chapter 11 Part E where the duty of delivery has been included as part of the conforming criteria (“overeenstemmingscriteria”) in article 1649ter § 1 of the Code.

²⁹⁹ *Ibid.*

³⁰⁰ Cauffman & Sagaert 260.

³⁰¹ *Ibid.*

³⁰² This is an example of attornment rather than delivery with the long hand and seems to have a different meaning in Belgian law than in South African law. See for the application in South African law Part B 2.2 of this chapter.

³⁰³ Cauffman & Sagaert 263.

³⁰⁴ *Idem* 264.

Delivery in this manner is also possible in the case of large amounts of goods that are stored in the seller's storage facilities, but this will only be the case if the buyer takes the goods with him, or at least sets them apart and marks them so that there can be no dispute about his possession of the goods at a later stage.³⁰⁵

2.2.2.2 Symbolic delivery

The handing over of keys constitutes a symbolic *traditio*, as the seller does not deliver the goods himself but only delivers the means that enable the buyer to take possession thereof.³⁰⁶ Symbolic delivery has the same effect as the real factual delivery of the goods and offers the buyer the protection of article 1141 of the Civil Code³⁰⁷ against a subsequent buyer on condition that the buyer actually takes possession of the goods.³⁰⁸ To avoid disputes, the buyer should externalise his taking into possession of the goods, for instance by marking them.³⁰⁹

Another example of symbolic *traditio* is where the seller sends the buyer the titles of the goods or the objects that symbolise the goods.³¹⁰ This could be done by for example a bill of lading ("cognossement") in the case of carriage by sea, a consignment ("vrachtbrief") in the case of carriage by road and other documents that attribute to the holder an exclusive right to the goods.³¹¹ If the goods are still en route, delivery takes place by endorsement of the title that represents the goods.³¹²

The buyer can also realise the delivery by handing over written permission to log and affix a sign on the goods which is generally considered an indication of the fact that the buyer has taken possession of the goods.³¹³

³⁰⁵ *Ibid.*

³⁰⁶ *Ibid.*

³⁰⁷ A 1141 provides that where a person is put in actual possession of the thing sold, that person's right will take preference and he remains owner of it, although his title is subsequent in date, provided, however, that the possession is in good faith.

³⁰⁸ Cauffman & Sagaert 264.

³⁰⁹ *Ibid.*

³¹⁰ *Idem* 265.

³¹¹ *Ibid.*

³¹² *Idem* 267. The sale of goods in transit falls outside the scope of this thesis.

³¹³ *Ibid.*

2.3 Delivery: Consumer sales

2.3.1 Common law duties of delivery and warranty against latent defects combined in the case of consumer sales:

Articles 1649*bis* to 1649*octies* of the Code regulate consumer sale agreements. The two common law duties of the seller (delivery of the thing sold and warranty against latent defects)³¹⁴ are now substituted in the case of consumer sales with one duty namely: “conformity with the agreement” (“de cumulatiewe overeenstemmingscriteria”). The criteria that goods must comply with in order to “conform to the agreement” is set out in article 1649*ter* § 1 of the Code.

The first criteria in terms of article 1649*ter* § 1 provides that goods will “conform to the agreement” if the description of the goods given by the seller corresponds with the sample given.

According to Tilleman & Verbeke this criteria is not new to Belgian law as it coincides with the classical common law concept of “conforming delivery” (“conforme levering”) as discussed above.³¹⁵ The rest of the criteria in article 1649*ter* § 1 broadly relates to the provisions regarding the warranty against latent defects as it applied in terms of the common law.

Article 1649*ter* governing the criteria that goods must comply with to “conform to the agreement” is however not just an inclusion of the common law duties of delivery and warranty against latent defects, but also an amendment of its application in the case of consumer sales.

It should be noted however that the common law provisions regarding delivery will still apply to all sales that fall outside the application of consumer sales (articles 1649*bis* to 1649*octies*).³¹⁶

The “conformity criteria” is discussed comprehensively in chapter 11.³¹⁷

³¹⁴ Duty of delivery and warranty against latent defects.

³¹⁵ Tilleman & Verbeke (2009) 40. See also Dekkers 548-549. See Part E 2.2.1.1 above for a discussion on the common law duty of delivery.

³¹⁶ Tilleman & Verbeke (2009) 40.

³¹⁷ See chapter 11 Part E 2.4.

2.3.2 Motor vehicles

In Belgian law, motor vehicles are to be registered according to the Royal Decree of 20 July 2001.³¹⁸ This piece of legislation does not deal with the proprietary status of the motor vehicle. Article 8 (dealing with natural persons) and article 9 (dealing with juristic persons) of the Royal Decree determine that the public registry must mention the name of the person who makes the request for registration. However, according to article 10 of the Royal Decree, the request can be made either by the owner or by the user of the vehicle. The registry does not mention who the owner of the vehicle is. It has mainly administrative and insurance purposes.³¹⁹ Motor vehicles can therefore not be considered registered property and remain subject to article 2279 of the Civil Code. According to Cauffman & Sagaert, a professional buyer cannot gain from this protection. The reason is that the buyer is considered not to have acted in good faith where he did not ask for the invoice (proof of purchase) at the time of the sale.³²⁰

2.4 Acceptance of thing sold by buyer

The buyer must pay the purchase price as well as expenses and take delivery of (accept) the thing sold.³²¹

Dekkers argues that by accepting the thing sold the buyer agrees and accepts that the goods conform to the agreement.³²² Acceptance can either be express (written or oral) or tacit and will remain a factual question.³²³

Dekkers gives examples where the buyer is regarded as having tacitly accepted delivery where he (the buyer) keeps quiet and makes no comment even where he is aware of the fact that the goods delivered are not delivered in terms of the sale agreement.³²⁴ Other examples are where the buyer uses the goods or modifies them.

³¹⁸ Cauffman & Sagaert 273.

³¹⁹ *Ibid.*

³²⁰ *Ibid.*

³²¹ Herbots 229. See also Tilleman (2012) 797.

³²² Dekkers 477.

³²³ *Ibid.*

³²⁴ *Ibid.*

In commercial agreements, the method or manner of acceptance is usually described and consented to in the agreement and the buyer must reject goods that do not conform to the agreement as soon as possible after delivery (within a short time).³²⁵

Dekkers states that where the buyer does not accept the goods or where there is a dispute between the parties as to the acceptance, the buyer will have a duty to take care of the goods in the meantime.³²⁶ Acceptance does not exclude claims by the buyer based on fraud by the seller, latent defects or error.³²⁷ Tilleman states that the buyer may refuse to take delivery where the seller did not comply with his duty of delivery.³²⁸ The writer argues that in principle, the refusal of the buyer to take delivery will be a factual question.³²⁹

In the case of movable goods, the seller will have a duty to take care of the goods in terms of article 1136 until delivery and this will also include any costs incurred in the safe-keeping of the goods until delivery.³³⁰

The consequence of acceptance means that: The goods conform to the agreement; there are no visible patent defects in the goods; the amount, volume or weight of the goods are no longer in dispute nor the form of delivery.³³¹ The position with regard to the conformity of goods in terms of consumer agreements is discussed in detail as part of chapter 11.³³²

Section 6 of the WMPC 2010 governs unfair terms in consumer contracts. Article 74 provides that a term will be unfair in all circumstances if it has the object of unilaterally fixing or altering the time of delivery of a product.

³²⁵ *Ibid.*

³²⁶ *Ibid.*

³²⁷ *Ibid.*

³²⁸ Tilleman (2012) 798.

³²⁹ *Ibid.*

³³⁰ *Ibid.* For a comprehensive discussion on the safe-keeping of the thing sold see chapter 8 of this thesis.

³³¹ Dekkers 478.

³³² Chapter 11 Part E 2.

F. CONCLUSION AND RECOMMENDATIONS

1. Delivery and transfer of ownership

The mere conclusion of a contract of sale does not constitute the transfer of ownership in South Africa³³³ or in terms of the common law of Scotland.³³⁴ The intention of the parties will indicate whether it is a cash or credit sale but mere conclusion of the sale will also not constitute a transfer of ownership without some form of recognised delivery.³³⁵ The problem that currently exists in Scotland where two systems for the transfer of ownership overlap in the case of consumer sales is avoided in South Africa since the CPA does not (as is the case with SOGA in Scotland) introduce a new system of transfer. In Scotland, SOGA introduces a causal system of transfer of ownership.

The CPA is silent on the distinction between cash and credit sales of movable goods and the common law position with regard to the transfer of ownership in cash and credit sales will still be applicable. The scope and application of the National Credit Act (NCA)³³⁶ will assist in determining whether a consumer sale is one of credit. The NCA will apply where the consumer sale falls within the definition of “consumer agreement” in terms of that Act.³³⁷

Section 5(2)(d) of the CPA provides that the CPA will not be applicable to a consumer sale that also constitutes a credit agreement under the NCA, but the goods or services that are the subject of the credit agreement are not excluded from the ambit of the CPA. A discussion of the interplay between the CPA and NCA falls outside the scope of this thesis.³³⁸

As indicated earlier, the common law position with regard to the seller’s duty of delivery is confirmed in the CPA.³³⁹ Section 44 only guarantees the consumer’s right of quiet possession and the disclosure of charges or encumbrances but it does not

³³³ Part B 2 above.

³³⁴ Part E 1.2 above.

³³⁵ Part B 2.1 above.

³³⁶ 34 of 2005.

³³⁷ See definitions in s 1 NCA.

³³⁸ For a comprehensive discussion see Melville & Palmer 272-278.

³³⁹ See Part D 1.

guarantee ownership.³⁴⁰ The fact that section 44 provides that the supplier has the authority to supply the goods is also not a guarantee for the transfer of ownership.³⁴¹

The transfer of ownership may become problematic in two instances. Firstly, where goods (for example motor vehicles) are sold in a chain of transactions which also include financing and entails sequential ownership.³⁴² In these cases the common law position³⁴³ should in future be used as a guideline.

The second instance which could be problematic and relates to the first, is where the seller is either unsure of whether he is in fact the owner or where the seller is not the owner at time of conclusion of the sale but will become owner in the near future. There is nothing in the CPA that conflicts with the common law position that a seller may sell goods of which he is not the owner.³⁴⁴ In fact, it would seem that the seller is not required to make any pre-contractual or contractual statement in this regard because it is an implied term.³⁴⁵ The purpose of section 44 is not to guarantee a transfer of ownership but rather to better protect consumers where suppliers act *mala fide* or fraudulently in their dealings with them.

It is recommended that the Minister of Trade and Industry should publish industry codes to regulate consumer sale agreements that are prone to “chain selling” (as in the case of motor vehicles). The purpose of these codes would be to clarify the situation and the manner in which agreements are concluded and ownership is (or is not) transferred. The parties involved in these type of consumer agreements are manufacturers, importers, distributors, retailers and suppliers on the one hand and consumers on the other.

In terms of section 44 the meaning of “quiet possession” should be clarified by the Minister of Trade and Industry as well as the remedy available to a consumer if section 44 is not complied with, since no remedy is provided for by the section itself. If the Minister fails to bring clarity and it is left to the courts, NCT or NCC, the common law

³⁴⁰ See Part D 3.

³⁴¹ *Ibid.*

³⁴² *Ibid.*

³⁴³ See part B 2.2-2.5.

³⁴⁴ See Part B 2. See also chapter 5 Part B 2.

³⁴⁵ S 44 CPA.

position³⁴⁶ will be used as a guide. It would also be valuable for the courts and Tribunal to consider foreign law in terms of section 2(1)(a) of the CPA. Section 12 of SOGA as well as the applicable case law discussed³⁴⁷ could be helpful in this regard.

With regard to the interpretation of the intentions of the parties as to when and how ownership will transfer it is recommended that the rules as set out in section 18 of SOGA and the manner in which the courts have interpreted these rules be considered as guidelines in respect of consumer contracts in South Africa.³⁴⁸ Similar to South African law, the general principle of the law relating to movable property in Scotland is that a seller cannot transfer ownership of the goods unless he himself is owner. This confirms the *nemo plus iuris* rule.³⁴⁹

In terms of Belgian law there is also a duty on the seller to deliver the thing sold³⁵⁰ and the forms of delivery³⁵¹ are very similar to the position in both South Africa³⁵² and Scotland.³⁵³ Ownership in Belgium transfers immediately upon conclusion of the agreement and no additional act (such as the payment of the purchase price or the delivery of the thing sold) is needed.³⁵⁴ The exceptions to the general rule of transfer of ownership in Belgian law could perhaps be helpful in determining the true intentions of the parties in terms of South African consumer sale agreements. The most relevant of these would be the transfer of ownership in terms of Belgian law in generic sales,³⁵⁵ the sale of future goods,³⁵⁶ sales subject to suspensive conditions³⁵⁷ and selling in a chain.³⁵⁸

³⁴⁶ See Part B 2. See also chapter 10 Part B 2.

³⁴⁷ See Part E 1.7.1.

³⁴⁸ *Ibid.*

³⁴⁹ Ervine 41. See also Black 182-185.

³⁵⁰ Part E 2.2 & 2.2.1.

³⁵¹ Part E 2.2.2.

³⁵² Part B 2.2.

³⁵³ Part E 1.1.2.

³⁵⁴ Part E 2.1.

³⁵⁵ Part E 2.1.1.

³⁵⁶ Part E 2.1.2.

³⁵⁷ Part E 2.1.3.

³⁵⁸ Part E 2.3.2.

Contrary to the position in Belgium,³⁵⁹ the duty of the seller (supplier) to deliver the thing sold remains separate from the right to good quality in the case of consumer sales in terms of the CPA in South Africa.

2. Time and place of delivery

As regards the South African position it is clear from the discussion above that the CPA confirms the common law position with regard to the time and place of delivery.³⁶⁰ The position is similar in Scotland³⁶¹ and Belgium.³⁶²

3. Acceptance or rejection of goods

In terms of the CPA, acceptance of delivery of consumer goods is deemed when a consumer expressly or implicitly communicates to a supplier that he has accepted delivery of such goods, or if a consumer does anything in relation to the goods that is inconsistent with the supplier's ownership, or if a consumer keeps the goods for an unreasonable period without informing the supplier that he does not want them.³⁶³

As discussed above,³⁶⁴ the implicit communication of acceptance and an act by the consumer inconsistent with the supplier's ownership is not always clear and simple. A consumer will generally lose his right to reject the goods where an act of acceptance in terms of section 19 was committed. Because the common law position with regard to cash and credit sales remain intact where the CPA is applicable, a consumer may also obtain a real right by accepting the goods upon delivery as ownership transfers at that time.

The consumer is also regarded to have accepted goods where he or she keeps them for an unreasonable period of time without informing the supplier that they are not wanted.³⁶⁵ As discussed above³⁶⁶ what constitutes an unreasonable period of time will be a factual question but it is also argued that an unreasonable time will always be more

³⁵⁹ Part E 2.3.1.

³⁶⁰ Part D 1.

³⁶¹ Part E 1.1.

³⁶² Part E 2.1.

³⁶³ S 19(4).

³⁶⁴ Part D 2.1.

³⁶⁵ *Ibid.*

³⁶⁶ *Ibid.*

than the time given to the consumer (in the specific section of the Act) in which the consumer may exercise his rights.³⁶⁷ For example, six months in which to reject the goods in terms of section 56 or five days in which to exercise his (the consumer's) cooling-off right in terms of section 16. An unreasonable period of time is also discussed as part of defective goods in chapter 11.

Suppliers may argue that where consumers have accepted goods in terms of section 19 they will lose their right to reject and return the goods even if there is a defect in the goods and that they may only then claim for a repair or replacement of the goods. In Scotland, for example, the consumer must reject the goods within a reasonable time and certain acts by the consumer will be regarded as acceptance of the goods.³⁶⁸ Once the consumer has acted in a manner of accepting the goods, the consumer may no longer reject the goods based on a defect and may only claim for a replacement or repair thereof. In Belgium the consumer must reject the defective goods in a short period of time or else will be regarded as having been accepted.³⁶⁹ In all three jurisdictions (South Africa, Scotland and Belgium) an unreasonable, reasonable or short period of time remains a factual question. What is clear, however, is that consumers in terms of the CPA have greater protection in that the CPA provides that the rights contained in section 20 are additional to any other right given to consumers in the Act, the common law or any other law.³⁷⁰

Where goods bought for a particular purpose are rejected in terms of section 20 of the CPA, there is a contradiction between the appropriate sections to be applied.³⁷¹ The difference in the wording of sections 20 and 56 is cumbersome for the consumer and a stumbling block for the proper interpretation of the consumer's rights. The ordinary alert consumer will not be aware of the subtle differences in exercising his right to return goods bought for a particular purpose in either of these sections. It is also argued that suppliers might choose to enforce the right to return particular goods in terms of section 20 rather than section 56 for the simple reason that in terms of section 20 the time in which to return the goods is shorter (ten days instead of six months) and

³⁶⁷ *Ibid.*

³⁶⁸ S 14 SOGA. See Part E 2.1 as well as chapter 11 Part E 2.1.

³⁶⁹ See Part E 1.5.

³⁷⁰ Ss 20(2)(d) & 56(4) CPA.

³⁷¹ The appropriate sections are ss 20(2)(d), 55 & 56.

certain reasonable charges may be deducted in terms of section 20(6) (*contra* section 56(2) where goods may be returned to the supplier without penalty). In terms of the Act, the consumer may still return the goods in terms of section 56 even after the ten day-period (in terms of section 20) has lapsed.³⁷²

Section 36 of SOGA provides that where goods have been rightfully rejected by the buyer, the buyer is not obliged to return them to the seller. It is the responsibility of the seller to arrange a return of the goods. In South African law section 20 of the CPA will determine at whose expense the goods must be returned.

³⁷² Ito s 20(1) the right to return the goods in terms of s 20(2)(d) is in addition to any other right in terms of the Act or the common law. See also s 56(4) for similar wording.

10 WARRANTY AGAINST EVICTION

- A. INTRODUCTION
 - B. LEGAL POSITION WHERE THE CONSUMER PROTECTION ACT 68 OF 2008 IS NOT APPLICABLE (COMMON LAW POSITION)
 - C. LEGAL POSITION IN TERMS OF THE CONSUMER PROTECTION ACT 68 OF 2008
 - D. EVALUATION
 - E. COMPARISON
 - F. CONCLUSION AND RECOMMENDATIONS
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A. INTRODUCTION

The seller has a duty to warrant the buyer against eviction from the *merx*. The common law position regarding the warranty against eviction is discussed and includes the application of the warranty as well as the limitation thereof by way of agreement. The rules that have to be followed by the buyer prior to enforcing his right of recourse is also included in the discussion. The influence of the CPA (section 44 in particular) is critically discussed followed by the application of the warranty against eviction in both Scotland and Belgium. The chapter is concluded with a summary of the legal position in terms of the CPA with suggestions and recommendations.

B. LEGAL POSITION WHERE THE CONSUMER PROTECTION ACT 68 OF 2008 IS NOT APPLICABLE (COMMON LAW POSITION)

1. Brief historical overview

Van Warmelo accurately summarises the reason why the warranty against eviction was introduced in Roman times.¹ Because the seller did not have to be the owner of the *merx*, the danger always existed that the seller might have acted in a fraudulent manner. This caused doubt in the mind of the buyer and also a fear that the true owner might arrive at any moment and reclaim the thing sold with his (the true owner's) *rei*

¹ Van Warmelo (1965) par 851. See also Jamneck 138-142.

vindicatio.² The buyer was only prepared to pay a reduced price because of the risk of vindication. Such a situation was obviously also not beneficial to the seller. It was at this stage that the Romans decided to hold the seller liable for any damages incurred by the buyer being evicted by a third party with a stronger title to the *merx* (such as the true owner).³

In both Roman and Roman-Dutch law the seller had a duty to warrant the buyer that the buyer had the right to use, enjoy and (where the seller was also the owner) dispose of the thing sold.⁴ The *actio empti*⁵ was only available to the buyer once the buyer was evicted.⁶ The damages that the buyer could claim with the *actio empti* included both *lucrum cessans* (the loss of profit that the buyer would have made had he not been evicted) and *damnum emergens* (the actual damages suffered by the buyer because of the eviction).⁷ The seller only guaranteed undisturbed possession of the thing sold.⁸ Where the buyer was threatened with eviction, the buyer could request the seller to provide the necessary assistance.⁹

Where the seller refused to assist the buyer and the buyer was then actually evicted, the buyer was entitled to double the value of the purchase price.¹⁰ The buyer could hold the seller (even the *bona fide* seller) liable where the buyer was evicted provided the cause of the eviction existed at time of conclusion of the contract and that the buyer had no fault on his part with regard to the eviction.¹¹ In both Roman and Roman-Dutch law the buyer could claim damages with the *actio empti* but this has always been a point of conflict amongst legal writers, the details of which are unnecessary for the purposes of this thesis.¹²

² Claim only available to true owner to reclaim *merx*.

³ Van Warmelo (1965) par 851.

⁴ Zimmermann *Obligations* 271; Voet 41 2 1 .

⁵ See chapter 11 Part 1 for a comprehensive discussion of the historical overview and development of the *actio empti*.

⁶ Zimmermann *Obligations* 271-272.

⁷ Van Warmelo (1965) par 853.

⁸ *Vacua possessio*. See Zimmermann *Obligations* 279, 293. See also Lötz 1992 (Deel 2) 145 fn 116 who states that both the delivery and the possession of the thing sold by the buyer were subject to the *nemo plus iuris* rule that no person may transfer more rights than he himself possesses.

⁹ Zimmermann *Obligations* 294.

¹⁰ *Ibid.*

¹¹ *Idem* 296-298.

¹² *Idem* 301-304; Voet 19 1 10.

The rules that the buyer must follow where he was threatened with eviction were established in Roman law,¹³ received into Roman-Dutch law¹⁴ and still apply in modern South African law. The buyer had to notify the seller of the threatening eviction as well put up a vigorous defence.¹⁵

2. Warranty against eviction

2.1 Introduction

Nagel *ea* define eviction as “any action by a third party who has better rights in the thing sold than the buyer, and who deprives the buyer of the total or partial use, enjoyment and disposal of the thing sold”.¹⁶

According to Sharrock¹⁷ the duty of the seller to provide undisturbed use and enjoyment of the thing sold has two facets, namely, that the seller undertakes that he will not himself engage in any conduct which will disturb the buyer in his use and enjoyment of the things sold,¹⁸ and he also warrants that the buyer will not be evicted from the thing sold by a third person. In contrast, Kerr refers to Roman-Dutch writers such as Voet and Van Leeuwen and argues that only a third party (and not the seller) can evict the buyer from his possession of the thing sold.¹⁹ This is, with respect, incorrect. The warranty given by the seller is that the buyer will not be disturbed in his use and enjoyment of the thing sold (not by the seller nor by any third party). The seller undertakes to indemnify the buyer if he (the buyer) is evicted. Kahn²⁰ states that the disturbance of possession by a third party covered by the warranty is limited to a person asserting a stronger entitlement to permanent possession of the thing sold than the buyer acquired from the seller and is often referred to as a “superior title”. Kerr argues that the “residual warranty” (common law warranty) would apply to a sale agreement but

¹³ Zimmermann *Obligations* 303.

¹⁴ Voet 21 2 20.

¹⁵ Lötze 1992 (Deel 2) 146 fn 134. For a comprehensive discussion see par 2.3 below.

¹⁶ Nagel *ea* 219. See also *Lammers and Lammers v Giovannoni* 1955 3 SA 385 (A); *Lavers v Hein & Far BK* 1997 2 SA 396 (T); *Alpha Trust (Edms) Bpk v Van der Watt* 1975 3 SA 734 (A).

¹⁷ Kerr 290.

¹⁸ See *A Becker & Co (Pty) Ltd v Becker and Others* 1981 3 SA 406 (A) where the court confirmed that the seller is liable for breach of contract if he does anything which directly or indirectly detracts from the buyer's right of use and enjoyment of the thing sold.

¹⁹ Kerr 1999 (warranty against eviction) 458; Kerr 180.

²⁰ Kahn (2010) 27.

only in circumstances not provided for by the express provisions of the contract.²¹ He describes the warranty against eviction as a promise by the seller that he will compensate the buyer if the buyer is evicted but only in circumstances in which the warranty applies.²²

The duty of the seller to warrant the buyer against eviction does not include a warranty for the transfer of ownership and the seller is therefore also not obliged to transfer ownership.²³ The warranty forms part of the implied terms or *naturalia* of a contract of sale and need not be contained in an express warranty in the agreement.²⁴ The reason for the eviction must exist at the time of conclusion of the contract and where eviction is not imminent and merely a threat; the buyer will have no cause of action against the seller.²⁵ Sharrock gives the example of a buyer losing possession due to the execution of a writ of attachment issued against the seller.²⁶ Where, however, a buyer is deprived of his possession as a result of the activities of squatters or a thief this will not amount to eviction.²⁷

In *Vrystaat Motors v Henry Blignaut (Edms) Bpk*²⁸ it was held that where a temporary deprivation of possession has become permanent, eviction has taken place. Similarly in *Lavers v Hein & Far BK*²⁹ the motor vehicle bought by the *bona fide* buyer was temporarily seized as part of an on-going investigation of possible theft. The motor vehicle turned out to be stolen property and the temporary eviction became permanent.

The court held in *Göbel Franchises CC v Kadwa and Another*³⁰ that in order for eviction to take place, the third party's claim also had to be lawful.

2.2 Forms of eviction

The forms of eviction established by South African case law include situations where

²¹ Kerr 1999 (warranty against eviction) 458.

²² *Ibid.*

²³ For a comprehensive discussion on the transfer of ownership in sale agreements see chapter 9.

²⁴ Nagel *ea* 219.

²⁵ *Ibid.* See also Kahn (2010) 26-27.

²⁶ Sharrock (2011) 290.

²⁷ *Ibid.*

²⁸ 1996 2 SA 448 (A).

²⁹ 1997 2 SA 396 (T).

³⁰ 2007 5 SA 456 (C).

the true owner of the thing sold claims his property from the buyer;³¹ a third party obtains possession of the *merx* and the buyer cannot reclaim it due to his defective title³² or where the holder of a limited real right prevents the buyer from having the full use and enjoyment of the thing sold.³³

2.3 Duties of buyer when eviction becomes imminent

Although it is correct that the buyer has no right of recourse where he is merely threatened with eviction, it is perhaps more accurate to say that the buyer does not have a right of recourse *in the period during*³⁴ which he is threatened³⁵ with eviction. The buyer needs to follow certain rules in the period during which he is threatened with eviction.³⁶ If he does not follow the rules when eviction is a threat, he might lose his right of recourse when eviction is complete, if he cannot succeed in proving that there was a good reason for not following the rules.³⁷ The onus of proof therefore shifts from the seller to the buyer where the rules were not followed.³⁸ The most probable reason for a buyer not to follow the rules would be where the buyer can prove that the third party that evicted the buyer had an unassailable title³⁹ (the true owner) or that the seller had a defective title.⁴⁰

2.3.1 The rules

The buyer must comply with certain rules as soon as eviction threatens. Firstly the rules prevent the buyer from surrendering or relinquishing the thing sold. Secondly the buyer must notify the seller of the threatened eviction. According to Nagel *ea* the purpose of the notification is to give the seller an opportunity to assist the buyer or to put up a

³¹ *Mdakane v Standard Bank of South Africa Ltd* 1999 1 SA 127 (W).

³² *Par Excellence Colour Printing (Pty) Ltd v Ronnie Cox Graphic Supplies (Pty) Ltd* 1983 1 SA 295 (A).

³³ *Glaston House (Pty) Ltd v Inag (Pty) Ltd* 1977 2 SA 846 (A).

³⁴ Own emphasis.

³⁵ See Nagel *ea* 220 where the writers also refer to this time period as the time “when eviction is imminent”.

³⁶ *Ibid.*

³⁷ *Idem* 220-221. See also Kahn (2010) 27-28.

³⁸ Sharrock (2011) 291-292.

³⁹ See *Göbel Franchises CC v Kadwa and Another* 2007 5 SA 456 (C) 466-467 where the court held that a buyer only needs to prove an unassailable title on a balance of probabilities.

⁴⁰ Nagel *ea* 220. See also Sharrock (2011) 219; *Nunan v Meyer* 1905 22 SC 203; *Grand National Transport (Pty) Ltd v Du Plessis* 1989 2 SA 495 (W).

defence against the third party.⁴¹ The seller must be given a reasonable time in which to respond to the notification and the buyer must notify the seller even where the seller might already have knowledge of the imminent eviction.

When the seller receives notification in terms of the rules, the seller has a choice to make. The seller can choose to take cession of the buyer's rights and duties, assist the buyer and furnish the necessary proof of title, be joined as a party to the lawsuit or simply do nothing.⁴² If the seller chooses to do nothing, he cannot argue at a later stage that the buyer should have resisted the third party's claim more energetically or skilfully, for it was open to him (the seller) to have taken steps to protect himself and the buyer.⁴³

Where the seller decided to do nothing (or where the buyer did not effectively notify the seller) the buyer must put up a forcible, virile, vigorous defence. Nagel *ea* state that the circumstances of each case will determine what a vigorous defence is.⁴⁴ Putting up a vigorous defence does not, however, mean that the buyer is obliged to resist the third party's claim at all costs; it suffices if he takes reasonable steps to defend the legal proceedings.⁴⁵

The case of *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd*⁴⁶ is an example where a seller prompted legal proceedings and requested a declaratory order on the basis that it (the seller) is likely to face claims from its buyers for repayment of the purchase price of vehicles in respect of which eviction threatened. The declaratory order requested by the seller included a determination with regard to the third party's alleged right of ownership. The importance of the court's declaration of ownership was that it would also influence the seller's right to claim compensation from its suppliers. The court also had to determine whether or not the third party's title was in fact unassailable.⁴⁷ In discussing the case Nagel states that it is unclear whether or not the seller received notice from its buyer's at the time of the application.⁴⁸ He remarks that the result of the application was that the seller received legal advice to be pro-

⁴¹ Nagel *ea* 220.

⁴² *Idem* 220-221.

⁴³ Sharrock (2011) 291. See also *Lammers and Lammers v Giovannoni* 1955 3 SA 385 (A) 388.

⁴⁴ Nagel *ea* 221.

⁴⁵ *Göbel Franchises CC v Kadwa and Another* 2007 5 SA 456 (C). See also Sharrock (2011) 291.

⁴⁶ 2005 6 SA 205 (A).

⁴⁷ 213.

⁴⁸ Nagel 2005 378-381.

active and that this should be applauded.⁴⁹ The seller most likely wanted to avoid a huge bill in legal costs.⁵⁰

2.4 Buyer's right of recourse

2.4.1 Total eviction

In the case of *Alpha Trust (Edms) Bpk v Van der Watt*⁵¹ the Appellate Division held that it would be unfair against the innocent buyer if he was only entitled to claim the value of the *merx* at the time of eviction.⁵² The reason is that eviction gives rise to contractual (and not delictual) liability.⁵³ The court did not accept as authority the *obiter* remark in *Lammers and Lammers v Giovanni*,⁵⁴ in terms of which the buyer would be entitled to the value of the *merx* only at the time of eviction. The court also rejected the argument that the buyer would be placed in a better position after his eviction as he had the use of the *merx* for a certain period at no cost since the cost-free use of the *merx* is for the account of the true owner (and not for the seller).⁵⁵ Not compelling the seller to return the whole of the purchase price would allow him to benefit from his own improper conduct.⁵⁶ It must also be borne in mind that, in the meantime, the seller had had the use of the buyer's money.⁵⁷ In an *obiter* remark, the court mentioned that where the *merx* is of a rapidly wearing or consumable nature, it is possible that the buyer, having used it for a reasonable period of time, would not always be entitled to repayment of the full purchase price upon eviction.⁵⁸ In such a case, the court could modify the amount which the seller should repay to the buyer.⁵⁹ The court held that upon eviction, the innocent buyer is entitled to the repayment of the purchase price already paid, cancellation of the contract of sale and damages for his full *id quod interest*.⁶⁰

⁴⁹ *Idem* 380-381.

⁵⁰ *Ibid.*

⁵¹ 1975 3 SA 734 (A).

⁵² 749.

⁵³ 740.

⁵⁴ *Lammers and Lammers v Giovanni* 1955 3 SA 385 (A).

⁵⁵ 749.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ 755.

⁵⁹ 749-750.

⁶⁰ 755.

Lötz *ea* criticise the judgment.⁶¹ The writers argue that the buyer had the benefit of using the *merx* for free and that the seller's benefit of having the use of the buyer's money is of a lesser value than the buyer's benefit of using the car.⁶² The writers correctly state that the *obiter* point of view regarding a reduction of the purchase price in the case of a *merx* which is of a rapidly wearing or consumable nature should have been applied.⁶³ The normal principles of the law of damages for breach of contract were not applied and by not taking into account the benefit of using the *merx*, the buyer was placed in a better patrimonial position than that in which he found himself before eviction.⁶⁴

Sharrock states that upon eviction the buyer is entitled to claim the following: Any increase in the value of thing sold (provided it did not come about as a result of unforeseen circumstances), any costs incurred in defending an action by the true owner and any further loss occasioned by the eviction (provided the loss was reasonably foreseeable by the parties at time of conclusion of the contract).⁶⁵

The fact that the buyer has had the use of the *merx* prior to eviction does not affect the buyer's right of recourse.⁶⁶

Kahn explains that eviction by the seller constitutes a breach of contract in the form of repudiation.⁶⁷ The buyer will therefore have a choice of either accepting the repudiation and cancel the sale or reject the repudiation and enforce the contract.⁶⁸ The buyer may not, however, claim restoration of possession from the seller and may only claim repayment of the purchase price and compensation for loss with the *actio empti*.⁶⁹

⁶¹ Lötze *ea* 51-52.

⁶² *Idem* 52.

⁶³ *Ibid.*

⁶⁴ *Ibid.*

⁶⁵ Sharrock (2011) 292. See also *Watt v Standard Bank National Industrial Credit Corporation and Another* 1982 2 SA 47 (D).

⁶⁶ *Katzeff v City Car Sales (Pty) Ltd* 1998 2 SA 644 (C).

⁶⁷ Kahn (2010) 29 fn 195.

⁶⁸ *Ibid.*

⁶⁹ *Ibid.* See also Kerr 187 where the writer states that the *actio empti* may also be used when the action is based on a failure to transfer ownership.

2.4.2 Partial eviction

According to *Lammers and Lammers v Giovanni*,⁷⁰ two possibilities exist where the buyer is partially evicted. Firstly, where the buyer is left with so little of the thing sold that a reasonable person would not have bought it, the buyer may cancel the agreement, claim repayment of the purchase price as well as damages (provided that he offers to return the remains of the thing sold to the seller).⁷¹ Secondly, where the portion evicted is not substantial and the remainder of the thing sold can be effectively used, the buyer may retain the thing sold and claim a *pro rata* repayment of the purchase price from the seller.⁷²

2.5 Where the buyer has no or limited right of recourse

The buyer will not have a right of recourse where the eviction was caused by something beyond the parties' control (for example *vis maior*) or where the buyer's claim has prescribed.⁷³ The seller will not be liable where the buyer knew that the seller was not the owner of the thing sold or where the seller made such a fact known to the buyer.⁷⁴ The seller will, however, be liable where the cause of eviction came into existence prior to conclusion of the contract or after conclusion of the contract but due to the seller's fault.⁷⁵

2.6 Exclusion of warranty against eviction

In *Vrystaat Motors v Henry Blignaut (Edms) Bpk*⁷⁶ the court held that even where the warranty against eviction is excluded as part of an exemption clause, the evicted buyer may still cancel the agreement and claim for the repayment of the purchase price. It is only the recovery of damages in terms of a warranty against eviction that may be reduced or excluded.⁷⁷

⁷⁰ *Lammers and Lammers v Giovanni* 1955 3 SA 385 (A).

⁷¹ *Nagel ea* 221.

⁷² *Ibid.*

⁷³ *Idem* 222.

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*

⁷⁶ 1996 2 SA 448 (A).

⁷⁷ 450.

The above position was confirmed in *Van der Westhuizen v Arnold*⁷⁸ where Lewis AJA held that the most fundamental obligation of the seller, namely, the duty to give undisturbed possession of the thing sold, cannot be excluded in terms of an exemption clause in the contract.

In *Plit v Imperial Bank Ltd*⁷⁹ the question was whether a warranty against eviction was excluded in an instalment sale agreement between the bank (the seller) and the buyer. The court held that *in casu* the parties intended for the warranty against eviction to be excluded.⁸⁰ Neither the Supreme Court of Appeal nor the court *a quo* ruled on the fact that even though the warranty is excluded, that buyer may still be able to reclaim the purchase price.⁸¹ Naudé states that *in casu* the only situation where the buyer will not be able to reclaim the purchase price is where the buyer tacitly agreed to assume the risk of uncertainty as to the seller's title to the property sold.⁸² The writer correctly argues that the warranty of eviction can never be excluded *in toto*.⁸³

A clause excluding liability for eviction is invalid in certain types of sale agreements, for example a sale of residential land in terms of the ALA⁸⁴ and credit agreements falling within the application of the NCA.⁸⁵

C. LEGAL POSITION IN TERMS OF THE CONSUMER PROTECTION ACT 68 OF 2008

1. Consumer's right to assume supplier is entitled to sell goods⁸⁶

Every consumer has a right to assume, and it is an implied provision of every transaction or agreement, that the supplier has the legal right, or the authority of the legal owner, to supply those goods.⁸⁷

⁷⁸ 2002 6 SA 453 (SCA) 468-469.

⁷⁹ 2007 1 SA 315 (SCA).

⁸⁰ 321.

⁸¹ 322.

⁸² Naudé 2007 1041-1042.

⁸³ *Idem* 1042.

⁸⁴ 68 of 1981 (s 15(1)(c)).

⁸⁵ 34 of 2005 (s 90).

⁸⁶ Chapter 2 Part F, s 44 CPA.

⁸⁷ S 44(1)(a).

In the case of an agreement to supply goods, it is similarly assumed and implied that the supplier will have a legal right, or the authority of the legal owner, to sell the goods at the time the title to those goods is to pass to the consumer.⁸⁸

As between the supplier and the consumer, the supplier is fully liable for any charge or encumbrance pertaining to the goods in favour of any third party unless such a charge or encumbrance is disclosed in writing to the consumer before the transaction or agreement is concluded⁸⁹ or the supplier and the consumer have colluded to defraud the third party.⁹⁰

The supplier guarantees that the consumer is to have and enjoy quiet possession⁹¹ of the goods, subject to any charge or encumbrance disclosed.⁹²

If, as a result of any transaction or agreement in which goods are supplied to a consumer, a right or claim of a third party pertaining to those goods is infringed or compromised the supplier is liable to the third party to the extent of the infringement or compromise of that person's rights pertaining to those goods.⁹³

2. Lawfully retaining unsolicited goods

If a person lawfully retains any unsolicited goods, the property in those goods passes unconditionally to the person, subject only to any right or valid claim that an uninvolved third party may have with respect to those goods.⁹⁴ The person who supplied or delivered those goods is liable to any other person in respect of any right or valid claim relating to such goods.⁹⁵

Unsolicited goods (and the issue regarding ownership in unsolicited goods) are discussed comprehensively as part of chapter 5 and chapter 9 of this thesis.⁹⁶

⁸⁸ S 44(1)(b)(i).

⁸⁹ S 44(1)(c)(i).

⁹⁰ S 44(1)(c)(ii).

⁹¹ S 44(1)(d).

⁹² As contemplated in s 44(1)(c)(i).

⁹³ S 44(2). Except to the extent of a charge or encumbrance disclosed as contemplated in s 44(1)(c)(i).

⁹⁴ S 21(6)(a).

⁹⁵ S 21(6)(b).

⁹⁶ Chapter 5 Parts B - F.

D. EVALUATION

1. Consumer's right to assume that supplier is entitled to sell goods

I agree with Sharrock that section 44 is badly drafted.⁹⁷ Although the consumer has a right in terms of the CPA to *assume*⁹⁸ that the seller has the legal right to sell the goods, this does not result in the seller having a duty to guarantee the transfer of ownership. Even where the buyer has a right to assume that the seller has a right to sell the goods at the time the title to those goods (ownership) is to pass to the buyer,⁹⁹ there is no obligation on the seller to transfer ownership in terms of the Act. One would assume that the main purpose of the section was to prevent the seller from selling stolen goods.

Sharrock correctly argues that it is unclear whether or not the legislature intended to reaffirm or abandon the common law rule that a person may validly sell goods of which he is not the owner (*res aliena*).¹⁰⁰ The section is silent on any remedy if the required legal right or authority does not exist or does not come into existence.¹⁰¹

Van Eeden states that there are two important effects of sections 44(1)(a) and (b). Firstly, the consumer can assert that he legitimately assumed that the seller has the right or the authority of the legal owner to sell the goods.¹⁰² Secondly, the effect of these provisions is that the seller is not required to make a pre-contractual statement to the consumer that he (the seller) is the owner or has the authority to sell the goods, or to include a statement to such effect in the agreement itself as it is provided for in the Act.¹⁰³

2. Liability for charges and encumbrances

In terms of section 44(1)(c), the supplier is fully liable for any charge or encumbrance pertaining to the goods in favour of any third party unless such a charge or encumbrance is disclosed in writing to the consumer before the transaction or

⁹⁷ Sharrock (2011) 604.

⁹⁸ Own emphasis.

⁹⁹ Nagel *ea* 214.

¹⁰⁰ Sharrock (2011) 604.

¹⁰¹ *Ibid.*

¹⁰² Van Eeden 221.

¹⁰³ *Ibid.*

agreement is concluded¹⁰⁴ or the supplier and consumer have colluded to defraud the third party.¹⁰⁵

If one were to look at section 44(1)(c) from the viewpoint of a seller, the section provides that the buyer can assume and it is an implied term (the buyer does not have to be informed thereof because it forms part of the consumer sale agreement as an implied term) that the seller will not be fully liable or that the seller will only have limited liability for charges or encumbrances relating to the thing sold.

The proviso in section 44(1)(c)(i) is that the seller can only escape or limit his liability where the charge or encumbrance was disclosed to the buyer in writing before the conclusion of the agreement. It can be argued, therefore, that the seller only has a duty to disclose the charge or encumbrance to the buyer (in writing, prior to conclusion of the agreement) and *not*¹⁰⁶ the fact that the seller will limit his own liability by doing so. The reason is that in terms of section 44(1) it is an implied term of the consumer sale agreement. The seller is fully liable to a third party for any charge or encumbrance pertaining to the goods in favour of that third party if the seller and the buyer colluded to defraud the third party.¹⁰⁷

No remedy is available to a consumer in terms of section 44(1) where the charges or encumbrances were not disclosed. This is an oversight by the legislature and must be rectified.

2.1 Meaning of “charge” or “encumbrance”

Neither “charge” nor “encumbrance” are defined in the CPA and it is assumed that the definitions as established through case law will apply. In *Hollins v Registrar of Deeds*¹⁰⁸ Innes CJ defined “encumbrance” as a real burden on the land, a portion of the *dominium* parted with by the owner.¹⁰⁹ A “charge” therefore does not refer to a real right but rather a personal right held by the particular contracting party.

¹⁰⁴ S 44(1)(c)(i).

¹⁰⁵ S 44(1)(c)(ii).

¹⁰⁶ Own emphasis.

¹⁰⁷ S 44(1)(c)(ii).

¹⁰⁸ 1904 TS 603.

¹⁰⁹ 608.

In *Glaston House (Pty) Ltd v Inag (Pty) Ltd*¹¹⁰ the court found the existence of a monument embedded in the building which prevented re-development of the building to be an encumbrance. In *Ex Parte Fleishman NO*¹¹¹ the court held that rights are not encumbered unless a party received a real right therein. Leases on property were considered to be encumbrances in *Estate Marks v Pretoria City Council*.¹¹²

In certain instances estate duty could be described as an encumbrance or as a tax.¹¹³ The court held in *Lorentz v Melle and Others*¹¹⁴ that the general rule is that a contract cannot bind a person who is not a party to it. According to the court, contractual duties, however, can be or are transmitted where the duty constitutes a real encumbrance on land, by the acquisition of such land. In *Port Edward Town Board v Kay*¹¹⁵ zoning was held to be a legally enforceable encumbrance relating to the property and its effect would be to inhibit the marketing of that property; it was a restriction that the owner had to overcome.

In *Ex Parte Estate Bostock*¹¹⁶ a “charge” was regarded as normal income tax, super tax, personal and provincial income tax and a personal savings fund levy (basic tax). The court held that the word “charge” is a burden on property or a person and includes whatever constitutes a burden on property such as rents, taxes, liens, costs, expenses incurred, usually in the plural.

A “charge” in the commercial sense can be defined as “to impose a burden, duty, obligation, or lien; to create a claim against property; to impose a tax, duty, or trust; to bill or invoice, and can also include the price of, or rate for, something”.¹¹⁷

2.2 Guarantee of quiet possession

In terms of section 44(1)(d) the supplier guarantees that the consumer is to have and enjoy quiet possession¹¹⁸ of the goods, subject to any charge or encumbrance

¹¹⁰ 1977 2 SA 846 (A) 848.

¹¹¹ 1983 4 SA 866 (E).

¹¹² 1969 3 SA 227 (A).

¹¹³ *Albert v Pearse, NO and The Master* 1973 1 SA 827 (N).

¹¹⁴ 1978 3 SA 1044 (T).

¹¹⁵ 1996 3 SA 664 (A).

¹¹⁶ 1945 CPD 58 64-65.

¹¹⁷ *The Free Legal Dictionary* by Farlex <http://bit.ly/NKYL1c> visited on 27/07/2012.

¹¹⁸ S 44(1)(d).

disclosed. Because no definition is given to “quiet possession” is it unclear what is meant by the term and whether “quiet possession” is synonymous with the common law term of *vacua possessio* or undisturbed possession of the thing sold. It is important to establish whether or not the guarantee of quiet possession is an entrenchment of the common law warranty against eviction into the CPA.

Jacobs *ea* are of the opinion that section 44(1)(d) corresponds with a buyer’s common law warranty against eviction.¹¹⁹ Van Eeden explains that in terms of the common law, the seller can also undertake expressly or would be deemed to have undertaken (unless specifically excluded by agreement) that the buyer would enjoy “quiet possession”.¹²⁰ It would seem that he also considers the guarantee of quiet possession as a confirmation of the buyer’s common law warranty against eviction.

If section 44(1)(d) is a confirmation of the common law warranty against eviction, certain important issues need to be addressed. In other words, whether or not the buyer still needs to follow the rules as established in terms of our common law.¹²¹ Does the buyer still need to put up a vigorous defence, not readily relinquish the thing sold and notify the seller? The main purposes of the rules are to ensure that the buyer will have a claim if he is evicted and to give the seller an opportunity to prove his title or to assist the buyer.¹²²

Because of the implied term and warranty contained in section 44 it seems unnecessary for the buyer to follow the rules. There is nothing in the section or the Act that would indicate that if the buyer does not follow the common law rules, the onus of proof would be on the buyer to prove that the seller had a defective title or that the third party had an unassailable title.¹²³ Because the buyer has a right to assume that the seller has the right or the authority to the sell the goods and since the seller guarantees quiet possession in terms of section 44 of the Act, there is no longer such an onus on the buyer.

¹¹⁹ Jacobs *ea* 350.

¹²⁰ Van Eeden 220.

¹²¹ See Part B par 2 above.

¹²² Nagel *ea* 220-221.

¹²³ See Part B par 2 above.

2.2.1 Absence of remedies in section 44

As mentioned earlier, section 44 does not provide any remedies and it is argued that the provisions of section 2(10) keep the buyer's common law remedies intact. Section 2(10) provides that no provision of the CPA may be interpreted so as to preclude a consumer (buyer) from exercising any right he may have in terms of the common law. The buyer may therefore still rely upon the cancellation of the consumer agreement, repayment of the purchase price and a claim for damages.

2.3 *Right or claim of third party to goods*

The wording of section 44(2) is obscure. Sharrock explains that the liability referred to in the section would appear to be a liability in damages for loss suffered by the third party pursuant to the unauthorised supply of the goods, for example loss suffered because of the consumption of the goods by the buyer.¹²⁴ It is difficult to see how a seller may limit his liability towards a third party (not a party to the contract) where he (the seller) disclosed certain charges and encumbrances to the *consumer*¹²⁵ pertaining to the goods and as part of the sale agreement with the *consumer*.¹²⁶ The only possible explanation would be where the consumer (the buyer) will then be liable for the remainder of the infringement provided the latter had knowledge of the seller's defective title or further charges and encumbrances.

2.4 *Exclusion of liability in terms of warranty in consumer sales*

As established by case law,¹²⁷ the warranty against eviction may be limited by way of agreement but never completely excluded. This means that parties may exclude a claim for damages in terms of a warranty against eviction but not the cancellation of the agreement and the repayment of the purchase price. The question may be asked whether the supplier may exclude a claim for damages where the claim is based on section 44 of the CPA.

¹²⁴ Sharrock (2011) 605.

¹²⁵ Own emphasis.

¹²⁶ Own emphasis.

¹²⁷ See Part B above.

Provisions in the Act itself seem to be in conflict with each other in this regard. In terms of section 2(10) the buyer will always have a right to cancel the agreement and to claim the purchase price as well as damages. Section 48(1)(c), on the other hand, leaves the backdoor open for sellers to limit the claim for damages based on a warranty against eviction as long as the terms and conditions of such a waiver of a right by the buyer do not amount to unfair, unreasonable or unjust terms and conditions. Section 48(1)(c) does not prohibit the waiver of the supplier's liability, only the way in which such terms are formulated in the consumer sale agreement and the waiver may therefore not be based on a term that is unreasonable, unjust or unfair.

Section 48(2) provides that a term or condition is regarded as unfair, unreasonable or unjust where it is excessively one-sided in favour of a non-consumer (presumably the seller) or so adverse to a consumer that it is inequitable,¹²⁸ or where a consumer relied upon a misrepresentation or term as contemplated respectively in sections 41 and 49 of the CPA.¹²⁹

Section 4 deals with the realisation of consumer rights and provides that the court *must*¹³⁰ develop the common law as necessary to improve the realisation and enjoyment of consumer rights generally, and in particular by persons contemplated in section 3(1)(b).¹³¹

It is clear from section 4(4)(b) that the exclusion or limitation of a seller's liability is not prohibited *per se*, but will be interpreted against the seller (supplier). Section 4(4)(b) provides that any contract must be interpreted to the benefit of the consumer so that any restriction, limitation, exclusion or deprivation of a consumer's legal rights set out in such a document or notice is limited to the extent that a reasonable person would ordinarily contemplate or expect.¹³²

If the CPA applied at the time of the court's decision in *Van der Westhuizen v Arnold*,¹³³ the court would most likely have come to a different conclusion. The clause stating that the seller had given "no warranty whatsoever" seen through the eyes of the

¹²⁸ Ss 48(2)(a) & 48(2)(b).

¹²⁹ Ss 48(2)(c) & 48(2)(d).

¹³⁰ Own emphasis.

¹³¹ Section 3(1)(b) includes low-income, illiterate, isolated vulnerable consumers.

¹³² S 4(4)(b); taking into account the circumstances and content of the document and the manner in which it was presented.

¹³³ 2002 6 SA 453 (SCA).

Act would be regarded as an unfair, unjust and unreasonable term and would not be enforceable against the buyer.

In terms of section 49 of the CPA, for example, the acknowledgement of any fact by the consumer in a contract must be drawn to the attention of the consumer in plain language. Therefore stating that the seller had given no warranty at all should comply with the requirements of section 49. If it does not, the term will be regarded as unfair, unreasonable and unjust in terms of section 48(2)(d).

To reiterate the argument that the warranty against eviction may not be excluded in terms of the CPA nor may the damages be reduced by way of agreement, the provisions of section 51 of the Act must be mentioned in this regard. Section 51 provides that a supplier must not make a transaction or agreement subject to any term or condition if its general purpose is to defeat the purposes and policy of the CPA;¹³⁴ or it directly or indirectly purports to waive or deprive a consumer of a right;¹³⁵ or purports to avoid a supplier's obligation or duty in terms of the Act.¹³⁶

Additional protection is provided for consumer's who are natural persons in terms of regulation 44 to the Act. Regulation 44(3)(e) provides that a term is presumed unfair if it has the purpose of forcing the consumer to indemnify the supplier against liability incurred by it to third parties. A term is also presumed unfair in terms of regulation 44(3)(x) where a consumer's right to take legal action or exercise any other legal remedy is excluded or hindered in a consumer sale agreement.¹³⁷

Kahn correctly argues that the warranty against eviction, including the claim for damages, may not be excluded in terms of the Act.¹³⁸

3. Liability of supplier against third party (unsolicited goods)

Unsolicited goods are discussed extensively elsewhere.¹³⁹ It is, however, important to note that where goods were erroneously delivered to the consumer and actually belonged to somebody else (the true owner or third party), section 21(6) provides that

¹³⁴ S 51(1)(a)(i).

¹³⁵ S 51(1)(b)(i) .

¹³⁶ S 51(1)(b)(ii).

¹³⁷ Regulation 44(3)(x).

¹³⁸ Kahn (2010) 29-30.

¹³⁹ See chapters 5 & 9.

even if such goods become unsolicited goods ownership in the goods will not pass to the consumer. The true owner will be able to institute his *rei vindicatio* against whomever (including the consumer) is in possession of such goods. The *proviso* in terms of section 21(6) seems to be that the claim by the third party must be valid and such a third party must be uninvolved in the transaction of the unsolicited goods. The supplier will be liable to the third party (true owner) in respect of any right or valid claim relating to such goods (including the *rei vindicatio*).¹⁴⁰

E. COMPARISON

1. Scotland

1.1 Section 12 SOGA

Section 12 of SOGA provides that it is an *implied term*¹⁴¹ on the part of the seller that in the case of a sale he has a right to sell the goods, and in the case of an agreement to sell, he will have such a right at the time when the property is to pass.¹⁴² In a contract of sale the goods are free, and will remain free until the time when the property is to pass, from any *charge or encumbrance*¹⁴³ not disclosed or known to the buyer before the contract is made, and the buyer will enjoy *quiet possession*¹⁴⁴ of the goods except so far as it may be disturbed by the owner or other person entitled to the benefit of any charge or encumbrance so disclosed or known.¹⁴⁵ Sections 12(3) and 12(4) provide that in a contract of sale in which there appears to be an intention that the seller should transfer only such title as he or a third person may have, there is an implied term that all charges or encumbrances known to the seller and not known to the buyer have been disclosed to the buyer before the contract is made. There is also an implied term in the sale of goods that neither the seller, a third party nor anyone claiming through or under the seller or that third person otherwise than under a charge or encumbrance disclosed or

¹⁴⁰ S 21(6)(b).

¹⁴¹ Own emphasis.

¹⁴² S 12(1) SOGA.

¹⁴³ Own emphasis.

¹⁴⁴ Own emphasis.

¹⁴⁵ S 12(2) SOGA.

known to the buyer before the contract is made, shall disturb the buyer's quiet possession.¹⁴⁶

1.1.1 General

SOGA only applies to the sale of corporeal movable goods.¹⁴⁷ This includes consumer sales.¹⁴⁸ According to Dobson & Stokes,¹⁴⁹ section 12(5A) makes it clear that the implied term referred to in section 12(1) is a condition and the term used in section 12(2) with regard to the buyer's quiet possession is a warranty. Section 12(1) of SOGA does not require the seller to be the owner, nor that he should acquire title before transferring the goods, but merely that he must have the right to sell.¹⁵⁰ The expression "right to sell" is wider than the word "title" and it means that the buyer is protected not only when the seller has no title but also when he is prevented from selling the goods by a legal process such as a court order.¹⁵¹ Thus the right to sell includes the 'legal power to sell'.¹⁵²

Section 12(1) also¹⁵³ draws a distinction between "to sell" and "an agreement to sell". "An agreement to sell goods" is interpreted to mean that if the transfer of property is to take place at a future time or is subject to the later fulfilment of a condition, the buyer will have that right at the time when the property is to pass.¹⁵⁴

Section 12(3) and (4) provide specifically for the sale of goods where the seller has a limited title and the provision of such a limited title should also be the intention of the parties. An example given by Dobson & Stokes is that of a seller who only has a "finder's title".¹⁵⁵ A finder does have a title to the goods but only a possessory title which is subject to the title of the original owner. A finder who sells goods without first disclosing that he only has a finder's title is in breach of the provisions of section 12. However, if the seller has disclosed that fact so as to indicate only a transfer of a

¹⁴⁶ S 12(5) SOGA.

¹⁴⁷ Ss 1 & 2 SOGA.

¹⁴⁸ Dobson & Stokes 162-163.

¹⁴⁹ *Idem* 103.

¹⁵⁰ *Ibid.*

¹⁵¹ Ervine 21.

¹⁵² *Ibid.*

¹⁵³ S 44(1)(a)(b). See also 3.2 above.

¹⁵⁴ Evans-Jones & Smith 273.

¹⁵⁵ Dobson & Stokes 105.

possessory title, the buyer will have no claim in terms of section 12(3) based on the limited title of the seller. Even if the limited title of the seller is disclosed to the buyer, the seller must in addition disclose all charges and encumbrances known to him at the time of conclusion of the contract.¹⁵⁶

1.2 “Charges and encumbrances”

Dobson & Stokes describe “charges and encumbrances” in terms of section 12 of SOGA as a right that someone else has over the goods.¹⁵⁷ An example is where someone has a lien over the goods (a right to retain possession of the goods until a debt is paid).¹⁵⁸ Importantly, the writers state that even where the goods are subject to a charge or encumbrance the seller can still sell the goods and will not be in breach of section 12 of SOGA and the warranty of quiet possession, provided of course that the seller informed the buyer of this fact prior to the conclusion of the contract.¹⁵⁹

1.3 Interpretation of section 12 SOGA by the courts

The facts of the Scottish case *McDonald v Provan (of Scotland Street) Ltd*¹⁶⁰ is very similar to the facts of *Vrystaat Motors v Henry Blignaut (Edms) Bpk*.¹⁶¹ In *McDonald* the seller sold a stolen vehicle in good faith to the buyer. Three months after the sale the vehicle was taken from the buyer by the police because at least part of the motor vehicle was stolen property. The buyer (McDonald) successfully sued for damages for the breach of the implied warranty of quiet possession in terms of section 12 of SOGA.

*Rowland v Divall*¹⁶² also involved the sale of a motor vehicle. The buyer used it for four months before discovering that it had been stolen and that the seller was not the true owner. The buyer returned the car to the true owner and sued the seller for the return of the purchase price based on section 12 of SOGA. The court held that the four months’ use was regarded as irrelevant and no set-off (a sum deducted to take into account any advantages received or detriments suffered) was allowed for the four

¹⁵⁶ *Ibid.*

¹⁵⁷ *Idem* 104.

¹⁵⁸ *Ibid.*

¹⁵⁹ *Idem* 105.

¹⁶⁰ 1960 S.L.T 231.

¹⁶¹ 1996 2 SA 448 (A).

¹⁶² [1923] 2 K.B. 500 CA.

months of use. The case has been the subject of considerable criticism in the United Kingdom and writers such as Dobson & Stokes¹⁶³ argue that it is inequitable for the buyer to have had over four months' free use of the motor vehicle. (The criticism of the case is remarkably similar to that levelled at the South African case of *Alpha Trust (Edms) Bpk v Van der Watt*).¹⁶⁴

In *Niblett Ltd v Confectioners Materials Co Ltd*¹⁶⁵ the court found that if there is a breach of section 12 (and eviction took place) the buyer may reject the goods and recover the full price, even if he has done something which would otherwise amount to an acceptance of the goods.¹⁶⁶

In *Rubicon Computer Systems Ltd v United Paints Ltd*¹⁶⁷ the seller attached a time lock on a computer system which after a period of time denied the buyer access to the computer system. The court held that this breached section 12(2)(b) in that the buyer could not enjoy quiet possession.¹⁶⁸ In this case it was held that the seller disturbed the buyer in its quiet possession and not a third party. Although English decisions on the sale of goods do not limit the warranty of quiet possession to interference by the seller, some link with the seller is required.¹⁶⁹

An interesting case with regard to the time period in which the buyer has a right to enjoy quiet possession is that of *Microbeads AG v Vinhurst Road Markings Ltd*.¹⁷⁰ The court held that the warranty of quiet possession relates not only to the time when the contract is concluded but also to the future because of the wording of section 12 that the buyer *will*¹⁷¹ enjoy quiet possession. The warranty of quiet possession is a continuing warranty and not limited solely to a defective title existing at the time of conclusion of the contract.¹⁷²

¹⁶³ Dobson & Stokes 103.

¹⁶⁴ 1975 3 SA 734 (A); see 2.4.1 above for criticism against this decision.

¹⁶⁵ [1921] 3 K.B. 387 CA.

¹⁶⁶ In terms of Scottish law the buyer usually loses his right to reject the goods if he committed an act of acceptance. The warranty of quiet possession seems to be an exception to this general rule.

¹⁶⁷ [2000] 2 TCLR 453.

¹⁶⁸ 453.

¹⁶⁹ Evans-Jones & Smith 278.

¹⁷⁰ [1975] 1 W.L.R 218 CA.

¹⁷¹ Own emphasis.

¹⁷² Evans-Jones & Smith 276. The writers refers to the South African case of *Van Staden v Pretorius* 1965 1 SA 852 (T) 853 where the court held that the eviction must either exist at time of conclusion of the contract or if arising subsequent thereto, is due to some act on the part of the seller.

1.4 Remedies available to buyer

It is clear from the above discussion of the case law that where the buyer is evicted from his quiet possession in terms of section 12, he may cancel the agreement, reclaim the purchase price and claim damages.

SOGA also provides remedies for breach of the warranty by the seller. In terms of section 53 the buyer may reclaim the purchase price or claim for a reduction in the purchase price and damages where the breach is not of a material nature. (This is similar to the position in terms of South African law where the buyer is only partially evicted).¹⁷³ In terms of section 54 the buyer may also claim interest on the purchase price.¹⁷⁴

1.5 Exclusion of warranty of quiet possession prohibited

Section 20(1)(a) of UCTA 1977 prohibits any exclusion of the implied terms of section 12 of SOGA in a contract for the sale of goods. Section 6 of the same Act¹⁷⁵ provides that in the case of the sale of consumer goods, the supplier (seller) is prohibited from exempting himself from any liability under section 12 of SOGA and can therefore never exclude or restrict the warranty of quiet possession. It seems that the warranty of quiet possession enjoys additional protection in the case of consumer sales because not only is the exclusion thereof prohibited by SOGA but also by UCTA 1977.

2. Belgium

2.1 Relevant provisions: Belgian Civil Code

Article 1599 provides that the sale of a thing belonging to another is void and can give rise to a claim for damages when the buyer did not know that the thing belonged to another.

Article 1625 states that the seller guarantees to the buyer peaceful possession of the thing sold. Articles 1626 to 1649 deal with the guarantee in the case of

¹⁷³ See *Lammers and Lammers v Giovannoni* 1955 3 SA 385 (A).

¹⁷⁴ S 15B of SOGA which only applies to Scotland provides that the buyer may only repudiate (cancel) the agreement where the breach of warranty is material. Disturbing the buyer in his quiet possession seems to be regarded as material when looking at the interpretation of the section as well as the relief awarded to the buyer by the courts as discussed in 4.3 above.

¹⁷⁵ UCTA 1977.

dispossession. The guarantee against dispossession is an implied term in a contract of sale because article 1626 provides that the seller is obliged by law to give it even if the sale made no stipulation thereof. On the contrary, however, the parties may exclude the guarantee of dispossession by way of agreement.¹⁷⁶ Tilleman explains that despite the exclusion available to the parties by way of agreement in terms of article 1627, the seller has a duty to inform the buyer of any circumstances that might result in eviction prior to the conclusion of the contract and the seller may not escape liability in terms of an exclusion clause in this regard.¹⁷⁷ The writer gives the example of a seller who does not inform the buyer of an existing lease on a property and states that withholding such information from the buyer will result in the seller committing fraud.¹⁷⁸

Article 1628 provides that an exclusion of the guarantee within the agreement will be void if the seller had exclusive knowledge with regard to the ownership of the thing sold and did not disclose it to the buyer.

The buyer may reclaim the purchase price if he is in fact dispossessed and had no knowledge of the defective title of the seller, even if there is an exclusion clause in the agreement.¹⁷⁹ Even where there is an exclusion clause with regard to the guarantee of quiet possession, the buyer may have some form of remedy (reclaiming the purchase price) where he is dispossessed or evicted.

On the other hand, where the parties have specifically included the guarantee of quiet possession or nothing was said about the guarantee and it applies as an implied term, the buyer has a claim in terms of article 1630. The buyer may claim from the seller the purchase price, any advantage that accrues to the owner (“fruits”), costs incurred by the buyer, damages as well as costs and reasonable expenses of the contract.¹⁸⁰

In Belgian law the Code provides that possession is equivalent to title.¹⁸¹ This is the general rule. However, an exception is made where a thing was stolen or lost. In such a case the owner has three years from the date of loss or theft in which to claim it

¹⁷⁶ A 1627.

¹⁷⁷ Tilleman (2012) 789.

¹⁷⁸ *Ibid.*

¹⁷⁹ A 1629

¹⁸⁰ A 1630 § 3 provides that the costs claimable also include those incurred by the original complainant.

¹⁸¹ A 2279. This is contrary to South African and Scottish law. See chapter 9 Parts D & E 1.

“against to one in whose hands he finds it”.¹⁸² Where a thing was bought from a merchant who also sells similar things, the original owner may reclaim it but must also reimburse the purchase price to the possessor (the buyer).¹⁸³

Article 549 provides that a person who only has the possession of property is entitled to its fruits if he possesses the property in good faith.

2.2 Evaluation of relevant provisions

2.2.1 Sale by non-owner and article 1599

De Backer states that the rule contained in article 1599 of the Civil Code stands independently of theft and creates an absolute nullity that may be invoked by both the seller and the buyer.¹⁸⁴ The rightful owner can also not remedy the nullity by a ratification of the sale nor the title subsequently acquired by the seller.¹⁸⁵

Where the buyer realises that there is an absence of title he may bring an application to court for an annulment of the sale within 10 years after discovering his defective title.¹⁸⁶ The seller does not have such an action at his disposal.¹⁸⁷

2.2.2 Warranty against eviction

Writers like De Backer¹⁸⁸ and Herbots¹⁸⁹ argue that the warranty of quiet possession mostly relates to immovable property¹⁹⁰ as buyers of movable property are protected in terms of article 2279. More importantly, De Backer states that the warranty of quiet possession (warranty against eviction) and the remedies available to buyers are also specifically applicable to consumer contracts.¹⁹¹ The warranty is given with regard to the seller himself as well as third parties.¹⁹²

¹⁸² *Ibid.* Such a right is not applicable to notes of the National Bank of Belgium or to notes issued by virtue of the Law of 12 June 1930 when their possessor is in good faith.

¹⁸³ A 2280.

¹⁸⁴ De Backer 114. See also Herbots 231.

¹⁸⁵ *Ibid.*

¹⁸⁶ De Backer 119.

¹⁸⁷ *Ibid.*

¹⁸⁸ 114.

¹⁸⁹ 232.

¹⁹⁰ Contrary to Scotland; see Part E 1.

¹⁹¹ De Backer 115.

¹⁹² Herbots 232.

Herbots states that the seller must refrain from any act that would “trouble” the ownership of the buyer.¹⁹³ The eviction by a third party must be of a serious nature and must be in circumstances in which the third party is claiming to enforce some rights over the goods sold, rights which existed at the time of the sale.¹⁹⁴

There are only two situations in the case of eviction where the seller is entitled to keep the price.¹⁹⁵ Firstly, where the buyer buys at his own risk and the sale is considered to be an aleatory gamble. Secondly, where the buyer knows of the fact that caused the eviction when he purchased the goods. The latter case is also considered to be a situation where the buyer bought at his own risk.¹⁹⁶

Forms of eviction include full or partial eviction or the enforcement of a charge of servitude on the goods sold. Similar to the position in South Africa¹⁹⁷ and Scotland,¹⁹⁸ the buyer will not be regarded as being evicted where he was aware of the above-mentioned at the time of the sale.¹⁹⁹ The buyer is presumed to have knowledge of servitudes which are apparent.²⁰⁰ However, De Backer²⁰¹ states that it is common practice in the relevant consumer industries to exclude the warranty against eviction by way of an exemption clause in the agreement.

Where there is a breach of the warranty against eviction, the buyer can choose to either request assistance from the seller in proceedings against the third party or may choose to bring an action against the third party without the seller’s assistance.²⁰² Where the buyer is unsuccessful in his claim against the third party he may choose to invoke a claim against the seller.²⁰³ Herbots argues that giving the buyer a choice not to request the seller’s assistance is a dangerous cause of action, as the seller will escape liability if he can prove that the third party’s action would have failed had the buyer

¹⁹³ *Ibid.* “Trouble” is widely interpreted to include not merely physical interference and would be a factual question to be decided by the court.

¹⁹⁴ *Ibid.*

¹⁹⁵ *Ibid.*

¹⁹⁶ *Ibid.*

¹⁹⁷ S 44 CPA.

¹⁹⁸ S 12 SOGA.

¹⁹⁹ Herbots 232.

²⁰⁰ *Ibid.*

²⁰¹ 116.

²⁰² *Ibid.*

²⁰³ *Ibid.*

enlisted his (the seller's) help in those proceedings.²⁰⁴ (This situation is avoided in terms of South African common law where the buyer follows the rules of eviction which include notifying the seller). There are also considerable procedural advantages in joining the seller in a suit against the third party.²⁰⁵

Dekkers confirms that the warranty against eviction in terms of Belgian law includes a warranty by the seller that neither he nor any third party will disturb the buyer in his possession of the thing sold.²⁰⁶ Dekker states that three requirements need to be met for a seller to be liable in terms of a warranty against eviction.²⁰⁷ Firstly, the threat or eviction by a third party must be of a juristic nature ("rechtsstoornis"). Secondly, the reason for the eviction must have existed at the time of conclusion of the contract and lastly the threat or eviction must be of a serious and material nature. Because of the system of transfer of ownership in Belgium (transfer of ownership occurs upon conclusion of the contract), the last possessor (buyer) can hold the very first seller in the chain of transactions liable.²⁰⁸

According to Dekkers the seller must stand in for all possible encumbrances ("lasten") of whatever nature that would influence the buyer's possession of the thing sold. The warranty covers for example a loss of the whole or a part of the *merx*,²⁰⁹ a claim based on a debt owed (but only where the buyer was not informed thereof) and any real right (including ownership, usufruct, leasehold and a right of occupation). It is irrelevant whether the seller was *mala fide* or *bona fide*, he will be held liable in terms of the warranty regardless.²¹⁰ Contrary to South African and Scottish common law, the warranty against eviction in terms of Belgian law may be excluded completely.²¹¹ The seller will, however, always be liable to return the purchase price in terms of article 1629 of the Civil Code.²¹² The basis of this claim according to Dekkers is found in the

²⁰⁴ *Ibid.*

²⁰⁵ *Ibid.*

²⁰⁶ Dekkers 481.

²⁰⁷ *Idem* 482-483.

²⁰⁸ *Idem* 483: "Bij opeenvolgende verkopen mag de laatste verkrijger direct de eerste verkoper aanspreken".

²⁰⁹ *Idem* 484.

²¹⁰ *Ibid.*

²¹¹ *Idem* 487.

²¹² *Ibid.*

principles regarding unjust enrichment.²¹³ The exclusion of the warranty must be clear from the agreement between the parties.²¹⁴

2.2.3 Meaning of “fruits”

Belgian law distinguishes between “fruits” and “products”.²¹⁵ Cauffmann states that fruits are the periodical gains of the property that do not reduce its value as such and that a distinction is usually made between natural fruits and civil fruits.²¹⁶ Natural fruits are, besides the produce of the soil itself, the gains of animals and their offspring while civil fruits are for example interest and rentals.²¹⁷ The writer states that a mere right to enjoy a movable is sufficient to be entitled to the fruits thereof.²¹⁸ Fruits of movables are regulated by article 2279 of the Civil Code, and special rules concerning fruits of movables as well as immovables are contained in article 549. The latter rules will usually give the possessor less protection and he will therefore prefer to base his claim on the provisions in terms of article 2279.²¹⁹

De Backer argues that where the buyer invokes the defence in terms of article 2279, the owner must prove that possession was in bad faith before he (the owner) will be successful in his claim.²²⁰

2.3 Exclusion of liability for eviction: Consumers

Though the seller is allowed to exclude the warranty against eviction by a third party, the seller may not exclude the warranty in respect of his own acts by a general exemption clause in the case of consumer sales.²²¹ Such a clause is null and void.²²²

De Backer explains that in general, a valid exemption clause does not prevent the buyer from recovering the price if he loses the bought item.²²³

²¹³ *Ibid.*

²¹⁴ *Ibid.*

²¹⁵ Cauffmann 320-321.

²¹⁶ *Idem* 320.

²¹⁷ *Ibid.*

²¹⁸ *Idem* 321.

²¹⁹ *Ibid.*

²²⁰ De Backer 114.

²²¹ Herbots 232.

²²² *Ibid.*

²²³ De Backer 123.

The inclusion of clauses into contracts concluded with consumers that create an obvious imbalance of rights and obligations of contracting parties are prohibited.²²⁴ De Backer argues that the warranty against eviction may not be excluded where the buyer is a consumer.²²⁵

Tilleman argues that article 74, 13 ° of the WMPC 2010 prevents a seller in the case of a consumer sale to escape liability for eviction and will be held liable regardless of a general exemption clause (“algemeen vrijwaringsbeding”) present in the agreement of sale.²²⁶ According to the writer it is not necessary to prove that the seller was *mala fide*.²²⁷

The position regarding complete and partial eviction is similar to that of South Africa and does not provide any further guidance or substance to the aim of the chapter.²²⁸

F. CONCLUSION AND RECOMMENDATIONS

1. Implied right or authority to sell not a guarantee of transfer of ownership

It is clear that even though the consumer has the right to assume that a supplier has the right or authority to sell goods, this implied term as provided for in terms of section 44(1) of the CPA is not a guarantee of the transfer of ownership. In this regard the common law position remains unchanged and the *nemo plus iuris* rule²²⁹ remains intact. This approach is also in line with the relevant foreign law.²³⁰

2. Charges and encumbrances

Because no definition is provided for either “charge” or encumbrance” in terms of the CPA, the interpretation thereof in terms of South African case law was investigated.²³¹

²²⁴ *Ibid.*

²²⁵ *Idem* 129.

²²⁶ Tilleman (2012) 790.

²²⁷ *Ibid.*

²²⁸ Tilleman (2012) 793-794. For a comprehensive discussion on complete eviction see Tilleman (2012) 763-774 and for partial eviction 775-779.

²²⁹ The principle that no person may transfer more rights than he himself possesses.

²³⁰ S 12 SOGA.

²³¹ See Part D 2.1 above.

In terms of South African case law an encumbrance is some form of real right connected to immovable property. A charge, on the other hand, can be a burden on either property (including movable property) or a person and includes taxes, rents, levies, debts and liens.²³² These definitions seem to be to most appropriate to apply in the case of section 44 of the CPA and are also consistent with definitions given to “charge” or “encumbrance” in terms of foreign law.²³³

Charges and encumbrances do not affect the validity of the sale of goods in terms of consumer sale agreements.²³⁴ Furthermore section 44(1) of the CPA provides that the seller only needs to inform the buyer in writing of charges or encumbrances known to him at the time of conclusion of the contract and not that by informing the buyer, he (the seller) will restrict his own liability.

It is recommended that the interpretations that crystallised through case law be followed in consumer sales in this regard.

3. Is the guarantee of quiet possession in section 44 of the CPA an entrenchment of the common law warranty against eviction?

The seller guarantees that the buyer will enjoy quiet possession of the thing sold in terms of section 44(1)(d). In light of the comparative discussion of Scotland (and section 12 of SOGA in particular that has very similar wording to that of section 44 of the CPA), the question posed above must be answered in the affirmative. The implication of this for consumer sales in South Africa is that the buyer now has a statutorily entrenched contractual guarantee as to the undisturbed use and enjoyment of the thing sold. It follows, therefore, that the buyer neither needs to follow the common law rules when threatened with eviction nor bears the onus of proving that the rules were not followed because of a defective title of the seller or an unassailable title of the third party.

4. Remedies available to buyer

It is an unfortunate oversight on the part of the legislature not to have included any remedies for the breach of the guarantee of quiet possession in section 44(1)(d) of the

²³² *Ibid.*

²³³ See Part E 1.2 above.

²³⁴ *Ibid.*

Act. In fact, no provision is made for remedies for the breach of such a warranty anywhere in the Act. The remedies available to the consumer in, for instance, section 56 of the Act only relate to the quality of the goods and not where the guarantee of quiet possession is breached.

The obvious solution regarding the lack of remedies in terms of section 44 of the Act is to revert to the common law remedies available to the buyer in the case of eviction. This is confirmed by section 2(10) of the Act.²³⁵ At common law the buyer may cancel the agreement, reclaim the purchase price and claim damages,²³⁶ bearing in mind that the buyer may utilise these remedies without a reduction of the amounts claimed for wear and tear where the goods were of a consumable nature.²³⁷ Similar remedies are also available to a buyer in terms of applicable foreign law.²³⁸

5. Exclusion of claim for damages where guarantee of quiet possession (warranty against eviction) is breached

As discussed above²³⁹ contradictory provisions exist within the CPA on whether a seller may exclude or limit his liability. On the one hand the seller may do so provided the terms of such an exclusion is not unfair, unreasonable or unjust.²⁴⁰ Any provision in an agreement which excludes the seller's liability will be interpreted and construed against him.²⁴¹ On the other hand, the CPA provides that consumer rights (and remedies) must be developed and not restricted. Where there are contrasting provisions the rule of thumb should be: What is most beneficial to the consumer?

Taking into account section 2(10) of the Act, in terms of which no common law right of a consumer may be precluded in terms of the CPA, the common law position with regard to the exclusion of a claim for damages has been amended. The seller may not exclude a claim for damages where the CPA is applicable.

²³⁵ No common law right available to the consumer may be excluded where the CPA is applicable.

²³⁶ See Part B 2 above.

²³⁷ The position in *Alpha Trust (Edms) Bpk v Van der Watt* 1975 3 SA 734 (A) has not been overturned by the courts and it is doubtful whether the position will change with the application of the CPA to consumer sales.

²³⁸ See Part E 1.4 above. Buyers are granted these remedies by the courts. Similar remedies are also provided for in the Act itself (s 53 of SOGA).

²³⁹ See Part D 1.4 above.

²⁴⁰ S 48 CPA.

²⁴¹ S 4(4)(b) CPA.

To re-enforce this argument, notice should be taken of the applicable foreign law which also prohibits the exclusion of the warranty of quiet possession. Section 2(2)(a) of the CPA provides that when interpreting the Act, applicable foreign and international law may be considered. UCTA 1977 specifically prohibits the exclusion of the warranty of quiet possession or any remedy in terms of such a warranty in the sale of consumer goods in Scotland.²⁴²

The common law warranty against eviction is confirmed by section 44 of the CPA. The exclusion of a claim for damages based on eviction is prohibited where the CPA is applicable. This is confirmed by regulations 44(3)(e) and (x) in the case of natural persons.²⁴³

Due to poor drafting and the inclusion of provisions from other foreign legislation without having regard to the meaning of the terminology in South African law, uncertainties have crept into the Act and ironically need to be solved by reverting to the foreign legislation which the provisions of the CPA mimic. In this instance section 12 of SOGA and the interpretation thereof by the courts in the United Kingdom (and Scotland in particular) have provided some answers.

Solutions are also found in the South African common law and the interpretation thereof by the South African courts. It remains to be seen, however, whether the South African courts will revert to what is already entrenched in our law (the common law) or choose to consider the applicable foreign law or both.

²⁴² Ss 6 and 20(1)(a) SOGA.

²⁴³ See Part D 2.4 above.

11 WARRANTY AGAINST LATENT DEFECTS

- A. INTRODUCTION
 - B. LEGAL POSITION WHERE THE CONSUMER PROTECTION ACT 68 OF 2008 IS NOT APPLICABLE (COMMON LAW POSITION)
 - C. LEGAL POSITION IN TERMS OF THE CONSUMER PROTECTION ACT 68 OF 2008
 - D. EVALUATION
 - E. COMPARISON
 - F. CONCLUSION AND RECOMMENDATIONS
-

A. INTRODUCTION

The warranty against latent defects may be given *ex lege* (as part of the *naturalia* of the contract of sale) or contractually (as part of the *incidentalia*). The manner in which the warranty is given will also determine the remedies available to the buyer should a latent defect be present in the thing sold (aedilician remedies and the *actio empti*).

Although the aedilician actions or remedies¹ are relevant to other common law duties of the seller (such as the duty of safe-keeping and the warranty against eviction), an in-depth discussion of the remedies is included in this chapter. The warranty may also be excluded by agreement and the *merx* is then sold “as is” or *voetstoots*. Much has been written about the common law warranty against latent defects, its application and development (from its inception into Roman law, its development in Roman-Dutch law and finally its application in modern South African law).²

A brief historical overview of the warranty is necessary to understand its application in South African law. Of particular importance is the situation where the seller is a merchant seller (dealer) or a manufacturer. As will be shown, the common law position is amended where the CPA is applicable. With regard to liability, the concept of strict liability is also introduced in terms of section 61 of the Act and deserves discussion.

¹ Zimmermann *Obligations* 305-337 (fn 16) refers to case law where the aedilician actions were also referred to as remedies. This will also apply interchangeably for the purposes of this thesis.

² Mostert *ea* 185-238, Kerr 106-136 & 205-219, Zimmermann & Visser 77, Mackeurtan's 238-265, Kahn (2010) 26-40, Lötze 2001 219-246, Lötze 1992 (Deel 2) 148-155, Grobler 1974 *passim*.

Defects in movable goods as well as the provisions regarding product liability in Scotland are discussed. Particular reference is made to the remedies suggested by the Report of the UK- and Scottish Law Commissions in the case of consumer sales.³ These remedies are also included in the Draft of the Consumer Bill of Rights to be implemented in the UK in the near future. The Consumer Bill of Rights is still in the process of consultation and not included in the discussion.

The common law provisions regarding the warranty against latent defects in Belgium is discussed due to the similarities with the South African common law position. The provisions governing defects in consumer sales as well as product liability in Belgium are also investigated.

The chapter ends with conclusions and recommendations which include a comparative table of the relevant provisions in the three jurisdictions (South Africa, Scotland and Belgium).

B. LEGAL POSITION WHERE THE CONSUMER PROTECTION ACT 68 OF 2008 IS NOT APPLICABLE (COMMON LAW POSITION)

1. Brief historical overview

According to Thomas *ea*⁴ the oldest remedy in Roman times with regards to defects was the *actio de modo agri*. This was an action on the size of land purchased. Where the land was transferred by *mancipatio* and the seller formally declared the land to be of a particular size, he was liable for double the proportionate amount if the land was not the size as declared by the seller. The *actio de modo agri* fell away altogether in Justinian's time. According to Zimmermann⁵ the *actio empti* only became available by the time of the late Republic and then only in two instances.

The vendor (seller) was liable where the defect was concealed *dolo malo*. Secondly the vendor was liable under the *actio empti* (*actio ex empto*) where he had specifically assured the buyer, in the course of concluding the sale, that the object was free from defects or possessed particular qualities. Liability could also arise from specific *promissa*, in other words where the buyer wanted to make sure that the thing

³ See Part E 1 below.

⁴ Thomas *ea* 338. See also Lötze 1992 (Deel 2) 149 & Zimmermann *Obligations* 308.

⁵ Zimmermann *Obligations* 308.

sold was either free from specific defects or that it had certain qualities. At the end of Justinian's time (unless the vendor expressly excluded liability) the vendor was liable for all latent defects in almost all kinds of *merces* (regardless where the agreement was concluded).⁶

Caveat emptor was the principle governing the sale of goods in all early legal systems.⁷ Directly translated it means "buyer beware". The principle reflected a situation where the contract was concluded and executed at the same time, in the presence of both parties. The buyer had the object in front of him and it could therefore be expected of him to examine it properly before concluding the sale.⁸ This also meant that a seller had no duty to disclose any latent defect in the object if it was a sale in the abovementioned circumstances. (Unless of course the seller concealed the defect with the intention to defraud or mislead.) Zimmermann argues that even though the protection of the buyer developed gradually and from a variety of roots, the maxim *caveat emptor* remained.⁹ This is also the case in the South African common law of sale.

Special remedies for latent defects were introduced by the *aediles curules*. These magistrates issued edicts concerning trade issues and objects (i.e. slaves, cattle etc.) on the public market. The edicts sought to compel the seller to disclose certain things with regard to the *merx* which the buyer would not have readily discovered on his own. However, the development of the actions was reduced to a claim only in the case of latent defects. Where the buyer was aware of the defect or if the defect was such that everybody would have noticed it, no aedilitian action was available. Two actions were available to the buyer, namely, the *actio redhibitoria* (claim for restitution or the redhibitory action) and the *actio quanti minoris* (claim for a reduction in the purchase price). The *actio redhibitoria* had to be instituted within six months after the sale and entitled the buyer to not only reclaim the full purchase price but also interest and all expenses related to the sale.

⁶ Lötzt 1992 (Deel 2) 150.

⁷ Zimmermann *Obligations* 307.

⁸ *Ibid.*

⁹ *Ibid.*

The buyer could also institute the *actio redhibitoria* where the seller refused to give a *stipulatio* with regard to the absence of latent defects in the slave being sold. The action for a reduced purchase price¹⁰ could only be instituted for less serious illnesses or defects. The buyer could recover the difference between the actual value of the object at the time of the sale and the price paid. The aedilitian actions could only be instituted if the illness or defect was latent. Both the seller and the buyer had to be unaware of the defect. A seller was not liable if the disease or defect did not undermine the usefulness of the object for the purpose for which it was sold. The seller could, however, increase his liability in terms of the aedilitian actions by way of a *dictum et promissum* (statement and promise).¹¹

In Roman-Dutch law the distinction between the *actio empti* and the aedilitian actions was unclear.¹² Voet proposed the following requirements before the aedilitian actions could be instituted, namely, whether the defect was of a serious nature, whether the defect established a physical defect and whether it was hidden or latent.¹³ In contrast with the position in Roman law, the Roman-Dutch position focused on the latent nature of the defect. The position with regard to the grounds for liability in terms of the *actio empti* remained the same as in Roman law.

According to Voet where the latent defect manifested shortly after conclusion of the contract a presumption existed in Roman-Dutch law that the defect already existed at time of conclusion of the contract.¹⁴ The aedilitian actions were also not available where goods were bought at public auction or in terms of a sale in execution. The *actio redhibitoria* was only available where the latent defect was of such a serious nature that the buyer would not have concluded the agreement had he been aware of the defect. Although the distinction between the *actio empti* and the aedilitian actions was also unclear in Roman-Dutch law the main difference was that no claim for damages was available in terms of the aedilitian actions (which is still the case in South African law).¹⁵

¹⁰ *Action quanti minoris*.

¹¹ Thomas *ea* 339, Zimmermann *Obligations* 311-319.

¹² Mostert *ea* 94.

¹³ Voet 21 1 8. See also LötZ 2001 232.

¹⁴ Voet 21 1 8. See also Zimmermann *Obligations* 228-232.

¹⁵ Zimmermann *Obligations* 328-329.

In the light of the discussion of the Pothier rule and its application with regard to merchant sellers and manufacturers later in this chapter, its historical development is forthwith discussed. According to Zimmermann,¹⁶ by undertaking to produce or professionally sell objects, a producer (manufacturer) and merchant seller guarantees that the thing sold is fit for use.¹⁷ Even if these sellers were ignorant they would be liable for the buyer's full consequential loss. (This rule does not, however, apply to sale generally.) Zimmermann declares that: "Robert Joseph Pothier, as usual, put into elegant French what Molinaeus had already said in bad Latin".¹⁸ Pothier explains that if a vendor did not know about the defect in the article sold he was not liable for consequential loss. The exception is the case in which "the seller is a worker or a merchant seller who sells articles of his own make, or articles of commerce which it is his business to supply".¹⁹ The same applies to a merchant seller who confessed in public to have knowledge of the thing sold. He (the merchant seller) guarantees that his articles are fit for use.

Zimmermann argues that this rule was not received in modern French law or by any Roman-Dutch jurists save one, namely, Voet.²⁰ Voet only recognised one exception and that is the artifex (artist) and not a merchant seller.²¹ Nevertheless the Pothier rule was received in modern South African law. Zimmermann²² refers to the case of *Kroonstad Westelike Boere Ko-operatiewe Vereniging Bpk v Botha*²³ where the court found a merchant seller to be liable for consequential damages caused by a latent defect who was unaware of the defect but yet publicly professed to have attributes of skill and expert knowledge of the thing sold. Zimmermann finds this to be an "amputated version" of the Pothier rule and argues that it is incorrectly translated and applied in South African law.²⁴ Lötz argues that the correct translation of Pothier indicated an

¹⁶ *Idem* 334.

¹⁷ *Ibid.*

¹⁸ *Idem* 335.

¹⁹ "c'est le cas auquel le vendeur est ouvrier ou un marchand qui vend des ouvrages de son art, ou du commerce dont il fait profession": Zimmermann *Obligations* 335.

²⁰ Zimmermann *Obligations* 335.

²¹ Voet 21 1 9.

²² *Idem.*

²³ 1964 3 SA 561 (A) 571.

²⁴ Zimmermann *Obligations* 335-336.

action for restitution but not consequential damages.²⁵ The Pothier rule has not been applied uniformly in our positive law.²⁶

2. Modern South African law (common law position)

2.1 Meaning of latent defect

A latent defect constitutes an impairment of the usefulness of the thing sold and something that is not discoverable upon reasonable inspection by an ordinary person (not an expert).²⁷ The defect renders the *merx* unfit for the purpose for which it is bought or for which it is normally used and must be determined objectively. In *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd*²⁸ a latent defect is described as an abnormal quality or attribute which destroys or substantially impairs the utility or effectiveness of the *merx*. To establish the abovementioned, the court asked whether the defect was easily visible and reasonably discoverable by an ordinary buyer and whether or not the buyer was aware of the defect at the time of conclusion of the contract.

The test is an objective one and relates to the usefulness of the thing sold and is not dependent on the specialist knowledge of the buyer.²⁹ The defect must be material and substantial to qualify as a latent defect and it must affect the utility of the *merx*. The defect must have existed at time of conclusion of the contract and the buyer must not have been aware of the defect at that time. The onus is on the buyer to prove the latter. Although case law³⁰ has found a concealed servitude to be a latent defect, this has been criticised with merit. Since a concealed servitude affects the use, enjoyment and disposal of the thing sold it is a form of eviction rather than a latent defect.³¹

²⁵ Lötze 2001 233.

²⁶ *Ibid.* The writer refers to the difference in interpretation of *Kroonstad Westelike Boere Ko-operatiewe Vereniging Bpk v Botha* 1964 3 SA 561 (A) and *Langeberg Voedsel Bpk v Sarculum Boerdery Bpk* 1996 2 SA 565 (A).

²⁷ Mackeurtan's par 338-240.

²⁸ 1977 3 SA 670 (A) 680. See also Mostert *ea* 185; *Dibley v Furter* 1951 4 SA 73 (C) 81; *Truman v Leonard* 1994 4 SA 371 (SE); *Van der Merwe v Meades* 1991 2 SA 1 (A); *De Vries v Wholesale Cars* 1986 3 SA 22 (O); *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd* 2002 2 SA 447 (A) 48.

²⁹ Nagel *ea* 223.

³⁰ *Southern Life Association v Segall* 1925 OPD 11; *Overdale Estates (Pty) Ltd v Harvey Greenacre and Co Ltd* 1962 3 SA 767 (N); *Glaston House (Pty) Ltd v Inag (Pty) Ltd* 1977 2 SA 846 (A).

³¹ De Wet & Van Wyk 330.

A patent defect will be noticed by a diligent person. The nature of the defect will determine whether it is latent or patent.³²

2.2 Warranty

The warranty against latent defects applies automatically by operation of law (*ex lege*) and forms part of every contract of sale as part of the *naturalia*. Where the warranty is given *ex lege* the remedies available to the buyer are the aedilician remedies (*actio quanti minoris* and the *actio redhibitoria*).³³

It is also possible that a seller may give an express or tacit contractual warranty. This warranty may include the absence of bad or the presence of good qualities in the *merx*. Where the warranty is given contractually the remedy available to the buyer is the *actio empti*. The buyer is entitled to cancel the contract and claim damages in terms of the *actio empti*. In terms of our common law the buyer will always be able to use the aedilician remedies even if a contractual remedy is present.³⁴ A claim for damages would however not be available to the buyer in terms of the aedilician actions.³⁵

2.3 Aedilician Remedies

The aedilician actions or remedies are available where there is a breach of warranty against latent defects and no express or tacit guarantee is present in terms of the contract or where such a warranty is expressly excluded. It can also be instituted where the seller fraudulently conceals the defect, guarantees the presence of good or absence of bad characteristics and where a *dictum et promissum*³⁶ was made.³⁷

³² *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* 1964 3 SA 561 (A) 677, *Waller v Pienaar* 2004 6 SA 303 (C) 308.

³³ *Nagel ea* 223.

³⁴ Kerr 108 (fn 22) states that the case of *Hackett v G and G Radio and Refrigerator Corporation* 1949 3 SA 664 (A) would be authority for the proposition that during the course of history the *actio redhibitoria* absorbed some of the characteristics of the *actio empti*.

³⁵ *Nagel ea* 226. See also *Kroonstad Westelike Boere Ko-operatiewe Vereniging Bpk v Botha* 1964 3 SA 561 (A).

³⁶ In *Phame (Pty) Ltd v Paizes* 1973 3 SA 397 (A) a *dictum et promissum* was defined as a declaration made during negotiations with regard to the quality of the *merx* that turns out to be false, which is something more than mere praising of the thing sold.

³⁷ *Nagel ea* 226.

2.3.1 Trade-in transactions

Until the judgment of *Janse van Rensburg v Grieve Trust*³⁸ there was uncertainty regarding the right of the seller to institute the aedilician remedies in trade-in transactions. This would be a situation where the seller sells a new motor vehicle to the buyer and the buyer pays the purchase price part in money and part in kind with an older motor vehicle. One of the questions that had to be answered by the court (other than for example determining the nature of the trade-in agreement itself) was whether the seller would be able to institute the *actio quanti minoris* where the older vehicle had a latent defect.

In *Wastie v Security Motors (Pty) Ltd*³⁹ the court found the trade-in part of the agreement to be one of barter. The old motor vehicle had a latent defect which was repaired at a cost of one hundred and twenty rand. The applicant argued that the *actio quanti minoris* could not be used because the vehicle formed part of the *merx* and not the *pretium*.⁴⁰ The court rejected the applicant's argument and held that the old motor vehicle did form part of the purchase price and the parties had the intention to conclude one transaction. The use of the aedilician actions in both sale and barter was confirmed and the court added that even if the trade-in motor vehicle formed part of the *merx*, the *actio quanti minoris* would still be available to the seller.⁴¹

In *Mountbatten Investments (Pty) Ltd v Mahomed*⁴² the court found the trade-in part of the transaction to be neither sale nor barter.⁴³ As a result the court came to the conclusion that the *actio quanti minoris* was not applicable to the trade-in transaction regarding the older model vehicle because the *actio quanti minoris* applies only to contracts of sale and barter and not to trade-in agreements.

The court found the sale of the new motor vehicle and the trade-in of the older vehicle to be one transaction in *Bloemfontein Market Garage (Edms) Bpk v Pieterse*.⁴⁴ The court also confirmed the use of the aedilician actions for sale and barter

³⁸ 2000 1 SA 315 (C).

³⁹ 1972 2 SA 129 (C).

⁴⁰ 133.

⁴¹ 134-135.

⁴² 1989 1 SA 172 (D).

⁴³ 180.

⁴⁴ 1990 2 SA 208 (O).

transactions.⁴⁵ The court held that the trade-in part of the transaction could be treated as a *datio in solutionem* (substitutive payment) but that it would not be applicable where there was a latent defect. In the latter case the seller could reject the older motor vehicle and claim the amount in cash.⁴⁶

Hawthorne discusses the conflicting viewpoints of the courts.⁴⁷ She explains that the initial agreement between the seller and buyer in trade-in transactions is the purchase of a new motor vehicle for a fixed purchase price. The seller then agrees to accept something else (other than money) as payment (an older motor vehicle and cash). The writer argues that on that basis an analogy can be drawn between the *datio in solutionem* and sale. *Datio in solutionem* is a novation of the initial obligation and similar actions as would be available in terms of our law of sale is then available, including the aedilician actions.⁴⁸

Van Zyl J attempted to provide certainty to trade-in transactions by also taking the Constitution into account in *Janse van Rensburg v Grieve Trust CC*.⁴⁹ The judge rejected the decisions of both the *Mountbatten Investment*⁵⁰ and *Bloemfontein Market Garage*⁵¹ cases. Van Zyl J referred to sections 8 and 9 of the Constitution and confirmed the duty of the court to develop the common law in terms of the section 38.⁵² The court rejected the proposed solution of *datio in solutionem*.⁵³ Instead, the court developed the common law to include the use of aedilician actions where an innocent misrepresentation was made. The judge extended the aedilician actions to all trade-in transactions and also took good faith into account. Glover correctly supports the court's approach in developing the common law in terms of the Constitution.⁵⁴

⁴⁵ 210.

⁴⁶ *Ibid.*

⁴⁷ Hawthorne 1991 143–150.

⁴⁸ *Idem* 149–150.

⁴⁹ 2000 1 SA 315 (C) 318.

⁵⁰ 1989 1 SA 172 (D).

⁵¹ 1990 2 SA 208 (O).

⁵² 317.

⁵³ 318.

⁵⁴ Glover 2001 156–166. See also Smith 2000 2–4.

2.3.2 The *actio redhibitoria* and the *actio quanti minoris*

Liability under the aedilician actions presupposes that the defect is not insignificant, that it is latent, that the buyer is unaware of it and that the defect existed at the time of conclusion of the contract.⁵⁵ Kerr declares that the motive for the actions is to assist buyers whenever they are cheated by sellers.⁵⁶ According to him the extension of the aedilician actions to cases in which the seller was unaware of the disease or defect is the main reason for the survival of the actions in modern times.⁵⁷

The purpose of the *actio redhibitoria* is to put the parties in the position they were before conclusion of the contract by way of restitution. The onus is on the buyer to prove that a reasonable person would not have bought the thing sold had he been aware of the latent defect. Kerr is of the opinion that the buyer does not have to prove that the disease or defect was apparent at the time of the sale, but only that the thing sold had within it the beginnings of what is later seen to be a disease or defect.⁵⁸ This would seem to be consistent with the definition of a defect going to the root or nature of the particular *merx*.

The requirements differ when dealing with a class of goods still to be separated (such as bags of mealies or pockets of potatoes). The buyer may reclaim the purchase price, interest and compensation for the reasonable expenses incurred in connection with the delivery, preservation and maintenance of the thing sold.⁵⁹ Kahn⁶⁰ gives other examples such as the costs of drawing up the contract, the cost of transporting the property sold from the place of delivery to the buyer's place of business or residence and the cost incurred in taking care of the property sold until its return. The *actio redhibitoria* may only be instituted once and the defect must warrant restitution.

If there are a number of defects, none of which is in itself material, their cumulative effect may nevertheless be considered to be material.⁶¹ The test would be

⁵⁵ Zimmermann *Obligations* 379-380.

⁵⁶ Kerr 107. "It is however, to be understood that a seller, even though he was unaware of the existence of faults, liability for which is ordained by the aediles, must nevertheless be held liable. Nor is this unfair; for the seller was in a position to inform him on these matters, while to the buyer it makes no difference whether his deception is due to the seller's ignorance or to his guile."

⁵⁷ Kerr 124.

⁵⁸ Kerr 115.

⁵⁹ *Ibid.*

⁶⁰ Kahn (2010) 36.

⁶¹ *Ibid.*

whether or not the latent defect is serious enough to render the *merx* unfit for the purpose for which it was bought. The latter was confirmed in *De Vries v Wholesale Cars (Pty) Ltd*.⁶² The appellant instituted a claim for restitution with the *actio redhibitoria* because of a wobble in the steering mechanism found to be a latent defect. The court *a quo* confirmed the defect to be a latent defect but held that it was not serious enough to justify the *actio redhibitoria*.⁶³ On appeal, the court had to determine whether the latent defect was material. The court applied the following test: Was the defect of such a nature that if the buyer was aware of it at time of conclusion of the contract would he have bought the *merx*? If the answer was in the negative, the defect was material and the *actio redhibitoria* may be instituted. The factors the court took into account to determine materiality of the defect included the speed and ease in which the defect was repaired, the cost of the repair, the cumulative effect which all of the factors had on the buyer's frame of mind and whether or not the defect had been caused by normal wear and tear.⁶⁴ The court found the defect to be material.⁶⁵ The *Janse van Rensburg*⁶⁶ case also confirmed the materiality test for the institution of the *actio redhibitoria*.

The buyer has to return the thing sold together with any fruits and may be liable to compensate the seller for any depreciation in value of the *merx* for which the buyer is responsible.⁶⁷ Where a buyer has pledged or mortgaged the property such a pledge or mortgage needs to be redeemed before restitution can take place. The buyer will not have a right to institute the *actio redhibitoria* where the buyer (or someone for whom the buyer is responsible) consumed, altered or materially damaged the property.⁶⁸ The buyer may expressly or tacitly waive his right to invoke the *actio redhibitoria*. The buyer has been deemed to have tacitly waived his right where he retains the property with knowledge of the defect and exercises acts of ownership.⁶⁹ He may still be able to institute a claim for the reduction in the purchase price.

⁶² 1986 2 SA 22 (O).

⁶³ 24.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ 2000 1 SA 315 (C) 320.

⁶⁷ *Ibid.*

⁶⁸ Kahn (2010) 37 also mentions situations where because of reasons of equity the buyer is not obliged to return the property, for example where the property was destroyed because of the latent defect or *vis maior*.

⁶⁹ *Schwarzer v John Roderick's Motors (Pty) Ltd* 1940 OPD 170, 176.

A pro-rata reduction in the purchase price may be claimed with the *actio quanti minoris*. It may be instituted more than once for every latent defect that existed at time of conclusion of the contract.⁷⁰ A buyer may institute action for a reduction in the purchase price either where the *dictum et promissum* or the defect is not sufficiently material to warrant cancellation or where the buyer chooses to retain the property.⁷¹ The *actio quanti minoris* allows the buyer to claim a reduction in the purchase price while retaining the thing sold. The amount of the reduction is the difference between the purchase price and the value of the defective goods.⁷²

In *Sarembock v Medical Leasing Services (Pty) Ltd and another*,⁷³ the court held that the value of the property sold in its defective state is evidenced by its market value.⁷⁴ If there is no market for the property, other methods of determining its value will be considered, such as subtracting the costs of repair from the purchase price paid at time of conclusion of the contract.⁷⁵ Kerr is of the opinion that similar problems as with the *actio redhibitoria* may be encountered when determining the actual value of the goods in claim for a reduction in the purchase price.⁷⁶ Where more than one factor contributes to the need for repair, the court will be required to separate deterioration for which the seller is responsible from that for which the buyer would be responsible and only reasonable costs of repair will be allowed.⁷⁷ Kahn discusses the conflicting view points of the courts as to the time when the market value must be determined but declares that the predominant view seems to be that it is at the time of conclusion of the contract.⁷⁸ The *actio quanti minoris* may also be instituted in the alternative to the *actio redhibitoria* provided it is based on different factual averments. The same applies to the institution of the *actio quanti minoris* in the alternative to the *actio empti*.⁷⁹

⁷⁰ Nagel *ea* 226-227

⁷¹ Kahn (2010) 37.

⁷² Zimmermann *Obligations* 380.

⁷³ 1991 1 SA 344 (A).

⁷⁴ 215.

⁷⁵ 352. See also Kerr 129-130.

⁷⁶ Kerr 130.

⁷⁷ *Ibid.* See also *Maennel v Garage Continental Ltd* 1910 AD 137, 149.

⁷⁸ Kahn (2010) 38. See also Kerr 133 who is of the same opinion.

⁷⁹ *Le Roux v Autovend (Pty) Ltd* 1981 4 SA 890-894.

2.3.3 When aedilician actions may not be instituted

The aedilician actions or remedies are not available to the buyer where the latent defect did not exist at the time of conclusion of the contract, the defect was patent not latent, the sale was a voetstoots sale, the latent defect was corrected, where there was a waiver of the warranty or prescription occurred.⁸⁰ It would further not be applicable to goods bought at an auction or a sale by order of the court.⁸¹ Where the whole contract of sale is subject to a suspensive condition, the aedilician actions will only be available after the condition has been fulfilled.⁸²

2.4 Residual “warranty” against latent defects

Kerr argues that it is incorrect to refer to the aedilician edicts as implied warranties against latent defects.⁸³ It is misleading because if they are used to consider whether or not there are provisions in a contract, they are residual and not implied and the “warranty” does not include liability for consequential loss as warranties normally do. He argues that it would be better to speak of liability under the edict since the *aediles* granted actions and were silent on any provisions in a contract.⁸⁴ This argument is purely academic because of the common usage of the term “warranty” by our courts.⁸⁵

2.5 The *actio empti*

The buyer may institute the *actio empti* where there is either an express or a tacit warranty given in terms of the agreement. Other grounds⁸⁶ for institution include the warranty by the seller of the presence of good or the absence of bad characteristics in the thing sold; where the seller concealed the defect⁸⁷ and where the seller is a merchant seller or manufacturer. The *actio empti* may also be excluded by way of a

⁸⁰ Nagel *ea* 228.

⁸¹ Kerr 135.

⁸² *Ibid.*

⁸³ *Idem* 219.

⁸⁴ *Ibid* fn 517.

⁸⁵ *Janse van Rensburg v Grieve Trust CC* 2000 1 SA 315 (C); *De Vries v Wholesale Cars (Pty) Ltd* 1986 2 SA 22 (O); *Sarembock v Medical Leasing Services (Pty) Ltd and another* 1991 1 SA 344 (A); *Le Roux v Autovend (Pty) Ltd* 1981 4 SA 890-894.

⁸⁶ For a summary of grounds for institution see Nagel *ea* 224-226.

⁸⁷ In *Van der Merwe v Meades* 1991 2 SA 1 (A) 3 the court held that the buyer had to prove that the seller was aware of the existence of a latent defect at time of conclusion of the contract and concealed it *dolo malo* (with the intention to defraud). The buyer will in these instances be entitled to use the *actio empti* even if a voetstoots clause is present.

voetstoets clause in the agreement.⁸⁸ The buyer may cancel the agreement and claim damages in terms of the *actio empti*. The claim for damages is based on a breach of contract and the breach must be sufficiently serious to warrant cancellation.⁸⁹

2.6 Inspection of the goods prior to delivery

Where the buyer inspected the goods before delivery, the seller's warranty covers only latent defects.⁹⁰ There is no need for the buyer to inspect where the thing bought is new.⁹¹ The question may be asked whether there is a duty on the buyer to inspect goods where the goods are bought second-hand. Kerr refers to conflicting judgments⁹² and attempts to reconcile the principle under Roman law with the conflicting case law by drawing attention to the age and appearance of a second-hand motor vehicle. The example is given that no buyer would inspect underneath a vehicle where it is less than a year old or has very low mileage.⁹³ Irrespective of the expertise of the person conducting the inspection (the buyer or an authorised agent), where the buyer does not rely on the results of the inspection he may not be deprived of the use of the aedilitian actions merely because an inspection took place.⁹⁴ Kerr refers to circumstances where the buyer must accept responsibility for the fact that he is in a weaker bargaining position than would otherwise have been the case.⁹⁵ This would be where the buyer was aware of the defect at the time of conclusion of the contract, where the defect was obvious or where the buyer relies on his own opinion or that of another.⁹⁶ In these instances the aedilitian actions would not be available to the buyer.

Kerr supports the view that by the mere definition of a latent defect there is no indication of its presence during inspection of the *merx* so as to alert the buyer. Even in the absence of an express or tacit warranty a buyer is not bound to examine the thing sold at the time of the sale nor is he bound to take it to pieces immediately after the

⁸⁸ See discussion below with regard to the voetstoets clause and situations where the seller is a merchant seller or manufacturer.

⁸⁹ 378.

⁹⁰ Kerr 140-144, Nagel *ea* 224.

⁹¹ Kerr 140 fn 325.

⁹² *Ibid.* See also *Schwarzer v John Roderick's Motors (Pty) Ltd* 1940 OPD 170; *Lakier v Hager* 1958 4 SA 180 (T).

⁹³ *Ibid.*

⁹⁴ Kerr 142.

⁹⁵ *Idem* 143.

⁹⁶ *Idem* 136-138.

sale.⁹⁷ Furthermore the mere fact that the buyer inspected the thing sold prior to buying it is not sufficient to constitute a voetstoots sale.⁹⁸

2.7 Voetstoots sales and non-disclosure

“As one would expect the aedilician liability of the seller provides the buyer not only with a cause of action but also with a defence”.⁹⁹

Where a voetstoots clause is present the *merx* is sold and delivered as is. The word voetstoots is derived from the custom in terms of Roman-Dutch law to “stoten” or push the thing sold (for example a barrel of grain) with one’s foot to indicate the delivery and sale of the property and thereby avoiding complaints later.¹⁰⁰ Kerr describes a voetstoots clause as a clause which stipulates that the seller is not to be held responsible for diseases or defects and goods are sold “as it stands” or “with all its faults”.¹⁰¹ The effect of such a clause is that the seller does not take the risk of the presence of any diseases or defects, but is liable for misrepresentations of any kind.¹⁰² Even if the word “voetstoots” is not expressly used in the clause which excludes liability, it is still referred to as such.¹⁰³ In general the parties exclude the aedilician actions as well as the *actio empti* where a voetstoots clause is present.

Where contracting parties contradicted themselves (for example where a warranty was given by the seller that the thing sold is free from diseases but the contract also contains a voetstoots clause) the courts should not approach the question mechanically, but should ask which clause better reflects the true intentions of the parties.¹⁰⁴ In principle a voetstoots clause may either be express or implied nonetheless

⁹⁷ *Idem* 145.

⁹⁸ *Idem* 146.

⁹⁹ Zimmermann *Obligations* 381.

¹⁰⁰ *Nederlandse spreekwoorden, spreuken en zegswijzen* (2009) 362. See also Otto 2011 530.

¹⁰¹ Kerr *Contracts* 150.

¹⁰² *Ibid.*

¹⁰³ *Ibid.*

¹⁰⁴ *Idem* 151.

the courts will not likely be persuaded that parties entered into an implied voetstoets clause.¹⁰⁵ Moreover there is a presumption against voetstoets sales.¹⁰⁶

In *Consol Ltd t/a Consol Glass v Twee Jonge Gezellen (Pty) Ltd and another*,¹⁰⁷ the court held that where an indemnity clause excluded liability in terms of an implied warranty of quality it may also exclude a warranty against latent defects. The court held that a warranty against latent defects was not dependent on contractual consensus but rather imposed by law and it would be inappropriate to talk about an implied warranty.¹⁰⁸

The seller cannot “hide” behind a voetstoets clause where he concealed the latent defect. In *Orban v Stead and another*,¹⁰⁹ the court confirmed the common law principle that there is no general duty on a seller to disclose a defect. The court held that there are three situations where the silence of the seller will give rise to an action based on non-disclosure, namely, where there is concealment, a designed concealment or a simple non-disclosure.¹¹⁰ There is however, no duty on a seller to disclose where the seller does not know that the buyer acted under an erroneous belief.¹¹¹

Where the seller intentionally concealed the defect he will be guilty of misrepresentation and the *actio empti* may be instituted.¹¹² This will also be the case where the purpose of the concealment was to mislead. The seller will not be protected by a voetstoets clause where he had knowledge of the latent defect at the time of conclusion of the contract and fraudulently concealed it. This was confirmed in *Truman v Leonard*¹¹³ where the court held that where a contractual undertaking came about through fraud it is against public policy. A seller may only rely on a voetstoets clause where he was honest.¹¹⁴ The court held that where there was a deliberate (fraudulent) concealment of latent defects by the seller which caused damages to the buyer, the cause

¹⁰⁵ *Idem* 152.

¹⁰⁶ *Schwarzer v John Roderick's Motors (Pty) Ltd* 1940 OPD 176.

¹⁰⁷ 2002 6 SA 256 (C).

¹⁰⁸ 276-278.

¹⁰⁹ 1978 2 SA 713 (W) 717.

¹¹⁰ 717-718.

¹¹¹ 719-720.

¹¹² *Nagel ea* 225.

¹¹³ 1994 4 SA 371 (SE). See also *Janowski and others v Payne* 1989 2 SA 562 (C); *Glaston House (Pty) Ltd v Inag (Pty) Ltd* 1977 2 SA 846 (A); *Wells v South African Alumenite Company* 1927 AD 69, 72.

¹¹⁴ 377.

of action may be based on either the aedilician actions or on delict on the grounds of fraudulent misrepresentation.¹¹⁵

In *Waller v Pienaar*¹¹⁶ the aedilician actions were instituted because of a latent defect. The buyer argued that the seller was aware of the defect and despite the voetstoots clause had a duty to disclose. It was also argued that it was an implied term of the contract that the house was sold free from defects and was fit for residential purposes.¹¹⁷ The seller on the other hand argued that the defect was of a patent nature because it was visible to the naked eye and the nature and scope of the defect was contained in a public document (the engineer's report). If the court found the defect to be a latent one, the seller argued that he was unaware of it and therefore protected by the voetstoots clause.¹¹⁸ The court referred to the "honesty requirement" as laid down in *ABSA Bank Ltd v Fouche*¹¹⁹ and found that the defect was within the seller's exclusive knowledge and that the seller was aware of the fact that the buyer did not know about the defect.

The court found that the seller fraudulently failed in his duty to disclose.¹²⁰ According to Erasmus J the buyer had to prove the following: That the seller knew that the defect was latent, that the seller was under a duty to disclose, that the seller fraudulently concealed the latent defect or made a fraudulent misrepresentation and lastly that non-disclosure induced the buyer to enter into the contract.¹²¹ The court held that intentional or negligent breach of the duty to disclose will automatically attract delictual liability based on public policy.¹²² This would be the case where a material fact falls within the exclusive knowledge of the seller, the seller is aware of extraordinary circumstances with regard to the transaction or the *merx* and a previous statement by the seller is vague and the circumstances of the transaction requires augmentation

¹¹⁵ 378.

¹¹⁶ 2004 6 SA 303 (C).

¹¹⁷ 305-306.

¹¹⁸ 306.

¹¹⁹ 2003 1 SA 176 180-181.

¹²⁰ 309.

¹²¹ *Ibid.*

¹²² *Ibid.*

thereof.¹²³ The court held that the buyer discharged his onus of proof and succeeded in his claim.¹²⁴

The judgment is criticised by Lötzt & Nagel.¹²⁵ The first point of criticism is with regard to the defect being a latent one. They refer to the definition of a latent defect as laid down in the *Holmdene Brickworks* case¹²⁶ and argue that the defect was patent rather than latent and that the buyer was not discharged from his duty to do a proper, reasonable inspection of the property.¹²⁷ The writers argue that the court ignored both the *caveat emptor* rule and the fact that there is no general duty to disclose on the seller.¹²⁸ The latter was confirmed in the same case the court referred to (*ABSA v Fouche*).¹²⁹ According to Lötzt & Nagel the seller would only have a duty to disclose where such information does not fall within the scope of the buyer's knowledge; there is no possibility that the buyer could obtain such knowledge on his own and the information being within the exclusive knowledge of the seller results in unequal bargaining positions.¹³⁰

The question the court had to answer in *Odendaal v Ferraris*¹³¹ was whether a failure to obtain statutory approval for building was a latent defect and, if so, whether a voetstoets clause would protect a seller in such a situation. The court confirmed that the absence of statutory authority constituted a latent defect.¹³² The issue was whether the voetstoets clause which appeared to cover all the physical defects in the property protected the seller. The court held that if a buyer hopes to avoid the consequences of a voetstoets sale, he must show firstly that the seller knew of the latent defect and did not disclose it and secondly that the intention of the concealment was to defraud.¹³³ *In casu* the buyer could not prove the latter and the voetstoets clause was enforced.

¹²³ 308.

¹²⁴ *Ibid.*

¹²⁵ Lötzt & Nagel 2005 188-194.

¹²⁶ 1977 3 SA 670 (A) 680.

¹²⁷ 188.

¹²⁸ Lötzt & Nagel 2005 193-194.

¹²⁹ *Ibid.* Se also *ABSA Bank Ltd v Fouche* 2008 4 All SA 529 (A).

¹³⁰ *Ibid.*

¹³¹ 2008 4 All SA 529 (A).

¹³² 537.

¹³³ 549.

2.8 Merchant sellers, manufacturers and grounds for liability

Where a seller is a merchant seller or dealer, the seller will be liable for damages (including consequential damages¹³⁴) in respect of latent defects in the *merx*. The merchant seller (dealer) had to profess in public to have been a dealer at time of conclusion of the contract and to have expert knowledge and skill regarding the *merx* (the so-called Pothier rule).¹³⁵ As was mentioned earlier¹³⁶ there have been conflicting viewpoints regarding the interpretation of the Pothier rule as well as the merchant seller's liability for damages. Many judgments have been handed down regarding the issue of liability of merchant sellers and manufacturers for damages caused by latent defects.¹³⁷ An in depth discussion of this issue is not relevant. For purposes of this thesis therefore a summary of the historical development in terms of our positive law is given and only the most relevant cases in terms of the modern South African position (common law position) are mentioned.

The manufacturer is liable for all damages (including consequential damages) and does not have to profess in public to have special knowledge with regard to the thing sold.¹³⁸ Negligence or ignorance of the defect is no defence against liability.¹³⁹ This was confirmed in *D & H Piping Systems (Pty) Ltd v Trans Hex Group Ltd and Another*.¹⁴⁰ The court held that the manufacturer was liable to the buyer as a "manufacturer seller" for any consequential damages it suffered as a result of any latent defect in the thing sold.¹⁴¹ Maleka criticises the remarks by Cohen and Costa¹⁴² in that *D & H Piping Systems (Pty) Ltd* did not bring about a change in the previous common law position.¹⁴³ The requirements for a manufacturer's liability remain unchanged.

¹³⁴ Consequential damages or loss that flows from direct damages.

¹³⁵ See origin and historical overview of rule in Part B 1 above.

¹³⁶ *Ibid.*

¹³⁷ *Erasmus v Russell's Executors* 1904 TS 365; *Marais v Commercial General Agencies Ltd* 1922 TPD 440; *Young's Provision Stores (Pty) Ltd v Van Ryneveld* 1936 CPD 87; *Lockie v Wightman and Company* 1950 1 SA 361 (SR); *Odenaal v Bethlehem Romery Bpk* 1954 3 SA 370 (O); *Kroonstad Westelike Ko-operatiewe Vereniging Bpk v Botha* 1964 3 SA 561 (A); *Langeberg Voedsel Bpk v Sarculum Boerdery* 1996 2 SA 565 (A). See also Lötz 2001 233-242.

¹³⁸ *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* 1977 3 SA 670 (A); *Langeberg Voedsel Bpk v Sarculum Boerdery* 1996 2 SA 565 (A); *Sentrachem Bpk v Prinsloo* 1997 2 SA 1 (A).

¹³⁹ Kahn (2010) 196.

¹⁴⁰ 2006 3 SA 593 (SCA).

¹⁴¹ 601.

¹⁴² 13.

¹⁴³ Maleka 586-587.

Kahn gives the correct summary as to the historical development and current application of the Pothier rule and the basis of the merchant seller's liability.¹⁴⁴ Before *Kroonstad Westelike Ko-operatiewe Vereniging Bpk v Botha*¹⁴⁵ the claim for consequential damages was restricted to the manufacturer of the goods sold. The court held in *Kroonstad Westelike Boere Ko-operatiewe Vereniging Bpk v Botha*¹⁴⁶ that a merchant seller was liable for consequential damages where he publicly professed to have expert knowledge in relation to the thing sold.¹⁴⁷ There had been some uncertainty as to the basis of such liability. According to Kahn¹⁴⁸ some have argued that the manufacturer and merchant seller are presumed to have been aware of the defect and are therefore guilty of implied fraud and liable on that basis. Others have based the liability on a tacit warranty against latent defects which enable the buyer to claim damages in terms of the *actio empti*.¹⁴⁹ Recent authority¹⁵⁰ is to the effect that the remedy is a general contractual remedy based on the breach of a sale agreement.

In *Ciba-Geigy v Lushof Farms and another*,¹⁵¹ the appellant was a manufacturer of herbicide which the buyer bought from a merchant seller (Van Staden). The herbicide caused physical and economical damage to the buyer's pear trees. The court *a quo* awarded damages against the manufacturer and merchant seller in favour of the buyer. The manufacturer appealed. On appeal, the court held that the merchant seller was liable in terms of the Pothier rule. The buyer was entitled to consequential damages for breach of a contractual warranty and could cancel the contract in terms of the *actio empti*.¹⁵² The buyer's claim against the manufacturer was based on delict. The buyer argued that the manufacturer was negligent in making a herbicide available prior to the proper testing of its effects specifically on pears and the court agreed with this argument.¹⁵³ The court referred to the manufacturer's liability as product liability and

¹⁴⁴ Kahn (2010) 39-40.

¹⁴⁵ 1964 3 SA 561 (A).

¹⁴⁶ *Ibid.*

¹⁴⁷ 566.

¹⁴⁸ Kahn (2010) 39-40.

¹⁴⁹ *Ibid.*

¹⁵⁰ *Wagener v Pharmicare Ltd; Cuttings v Pharmicare Ltd* [2003] 2 All SA 167 (SCA); *Ciba-Geigy (Pty) Ltd v Lushof Farms and another* 2002 2 SA 447 (SCA).

¹⁵¹ 2002 2 SA 447 (SCA).

¹⁵² 446.

¹⁵³ 473.

explained that a *nexus* between the manufacturer and consumer is not a requirement. A manufacturer who distributes a product commercially, which, in the course of its intended use, and as a result of the defect, caused damage to the consumer thereof, acts wrongly and thus unlawfully according to the legal convictions of the community.¹⁵⁴ The result was that the merchant seller and the manufacturer were held to be jointly and severally liable. (The merchant seller's liability was based on a contractual warranty whereas the manufacturer's liability was based on delict).¹⁵⁵

The court also held that where the buyer succeeded with its delictual claim the same amount may not be claimed from the merchant seller.¹⁵⁶ Neethling & Potgieter¹⁵⁷ support the court's decision to move towards product liability for manufacturers and voices the hope that courts will apply the same in future judgments.¹⁵⁸ Lötz & Nagel¹⁵⁹ question whether the Pothier rule is still juridically relevant and workable in a modern trade environment. It is argued that the true implication is that the rule transforms a general question of fact into an absolute legal principle.¹⁶⁰ An argument is made in favour of the foreseeability test in terms of our law of damages to determine consequential damages rather than applying the Pothier rule.¹⁶¹

Although the cause of action in *Wagener v Pharmacare Ltd; Cuttings v Pharmacare Ltd and another*¹⁶² was based on a delictual claim for personal injury, the case is of importance with regard to product liability. The court held that there could be reasons for imposing strict liability on manufacturers but that it was not appropriate for the courts to address the issue. The court commented that the legislature was in a far better position to do so and for the court to attempt to alter the law judicially would raise more questions than it would answers.¹⁶³ (Prophetic words regarding the CPA even though the Act only came into operation several years after the judgment). Van Eeden argues that the decision of the court seems to imply that the aquilian liability *in casu* was

¹⁵⁴ 470.

¹⁵⁵ 475.

¹⁵⁶ *Ibid.*

¹⁵⁷ Neethling 2011 812.

¹⁵⁸ 586.

¹⁵⁹ 2005 *THRHR* 56-57.

¹⁶⁰ *Ibid.*

¹⁶¹ *Ibid.*

¹⁶² [2003] 2 All SA 167 (SCA).

¹⁶³ 177-178. See also Neethling 2011 812.

satisfactory and moreover that the onus of proof was on the manufacturer.¹⁶⁴ Despite the latter Van Eeden argues that the decision is an extension of the rule of *re ipsa loquitur*¹⁶⁵ to include product liability.¹⁶⁶

In the related case of *AB Ventures Ltd v Siemens Ltd*¹⁶⁷ the court held that there would be major implications for a multiple-party joint venture project if each participant were bound to adhere not only to the terms of its specific contractual relationship, but also to each and all the specific contractual provisions between the other participants.¹⁶⁸ Since the parties to such ventures are fully able to regulate their exposure to loss contractually, the above-mentioned policy implications militate against the extension of common law remedies (the aquilian action in particular) to such scenarios.¹⁶⁹

The court in *Freddy Hirsch Group (Pty) Ltd v Chickenland (Pty) Ltd*¹⁷⁰ referred to the *Ciba-Geigy* case¹⁷¹ and confirmed that the liability of manufacturers is based on product liability.¹⁷² The court held that there was a legal duty on the manufacturer to make sure that any product it manufactured and supplied complied with South African as well as international legislation which had as its aim ensuring that the product was fit for human consumption.¹⁷³ Because of the manufacturer's negligence in this regard, the court held it liable for consequential damages.¹⁷⁴ The voetstoots clause protecting the seller who is also a manufacturer from claims based on latent defects will be of no effect where the seller delivered goods other than those contracted for. *In casu* the goods were not fit for human consumption and were therefore something else than was contracted for.¹⁷⁵ Neethling supports the decision of the court *in casu*.¹⁷⁶

¹⁶⁴ Van Eeden 67.

¹⁶⁵ The facts speak for themselves.

¹⁶⁶ Van Eeden 66. See also Neethling 2011 808.

¹⁶⁷ 2011 4 SA 614 (SCA).

¹⁶⁸ 614.

¹⁶⁹ 622-623.

¹⁷⁰ 2010 1 SA 8 (GSJ). See also case discussion of Neethling 2011 809-812.

¹⁷¹ *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd* 2002 2 SA 447 (AC).

¹⁷² 26.

¹⁷³ *Ibid.*

¹⁷⁴ 27.

¹⁷⁵ 22.

¹⁷⁶ Neethling 2011 811-812. See also Neethling *Delict* 337.

Kerr discusses the situation where manufacturers and merchant sellers warrant the skill of their respective arts (in the absence of an agreement to the contrary).¹⁷⁷ The author refers to jurists such as Pothier and Molinaeus to support his argument that this particular warranty is contractual in nature.¹⁷⁸ In summary the warranty of skill and art will be included *ex lege* where both parties know the particular purpose of the contract and the seller has skills which he applies for the purpose of the contract to be accomplished. The warranty will apply regardless of whether or not persons in the particular class to which the seller belongs have those skills or not. The only exception would be where the buyer uses the *merx* for some other purposes or in a way that the particular goods would not ordinarily be used for and the seller is unaware of this fact.¹⁷⁹

2.9 Residual warranties

Kerr discusses other warranties that may be given by a seller.¹⁸⁰ These include a warranty that the *merx* is fit for the purposes for which it is sold and a warranty that the *merx* is of reasonable merchantable quality.¹⁸¹

2.9.1 Merx fit for the purposes for which it was sold

Kerr argues that this residual warranty is only read into certain contracts of sale and will depend on the intention of the parties and the specific purpose for which the goods are sold.¹⁸² The writer argues that “specific purpose” means a purpose of which both parties are (or are deemed to be) aware and not a purpose which only the buyer has in mind and which he keeps secret.¹⁸³

The warranty refers to the fitness of the article sold, and not the shortcomings of the surrounding circumstances. It is interesting to note that Kerr argues for the existence of the warranty whether or not the goods are unfit for a particular purpose though still sound, unfit because it is patently defective or unfit because it is latently

¹⁷⁷ Kerr 218-219 and Kerr *Contracts* 372-373.

¹⁷⁸ Kerr 218.

¹⁷⁹ *Idem* 219.

¹⁸⁰ *Idem* 215.

¹⁸¹ *Idem* 218.

¹⁸² *Idem* 206.

¹⁸³ *Idem* 208.

defective.¹⁸⁴ The remedies available to the buyer are the usual contractual remedies as well as compensation for loss including consequential loss suffered as a result of the breach of warranty.¹⁸⁵ The recovery for consequential loss is argued to be in line with the general rule of liability on warranties.¹⁸⁶

2.9.2 Warranty that *merx* is of reasonable merchantable quality

Kerr refers to old authorities and there seems to be no recent case law with regard to this residual warranty.¹⁸⁷ He submits that the recovery of consequential loss would also be possible. It is interesting to note that there is no definition of “reasonable merchantable quality” in South African law.¹⁸⁸

2.9.3 Goods bought by description or sample or both¹⁸⁹

When the subject matter of the contract of sale is determined by way of a description or sample or both, the goods to be delivered may not vary materially from the description or sample or both.¹⁹⁰

2.9.4 Defective things and different things

Kerr argues for a proper distinction between defective things and different things. He gives various examples but ultimately the argument is made that where different things (other than those originally contracted for) are delivered or where a mixture of things is delivered,¹⁹¹ it would be better to claim for a breach of contract based on malperformance rather than a latent defect.¹⁹²

¹⁸⁴ Kerr 209-213.

¹⁸⁵ *Idem* 215.

¹⁸⁶ *Ibid.* Kerr (*Contracts*) 460-461.

¹⁸⁷ Kerr 215-218.

¹⁸⁸ *Idem* 217.

¹⁸⁹ For a comprehensive discussion see chapter 5.

¹⁹⁰ Kerr 219-220. See also Mackeurtan’s 49-57.

¹⁹¹ For a comprehensive discussion see chapter 5 as part of the discussion of unsolicited goods.

¹⁹² Kerr 153-155.

C. LEGAL POSITION IN TERMS OF THE CONSUMER PROTECTION ACT 68 OF 2008

1. Introduction

Section 2 Part H of the Act¹⁹³ deals with the consumer's fundamental right to fair value, good quality and safety. It is extremely important to keep in mind that the Act is not applicable to once-off transactions¹⁹⁴ or where the consumer is a juristic person¹⁹⁵ with an asset value or annual turnover, at the time of the transaction that equals or exceeds the threshold value¹⁹⁶ as determined by the Minister of Trade and Industry.¹⁹⁷ The Act will also not be applicable where goods and services are not supplied in the ordinary course of business of the supplier.¹⁹⁸

The CPA therefore regulates the marketing, relationships, transactions and agreements between producers, suppliers, distributors, importers, retailers, service providers and intermediaries, on the one hand, and consumers on the other.¹⁹⁹

2. Definition of a defect in terms of the CPA

Section 53 provides certain definitions relevant to the right to fair value, good quality and safety (in other words applicable to the whole of Part H of the Act). "Defect" means a defect in goods, which is any material imperfection in the manufacture of goods or components that renders the goods less acceptable, including any characteristic of the goods or components that caused it to be less useful, practicable or safe, in circumstances that persons generally would be reasonably entitled to expect.²⁰⁰

"Failure" means the inability of goods to perform in the intended manner or effect.²⁰¹ "Hazard" means a characteristic that has been identified or declared to be a hazard in terms of any other law, or presents a significant risk of injury or damage when goods are utilised.²⁰² "Unsafe" means that due to a characteristic, failure, defect or

¹⁹³ Ss 53 – 61.

¹⁹⁴ S 5(2).

¹⁹⁵ Ito s 1 the definition of "juristic person" includes a close corporation, a trust and a partnership.

¹⁹⁶ Ito GN 294 in GG 34181 of 1 April 2011 the threshold amount is R2 million.

¹⁹⁷ See chapter 4 for a discussion of the relevant definitions in terms of the CPA.

¹⁹⁸ S 5.

¹⁹⁹ See s 1 CPA. See also chapter 4 for discussion of relevant definitions.

²⁰⁰ Ss 53(1)(a)(i) & 53(1)(a)(ii).

²⁰¹ S 53(1)(b).

²⁰² S 53(1)(c).

hazard, goods present an extreme risk of injury or damage to a consumer or other persons.²⁰³

3. Right to good quality service

Section 54 deals with the right of a consumer to demand good quality service. In terms of section 54(1) a consumer has the right to timely performance and completion and if there is an unavoidable delay, timely notice of such delay; performance of services in a manner and quality that persons are generally entitled to expect; the use, delivery or installation of goods that are free from defects and of a quality that persons are generally entitled to expect and the return of any property of a consumer in a good condition. In evaluating the quality of goods and services, the circumstances of the supply and any specific criteria agreed between the parties must be taken into account.²⁰⁴ If a supplier fails to comply with the said quality standard in terms of section 54(1), a consumer may either claim rectification thereof or a pro rata reduction in the contract price.²⁰⁵

4. The right to safe, good quality goods and the consumer's implied warranty of quality

Section 55 deals with a consumer's right to safe, good quality goods and is not applicable to goods bought at an auction.²⁰⁶ Auction has an extended meaning and also includes a "sale in execution of or pursuant to a court order".²⁰⁷

Section 55(2) stipulates that all goods must be reasonably suitable for the purposes for which they are generally intended for, of good quality, in good working order and free of any (not only material) defects. The goods must be useable and durable for a reasonable period of time, having regard to the use to which they would normally be put and to all the surrounding circumstances of their supply (which seems to be an indication that normal wear and tear may be taken into account). The goods

²⁰³ S 53(1)(d).

²⁰⁴ S 54(1).

²⁰⁵ S 54(2).

²⁰⁶ S 55(1).

²⁰⁷ S 45(1).

also need to comply with any applicable standards set under the Standards Act,²⁰⁸ or any other public regulation (bearing in mind that it is irrelevant whether the defect is latent or patent in terms of section 55(5)).

In addition, if a consumer has specifically informed a supplier of the particular purpose for which he wishes to use or acquire the goods and the supplier ordinarily offers to supply such goods, or acts knowledgeable about the use of those goods, a consumer may forthright expect that such goods are reasonably suitable for the indicated purpose.²⁰⁹

In determining whether goods are in line with the requirements of sections 55(2) and 55(3), the circumstances surrounding their supply must be considered, including the manner in which the goods were marketed, packaged and displayed, the use of any trade description or mark, any instructions for, or warnings about the use of the goods, the range of things that might reasonably be anticipated to be done with the goods and the time when the goods were produced and supplied.²¹⁰ It is irrelevant whether a product failure or defect was latent or patent, or whether it could have been detected by a consumer before taking delivery of the goods.²¹¹ If an improved model of such goods becomes available from the same or any other supplier, it cannot be assumed that the improvement was because of a product failure or defect in the earlier model.²¹²

It is, however, a defence if a consumer was informed of the specific condition of the goods and he expressly accepted the goods on that basis or knowingly acted in a way compatible with accepting the goods in that condition.²¹³

Regulation 44(3)(i) and (j) are also relevant to this discussion. Regulation 44 only governs consumer agreements between suppliers and natural persons and includes a list of terms that are presumed to be unfair. A term will be presumed unfair if it has to purpose or effect of enabling a supplier to unilaterally alter the terms of the agreement including the characteristics of the product or services;²¹⁴ or gives the supplier the right to determine whether the goods or services supplied are in conformity with the

²⁰⁸ 29 of 1993.

²⁰⁹ S 55(3).

²¹⁰ S 55(4).

²¹¹ S 55(5)(a).

²¹² S 55(5)(b).

²¹³ S 55(6).

²¹⁴ Reg 44(3)(i).

agreement or giving the supplier the exclusive right to interpret any term of the agreement.²¹⁵

4.1 The implied warranty of quality

The above right to quality of goods in terms of section 55 has been safeguarded by an implied legislative warranty.²¹⁶ If the goods do not comply with the requirements and standards contemplated in section 55(2), a consumer may return the goods within six months to the supplier (without penalty) at the supplier's risk and expense. If the goods are returned, a supplier must, at the direction of the consumer, either repair or replace the defective goods, or refund the purchase price,²¹⁷ provided that if a supplier repairs any goods unsuccessfully he or she must, within three months of such failed repair, replace it or refund the purchase price.²¹⁸

In terms of section 56(1) any transaction or agreement is subject to an implied warranty by a producer, importer, distributor and retailer to the effect that any supplied goods comply with the quality requirements and standards contemplated in section 55. However, this implied warranty is not applicable if the goods fail to meet the necessary standard because they were tampered with in some way after leaving the control of the supplier,²¹⁹ or if a consumer was informed of the specific condition of the goods and he or she expressly accepted the goods on that basis or knowingly acted in a way compatible with accepting the goods in that condition.²²⁰ Furthermore, this implied warranty is in addition to any other implied (not tacit) warranty or condition imposed by the common law, the Act itself, any public regulation or express contractual warranty or condition.²²¹

4.2 Warranty on repaired goods

A service provider also impliedly warrants the labour on every new or reconditioned part installed during any repair work for a period of three months after installation or such

²¹⁵ Reg 44(3)(j).

²¹⁶ S 56(1).

²¹⁷ S 56(2).

²¹⁸ S 56(3).

²¹⁹ S 56(1).

²²⁰ S 55(6).

²²¹ S 56(4).

longer period as the supplier may specify in writing.²²² This warranty is concurrent with any other deemed, implied or express warranty.²²³ However, this warranty is void if the consumer has misused or abused the part, goods or property in which it was installed²²⁴ and the warranty does not apply to ordinary wear and tear.²²⁵

5. Warning concerning facts and nature of risks, recovery and disposal of designated products and components

A supplier of any activity or facility that is subject to a risk of an unusual character or nature, or a risk which a consumer could not reasonably be expected to be aware of or contemplate in the particular circumstances, or any risk that could result in serious injury or death, must specifically draw the fact, nature and potential effect of that risk to the attention of a consumer.²²⁶ Packages containing any hazardous or unsafe goods must have instructions in plain and understandable language²²⁷ advising consumers on the safe handling and use of those goods.²²⁸ If the disposal of any type of goods is prohibited by any national legislation, the supplier of those goods must accept the return of it, without charge to the consumer.²²⁹ The supplier can then return such goods to the importer or manufacturer.²³⁰

The NCC has a duty within the framework of the Act²³¹ to develop industry wide codes of practice for product failures, defects or hazards providing investigating, recall and warning systems.²³²

6. Liability for damages caused by goods

A producer, importer, distributor or retailer of any goods is liable for any harm, without proof of negligence on his part, caused as a consequence of supplying any unsafe

²²² S 57(1).

²²³ S 57(2)(a).

²²⁴ S 57(2)(b).

²²⁵ S 57(2)(c).

²²⁶ In the manner prescribed in s 49 read together with s 58(1).

²²⁷ S 22.

²²⁸ S 58(2).

²²⁹ S 59(1)(a).

²³⁰ S 59(1)(b).

²³¹ S 82.

²³² S 60. See for example the Consumer Product Safety Recall Guidelines GN 490 in GG 35434 of 13 June 2012.

goods, or a product failure of whatever nature, or inadequate instructions or warnings provided to a person (not only consumers) for the use of such goods.²³³ For the purpose of section 61, a “supplier”²³⁴ of services who, in conjunction with the performance of those services, applies, supplies, installs or provide access to any goods, must be regarded as a “supplier” of those goods to a consumer.²³⁵

Harm for which a person may be held liable includes the death, illness or injury to any natural person, any loss or physical damage to any property and any economic loss that results from the aforementioned.²³⁶ If more than one person is liable, their liability is joint and several.²³⁷ Liability in terms of this section cannot be circumvented by means of a contractual indemnity or waiver.²³⁸ It is a defence if the above envisaged harm is wholly attributable to the compliance with any public regulation, or if the alleged unsafe product characteristic, failure, defect or hazard did not exist in the goods at the time they were supplied, or arose from complying with the instructions provided to the supplier, or if it is unreasonable to expect the distributor or retailer to have discovered the shortcomings in the goods, taking into account that person’s role in marketing the goods to consumers.²³⁹

A claim for damages in this instance must be brought within three years after the death or injury of a person;²⁴⁰ the earliest time at which a person became aware of an illness and its cause; the earliest time at which a person with an interest in any property became aware of the loss or damage to that property; or the latest date on which a person suffered any economic loss. Nothing in section 61 limits the authority of a court to assess whether any harm has been proven and adequately mitigated, or determine the extent and monetary value of any damages, including economic loss, or apportion

²³³ S 61(1).

²³⁴ The term “supplier” is used as an “umbrella term” to include all the possible sellers involved in consumer sales unless otherwise indicated as in the discussion of product liability within this chapter. See also chapter 2 paragraph 6 (reference techniques) and the definitions in terms of section 1 CPA as discussed in Part C & D of chapter 4.

²³⁵ S 61(2).

²³⁶ S 61(5).

²³⁷ S 61(3). Nagel *ea* 113: “The effect of joint and several liability is that the creditor may claim the whole performance from the debtors either separately or together. If one of them performs, the debt is extinguished, but the debtor who performed may have a claim against the other debtors. This will depend on the mutual agreement between them.”

²³⁸ S 51.

²³⁹ S 61(4)(a) to (c).

²⁴⁰ S 61(4)(d).

liability among persons who are found to be jointly and severally liable.²⁴¹ The standard of proof is on a balance of probabilities.²⁴²

If goods are supplied within South Africa in terms of a transaction that is exempted from the application of the CPA, such goods, including the importer, producer, distributor and retailer of those goods, are still subject to the provisions of sections 60 and 61.²⁴³ In terms of item 3(d) of Schedule 2 to the Act, section 61 also applies to any goods that were first supplied to a consumer on or after the “early effective date”²⁴⁴ which is 24 April 2010.

7. Goods on display

A consumer has the right to choose from goods openly displayed and cannot be held liable for the loss of or damage to such goods unless it was caused by the consumer’s unlawful conduct.²⁴⁵ If goods are displayed in or sold from open stock, a consumer has the right to select or reject any particular item from that stock before completing the transaction.²⁴⁶ Goods sold by description or sample must in all material aspects and characteristics, as envisaged by an ordinary alert consumer, correspond with the thing sold.²⁴⁷ Goods sold by sample and description must correspond with both.²⁴⁸

Before accepting delivery of thing, a consumer is entitled to examine it to make sure it is of the type and quality agreed upon or, if a special order was placed, reasonably matches the material specifications.²⁴⁹

D. EVALUATION

Section 2 Part H of the Act²⁵⁰ deals with the consumer’s fundamental right to fair value, good quality and safety. As will be shown, this fundamental right has a significant affect

²⁴¹ S 61(6).

²⁴² S 117.

²⁴³ S 61(5).

²⁴⁴ See chapter 3 part B for a discussion on the commencement and implementation of the Act.

²⁴⁵ S 18(1).

²⁴⁶ S 18(2).

²⁴⁷ S 18(3).

²⁴⁸ S 18(4).

²⁴⁹ S 19(5).

²⁵⁰ Ss 53 – 61.

on the common law position. As mentioned earlier,²⁵¹ the CPA is not applicable to once-off transactions. Where the owner of a motor vehicle for example wants to sell it and sells it once-off or not in the ordinary course of his business, the common law position discussed earlier in this chapter²⁵² will still be applicable.

The position of merchant sellers and manufacturers deserves discussion. When looking at the mere definition of a merchant seller and manufacturer it is clear that goods and services are supplied in the ordinary course of their business. Where a merchant seller or manufacturer falls under the definition of the Act and supplies goods and services in the ordinary course of business to a consumer (buyer) for consideration, the Act will apply.

1. Definition of a defect

Section 53 provides for certain definitions relevant to the right to fair value, good quality and safety (in other words applicable to the whole of Part H). “Defect” means a defect in goods, which is any material imperfection in the manufacture of goods or components that renders the goods less acceptable, including any characteristic of the goods or components that caused it to be less useful, practicable or safe, in circumstances that persons, generally, would be reasonably entitled to expect.²⁵³ The definition in section 53 seems to be a confirmation of the definition given to latent defects in *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd*.²⁵⁴ Perhaps the legislature should also have included the proviso in terms of section 55(5)(a) for greater certainty from the outset as part of the definition of defect. (In other words also including that it is irrelevant whether the defect is latent or patent).

Loubser & Reid²⁵⁵ state that the definition of “defect” in section 53 includes the “consumer expectations test”.²⁵⁶ The writers refer to the criticism of the test abroad,²⁵⁷

²⁵¹ See introduction Part C.

²⁵² See Part B 2.

²⁵³ Ss 53(1)(a)(i) & 53(1)(a)(ii).

²⁵⁴ 1977 3 SA 670 (A).

²⁵⁵ 413–452.

²⁵⁶ *Idem* 424. Also referred to as the “legitimate expectations” test. The test to discover whether a defect exists centres on the legitimate expectation of a consumer in relation to the product: If the risk carried by the product exceeds the consumer's expectation, a defect exists. See also Amin 367-385.

²⁵⁷ Loubser & Reid 425-428. See 425 where the writers argue that the “test purports to be an objective, normative standard for determining defectiveness, but in practice the courts conduct an objective enquiry into the attributes,

and argue with merit, that the wording of section 53 should be amended to do away with such a test in favour of a general standard of reasonableness assessed with hindsight.²⁵⁸ Van Eeden²⁵⁹ is of the opinion that the definitions in terms of section 53 and more specifically the definition of “defect” would require proof of the imperfection or characteristic, as well as proof of the state of the goods without the imperfection or characteristic. Proof also needs to be given about what people would reasonably be entitled to expect in the circumstances. Van Eeden argues that the CPA has introduced a modified negligence liability regime.²⁶⁰ Botha & Joubert correctly argue against the application of the test and states that because it relates to design defects, it is impossible for an ordinary consumer to define what he expects of such technical characteristics of a product.²⁶¹ Jacobs *ea* warn that the exact extent of the test for defective goods or services will have to be determined based on the facts of each case when interpreted by our courts, taking all the relevant circumstances into account.²⁶²

2. Right to good quality service

In evaluating the quality of goods and services, the circumstances of the supply and any specific criteria agreed between the parties must be taken into account.²⁶³ The principle of *pacta sunt servanda* will be taken into account but it is argued that the Act brings the parties to equal bargaining positions by way of legislative protection of the “weaker” party (the consumer) in terms of the Act. If a supplier fails to comply with the said quality standard, a consumer may either claim rectification thereof or a pro rata reduction in the contract price.²⁶⁴ Unlike section 56 which requires a consumer to exercise his or her remedies within six months, there is, except for the normal prescription period, no time limit provided for in section 54. As the focus of this thesis is on the supply of goods, a comprehensive discussion regarding the supply of services is excluded.

risks and benefits of a product and, inevitably, the application of the consumer expectations test in the final analysis involves a value judgment.”

²⁵⁸ *Ibid* 428-431.

²⁵⁹ Van Eeden 245.

²⁶⁰ *Ibid* where the writer states that this liability regime is broadly based on the EU Product Liability Directive and the UK CPA 1987.

²⁶¹ Botha & Joubert 216.

²⁶² Jacobs *ea* 363.

²⁶³ S 54(1).

²⁶⁴ S 54(2).

3. The right to safe, good quality goods

It is important to note that the implied warranty in terms of section 56(1) applies to both “transactions” and “agreements”. Although section 56(1) only refers to “producers”, “importers”, “distributors” and “retailers” the application should be extended to “suppliers”.²⁶⁵ This is also the recommendation made in Part F of this chapter.

4. Section 56: The implied warranty of quality

The right to quality of goods in terms of section 55 has been safeguarded by an implied contractual warranty of quality in terms of section 56.²⁶⁶ If the goods do not comply with the requirements and standards contemplated in section 55(2), a consumer may return the goods within six months to the supplier (without penalty) at the supplier’s risk and expense. If the goods are returned, a supplier must, at the direction of the consumer, either repair or replace the defective goods, or refund the purchase price,²⁶⁷ provided that if a supplier repairs any goods unsuccessfully he must, within three months of such failed repair, replace it or refund the purchase price.²⁶⁸

It is important to note that it is the choice of the *consumer*²⁶⁹ in terms of section 56(2) to claim for a repair, replacement or refund of the goods. If however, the consumer chooses to repair the goods, section 56(3) kicks in and should any failure, defect or unsafe feature not be remedied within three months, it is the choice of the *supplier*²⁷⁰ to then either replace the goods or refund the purchase price.

Jacobs *ea* argue that section 55 read together with section 56 is open to two different interpretations.

On the one hand, a possible interpretation could be that if the six month limitation has reference to the life span of the implied warranty as well as the implementation of

²⁶⁵ For a comprehensive discussion on the definitions in terms of s 1 of the CPA see chapter 4 Parts C, D & F.

²⁶⁶ S 56(1).

²⁶⁷ S 56(2).

²⁶⁸ S 56(3).

²⁶⁹ Own emphasis.

²⁷⁰ *Ibid.*

the consumer remedies, a voetstoets clause may become operational after six months from date of delivery.²⁷¹

On the other hand, the provisions could be interpreted to provide that if the limitation period refers only to the implementation of the consumer remedies, the implied warranty of quality will apply indefinitely and a voetstoets clause will never become operational.²⁷² This would mean that even though the consumer remedies in terms of section 56 are not available to the consumer after six months, he may still be able to institute any remedies available to him in terms of the common law. The latter interpretation according to Jacobs *ea* is more acceptable and more in line with the purposes of the Act and is noted with merit.²⁷³

In terms of section 56(1) any transaction or agreement is subject to an implied warranty by the supplier to the effect that any supplied goods comply with the quality requirements and standards contemplated in section 55. However, this implied warranty is not applicable if the goods fail to meet the necessary standard because they were tampered with in some way after leaving the control of the supplier,²⁷⁴ or if a consumer was informed of the specific condition of the goods and he or she expressly accepted the goods on that basis or knowingly acted in a way compatible with accepting the goods in that condition.²⁷⁵ Furthermore, this implied warranty is in addition to any other implied (not tacit) warranty or condition imposed by the common law, the Act itself, any public regulation or express contractual warranty or condition.²⁷⁶

4.1 Remedies available to the consumer in terms of section 56

Jacobs *ea* argue that Section 56 poses many interpretational problems and is one of the most controversial sections in the Act.²⁷⁷ It also has a potential extensive impact on the common law because even where a consumer examined goods and detected a defect prior to delivery but still accepted delivery, the consumer will still be entitled to rely on

²⁷¹ Jacobs *ea* 372-373.

²⁷² *Idem* 373.

²⁷³ *Ibid.*

²⁷⁴ S 56(1).

²⁷⁵ S 55(6).

²⁷⁶ S 56(4).

²⁷⁷ Jacobs *ea* 373.

the remedies in terms of section 56 as a wider interpretation gives more protection to the consumer.²⁷⁸

The writers further argue that the use of the word “or” between producer and importer means that the warranty is either given by the producer or the importer and cannot pertain to both simultaneously.²⁷⁹

4.2 May a consumer still impose common law remedies where the CPA is applicable?

The question may be asked whether the common law remedies (*actio quanti minoris*, *actio redhibitoria* and *actio empti*) are still available to the consumer where the Act is applicable or whether these actions have been substituted by legislative remedies. The answer is contained in sections 2(10) and 56(4) of the Act. Section 2(10) provides that no provision of the CPA may be interpreted so as to preclude a consumer from any rights afforded in terms of the common law. Section 56(4) provides that the implied warranty of quality and the right to replace, refund or repair goods are *in addition*²⁸⁰ to any implied warranty or condition imposed by the common law, the Act or other public regulation²⁸¹ and any express warranty or condition stipulated by a retailer, producer, importer, distributor as the case may be.²⁸² It would seem therefore that the common law remedies will still be available to the consumer (buyer) even where the Act is applicable.

Practically speaking there would be no sense in instituting the *actio redhibitoria* because the defect would have to be of a material nature and relying on the implied warranty would be much less cumbersome. Nothing prevents a consumer from instituting the *actio quanti minoris* but it would be much simpler to rely on the implied warranty of quality in terms of section 56. Jacobs *ea* argue that a consumer would only have the common law remedies to his disposal where the consumer discovers the defect or a breach of the implied warranty occurred six months or longer after delivery of

²⁷⁸ *Ibid.*

²⁷⁹ Jacobs *ea* 371. See also fn 479 where the writers confirm the extensive application of the Act.

²⁸⁰ Own emphasis.

²⁸¹ S 56(4)(a).

²⁸² S 56(4)(b).

the goods.²⁸³ This is not a correct interpretation taking into account section 2(10) and 56(4).

It can be argued that “harm” as defined in the Act²⁸⁴ is not synonymous to damages in a contractual sense or damages that can be claimed in terms of the *actio empti*. The rationale for instituting the *actio empti* over and above section 56 would be the additional claim for damages. (If the damages claimed in terms of the *actio empti* also fall within “harm” as contemplated in section 61(5), this will also be taken into account).

5. The Pothier rule

Though the wording of section 55(3) looks similar to that of the Pothier rule, it is not and should not be regarded as a confirmation thereof. Section 55(3) is not applicable to the supply of any or all goods but only relates to goods where the consumer *specifically*²⁸⁵ informed the supplier of the *particular*²⁸⁶ purpose for which the consumer wishes to acquire or use the goods. The supplier will therefore only be assessed in accordance with the requirements contained in sections 55(3)(a) and (b) where goods were sold (supplied) for a particular purpose or use and where the buyer (consumer) specifically informed the supplier thereof.

The Pothier rule has (as it has been applied in terms of our positive law) two requirements, both of which must be present. The seller must be a merchant seller *and*²⁸⁷ must have professed in public to have expert knowledge and skill. Section 55(3) does not call for both of these requirements to be present and clearly states that the supplier must either ordinarily offer to supply such goods²⁸⁸ *or*²⁸⁹ act in a manner consistent with being knowledgeable about the use of the goods. Before a consumer therefore has a right to expect that goods are reasonably suitable for the specific purpose that the consumer has indicated the following requirements need to be met: Firstly the consumer must inform the supplier of the particular purpose or use and

²⁸³ Jacobs *ea* 373.

²⁸⁴ S 61(5).

²⁸⁵ Own emphasis.

²⁸⁶ *Ibid.*

²⁸⁷ *Ibid.*

²⁸⁸ Goods for a particular purpose or use.

²⁸⁹ Own emphasis.

secondly the supplier must either ordinarily offer to supply such goods *or*²⁹⁰ act in a manner consistent in being knowledgeable about the use of the goods.

6. Did voetstoets sales survive the CPA?

6.1 *The argument in favour of survival of the voetstoets clause*

The right of the consumer to receive goods that are suitable for the purpose for which they are generally intended, of good quality, in good working order and free of any defects²⁹¹ will not apply where the seller sells goods in a particular condition and the consumer has been expressly informed that the goods were offered in a specific condition *and*²⁹² has expressly agreed to accept the goods in that condition (or knowingly acted in a manner consistent with accepting the goods in that condition).²⁹³

It could be argued that section 55(6) allows suppliers to sell goods voetstoets provided that a consumer is informed of the particular condition of the goods and accepts or acts in a manner compatible with accepting the goods in that condition.²⁹⁴ Morrissey & Coetzee²⁹⁵ goes as far as to argue that a voetstoets clause (and inadvertently a voetstoets sale) also forms part of the surrounding circumstances of the supply of goods²⁹⁶ which must then be taken into account when determining whether the goods were useable and durable for a reasonable period of time.²⁹⁷

Sharrock argues that a supplier may contract out of the liability for the implied undertakings as to suitability and quality, but not those as to durability and compliance with statutory standards and an agreement on a “defects disclaimer” must be based on actual consensus.²⁹⁸ The writer further argues that a “defects disclaimer” in terms of section 55(6) is an exemption clause and must also comply with the requirements of

²⁹⁰ *Ibid.*

²⁹¹ S 55(2)(a) and (b).

²⁹² Own emphasis.

²⁹³ S 55(6).

²⁹⁴ Van Eeden 225; Meiring 14-15; Morrissey & Coetzee 12-13.

²⁹⁵ Morrissey & Coetzee 13.

²⁹⁶ S 55(2)(c).

²⁹⁷ *Ibid.*

²⁹⁸ Sharrock (2011) 611.

section 49 of the Act.²⁹⁹ Jacobs *ea* is also of the opinion that a voetstoets clause will only apply where the provisions of section 55(6) are met.³⁰⁰

The Act does not prohibit the seller from including clauses in consumer agreements that limit or exclude the seller's liability, or clauses where the buyer's rights are waived or limited. Two sections in the Act can be used to substantiate this argument. Section 4(4)(b) provides that any contract or document prepared or drafted by the supplier must be interpreted to the benefit of the consumer so that any restriction, limitation, exclusion or deprivation of a consumer's legal rights set out in such a document is limited to the extent that a reasonable person would ordinarily contemplate or expect.³⁰¹

Section 48(1)(c) provides that a supplier must not request a consumer to waive any of his rights, or waive the liability of a supplier, or assume any obligations *on terms*³⁰² that are unfair, unreasonable or unjust. The argument in favour of the survival of the voetstoets clause therefore, does not prohibit a voetstoets clause but simply provides that such a clause may not be on terms that are unfair, unreasonable or unjust and must be interpreted against the seller taking into account what a reasonable person would expect.

6.2 The argument against survival of the voetstoets clause (preferred viewpoint)

Just as there are provisions in the Act that support the inclusion of the voetstoets clause, there are also provisions that would support the exclusion thereof. Section 2(10) provides that no provision of the Act (such as section 55(6)) may be interpreted so as to preclude a right that a consumer has in terms of the common law (like the warranty against latent defects). Section 56(4) provides that the implied warranty of quality is in addition to any other warranty in terms of the common law. A fortification of the exclusion of voetstoets sales is also contained in section 51(1)(b)(i) which provides that

²⁹⁹ *Ibid.* S 49 provides *inter alia* that any notice that purports to limit the suppliers liability must be drawn to the attention of the consumer in writing and in plain language, in a conspicuous manner at the earliest possible time and the consumer must be given an adequate opportunity to comprehend such a notice.

³⁰⁰ Jacobs *ea* 368.

³⁰¹ Having regard to the content of the document, the manner and form in which the document was prepared and presented; and the circumstances of the transaction or agreement in terms of s 4(4)(b)(i)-(iii).

³⁰² Own emphasis.

a supplier must not make a transaction or agreement subject to any term or condition if it directly or indirectly purports to waive or deprive a consumer of a right in terms of the Act. Such a transaction, agreement, provision, term or condition will be void.³⁰³ Selling goods in terms of a general “umbrella” voetstoots clause is a clear waiver and deprivation of a consumer’s rights. Whether a voetstoots clause is worded as a condition or term or if it boils down to a waiver or deprivation, it will still be invalid. The fact that goods should not only be free of any defects but also useable and durable and comply with any publically regulated standard makes the reliance on a voetstoots clause even more difficult.

Section 55(6) can be construed to have more than one meaning. Section 4(3) provides that in such an instance, the Tribunal³⁰⁴ or court must prefer the meaning that best promotes the spirit and purposes of the Act, and will best improve the realisation and enjoyment of consumer rights. Section 4(4)(a) further provides that any ambiguity that allows for more than one reasonable interpretation of a part of a document is resolved to the benefit of the consumer.

The argument by Morrissey & Coetzee³⁰⁵ that a voetstoots sale may be included as part of the surrounding circumstances is, with respect, not thought through. A latent defect will, by its mere definition in terms of the Act, render the goods less useful, practicable or safe in the in circumstances. A voetstoots clause will fail the test of section 55(2)(c) not only because of the nature of a latent defect but also because of the common law definition of a latent defect and moreover because the Act specifically provides that it is irrelevant whether the defect is latent or patent.³⁰⁶

The approach more in line with the purposes of the Act argues that the effect of section 55(3) is that the use of a voetstoots clause is excluded and suppliers will generally have a duty to disclose all attributes of the *merx*. In this regard, the rule *caveat emptor*³⁰⁷ is abolished and there seems to be a general duty to disclose in terms of the

³⁰³ S 51(3).

³⁰⁴ National Consumer Tribunal.

³⁰⁵ 13.

³⁰⁶ S 55(5).

³⁰⁷ Hiemstra & Gonin 163: “Let the buyer beware”.

Act (even in the absence of fraud) and the test (to determine whether or not the seller has a duty to disclose) laid down in *Waller v Pienaar*³⁰⁸ will no longer apply.

Nothing prevents a supplier (seller) however from selling goods in a particular condition.³⁰⁹ (The sale of second-hand goods and goods sold by pawn brokers are good examples). This would mean describing the quality of the goods as well as the defects in detail and also proving that the consumer was informed and accepted goods on that basis. A clause that for example determines that the seller does not guarantee that the roof does not leak will no longer be enforceable.³¹⁰ A clause that however informs the consumer (buyer) of a roof that leaks from time to time during heavy rains, will probably withstand the test of section 55(6).³¹¹ The “loophole” for shrewd suppliers will most likely be to argue that even though the consumer did not expressly accept the goods in that particular condition they did act in a way compatible with accepting the goods.³¹² The supplier still needs to keep a sales record of the transaction which must also include proof that the consumer was in fact informed and accepted the goods or acted in a way compatible with accepting the goods.³¹³

Additional protection is provided to consumers who are natural persons in terms of regulation 44(3)(j) of the CPA which provides that a term will be presumed unfair if it gives the supplier the right to determine whether the goods supplied are in conformity with the agreement or gives the supplier the exclusive right to interpret any term of the agreement.

7. Where an estate agent is involved in a sale of immovable property

Estate agents are regarded as intermediaries in terms of the CPA. An intermediary is defined as “a person who in the ordinary course of business and for remuneration or gain, engages in the business of representing another person with respect to the actual or potential supply of any goods or services; accepting possession of any goods or other property from a person for the purpose of offering the property for sale; or offering

³⁰⁸ 2004 6 SA 308 (C).

³⁰⁹ S 55(6).

³¹⁰ Also referred to as an “umbrella” or “all inclusive voetstoots clause”.

³¹¹ Otto 2011 539.

³¹² S 55(6)(b).

³¹³ S 26.

to sell to a consumer any goods or property that belongs to a third person”.³¹⁴ Section 1 of the CPA further provides that a person whose activities as an intermediary are regulated in terms of any other national legislation is not included in the definition of an intermediary. Though it can be argued that estate agents are already regulated by the Estate Agency Affairs Act³¹⁵ and the Estate Agents Board, estate agents are (and should be) included under the definition of intermediaries in terms of the CPA.

It is clear from the definition of “intermediary” that the Act will apply to the mandate agreement between the seller and the estate agent. The Act will also apply to the marketing practices³¹⁶ of the estate agent which should amount to responsible marketing.³¹⁷ The agent should be honest in his dealings³¹⁸ and have regard to the consumer’s fundamental rights of equality³¹⁹ and privacy³²⁰ in terms of the CPA. Finally section 27 and regulation 9 of the CPA requires full disclosure of certain prescribed information.

The question that arises is whether the involvement of an estate agent in the sale of property where the sale is not in the seller's ordinary course of business, will make any difference to the transaction and the inclusion of a *voetstoots* clause. The involvement of an estate agent in the sale of immovable property gives rise to two transactions namely the mandate agreement, and the resultant sale agreement. The service the agent provides to its client (the seller) is the marketing and advertising of the property in the hope of procuring a willing and able buyer for the property for which the estate agent will then receive consideration.³²¹ The estate agent receives no consideration for his services in advertising and marketing the property unless those services are successful and result in the production of a buyer for the property. The agreement that results from the estate agents marketing efforts does not fall under the

³¹⁴ Definition s 1 of the CPA.

³¹⁵ 112 of 1976.

³¹⁶ Part E: The right to fair and responsible marketing.

³¹⁷ *Ibid.*

³¹⁸ Part F: Right to fair and honest dealing.

³¹⁹ Part A: Right of equality in consumer market.

³²⁰ Part B: Right to privacy.

³²¹ Snyman <http://bit.ly/MneOp9> visited on 03/08/2012. See also Nagel *ea* 170-172.

scope of the Act. The contractual relationship that is the result of the agent's marketing efforts is a once-off transaction between the seller and the buyer.³²²

Because of uncertainty with regards to whether or not property may still be sold voetstoots where an estate agent is involved in a once-off transaction, estate agents have begun to have sellers forfeit their right to sell their property voetstoots and are attaching a copy of a so-called "Property Condition Report" as a disclosure of the defects in the property and including a warranty by the seller to the effect that these are in fact the only defects in the property.³²³ This approach by estate agents is unfair towards their clients.³²⁴

There may however be reasons for estate agents taking such extreme causes of action. Section 4.1.1 of the Estate Agents Code of Conduct provides that an estate agent who has a mandate to sell a property shall convey to a buyer all facts concerning the property that are (or should reasonably in the circumstances be) within the agent's personal knowledge and which could be material to a prospective buyer. Regulation 9(2)(m) to the CPA also provides that an estate agent must disclose any other³²⁵ information which may be relevant and which the estate agent may reasonably be expected to be aware of.

I agree with Davey that the estate agent should not take over the responsibility of disclosing any patent or latent defects which are known to the seller.³²⁶ In order to avoid any arguments between the seller and the estate agent after conclusion of a sale about to what was and was not disclosed by the seller to the estate agent, it is suggested that it be recorded in the mandate agreement that the seller accepts and acknowledges that it is his (the seller's) duty and responsibility to disclose any latent defects that he is aware of as well as any issue regarding the property which may be of relevance to the buyer.³²⁷ It is further suggested that the buyer should initial (and thereby acknowledge) a voetstoots clause in the agreement of sale.³²⁸ Having thus clearly advised the seller of

³²² *Ibid.*

³²³ Davey <http://bit.ly/RnMbV5> visited on 08/03/2012.

³²⁴ *Ibid.*

³²⁵ Aside from the other prescribed information in terms of reg 9 as to the intermediaries' identification, relevant personal and professional details, consideration or commission.

³²⁶ Davey <http://bit.ly/RnMbV5> visited on 03/08/2012.

³²⁷ *Ibid.*

³²⁸ *Ibid.*

his obligations and the buyer of his acknowledgements with regards to the condition of the property, the estate agent will have taken adequate care of both parties ensuring that they know exactly what their rights and obligations are.³²⁹

Davey correctly warns that if an estate agent is going to take on the responsibility of disclosing defects, he will need to be adequately informed of the nature and extent of the defect.³³⁰ Having taken on the responsibility of disclosing a defect from the seller and having passed on the information regarding the defect to the buyer, arguments will arise regarding representations made as to the severity or extent of the defect at a later date.³³¹

8. Second-hand goods

Naudé correctly argues that the interpretation and application of section 55(6) will be less stringent on suppliers of for example second-hand vehicles by the mere nature of the goods sold.³³² (Unless of course second-hand goods are sold by way of auction which would be a way for suppliers to circumvent the Act as section 55(1) expressly excludes goods sold by way of auction from its application). The writer does however advise dealers of immovable property or second-hand goods to recommend that the buyer consult an independent expert to inspect the goods before the buyer buys.³³³ Naudé states that sellers would not easily get away with exclusion clauses (in terms of section 55(6)) in the case of new products.³³⁴ It is clear that the wording of section 55 has a serious impact on sellers of second-hand goods including pawn- or consignment stores.

Though I agree with Morrissey & Coetzee³³⁵ that a second-hand vehicle dealer is seldom in a position to point out to a customer the exact wear and tear of every vehicle part as well as every other defect, I do not agree that such dealerships will still be able to sell second-hand vehicles (or pre-owned vehicles as the popular term seems to be) voetstoots. The argument by the writers is that a voetstoots sale could form part of the

³²⁹ *Ibid.*

³³⁰ *Ibid.*

³³¹ *Ibid.*

³³² Naudé 2011 344.

³³³ *Ibid.*

³³⁴ *Ibid.*

³³⁵ Morrissey & Coetzee 12.

surrounding circumstances of the supply of the goods which must then be taken into account when determining whether the vehicle was usable and durable for a reasonable period of time.³³⁶ A voetstoots clause is a clear exclusion of the supplier's liability. It would therefore seem problematic to sell second-hand goods "as is" and a voetstoots clause would not be enforceable as part of the surrounding circumstances in the sale of the goods.

A possible exception to the above position deserves discussion. Second-hand vehicle dealers also sell vehicles on behalf of owners rather than buying and reselling it themselves. The second-hand vehicle dealership only acts as an agent in the selling of the vehicle. In other words the dealership only provides space for the second-hand vehicle on its selling floor and it is sold on behalf of the seller. Usually the seller would be a natural person and the sale would be a once-off transaction in which case the CPA will not apply. Even if the seller mandates the dealership to sell second-hand vehicles in the ordinary course of the seller's business, the dealership would still only act as an agent and section 55 may not be enforced against the dealership. It would seem that the position with regards to estate agents as discussed above³³⁷ would apply. It is clear that these kinds of arrangements between sellers and second-hand vehicle dealers would regrettably increase in an attempt to avoid the repercussions of the Act.

One might think that the Second-Hand Goods Act³³⁸ sheds some light on the issue but the Act's main purpose and aim is to prevent the trade in stolen goods and promote ethics in the trade of second-hand goods and is therefore of no help.³³⁹

It is a realistic fact that the standard or condition of second-hand (or pawned goods) will differ from the condition of newly manufactured goods. It is worth mentioning that courts and the Tribunal will probably refer to the interpretations that crystallised through case law prior to the implementation of the CPA. Kerr refers to *Addison v Harris*³⁴⁰ where De Wet AJ states that the condition of new motor vehicles cannot be compared with the condition of second-hand vehicles. To say that a second-hand

³³⁶ *Idem* 13.

³³⁷ See Part D 7 above.

³³⁸ 6 of 2009.

³³⁹ Preamble to the Second-Hand Goods Act 6 of 2009.

³⁴⁰ 1945 NPD 444.

vehicle is in good condition means that the vehicle is in good condition *for what it is*³⁴¹ being an old, used vehicle adding that temporary breakdowns are to be expected and might even be caused by ordinary wear and tear.³⁴² There can be no doubt that the fact that goods are supplied or sold second-hand will be part of the surrounding circumstances as described in section 55. (The situation however, still does not allow for a voetstoots sale). There can also be no doubt that the majority of second-hand vehicle dealerships are exploiting consumers in this regard (using the condition of the vehicle and wear and tear of the vehicle as an excuse). The relevant industries might be more cautious when dealing with vulnerable consumers³⁴³ as provided for in terms of the Act. Authority given to the Minister of Trade and Industry to publish industry codes will also help to clarify the situation surrounding the sale of second-hand goods.³⁴⁴

8.1 Trade-in transactions

Trade-in transactions will fall under the application of the CPA where it was concluded in the seller's ordinary course of business. This would include the duties regarding marketing applicable to the seller as well as the protection of all the relevant fundamental consumer rights the buyer has in terms of Chapter 2 of the Act. The buyer's implied warranty of quality and the remedies available in terms of section 56 where the warranty is breached by the seller in the trade-in transaction are also included. However, the seller (supplier) will not be able to rely on these remedies available to the consumer for the "trade-in part" of the transaction. Any claim that a seller might have resulting from a trade-in transaction is governed by the common law as amended by the *Janse van Rensburg* case³⁴⁵ which states that the common law remedies (aedilician remedies) will be to the seller's disposal.³⁴⁶

³⁴¹ Italics in original.

³⁴² Kerr 118-119.

³⁴³ S 3(1)(b): Low-income, illiterate and vulnerable consumers to be protected in particular by the CPA.

³⁴⁴ S 82 CPA.

³⁴⁵ *Janse van Rensburg v Grieve Trust* CC 2000 1 SA 315 (C).

³⁴⁶ See Part B 2.3.1 above for the common law position.

9. Goods on display and inspection of goods prior to delivery³⁴⁷

Jacobs *ea*³⁴⁸ argue that even where a consumer inspected and detected a defect prior to delivery, the consumer may still be entitled to rely on the remedies in terms of section 56.³⁴⁹ If an improved model of such goods becomes available from the same or any other supplier, it cannot be assumed that the improvement was because of a product failure or defect in the earlier model.³⁵⁰

10. Liability for damage caused by goods in terms of section 61 of the Consumer Protection Act

10.1 Introduction

Section 61 has been discussed by many authors.³⁵¹ The scope of section 61 within the current discussion is however limited to a broad general overview of the section as well as a discussion of suppliers liable and the damages claimable in terms of section 61 (in light of the damage that may be caused by defective goods).

Section 61 provides that a producer, importer, distributor or retailer of any goods is liable for any harm, without proof of negligence on his part, caused as a consequence of supplying any unsafe goods, or a product failure of whatever nature, or inadequate instructions or warnings provided to a person (not only consumers) for the use of such goods.³⁵² For the purpose of section 61, a “supplier” of services who, in conjunction with the performance of those services, applies, supplies, installs or provide access to any goods, must be regarded as a “supplier” of those goods to a consumer.³⁵³

Harm for which a person may be held liable includes the death, illness or injury to any natural person, any loss or physical damage to any property and any economic loss that results from the aforementioned.³⁵⁴ If more than one person is liable, their

³⁴⁷ See also chapters 5 & 9.

³⁴⁸ 370.

³⁴⁹ The consumer may choose a refund or that the goods be replaced or repaired.

³⁵⁰ S 55(5)(b).

³⁵¹ Van Eeden 242-249; Melville 98-100; Sharrock (2011) 279-299; Loubser & Reid 413-452; Botha & Joubert 305-318 ; Otto 2011 425-454; Jacobs *ea* 363.

³⁵² S 61(1).

³⁵³ S 61(2).

³⁵⁴ S 61(5).

liability is joint and several.³⁵⁵ Liability in terms of this section cannot be circumvented by a contractual indemnity or waiver.³⁵⁶

It is a defence if the above envisaged harm is wholly attributable to the compliance with any public regulation, or if the alleged unsafe product characteristic, failure, defect or hazard did not exist in the goods at the time it was supplied, or arose from complying with the instructions provided to the supplier, or if it is unreasonable to expect the distributor or retailer to have discovered the shortcomings in the goods, taking into account that person's role in marketing the goods to consumers.³⁵⁷

The requirements established in terms of our positive law³⁵⁸ for the liability of merchant sellers (liability on a contractual basis) and manufacturers (liability on a delictual basis) for latent defects remain intact where the Act is not applicable. Ironically in cases such as *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd*,³⁵⁹ *Freddy Hirsch Group (Pty) Ltd v Chickenland (Pty) Ltd*³⁶⁰ and *Consol Ltd T/A Consol Glass v Twee Jonge Gezellen (Pty) Ltd And Another*³⁶¹ the Act would not have made any difference to the requirements for liability. The reason being that the buyers (consumers) in these cases were juristic persons with an annual turnover or asset value which exceeds the threshold value determined by the Minister of Trade and Industry³⁶² and therefore not protected by the Act. It is submitted that the reason for the exclusion coincides with the preamble and purposes of the Act being the protection of the vulnerable consumer.

Van Eeden is correct in stating that, in terms of our common law relating to product liability; it consisted of the law of delict subject to contractual variation.³⁶³ The buyer (in terms of our common law) has to prove that the manufacturer acted wrongfully and negligently, that the harm was caused by the manufacturer's negligence, and that there existed a causal *nexus* between the conduct of the manufacturer and the harm suffered by the consumer.³⁶⁴ Whereas the common law requires proof of negligence,

³⁵⁵ S 61(3).

³⁵⁶ S 51.

³⁵⁷ S 61(4)(a) to (c).

³⁵⁸ *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd* 2002 2 SA 447 (SCA) 451 & 456.

³⁵⁹ 2002 2 SA 447 (SCA) 451 & 456.

³⁶⁰ 2010 1 SA 8 (GSJ).

³⁶¹ 2002 6 SA 256 (C).

³⁶² S 5(2)(b) read together with s 6. Annual threshold is R2 million.

³⁶³ Van Eeden 64-65.

³⁶⁴ *Ibid.*

section 61 states that a manufacturer will be liable for harm irrespective of whether such harm was caused as a result of negligence.

Proving negligence on the part of a manufacturer has been notoriously difficult, very costly and time consuming. Litigation in this regard is likely to culminate in a judgment only after many years of litigation.³⁶⁵ The average consumer usually does not have the financial means or time to go through with such a lengthy litigation process whereas the manufacturer (in contrast) can better afford litigation and will probably delay the outcome of such proceedings as long as possible.³⁶⁶ Van Eeden argues that the *aquilian* or fault liability system is not too far removed from the no-fault liability or strict liability system.³⁶⁷

Van Eeden correctly agrees with Loubser & Reid that prior to the introduction of some form of strict liability in terms of the Act, South African law was lagging behind developments internationally.³⁶⁸ Van Eeden refers to the liability in terms of section 61 as “some form of ‘modified strict liability’”³⁶⁹ which is broadly based on the European model.³⁷⁰ The model which the Act introduces is however not an unqualified strict liability model but rather a model that attempts to strike a balance between fault and no-fault liability.³⁷¹

According to Van Eeden,³⁷² fault-based and strict liability-based product liability regimes may impact in different ways on production costs and management culture relating to product safety and product defect issues. Product safety law has fallen largely into the domain of statutory intervention, establishing regulation to be administered by means of bureaucratic and criminal measures, whereas arrangement on distribution, scope and probability of liability has been the domain of the common law.³⁷³

³⁶⁵ *Idem* 64.

³⁶⁶ *Ibid.*

³⁶⁷ *Idem* 66.

³⁶⁸ *Idem* 242, Loubser & Reid 413.

³⁶⁹ *Ibid.*

³⁷⁰ *Idem* 246.

³⁷¹ *Ibid.*

³⁷² *Idem* 239.

³⁷³ *Ibid.*

Though Van Eeden confirms the need for product liability (whether it be fault-based or strict liability-based) it is argued that the social and economic cost of an inappropriate product liability regime can be substantial.³⁷⁴

I agree with Van Eeden as well as Loubser & Reid³⁷⁵ that the product liability regime under the common law fault rule is not strict enough and as a result both suppliers and manufacturers often escape their apposite share of the liability.³⁷⁶ On the other hand Van Eeden cautions that producer liability should also not be so strict that it encourages excessive amounts of care and pushes prices up to an unreachable level for consumers.³⁷⁷

It is interesting to note that Loubser & Reid³⁷⁸ are of the opinion that section 61 sets contractual rights between suppliers and consumers rather than create general rules for strict liability outside the contractual relationship. The opinion of Jacobs *ea*³⁷⁹ is supported, which argue that section 61 does not require a contractual *nexus* between the supplier and the consumer. Section 61(3) supports this argument by providing that suppliers are jointly and severally liable.

10.2 Sellers liable in terms of section 61

The definitions of the parties involved in consumers sales and who have the potential of being liable in terms of section 61, are comprehensively discussed elsewhere in this thesis and will not be repeated here.³⁸⁰

Melville³⁸¹ states that section 61 does not require fault on the part of a manufacturer or *supplier*³⁸² to be proved in a claim for damages. (It does however seem that wrongfulness is still a requirement). It also extends the type of damages claimable

³⁷⁴ *Idem* 240.

³⁷⁵ *Ibid.*

³⁷⁶ Loubser & Reid 416.

³⁷⁷ Van Eeden 241.

³⁷⁸ Loubser & Reid 424.

³⁷⁹ Jacobs *ea* 370.

³⁸⁰ See chapter 4 Part C & D. See also s 1 CPA def “supply chain”: With respect to any particular goods or services, means the collectivity of all suppliers who directly or indirectly contribute in turn to the ultimate supply of those goods or services to a consumer, whether as a producer importer, distributor or retailer of goods, or as a service provider.”

³⁸¹ Melville 26.

³⁸² Own emphasis.

beyond what is normally the case in common law.³⁸³ It would seem that Melville regards a supplier to be included in the application of section 61 and also that the harm described in the section includes damages claimable under the common law. Van Eeden³⁸⁴ is of the opinion that the Act holds importers, distributors and *suppliers*³⁸⁵ of goods strictly liable for damages³⁸⁶ arising from the supply of any unsafe goods, product failure, defect or hazard. The writer's interpretation of section 61(2)³⁸⁷ is that a supplier of services must also be regarded as a supplier of those goods to the consumer. It would seem therefore that both Van Eeden and Melville regard suppliers of goods to be included rather than excluded from liability in terms of section 61. Van Eeden further substantiates this argument by referring to the provisions of section 51 and declares that a supplier would not be able to circumvent the modified product liability regime introduced by the Act.³⁸⁸

Jacobs *ea*³⁸⁹ follow a different approach. It is argued that section 61(2) attempts to impose strict product liability on, for example, an electrician who installs a defective geyser or a surgeon who implants a defective pacemaker or a defective prosthetic. The purpose of section 61(2) according to the writers is to protect customers against defective and inferior goods installed by suppliers, as they often do not have a choice from amongst goods and have to rely on the supplier's choices. However, it is argued that an amendment by the legislature may be necessary owing to the omission of the word "supplier" in section 61(1). Such an amendment is also needed where strict product liability as contemplated in section 61(2) may be imposed on service providers. It appears however that section 61(1) does not extend to service providers because it only refers to producers, importers, distributors and retailers. Alternatively, the legislature may have intended that service providers should be treated as retailers under section 61(1).³⁹⁰ It is also noteworthy that the word "supplier" was included in the

³⁸³ Melville 26.

³⁸⁴ Van Eeden 64.

³⁸⁵ Own emphasis.

³⁸⁶ Van Eeden 64,246,249.

³⁸⁷ Section 51 deals with prohibited transactions and agreements and provides that a supplier may not waive or deprive a consumer of rights in terms of the Act (s 51(1)(b)(i)), avoid a supplier's obligation or duty in terms of the Act (s 51(1)(b)(ii)) or set aside or override the effect of any provision of the Act (s 51(b)(iii)).

³⁸⁸ Van Eeden 249.

³⁸⁹ Jacobs *ea* 384.

³⁹⁰ *Ibid.*

Consumer Protection Bill under the provisions pertaining to strict liability³⁹¹ but omitted in the final Act. In their comparative analysis Loubser & Reid refer to other jurisdictions all of which include suppliers of goods and services as liable in terms of strict liability.³⁹²

Botha & Joubert³⁹³ refer to the defences against product liability contained in section 61(4) and more specifically section 61(4)(c).³⁹⁴ It is argued that the wording of section 61(4)(c) provides some form of strict liability for manufacturers and importers but not for distributors and retailers.³⁹⁵ It is argued that distributors and retailers can escape liability by proving that “it is unreasonable to expect the distributor or retailer to have discovered the unsafe product characteristic, failure, defect or hazard, having regard to that person’s role in marketing goods to consumers”.³⁹⁶ The writers argue that the liability of distributors and retailers are still fault-based where reference is made to reasonableness.³⁹⁷ What makes matters even more difficult is that a distributor of products is only liable under common law where there was a legal duty on him to inspect a product and he failed to do so. It is agreed that this defeats the purposes of the Act and will result in ineffective redress for the most vulnerable consumers.³⁹⁸

Before retailers and distributors escape strict liability based on reasonableness, their marketing of the goods will also be taken into account.³⁹⁹ Should “market” be used as verb it would include “to promote or supply any goods or services” and also include the sale of goods.⁴⁰⁰ Cases such as *Kroonstad Westelike Boere Ko-operatiewe Vereniging Bpk v Botha*⁴⁰¹ and *Ciba-Geigy (Pty) Ltd v Lushof farms (Pty Ltd)*⁴⁰² will be relevant when dealing with a supplier who is also an expert seller (merchant seller). Such a seller plays an important role in the marketing and supply of goods which have

³⁹¹ S 71(1).

³⁹² Loubser & Reid 431-433.

³⁹³ Botha & Joubert 318. See also Jacobs *ea* 388-389; Loubser & Reid 451-452.

³⁹⁴ S 61(4)(c) provides that liability of a particular product does not arise if it is unreasonable to expect the distributor or retailer to have discovered the unsafe product characteristic, failure, defect or hazard, having regard to that person’s role in marketing the goods to consumers.

³⁹⁵ Otto 2011 452 where the writer states that the application of the interpretation rule *unius inclusio est alterius exclusio* will have the effect that the producer and importer (in contrast with the distributor and retailer) will still be liable even if it would be unreasonable to expect them to have discovered the defect.

³⁹⁶ S 61(4)(c).

³⁹⁷ Botha & Joubert 318.

³⁹⁸ *Ibid.*

³⁹⁹ S 61(4)(c).

⁴⁰⁰ See definition of “supply” s 1 CPA.

⁴⁰¹ 1964 3 SA 561 (A).

⁴⁰² 2002 2 SA 447 (SCA).

to be considered in terms of section 61(4)(c). It is submitted that a retailer or distributor will be strictly liable where he played a significant role in the marketing of the goods (which by the mere definition of retailer and distributor in terms of the Act they seem to do) but it would seem that they would still need to comply with the Pothier rule and therefore “publicly professed to have attributes of skill and expert knowledge in relation to the kind of goods sold”.⁴⁰³ The advantage of this is of course that consequential damages over and above the harm caused in terms of section 61(5) will be claimable.

10.3 Types of goods

As the types of goods that may be applicable under section 61 are numerous, only the most relevant are mentioned.⁴⁰⁴ Section 61 would apply to land and buildings. Structural or design defects that render buildings unsafe, and hazards on land sold may result in huge strict liability claims. Section 61 would also apply to information itself (for example, a recipe in a cookbook that contains poisonous herbs or plants as ingredients) and to the medium on which information is written (for example, defective software that causes a computer to malfunction).

Some suppliers produce inherently dangerous products. An example would be the South African National Blood Service that supplies blood or blood products. The blood may, for instance, be contaminated by HIV. Blood and blood products should fall under the definition of goods⁴⁰⁵ and are not exempted from strict product liability.

Pharmaceuticals, which are by nature hardly ever completely safe, are also subject to strict product liability, despite the problems that may occur when establishing causation. The definition of goods does not provide directly for components, although they may be included under “any tangible object”.⁴⁰⁶ Section 61(1) provides for strict product liability caused wholly or partly as a consequence of, for example, a defect. As seen earlier⁴⁰⁷ the definition of a defect provides for components of goods. The supplier of a defective component (for example, the brakes of a truck) that caused a complex

⁴⁰³ *Kroonstad Westelike Boere Ko-operatiewe Vereniging Bpk v Botha* 1964 3 SA 561 (A) 571.

⁴⁰⁴ Loubser & Reid: land and buildings 433, information 433-434, blood and blood products 435-437, pharmaceuticals 437-438 and defective components 438-439. See also Jacobs *ea* 385-386.

⁴⁰⁵ S 1.

⁴⁰⁶ S 1 definition of goods *ito* CPA.

⁴⁰⁷ See C 1: Definition in terms of s 53 CPA.

product (for example, a truck) to fail, is liable, as is the supplier of the product. This is another example of the very wide application of the Act.

10.4 Damages, loss and harm

Van Eeden describes consequential damages as damages caused by the defective product, as distinguished from the cost of the defect itself.⁴⁰⁸ Van Eeden makes a distinction between the provisions relating to the supply of unsafe goods in terms of section 61(1)(a) and (b). In the former⁴⁰⁹ the activity of supplying unsafe goods is required whereas supply is not a requirement for liability in the latter.⁴¹⁰ Loubser & Reid⁴¹¹ state that the wording of the Act offers the owner significant additional opportunity for compensation over and above the contractual remedies already available when the product does not conform to the contract description.⁴¹² Section 61 also opens up an important and potentially vast area of liability.⁴¹³

I agree with Otto⁴¹⁴ that if we were to look at the literal meaning given by the legislature in section 61(5), not all economic consequential damages will be claimable under section 61(5)(d) but only to the extent that such damage was caused by “harm” as set out in subsection (a) to (c).⁴¹⁵ In *Minister van Landbou-Tegniese Dienste v Scholtz*⁴¹⁶ damages were claimed on the grounds of a breach of a tacit warranty. A bull was bought for breeding purposes but was later found to be impotent. The plaintiff succeeded in a claim for damages which included the potential loss for the calves he would have had based on the tacit warranty.⁴¹⁷ Otto argues that although the damages claimed in the *Scholtz*-case⁴¹⁸ were not based on a claim for consequential damages, it would theoretically be claimable on that basis. Unfortunately this type of consequential

⁴⁰⁸ Van Eeden 238.

⁴⁰⁹ S 61(1)(a).

⁴¹⁰ Van Eeden 246.

⁴¹¹ Loubser & Reid 439-440.

⁴¹² *Ibid.*

⁴¹³ Loubser & Reid 440: For example a small business might suffer loss of profits or loss of business reputation when a defective product was used in its undertaking and has caused an accident.

⁴¹⁴ Otto 2011 541.

⁴¹⁵ In other words damages caused due to the death, injury or illness of any natural person or the loss or damage due to the movable or immovable property.

⁴¹⁶ 1971 3 SA 188 (A).

⁴¹⁷ Otto 2011 541-542.

⁴¹⁸ *Minister van Landbou-Tegniese Dienste v Scholtz* 1971 3 SA 188 (A).

damage would not be claimable under the Act unless “loss of any property” in section 61(5)(c) was given a far reaching meaning.⁴¹⁹

The buyer may still be able to claim this type of consequential damage in terms of the breach of a tacit warranty even if liability under a tacit warranty is not mentioned in section 61(5).⁴²⁰ It is submitted that Otto’s argument that this is a gross oversight on the part of the legislature and should have been included, is correct.⁴²¹ One could also argue that even where the Act is applicable consequential damages would be claimable because the goods were unfit for the purpose for which it was bought and (or) not of reasonable merchantable quality. Naudé points out that if “harm” as defined in terms of section 61(5) was caused by goods, there will be a claim for damages regardless of a section 55(6) clause.⁴²²

E. COMPARISON

1. Scotland

1.1 Introduction

The UK CPA 1987,⁴²³ SOGA⁴²⁴ (including the 2002 Regulations) as well as the UCTA 1977⁴²⁵ are relevant for purposes of this discussion. Included also is The Report (2009) on the Consumer Remedies for Faulty Goods presented by The Law Commission and the Scottish Law Commission in 2009. The UK Government proposes to include the recommendations made in The Report into the Consumer Bill of Rights.⁴²⁶ The Consumer Bill of Rights has however not been implemented at the time of completion of this thesis.⁴²⁷

As mentioned earlier in this thesis⁴²⁸ SOGA only applies to movable goods⁴²⁹ and where a contract of sale is also a consumer contract it has to comply with the

⁴¹⁹ *Ibid.*

⁴²⁰ *Ibid.*

⁴²¹ Otto 2011 41.

⁴²² Naudé 2011 345.

⁴²³ Consumer Protection Act 1987.

⁴²⁴ Sales of Goods Act 1979.

⁴²⁵ Unfair Contracts Terms Act 1977.

⁴²⁶ See chap 4 Part E 1.1.1.

⁴²⁷ December 2012.

⁴²⁸ See chapter 4.

⁴²⁹ S 61 SOGA.

relevant legislation.⁴³⁰ The legislative definition of a defect, the warranties pertaining to the quality of goods, the consumer remedies for a breach of warranty as well as product liability for such goods are discussed.

1.2 Quality of consumer goods and defective products

“The vast majority of consumer complaints about goods are concerned with their quality. Consumers expect what they buy to be free from defects”.⁴³¹

Section 14 of SOGA provides an implied warranty that the goods supplied under the contract of sale are of satisfactory quality.⁴³² Satisfactory quality indicates that the goods must meet the standard that a reasonable person would regard as satisfactory, taking into account any description of the goods, the price (if relevant) and all other relevant circumstances. The quality of goods include their state, condition and *inter alia* their fitness for all the purposes for which goods (of the kind in question) are commonly supplied, appearance and finish, freedom from minor defects, safety and durability (at time of delivery).⁴³³

The purpose of section 14(2) is governing and preventing the sale of substandard goods.⁴³⁴ This means that the courts have to look at the intrinsic quality of the goods, using the test as laid out in subsections (2A), (2B) and (2C).⁴³⁵

Ervine states that determining satisfactory quality suggests taking into account several elements of the definition as well as certain factors.⁴³⁶ The writer further remarks that not all the factors would be relevant in every case and the list of factors are not exhaustive.⁴³⁷

⁴³⁰ See s 25 Part II of UCTA 1977. It must be the supply (and *in casu* sale) of goods in the ordinary course of business and includes a profession and any governmental activity. The goods must only be for the private use or consumption of the consumer. See also s 61 SOGA.

⁴³¹ Ervine 50.

⁴³² Dobson & Stokes 111. The word “merchantable” was substituted with “satisfactory” and a new definition was given to broaden the section’s application.

⁴³³ S 14(2A) and (2B). See Black 191 where all the former requirements for goods to be of “merchantable quality” are considered to be part of the “new” definition of “satisfactory quality” of goods.

⁴³⁴ Ervine 67 referring to *Jewson Ltd v Boyhan* [2003] EWCA Civ 1030 .

⁴³⁵ *Ibid.*

⁴³⁶ *Idem* 56.

⁴³⁷ *Idem* 61.

The test is an objective one and the description and condition of the goods have to be taken into account.⁴³⁸ It is also important to note that any public statement made by the supplier (seller), its agent, the producer or his representative⁴³⁹ in advertising or labelling is considered.

There is in other words an objective test regarding satisfactory quality and is given content by the list of factors which are to be taken into account in an assessment of what is satisfactory in a particular case.⁴⁴⁰ Ervine suggests that the objective test remains a standard that can be applied to all kinds of goods whether new or second-hand.⁴⁴¹

What a reasonable person is entitled to expect is also an objective test.⁴⁴² A reasonable person is not an expert.⁴⁴³ Who this reasonable person is will depend in part on the description of the product and the personal agenda of a particular buyer should not be taken into account.⁴⁴⁴ In *Bramhill v Edwards*⁴⁴⁵ the court described the reasonable person as a person who is in the position of the buyer, with his knowledge and not that of a third party observer not acquainted with the background of the transaction. Ervine gives the example of second-hand goods and that it would not be reasonable to expect the same quality as that of new goods.⁴⁴⁶ The writer adds however that the manner in which the goods are marketed or advertised might increase the standard of quality a buyer would reasonably be entitled to expect.⁴⁴⁷

According to Ervine goods sold have to be fit for *all*⁴⁴⁸ the purposes for which goods of the kind in question are suitable for.⁴⁴⁹ If goods have multiple purposes and

⁴³⁸ S 14(2D). See also Black citing *Jewson Ltd v Boyhan* [2003] EWCA Civ 1030 where a distinction is made between new goods and second-hand goods.

⁴³⁹ S14 (2D) – (2F); See also Black 190 where the inclusion is criticised and deemed unnecessary.

⁴⁴⁰ Ervine 57.

⁴⁴¹ *Ibid.*

⁴⁴² *Ibid.* See also *Jewson Ltd v Boyhan* [2003] EWCA Civ 1030 par 78.

⁴⁴³ *Clegg v Anderson* [2003] 1 All E.R. (Comm) 721 par 73.

⁴⁴⁴ Ervine 57.

⁴⁴⁵ [2004] EWCA Civ 403.

⁴⁴⁶ Ervine 58.

⁴⁴⁷ *Ibid* where the writer gives the example of advertising goods as “at the top end of the range.”

⁴⁴⁸ Own emphasis.

⁴⁴⁹ Ervine 61.

the seller intends his product to fulfil only one of those purposes it will be necessary to make this clear.⁴⁵⁰

Ervine states that appearance, finish and freedom from minor defects are also taken into account in determining whether goods are of a satisfactory quality but these characteristics are more likely to apply to new rather than second-hand goods.⁴⁵¹ There is ambiguity with regard to what is considered to be a minor defect. Traders might argue that any fault is minor, so that rescission will no longer be offered in practice.⁴⁵² It is also irrelevant whether or not the seller was in any way to blame for the defect.⁴⁵³ Whether or not a defect is a minor defect is clearly a factual question in Scottish law. Dents, scratches, minor blemishes, discolorations and small malfunctions will in appropriate cases be breaches of the implied warranty as to quality but not amount to something insignificant or trivial.⁴⁵⁴ The nature of the goods will also indicate how significant or insignificant a minor defect is to the quality. Ervine for example refers to natural products such as pottery or earthenware that may be expected to have minor inconsistencies and blemishes.⁴⁵⁵ In the case of vehicles sold for scrap metal minor defects will of course be of no significance at all.⁴⁵⁶

With regard to the requirement that goods must be of a satisfactory quality in the case of second-hand goods, courts have determined that it is reasonable to expect that a second-hand vehicle may break down soon after purchase.⁴⁵⁷ Each case will however turn on its own facts, which means that even similar cases may produce contrasting outcomes on the question of whether second-hand goods are of satisfactory quality.⁴⁵⁸

Safety forms part of the definition in section 14 of SOGA to reaffirm what is provided for in other legislation⁴⁵⁹ (dealing with product liability) and the fact that unsafe products will not be of satisfactory quality.⁴⁶⁰

⁴⁵⁰ *Ibid.*

⁴⁵¹ Ervine 62.

⁴⁵² The Report (2009) 38-40.

⁴⁵³ Black 188-189.

⁴⁵⁴ Ervine 62.

⁴⁵⁵ *Ibid.*

⁴⁵⁶ *Idem* 63.

⁴⁵⁷ *Thain v Anniesland Trade Centre* [1997] S.L.T (Sh Ct) 102.

⁴⁵⁸ *Ibid.*

⁴⁵⁹ S 3 UK CPA 1987.

⁴⁶⁰ Ervine 63.

The element of durability that forms part of the definition of the implied warranty is to be satisfied at the time of delivery and not at some later date, although later events may be relevant in determining the durability of the goods at the time of the sale.⁴⁶¹ According to Ervine the criterion is durability and not duration. Durability is to be a flexible concept requiring that goods should last a reasonable time taking into account whether they have been well or badly treated.⁴⁶² Including the requirement of durability into the definition is not as beneficial as one might expect.⁴⁶³ According to Ervine, the reason for this is that there is no corresponding change in the remedies available. By the time the consumer has realised that the goods are not durable, the right to reject has already been lost.⁴⁶⁴

Section 14(2A) refers to “other relevant circumstances” which may be taken into account in addition to the price and description. Case law provides that certain circumstances are relevant if a reasonable person would regard it as relevant.⁴⁶⁵ The place of sale can be regarded as relevant⁴⁶⁶ or even the commercial context of the problem and expected consumer expectations.⁴⁶⁷ On the other hand it has been held that the manufacturer’s warranty given with a new vehicle should not be taken into account as part of the “relevant circumstances”.⁴⁶⁸

With regard to the interpretation of section 14, it should be noted that goods may not be in conformity with the contract despite the fact that several minor defects could be repaired easily.⁴⁶⁹

1.2.1 Qualification of warranty in terms of section 14(2C) SOGA

The qualification for the supply of quality goods and the implied warranty is contained in section 14(2C) which states that the warranty will not cover any matter which was specifically drawn to the attention of the buyer. Ervine states that the matter or factor

⁴⁶¹ *Idem* 64.

⁴⁶² *Ibid.*

⁴⁶³ *Idem* 65.

⁴⁶⁴ *Ibid.*

⁴⁶⁵ *Clegg v Anderson* [2003] 1 All E.R. (Comm) 721 par 67.

⁴⁶⁶ Ervine 59.

⁴⁶⁷ *Britvic Soft Drinks Ltd v Messer UK Ltd* [2002] EWCA Civ. 448. See also Ervine 59-60 where the author is doubtful whether this should be taken in account as part of the “relevant circumstances.”

⁴⁶⁸ *Lamarra v Capital Bank Plc* [2006] CSIH 49.

⁴⁶⁹ *Rogers v Parish (Scarborough) Ltd* [1987] Q.B. 933.

(for instance that a second-hand motor vehicle is in a specific condition) must specifically be brought to the buyer's attention.⁴⁷⁰ In *Turnock v Fortune*⁴⁷¹ for example it was held that a strong recommendation from a third party not to buy a motor vehicle did not amount to specifically drawing the attention of its unroadworthiness to the buyer.

Dobson & Stokes state that the buyer cannot complain of defects which had been specifically drawn to his attention, although naturally the condition will still apply in relation to other defects rendering the goods of unsatisfactory quality.⁴⁷²

However, section 20 of UCTA 1977⁴⁷³ provides that any term of a contract which purports to exclude or restrict liability for breach of the obligations arising from the seller's implied undertaking as to quality for fitness for a particular purpose in terms of section 14, will be void. It would seem that consumer goods may still be sold "as is" unless goods were bought for a particular purpose in terms of section 14(3) of SOGA which is similar to the wording of section 55(3) of the CPA. This additional warranty will only apply to a consumer who made the specific purpose for which the goods were bought clear.⁴⁷⁴ Schedule 2 to UCTA 1977 provides guidelines for the application of the reasonableness test to determine whether or not the contract is void. These include the bargaining positions of the parties, whether the customer was induced to agree, whether the goods were special order goods and so forth.

Ervine discusses the conflicting view points in terms of case law⁴⁷⁵ of whether or not a buyer who examines the goods prior to the conclusion of the contract loses his right to claim in terms of the implied warranty.⁴⁷⁶ In the case of *Bramhill v Edwards*⁴⁷⁷ for example the court held the viewpoint that a representation made about aspects of the goods can be sufficient to alert the buyer to another aspect that could affect their quality. The writer criticises this viewpoint in that the buyer would lose his right to claim

⁴⁷⁰ Ervine 55.

⁴⁷¹ 1989 S.L.T (Sh. Ct) 32.

⁴⁷² Dobson & Stokes 110.

⁴⁷³ S 20(2)(a)(i). This section deals with obligations implied by law in sale and hire-purchase contracts.

⁴⁷⁴ Black 193. The Report (2009) also refers to these remedies as second-tier remedies.

⁴⁷⁵ *Thornett & Fehr v Beers & Son* [1919] 1 K.B. 486 KBD; *Bristol Tramways Carriage Co Ltd v Fiat Motors Ltd* [1910] 2 K.B. 831.

⁴⁷⁶ Ervine 56. See also *BSS Group Plc v Makers (UK) Ltd (t/a Allied Services)* [2011] EWCA Civ 809.

⁴⁷⁷ [2004] EWCA Civ 304.

for a defective product because the defect might not be detectable upon reasonable inspection.⁴⁷⁸

Section 14(3) governs situations where goods are bought for a particular purpose. The buyer must make the particular purpose or use of the goods bought clear.⁴⁷⁹ If goods are bought for a particular purpose and this is made clear at the time of sale (to the seller), the goods must be fit for the particular purpose indicated.⁴⁸⁰

Where goods are sold by sample in terms of section 15 of SOGA, such goods must conform to the sample.⁴⁸¹

1.3 Liability for defective products (not product liability)

The principle has been laid down by case law⁴⁸² in Scotland that if there was a defect, even though that defect was one which no reasonable skill or care could discover, the seller (supplier) should be responsible. This is so because where neither party is to blame, the seller (being the person who supplied the defective goods) and not the buyer should be liable for the defect.⁴⁸³

1.4 Consumer remedies

1.4.1 Introduction

SOGA provides the buyer (consumer) with original remedies⁴⁸⁴ as well as additional consumer remedies.⁴⁸⁵ The choice the consumer has between the two sets of remedies have been criticised as an example of “double-banking”, where EU directives are superimposed on domestic legislation causing complexity and confusion.⁴⁸⁶ Ervine states that the original remedies of rejection or damages remain together with the new additional consumer remedies.⁴⁸⁷ A consumer has a choice to make and is entitled

⁴⁷⁸ *Ibid.* See also Dobson & Stokes 110-114.

⁴⁷⁹ Ervine 68.

⁴⁸⁰ For a comprehensive discussion see Dobson & Stokes 116-118.

⁴⁸¹ Goods sold by sample is comprehensively discussed in chapter 5.

⁴⁸² *Randall v Newsom* (1876) 44 L.W.B. 364.

⁴⁸³ *Ibid.*

⁴⁸⁴ Ss 15A & 15B.

⁴⁸⁵ S 48B and C, also referred to as second-tier remedies in The Report (2009).

⁴⁸⁶ The Report (2009) xi.

⁴⁸⁷ Ervine 71.

(even if, according to Ervine it might appear unreasonable),⁴⁸⁸ to choose the draconian remedy of rejection under the original set of remedies rather than the options in terms of the new regime of remedies.⁴⁸⁹ As a result it is necessary to consider both sets of remedies. Ervine argues that it is sometimes very difficult for a consumer to make a choice between these sets of remedies and the courts will also have difficulty in determining which set of remedies was most appropriate in the circumstances where a dispute arises.⁴⁹⁰

1.4.2 Original remedies

Section 15B of SOGA provides that where the seller is in breach of any term of the contract the buyer has a right to claim damages and where the breach is material the buyer has a right to reject the goods (within a reasonable time) and treat the contract as repudiated. The section goes further and provides that in the case of consumer contracts a breach pertaining to the quality or fitness of goods for a purpose, and correspondence with description or sample are both deemed to be a material breach.

Section 15B does not however deem a breach of the implied term about title to be material. This is criticised by Ervine.⁴⁹¹

1.4.2.1 *Right to reject*⁴⁹²

The right to reject is regarded as an original remedy where the breach is material. (Section 25 of UCTA 1977 provides that in the case of consumer contracts, goods not of satisfactory quality or unfit for the purposes for which they were bought, will be considered to be a material breach of the contract).

According to Ervine consumers need to prove two things: That they have effectively intimated rejection to the seller; and that the goods have not been

⁴⁸⁸ *Ibid.*

⁴⁸⁹ *Ibid.*

⁴⁹⁰ *Ibid.*

⁴⁹¹ *Idem* 72.

⁴⁹² The right to reject as well as the acceptance of goods by the consumer is also discussed in chapter 9 Part E 1.

accepted.⁴⁹³ The consumer must therefore clearly indicate his intention to reject the goods.⁴⁹⁴

Section 36 of SOGA makes it clear that the consumer does not have to return the goods to the seller to fulfil the requirement of rejection unless otherwise agreed. The consumer will however have a duty to store them until the seller is able to collect the goods but where the seller refuses to collect the goods, the consumer may have a claim for any costs involved in the storage.⁴⁹⁵

Acceptance by a consumer is discussed in detail elsewhere.⁴⁹⁶ In summary it is perhaps necessary to mention that in terms of section 35 goods are accepted (and the right to reject lost) in three situations: Where the consumer has intimated to the seller that he has accepted the goods, where the buyer acts inconsistent with the seller's ownership of the goods, and finally where a reasonable period of time has lapsed and the buyer retains the goods without intimating to the seller that he (the buyer) has rejected them. Only the concept of what is considered to be a reasonable period of time will be discussed in more detail in this chapter.

1.4.2.2 *Lapse of a reasonable time*

What is considered to be a reasonable period of time is a factual question.⁴⁹⁷ Ervine states that section 35 of SOGA gives important guidance in this regard.⁴⁹⁸ Section 35 *inter alia* states that the questions that are material in determining whether a reasonable time has lapsed include whether the buyer has had a reasonable opportunity to examine the goods. Another factor to be taken into account is where the buyer requests or agrees to the repair of the defective goods.⁴⁹⁹ In *Clegg v Anderson*⁵⁰⁰ the court held that the period in which goods are being repaired will not be taken into account as part of a reasonable time, nor will the time the buyer was forced to wait for technical information necessary to make a decision whether or not to reject the goods.

⁴⁹³ *Ibid.*

⁴⁹⁴ *Lee v York Coach and Marine* [1977] R.T.R 35 CA. See also Dobson & Stokes 200.

⁴⁹⁵ Ervine 72. See also *Kolfor Plant Ltd v Tilbury Plant Ltd* (1977) 121 S.J. 390, DC.

⁴⁹⁶ See chapter 9 Part E 1.

⁴⁹⁷ Ervine 75. See also *Bernstein v Pamson Motors (Golders Green) Ltd* [1987] All E.R. 220.

⁴⁹⁸ *Ibid.*

⁴⁹⁹ S 35(6)(a).

⁵⁰⁰ [2003] 1 All E.R. (Comm) 721.

Ervine makes the relevant and important point that in many situations goods are not examined immediately and the question may be asked whether a lapse of a reasonable period of time will start to run from the date of delivery or from the moment the goods are examined properly.⁵⁰¹ The writer gives examples such as the buying of goods at an end of season sale and only opening the packaging and examining the goods several months later or buying goods that immediately goes into storage.⁵⁰² Ervine argues that section 35 makes it clear that a reasonable period of time will only start to run upon reasonable examination of the goods by the consumer.⁵⁰³

The Report by the Law Commissions argue that should the European Commission's proposed Directive be adopted as published, the UK would have to repeal the right to reject.⁵⁰⁴ This would mean that, if goods proved faulty, the consumer would not initially be entitled to a refund. The Report⁵⁰⁵ recommends that the right to reject should be retained in the UK as a short-term remedy of first instance because it is a simple, easy-to-use remedy which inspires consumer confidence. A recommendation is made to introduce a normal 30-day period for the right to reject unless a shorter or longer period would be more appropriate.⁵⁰⁶ The retailer could choose to provide either a repair or a replacement.⁵⁰⁷

Ervine recommends that consumers should reject goods at the earliest possible opportunity and that a reasonable lapse of time will vary from product to product (more complex products taking more time to properly examine for instance).⁵⁰⁸

1.4.2.3 Damages⁵⁰⁹

The second original remedy is the claim for damages⁵¹⁰ and is usually brought where the consumer has lost his right to reject through acceptance of the goods or where the

⁵⁰¹ Ervine 76-77.

⁵⁰² *Ibid.*

⁵⁰³ *Ibid.*

⁵⁰⁴ *Ibid.*

⁵⁰⁵ (2009) ix-xi.

⁵⁰⁶ E.g. in case of perishable goods: The Report (2009) ix-xi.

⁵⁰⁷ *Contra* s 56 of the CPA where it is at the instance of the consumer and will be available from the outset and not just as an "additional remedy".

⁵⁰⁸ Ervine 77.

⁵⁰⁹ For a comprehensive discussion on the measure of damage see Dobson & Stokes chapter 14 *passim*.

⁵¹⁰ S 15A.

breach is not material. A claim for damages includes general damages.⁵¹¹

Where the claim for damages is based in section 51 of SOGA (failure by the seller to deliver the goods) the measure of damages will be the difference between the contract price and the market price of the goods at the time they ought to have been delivered.⁵¹²

Where goods are delivered but of an unsatisfactory quality, section 53A provides the calculation of damages to be the difference between the value of the goods at the time of delivery and the value of the goods had the contract been fulfilled. Ervine refers to relevant case law where it is shown that damages for inconvenience or disappointment for breach are also possible.⁵¹³

The final and rarely used original remedy is specific implement or specific performance.⁵¹⁴

1.4.3 Additional consumer remedies⁵¹⁵

The additional remedies apply only to consumer contracts.⁵¹⁶ The remedies are a claim for the repair or replacement of the goods⁵¹⁷ and thereafter a claim for the reduction in the purchase price and rescission.⁵¹⁸ Ervine states that the additional remedies lack the simplicity of the original remedies and the consumer may not choose which remedy he wants to institute first.⁵¹⁹ The remedies must be instituted in the order mentioned above. The additional consumer remedies are only available within the first six months from date of delivery with regard to non-conformity with the consumer contract.⁵²⁰

Firstly, the consumer may elect to either replace or repair⁵²¹ the goods which must be done within a reasonable time and at the seller's expense with no extra

⁵¹¹ Damages naturally resultant from the breach.

⁵¹² Ervine 78.

⁵¹³ *Idem* 79. See also *Bernstein v Pamson Motors (Golders Green) Ltd* [1987] All E.R. 220

⁵¹⁴ For a comprehensive discussion of the difference in approach between the Scottish courts and the courts of England and Wales in granting specific implement see *MacQueen 1999 passim*.

⁵¹⁵ Ss 48A – 48F SOGA.

⁵¹⁶ S 48A(1) SOGA. See s 25 UCTA 1977 for the definition of consumer contract. For a comprehensive discussion of the definition of consumer contract see also chapter 4 Part E.

⁵¹⁷ S 48B SOGA.

⁵¹⁸ S 48C SOGA.

⁵¹⁹ Ervine 80. See also *Dobson & Stokes* 206-208.

⁵²⁰ S 48A(3) SOGA.

⁵²¹ S 48B SOGA. Also referred to as the primary remedy. See *Black* 198.

inconvenience to the buyer. In practice consumers suffer prejudice as a result of failed repairs and replacements and they fear becoming locked in a cycle of failed repairs.⁵²² What amounts to a reasonable time or extra inconvenience is to be determined with reference to the nature of the goods and the purpose for which it was acquired.⁵²³ Ervine gives examples of different kinds of goods⁵²⁴ to illustrate when either repair or replacement will be more appropriate and practical and will also indicate what constitutes a reasonable period of time.⁵²⁵

The buyer cannot require the seller to carry out one of these remedies if it is not possible to do so or if the cost of doing so would be disproportionate either to carrying out the other remedy, offering a price reduction or rescinding the contract.⁵²⁶ Section 48B(4) offers guidance on when one remedy is disproportionate to another.⁵²⁷ (This is most likely why the legislature included the right to repair, replace or refund from the outset at the instance of the consumer and not as an “additional remedy” in terms of the CPA in South Africa).⁵²⁸

Micklitz *ea* states that generally, proving the lack of conformity falls on the buyer.⁵²⁹ In addition, the buyer also has to establish that the lack of conformity existed at the time the goods were delivered.⁵³⁰ This would also be the position in the case of latent defects unless the reverse burden of proof applies.⁵³¹

A consumer currently benefits from a six month reverse burden of proof in terms of section 48A(3) of SOGA. This means that where a fault arises within six months of delivery, it is presumed to have existed at the time of delivery. It is up to the retailer to show either that the fault arose later, or that this is inconsistent with the nature of the goods. The Report recommends that, in the interest of simplicity, the presumption that is

⁵²² The report (2009) ix 1.18.

⁵²³ S 48B(5) SOGA.

⁵²⁴ Ervine 80 where the writer gives the example of a defective light bulb in a motor vehicle as a defect more prone to immediate repair if but the problem is of a more complex and mechanical nature a longer time would be reasonable.

⁵²⁵ *Ibid.*

⁵²⁶ *Ibid.*

⁵²⁷ S 48B(4) SOGA: Where the cost of a remedy is for example unreasonable taking into account the value which the goods would have if they actually did conform to the contract, the significance of the defect and whether the alternative remedy could be affected without significant inconvenience to the buyer.

⁵²⁸ S 55 of the CPA.

⁵²⁹ Micklitz *ea* (2010) 336.

⁵³⁰ *Ibid.*

⁵³¹ *Ibid.*

provided for in terms of section 48B also apply where a consumer seeks to rely on an original remedy, such as the right to reject.⁵³² A recommendation is also made that the six months reverse burden of proof should be suspended while repairs are being carried out and should resume after goods are redelivered following repair.⁵³³ The Report recommends that a further six months reverse burden should start after goods are redelivered following replacement.⁵³⁴

Thereafter the consumer may claim for a reduction in purchase price, and only then may the third and final remedy be instituted being the rescission of the contract.⁵³⁵ A pro-rata reduction of the purchase price is permitted in relation to the use of the goods by the buyer.

Ervine remarks that where the buyer embarked on an attempt to have a repair carried out or requests a replacement, the right to a reduction in price or rescission will revive if the seller is in breach of the requirement of section 48B(2) to achieve this within a reasonable time and without significant inconvenience to the buyer.⁵³⁶

Where a buyer embarked on a demand for either repair or replacement, he may not seek an alternative remedy until the seller has been given a reasonable opportunity to carry out the first one.⁵³⁷ Ervine argues that the qualification where the buyer claims a reduction of the purchase price that the reimbursement to the buyer may be reduced taking into account the use of the goods⁵³⁸ by the buyer is an important factor for a buyer to take into account when deciding which remedy to institute.⁵³⁹

In the recent case of *Douglas v Glenvarigill Co Ltd*⁵⁴⁰ a defective vehicle was bought by the buyer. Lord Young found that the defect in the vehicle existed at time of delivery and the breach was based on a lack of durability.⁵⁴¹ Though the defect was found to be material it only manifested itself 15 months after delivery. The buyer still attempted to reject the goods even though section 35 of SOGA provides that goods

⁵³² The Report (2009) xiii 1.42.

⁵³³ *Idem* 3.96-3.97 and 6.51-6.59.

⁵³⁴ *Ibid.*

⁵³⁵ S 48C SOGA.

⁵³⁶ Ervine 81.

⁵³⁷ *Ibid.*

⁵³⁸ S 48C(3).

⁵³⁹ *Ibid.*

⁵⁴⁰ [2010] CSOH 14, 2010 S.L.T 634.

⁵⁴¹ Par 20.

must be rejected within a reasonable time.⁵⁴² The court used the case as a platform to discuss the buyer's (consumer's) original remedy of rejection of the goods (in terms of section 15B of SOGA) and the additional consumer remedies (in terms of sections 48A to 48C of SOGA).⁵⁴³

The court carefully reviewed the Scottish authorities on rejection and decided that rejection is a relatively short-term remedy, and is simply not available when a latent defect manifests itself for the first time more than a year after delivery.⁵⁴⁴ The court could not find any reported case where rejection was permitted after such a long period.⁵⁴⁵ Lord Young held that in the case of a latent defect, while time begins to run as soon as the goods are delivered, some interval may elapse with the buyer still entitled to reject but this did not mean that the time period begins to run only when the defect was discovered.⁵⁴⁶ According to the court SOGA provides only for a reasonable time and does not refer to the emergence of latent defects in the context of the case *in casu*.⁵⁴⁷ Thus the court found the buyer's rejection in this case was too late. The buyer could still claim damages for breach of contract.⁵⁴⁸

Lord Young noted that there appeared to be differences between the traditional remedy of rejection in terms of section 15B and the new one of rescission in terms of section 48C. The difference in particular being that replacement or repair must have been unavailable or unsuccessful, and account must be taken of the use that the buyer had of the goods since delivery.⁵⁴⁹

MacQueen argues with merit that it is unfortunate Lord Young indicated his unwillingness to hold that the new rescission remedy was available to the buyer.⁵⁵⁰ MacQueen also expresses his regret that better use was not made of the European rules from the outset.⁵⁵¹ According to the writer⁵⁵² entry of the EU Consumer Sales

⁵⁴² Par 22.

⁵⁴³ Par 37.

⁵⁴⁴ *Ibid.*

⁵⁴⁵ *Ibid.*

⁵⁴⁶ *Ibid.*

⁵⁴⁷ *Ibid.*

⁵⁴⁸ Par 38.

⁵⁴⁹ Par 22 & par 37.

⁵⁵⁰ MacQueen 2011 113.

⁵⁵¹ *Ibid.*

⁵⁵² *Ibid.*

Directive remedies into the equation was possibly due to Lord Young's involvement as Chairman of the Scottish Law Commission which also participated in the preparation of The Report (2009) mentioned earlier in this chapter.⁵⁵³

1.5 Product liability: Introduction

Deficiencies in the common law led to some statutory intervention following the European Directive with regard to product liability.⁵⁵⁴ Part 1 of the UK CPA 1987 introduces a regime of strict liability on manufacturers of products⁵⁵⁵ which prove to cause harm by reason of a defect. Ervine argues that the liability in terms of the Act is strict but not absolute.⁵⁵⁶ The claimant still needs to prove that he has been injured, that the defendant manufacturer was the producer of the product and that it was the manufacturer's product that caused the injury.⁵⁵⁷ The issue of causation is the biggest stumble block to claimants and may turn to complex scientific evidence which results in extremely expensive lawsuits.⁵⁵⁸

The issues regarding product liability in Scotland that will be discussed below includes: The definitions of "defect" and "products" in terms of the Act (UK CPA 1987), who may be held liable for unsafe defective products and possible defences that may be raised.

1.6 Definition of a defect in terms of UK CPA 1987: Part of product liability regime

The definition of a defect in terms of section 3 of the Act only relates to situations where the defective product caused some sort of harm and not defective products and the standard of their quality *per se*.⁵⁵⁹ Section 3 of the UK CPA 1987 defines a defect as a defect in a product if the safety of the product is not such as persons generally are entitled to expect; and for those purposes safety, in relation to a product, shall include

⁵⁵³ See Part D 1.1 above.

⁵⁵⁴ Ervine 87.

⁵⁵⁵ For the duration of the discussion regarding product liability in Scotland "products" and "goods" will be used as interchangeable concepts with the same meaning unless otherwise stated.

⁵⁵⁶ Ervine 89.

⁵⁵⁷ *Ibid.*

⁵⁵⁸ *Ibid.*

⁵⁵⁹ *Idem* 50 & 92-93.

safety with respect to products comprised in that product and safety in the context of risks or damage to property, as well as in the context of risks of death or personal injury. Dobson & Stokes⁵⁶⁰ refer to the case of *A v National Blood Authority (No.1)*⁵⁶¹ where the court considered the definition of “defective”. The products *in casu* were held to be defective because they were non-standard products, and were unsafe by virtue of the harmful characteristics they had and which the standard products of the same type did not have.⁵⁶²

Circumstances such as the marketing, reasonable use of the product and time of supply may be taken into account⁵⁶³ in determining what persons generally are entitled to expect. Ervine states that it is clear from the definition of defect that the strict liability regime is concerned only with safety and not with shoddiness.⁵⁶⁴ It provides no remedy where the product is defective in the sense that it does not work nor has some other flaw (other than a safety defect) which render it of unsatisfactory quality.⁵⁶⁵ The writer explains that should there be a defect in the *quality*⁵⁶⁶ of the goods the buyer must revert back to the existing remedies governed by SOGA.⁵⁶⁷

Ervine argues that section 3 of the UK CPA 1987 is concerned with relative safety.⁵⁶⁸ The reason for this is that there is no such thing as a completely safe product.⁵⁶⁹ The focus in each case should be whether or not the safety of the product is the degree of safety as persons are generally entitled to expect and in determining the former taking all relevant circumstances into account. Section 3(2) sets out the factors to be taken into account which are the marketing, warning and instructions regarding the goods, the reasonable expectations about the use of the goods and the time of their supply. It should be noted that the court has held that only all the *relevant*⁵⁷⁰

⁵⁶⁰ 137.

⁵⁶¹ [2001] 3 All E.R. 289.

⁵⁶² 289 par 36. See also Dobson & Stokes 137.

⁵⁶³ S 3(2) UK CPA 1987.

⁵⁶⁴ Ervine 92.

⁵⁶⁵ *Idem* 92-93.

⁵⁶⁶ Own emphasis.

⁵⁶⁷ Ervine 93. In other words the original remedies (ss 15A & 15B SOGA) or the additional consumer remedies (Ss 48B & 48C SOGA).

⁵⁶⁸ *Ibid.*

⁵⁶⁹ *Ibid.*

⁵⁷⁰ Own emphasis.

circumstances should fall under the definition of “all circumstances” in terms of section 3(2).⁵⁷¹

1.7 “Products”

Ervine states that the word “product” is given a very wide meaning for the purpose of Part 1 of the UK CPA 1987.⁵⁷² Section 1(2) defines a product as any goods or electricity and includes a product which is comprised in another product, whether by virtue of being a component or raw material or otherwise. “Goods” in terms of section 45 of the Act⁵⁷³ includes substances, growing crops and things comprised in land by virtue of being attached to it and any ship, aircraft or vehicle. “Substance” is defined as any natural or artificial substance, whether solid, liquid or gaseous form or in the form of a vapour, and includes substances that are comprised in or mixed with other goods.

Section 46(3) makes it clear that buildings are not products for the purposes of Part 1 of the Act. According to Ervine the result of section 46(3) is that where a building for example collapses because of a design fault the UK CPA 1987 will not be applicable unless the collapse caused some form of injury.⁵⁷⁴

1.8 Who may be held liable?

The UK CPA 1987 provides that strict liability for damages or harm caused by unsafe defective products can be placed on a range of possible defendants.⁵⁷⁵ Where a defective product injures a consumer (buyer), both the implied terms of SOGA and the UK CPA 1987 will apply⁵⁷⁶ and the buyer may choose to institute action either against the manufacturer (in terms of the UK CPA 1987) or the retailer (in terms of SOGA).⁵⁷⁷ Manufacturer is an umbrella term that includes producers, own-branders, importers and suppliers.⁵⁷⁸ Section 2(1) of the UK CPA 1987 provides that where any damage is

⁵⁷¹ *A v National Blood Authority* [2001] 3 All E.R. 289.

⁵⁷² Ervine 89.

⁵⁷³ Section 45: Definitions in the interpretation of the UK CPA 1987.

⁵⁷⁴ Ervine 89 & 90.

⁵⁷⁵ *Dobson & Stokes* 135. Damage to non-business property is only allowed if it exceeds £275 in value.

⁵⁷⁶ Note that this statement is not contrary to the position of Ervine 89 & 90 and Part E 1.2.4.3 above. The implied terms of both SOGA as well as the UK CPA 1987 will apply where defective goods are of an unsatisfactory quality in terms of SOGA and also defective causing injury in terms of the UK CPA 1987.

⁵⁷⁷ *Dobson & Stokes* 131 & 141.

⁵⁷⁸ Ss 2(2)-(4) UK CPA 1987.

caused wholly or partly by a defect in a product, every person to whom subsection 2 applies shall be liable for the damage jointly and severally. Liability cannot be limited or excluded by any contractual term or otherwise.⁵⁷⁹

Suppliers are only secondarily liable unless they are unable to identify their own suppliers.⁵⁸⁰ Ervine explains that liability arises if three conditions are fulfilled.⁵⁸¹ Firstly, the injured person must request the supplier to identify one or more of the primarily liable persons (producers, own-branders and importers). Secondly the request must be made within a reasonable period of time from the date on which the damages occurred and thirdly the supplier must fail to supply the information requested within a reasonable period of time. Ervine gives the example where a retailer's goods have injured someone other than the buyer.⁵⁸² If the retailer cannot identify his supplier he finds himself strictly liable.

1.9 Damages

Damage is defined to mean death or personal injury or any loss or damage to any property including land.⁵⁸³ The property must ordinarily be intended for private use, occupation or consumption by the person suffering the loss or damage.⁵⁸⁴

Ervine argues that pure economic loss is not recoverable under the UK CPA 1987 and the basis on which damages are to be calculated are on the normal delictual principles.⁵⁸⁵ Dependents and relatives may also bring an action in terms of the Act in the case of death.⁵⁸⁶

Liability for damages to property is limited in many ways.⁵⁸⁷ Damages are not available for damage to the defective product itself or any damage to business property.⁵⁸⁸ A claimant may also not claim for damages caused to private property unless it exceeds £275.

⁵⁷⁹ S 7 UK CPA 1987. Similar to s 61 of the CPA South Africa (see Parts C & F of this chapter).

⁵⁸⁰ S 2(3) UK CPA 1987.

⁵⁸¹ Ervine 92. See also Dobson & Stokes 131.

⁵⁸² Ervine 92.

⁵⁸³ S 5 UK CPA 1987.

⁵⁸⁴ S 5(3) UK CPA 1987.

⁵⁸⁵ Ervine 104.

⁵⁸⁶ *Ibid.* See also s 6(1)(c) of the Damages Act of Scotland 1976.

⁵⁸⁷ *Ibid.*

⁵⁸⁸ S 5(3) & (4) UK CPA 1987. See also Dobson & Stokes 140-141 & Ervine 103-104.

1.10 Defences

Section 4 of the UK CPA 1987 provides for statutory defences. These defences include the situation where the defect in the product was attributable to compliance with a statutory or EC requirement, where the person proceeded against did not supply the product,⁵⁸⁹ where the product was not supplied in the course of a business, or not with a view to profit,⁵⁹⁰ where the defect did not exist at the relevant time⁵⁹¹ or where the defect was in the subsequent product and not the component part.⁵⁹² As a general rule a component manufacturer is liable as a producer for any defects in products of his which are incorporated in a finished product.⁵⁹³ The component manufacturer will have a defence in terms of section 4(1)(f) if it can be shown that the defect in the finished product which resulted from the article supplied by him was wholly attributable to the design of the finished product or to compliance with instructions given by the producer of the finished product.

Writers such as Ervine⁵⁹⁴ and Dobson & Stokes⁵⁹⁵ critically discuss the so-called “state of the art defence”⁵⁹⁶ the details of which do not form part of this thesis.

1.11 Manufacturers’ guarantees

Manufacturers’ guarantees (or warranties in the case of motor vehicles) are useful supplements to existing legal protection regarding quality.⁵⁹⁷ The legal status of manufacturers’ guarantees is governed by regulation 15 of the Consumer Sale Regulations.⁵⁹⁸ Regulation 15 provides that a consumer guarantee takes effect at the time of delivery of the goods as a contractual obligation owed by the guarantor thereof.

⁵⁸⁹ Ervine 99 gives the example of products stolen from a manufacturer and reached the market through illicit channels.

⁵⁹⁰ *Idem* 110: For example where homemade goods were sold as part of a charity sale.

⁵⁹¹ *Idem* 100: The time the product was put into circulation or supplied to other suppliers. The manufacturer will escape liability where he can prove that the damage was caused through ordinary wear and tear or the product may have become defective through unskilled servicing or maintenance.

⁵⁹² S 6 UK CPA 1987.

⁵⁹³ Ervine 103.

⁵⁹⁴ *Idem* 100-102.

⁵⁹⁵ 142.

⁵⁹⁶ Ervine 100.

⁵⁹⁷ *Idem* 84.

⁵⁹⁸ SI 20002/3045.

There is no obligation on a manufacturer or any other supplier in the supply chain to offer a guarantee but if it is offered to the consumer it has to conform to the requirements in terms of the Consumer Sale Regulations.⁵⁹⁹ The Consumer Sale Regulations require the guarantee to be in plain and intelligible language and must include the particulars for making claims and must be made available to potential consumers on demand.

2. Belgium

2.1 Introduction

As discussed comprehensively earlier in this thesis,⁶⁰⁰ consumer sales in Belgium are regulated by specific consumer legislation (provisions regarding consumer sales introduced into the Civil Code⁶⁰¹ by Act 2004⁶⁰²), general provisions regarding sales in the Civil Code⁶⁰³ (the common law position) as well as certain provisions governed by the general principles of contract law (in the Civil Code).⁶⁰⁴ There is also other legislation relevant to consumer sales (Act 1991,⁶⁰⁵ Act 1994⁶⁰⁶ and WMPC 2010).⁶⁰⁷

The various sources of law governing consumer sales is a point of contention amongst Belgian writers and the implementation of consumer specific legislation as mentioned above into the current Belgian law is also criticised.⁶⁰⁸

What constitutes a consumer sale including the relevant elements of the definition is discussed comprehensively in chapters 4 and 5 of this thesis.⁶⁰⁹ For purposes of completeness however, the relevant concepts will be briefly mentioned as part of this discussion.

⁵⁹⁹ *Ibid.*

⁶⁰⁰ See chapter 4 Part E.

⁶⁰¹ 1649*bis* – 1649*octies* Civil Code.

⁶⁰² Act of 1 September 2004 (regarding protection of consumers in respect of the sale of consumer goods).

⁶⁰³ Book III, Title V, Chapters I-VIII (arts 1582-1701)

⁶⁰⁴ Book III, Title III, Chapters I-VI (arts 1101-1369).

⁶⁰⁵ Act of 25 February 1991 (regarding liability for defective products).

⁶⁰⁶ Act of 9 February 1994 (regarding products and services safety).

⁶⁰⁷ Act of 6 April 2010 (regarding market practices and the protection of consumers).

⁶⁰⁸ For a comprehensive discussion see chapter 4 Part E. See also Dekkers 546, Samoy 254-262, Caufmann 6-16, Peeters 2005 442-444, Tilleman & Verbeke (2009) 27-37.

⁶⁰⁹ See chapter 4 Part E 2 & chapter 5 Part E 2.

In terms of article 1649*bis* the inserted provisions with regard to consumer sale agreements are only applicable to the sale of consumer goods⁶¹⁰ by the seller to a consumer. A “consumer” is described as a natural person who buys goods other than for his profession or business.⁶¹¹ A “seller” is described as either a natural or juristic person that sells consumer goods as part of his profession or business. Article 1649*bis*⁶¹² provides that agreements for the delivery or manufacturing of consumer goods are also regarded as consumer sale agreements.⁶¹³ The Civil Code provides that consumer goods are all moveable, corporeal goods.⁶¹⁴ This also includes animals.⁶¹⁵ The sale of immovable property, incorporeal rights and services are excluded.⁶¹⁶ Contrary to South African law, electricity is not regarded as consumer goods and specifically excluded from the definition in the Civil Code.⁶¹⁷ Water and gas that has not been determined in a fixed volume or quantity is excluded as well.⁶¹⁸

2.1.1 General contractual rules

In terms of the general principles regulating contracts there is an implied duty in terms of article 1135 of the Code that the content of an agreement must express the true intention of the parties and comply with the principles of equity, usage or any other law applicable to that particular obligation.⁶¹⁹ Applied to a contract of sale, this obligation includes giving the other party (the buyer) appropriate information, especially on the risks implied in the use of the product.⁶²⁰

⁶¹⁰ For a comprehensive discussion of the “thing sold”, “goods” and “consumer goods” see chapters 4 & 5.

⁶¹¹ A similar definition is provided for in terms of A 2, Chapter 1 of the WMPC 2010 where a “consumer” is described as a natural person who obtained or uses a product from the open market but not as part of his business or profession.

⁶¹² Dekkers 546-554.

⁶¹³ Tilleman & Verbeke (2009) 27 criticises this provision because of its uncertainty in practice. The reason being that contracts for the manufacturing of goods forms part of other transactions and the writers argue that legislative clarity is needed. See also 28 where the writers questions the inclusion of the supply of services and goods as part of consumer sales. The supply of goods and services are also included in the South African CPA (Chapter 2 Parth H) but is not a point of contention as is the case in Belgium. For a detailed outline of the purpose and scope of this thesis see chapter 1.

⁶¹⁴ A 1649*bis*.

⁶¹⁵ Cauffman 797. See also Dekkers 547.

⁶¹⁶ Tilleman & Verbeke (2009) 31. See also Cauffman 799.

⁶¹⁷ A 1649*bis*.

⁶¹⁸ *Ibid*.

⁶¹⁹ Crabb 221.

⁶²⁰ Otto 2011 531-533.

2.2 Definitions of “latent defect” and “defect”

In terms of article 1641 of the Civil Code a latent defect is a hidden defect in the thing sold which renders it unsuitable for the use for which it is intended, or which so diminishes such use that the buyer would not have purchased it, or would have given only a lesser price for it, had he known of it.

Due to the existence of different regimes of liability, the definition of a defect varies accordingly.

The common law warranty against latent defects in the case of consumer sales have been substituted by the provisions of articles 1649*bis* to 1649*octies* of the Civil Code. Goods have to conform to the agreement between the seller and the consumer and must comply with the conformity criteria as governed by article 1649*ter* of the Civil Code.

Article 5 of Act 1991 regards a product as being defective when it is not as safe as a person is generally entitled to expect taking into account all the surrounding circumstances including the presentation of the product, the normal or reasonably foreseeable use thereof as well as the time when it was put into circulation. A product is not considered to be defective in terms of article 5 simply because a better product was put into circulation. A “safe product” in terms of article 1 of Act 1994 is a product which, under normal or reasonably foreseeable conditions of use including its duration and possible entry into circulation, installation and maintenance requirements, does not present any risk or only the minimum risks compatible with the use of the product and from the perspective of a high level for the health and safety of persons, are considered acceptable. The feasibility of obtaining higher levels of safety or other products presenting a lesser risk to buy is not sufficient for a product to be regarded as dangerous. The following will be taken into account to determine the safety of a product in terms of article 1:

- a. the characteristics of the product, including its composition, packaging, instructions for assembly and, where applicable, for installation and maintenance;
- b. the effect on other products, where it is reasonably foreseeable that the product in combination with other products will be used;

- c. the presentation of the product, the labelling, any warnings and instructions for its use and disposal and any other indication or information regarding the product; and
- d. the categories of users when using the product and the seriousness of the risk, especially children and the elderly.

Micklitz *ea* explain the difference between manufacturing and design defects.⁶²¹ Manufacturing defects arise from something going wrong in the production process, possibly because of poor-quality raw materials, an error of a production line worker or because of contamination.⁶²² Design defects, by contrast concern the underlying design of the product.⁶²³ Defects based on failure to warn or instruction defects can be viewed as labelling, packaging and accompanying material.⁶²⁴

Dekkers defines a latent defect as a defect that a diligent (“nauwlettende”) buyer would not immediately notice at the time of delivery.⁶²⁵ The nature of the thing sold as well as the capacity of the buyer is taken into account.⁶²⁶ Courts have established the determination of the capacity of the buyer to be a factual question because the degree of skill may vary from buyer to buyer.⁶²⁷

Initially the concept of a “defect” referred to an intrinsic defect but a more functional approach is followed in more recent case law.⁶²⁸ This approach has the effect that goods will be regarded as defective if they cannot be used for the purposes for which they were bought even if they do not have an intrinsic defect.⁶²⁹ In applying this approach it is assumed that the seller is aware of the purpose for which the buyer buys

⁶²¹ Micklitz *ea* (2010) 461.

⁶²² *Ibid.*

⁶²³ *Ibid.*

⁶²⁴ *Ibid.*

⁶²⁵ Dekkers 488.

⁶²⁶ *Ibid.*

⁶²⁷ Cass 6 April 1916, Cass 24 November 1989. A buyer who is also a building contractor will most likely notice defects that an ordinary buyer that is not a professional would not. This differs from the South African position where the reasonable buyer does not have to be an expert and will not be taken in account (See Part B 2 of this chapter).

⁶²⁸ Dekkers 489.

⁶²⁹ *Ibid.*

the goods.⁶³⁰ The defect has to exist at time of conclusion of the contract⁶³¹ and must be of a material nature.⁶³²

When dealing with defects in movable corporeal goods in terms of a consumer sale agreement, Peeters⁶³³ argues that the word “manifest” in 1649*quater* § 1 of the Civil Code not only includes patent defects but also latent defects.

2.3 Warranty against latent defects (common law position)

2.3.1 General

The seller has two main duties at common law which are delivery of the thing sold and giving a warranty against latent defects to the buyer.⁶³⁴

Articles 1641 to 1648 regulate the common law warranty against latent defects for sale agreements.⁶³⁵

The thing sold has to comply with the agreement.⁶³⁶ The thing sold does not comply with the sale agreement if it does not have the characteristics that a buyer is entitled to expect for the normal or particular use thereof as indicated by the buyer. Similar to South African and Scottish law, what is expected of goods sold will differ where the quality of the goods as well as the purposes differ (for example second-hand goods will differ in quality from newly-manufactured goods).⁶³⁷

Dekkers refers to case law to illustrate what the courts have considered to be latent defects.⁶³⁸ Sellers have been held liable for insufficient foundations of a house, underground passages preventing the proper building of a house, a split in the chassis of a motor vehicle, an unacceptable amount of poisonous plants bought as part of animal feed and a taint in the taste of wine bought to name but a few.⁶³⁹

According to Derenne & Broere the liability of the seller depends on his knowledge of the defect prior to delivery of the product. If the seller did not have

⁶³⁰ *Ibid.*

⁶³¹ Cass. 5 November 1981, *Arr. Cass.* 1984-85, nr.19.

⁶³² Dekkers 490.

⁶³³ Peeters 2005 451 fn 103.

⁶³⁴ Arts 1641 to 1648 Civil Code.

⁶³⁵ See Peeters 2005 440.

⁶³⁶ Dekkers 489.

⁶³⁷ Otto 2011 532.

⁶³⁸ Dekkers 490-491.

⁶³⁹ *Ibid.*

knowledge of the defect, the buyer has the option of returning the defective product and being refunded⁶⁴⁰ or keeping the product and obtaining restitution of a part of the price, the value of which shall be determined by an expert.⁶⁴¹ The buyer is also entitled to a refund of expenses caused by the sale. The burden of proof that the defect existed at time of delivery of the goods is on the buyer.

Where goods perish because of the latent defect the seller will be held liable⁶⁴² unless the deterioration was due to *vis maior*.⁶⁴³ The onus is on the buyer to prove that the goods perished because of a latent defect.⁶⁴⁴

2.3.2 Exclusion of the warranty by agreement

In terms of the Civil Code a seller gives a warranty against latent defects⁶⁴⁵ but may also exclude his liability in terms of the warranty by way of agreement.⁶⁴⁶ The exclusion of the common law warranty against latent defects in Belgian law is also referred to as an “*exoneratiebeding*” (“*exoneration clause*”) or a “*beding van niet-vrywaring*”.⁶⁴⁷

The exclusion of the warranty only applies to *bona fide* sellers.⁶⁴⁸ Where the seller had knowledge of the defect at the time of the sale and kept this from the buyer, the seller is regarded as acting fraudulently and will not be protected by the exclusion clause.⁶⁴⁹ The seller will however not be held liable where the defect was disclosed to the buyer at time of conclusion.⁶⁵⁰ In the case of second-hand goods and bargain sales, it will be sufficient disclosure by the seller to declare to the buyer that defects do exist in the goods.⁶⁵¹ In these instances the seller will be protected by the exclusion clause.

⁶⁴⁰ *Action rédhibitoire*. Similar to the *actio redhibitoria*.

⁶⁴¹ Derenne & Broere 76 (also referred to as the *action estimatoire*). It is similar to a reduction in the purchase price in terms of South African common law *actio quanti minoris*.

⁶⁴² A 1647 Civil Code.

⁶⁴³ Dekkers 495.

⁶⁴⁴ *Ibid.*

⁶⁴⁵ A 1641.

⁶⁴⁶ A 1643.

⁶⁴⁷ Dekkers 496.

⁶⁴⁸ A 1645 provides that if the seller knew of the defects in the thing, he is liable, in addition to restitution of the price which he received for it, for all damages to the buyer.

⁶⁴⁹ Dekkers 496. *Contra* South African law where the seller will only be held liable for non-disclosure of the defect where he acted fraudulently (See Part B 2 of this chapter).

⁶⁵⁰ *Ibid.*

⁶⁵¹ *Ibid.*

According to Dekker the application of the warranty may also be limited by way of agreement.⁶⁵²

2.3.3 Common law remedies of the buyer

In terms of article 1648 of the Code the buyer has a choice of the following remedies upon discovery of a latent defect: Rescission of the agreement (also referred to as the *actio redhibitoria*),⁶⁵³ or a claim for a reduction in the purchase price (*actio quanti minoris*).⁶⁵⁴

The remedies of a claim for the repair or replacement of the goods will only be available where the sale falls under the definition of a consumer sale.⁶⁵⁵

Article 1646 of the Code provides that the buyer may also have a claim for damages in certain instances. Where the seller was unaware of the defect, the seller has to repay the purchase price as well as any expenses relating to the agreement.⁶⁵⁶ Where the seller was aware of the latent defect he will be liable for damages incurred by the buyer.⁶⁵⁷

2.3.3.1 Remedies must be instituted within a short period of time

The claim for a rescission of the agreement or a reduction in the purchase price must be brought within a short period of time (“binnen een korte tijd”).⁶⁵⁸ This is so since the claimant could be presumed to have unreservedly accepted the goods if he did not raise objection regarding the conformity.⁶⁵⁹ What constitutes as short period of time is a factual question and will be determined by the courts.⁶⁶⁰

Dekkers explains that the short period of time as referred to in article 1648 of the Code is to ensure that the defect did in fact exist at time of conclusion of the sale.⁶⁶¹

⁶⁵² Dekkers 496.

⁶⁵³ *Idem* 491 fn 115.

⁶⁵⁴ *Ibid.* See also Peeters 2001 545; Demarsin 38; Claeys & Van Strydonck 311.

⁶⁵⁵ Dekkers 491.

⁶⁵⁶ *Idem* 493 fn 124 such as the costs of drafting, lifting of a hypothec and collection of the document itself.

⁶⁵⁷ A 1645 Civil Code. Dekkers 493 states that the claim for damages will include damages suffered by the buyer as well as damages suffered because of the latent defect itself.

⁶⁵⁸ A 1648 Civil Code.

⁶⁵⁹ Dekkers 491.

⁶⁶⁰ *Idem* 492.

⁶⁶¹ *Ibid.*

The exact moment when the short period of time starts to run is a point of contention amongst Belgian writers.⁶⁶² Some argue that it should be the date of conclusion of the agreement while others argue that it should be the date of delivery.⁶⁶³ Dekkers argues that it seems the majority of writers hold the opinion that the period will start to run the moment the latent defect is discovered or should reasonably have been discovered.⁶⁶⁴

In determining the short period of time factors such as the nature of the goods, the nature of the defect and the use of the goods will be taken into account.⁶⁶⁵

Dekkers states that a provision in a sale where parties agree on the period in which the buyer may institute his remedies is valid and not against public policy.⁶⁶⁶

On the one hand an agreement with regard to the period in which the buyer may institute his remedies will bring more certainty to the unsure position in terms of the Code and will force a buyer to properly use and examine the goods bought in order to discover possible latent defects.⁶⁶⁷

If, on the other hand, a seller expressly guarantees the absence of certain defects the period of time in which to institute remedies becomes irrelevant.⁶⁶⁸ Even if the latent defect (which was expressly guaranteed not to be present) is discovered by the buyer after a very long period of time, the buyer may still institute his remedies.⁶⁶⁹

2.3.4 Liability of the professional seller (“beroepsverkoper”)

A professional seller is the manufacturer or merchant seller of goods.⁶⁷⁰ Because the professional seller is in a unique position to detect latent defects he will be liable for such defects should they arise after a sale (unless the professional seller can prove that the buyer had knowledge of the specific defect at the time of the sale).⁶⁷¹

⁶⁶² Dekkers 491.

⁶⁶³ *Ibid.*

⁶⁶⁴ *Ibid.*

⁶⁶⁵ Cass 23 Maart 1984 *Arr Cas 1983-1984*, nr 424.

⁶⁶⁶ Dekkers 492.

⁶⁶⁷ *Ibid.*

⁶⁶⁸ *Ibid.*

⁶⁶⁹ *Idem* 492-493.

⁶⁷⁰ *Idem* 493. See Claeyns & Van Strydonck 312 where the writers state that the Civil Code does not contain any provision regulating professional sellers.

⁶⁷¹ *Idem* 494. Cass. 19 September 1997 *Arr. Cass.* 1997 nr. 362; Cass 18 Oktober 2001, *Arr. Cass.* 2001, nr. 556.

In the case of a manufacturer all necessary measures should be taken to detect any latent defect in the goods prior to conclusion of the contract.⁶⁷² Where this is not done by the manufacturer, he will be liable for all damages incurred by the buyer.⁶⁷³ The manufacturer is assumed to have expert knowledge of the thing sold.⁶⁷⁴

Case law has shifted the onus of proof from the buyer to the seller in this regard.⁶⁷⁵ There is a rebuttable presumption against a professional seller that where latent defects are discovered by the buyer after conclusion of the contract, the professional seller will be liable.⁶⁷⁶ The onus is therefore on the seller to prove that despite the latent defect, he acted in good faith.⁶⁷⁷ *Claeys & Van Strydonck* refers to *Pothier*⁶⁷⁸ and the warranty that a merchant seller gives to use the skills of his art to reinforce the liability of professional sellers in this regard.

In the case of a merchant seller the measure of liability is not as stringent as in the case of a manufacturer.⁶⁷⁹ The reason being that the merchant seller cannot be expected to have the same first-hand knowledge as would the manufacturer.⁶⁸⁰

Claeys & Van Strydonck state that the general view amongst legal writers as well as the courts are that a professional seller may not limit or exclude his liability for latent defects.⁶⁸¹ The professional seller may limit the time period in which a buyer may institute a claim without excluding the remedy itself.⁶⁸² The professional seller will also not be liable where a latent defect was brought to the attention of the buyer during the sale.⁶⁸³

⁶⁷² *Dekkers* 494 fn 127.

⁶⁷³ *Ibid.*

⁶⁷⁴ *Ibid.* See also Cass. 18 Oktober 2001, *Arr. Cass.* 2001, nr. 556.

⁶⁷⁵ *Dekkers* 494.

⁶⁷⁶ *Ibid.*

⁶⁷⁷ *Ibid.* This will be for example where the manufacturer succeeds in proving that he did everything in his power to detect all possible latent defects.

⁶⁷⁸ *Idem* 313.

⁶⁷⁹ *Idem* 494-495.

⁶⁸⁰ Cass. 19 September 1997 *Arr. Cass.* 1997 nr. 362.

⁶⁸¹ *Claeys & Van Strydonck* 309.

⁶⁸² *Idem* fn 2.

⁶⁸³ *Ibid.*

Toussaint & Verstrepen⁶⁸⁴ discuss the three duties that have been imposed on sellers and more particularly professional sellers in general by Belgian law. The three duties are the duties regarding competence, advice and warranty.⁶⁸⁵

The competence duty provides that the manufacturer or the professional seller must ensure that the product manufactured or the product sold to a buyer is not affected by hidden defects. The professional seller and the manufacturer have a duty to take the necessary steps to detect all possible defects and ensure the buyer that a proper use of the product is possible.⁶⁸⁶

The information duty is based on article 1645 of the Civil Code. According to this article, if the seller was aware of the defect in the product and did not inform the buyer, the buyer is entitled to full compensation.⁶⁸⁷

The warranty duty will be enforceable where the seller has given an express warranty in the agreement (or has not excluded the warranty by way of agreement).⁶⁸⁸ The buyer may rescind the sale and recover the purchase price or request a price reduction and keep the product.⁶⁸⁹

2.4 Warranty for defects in terms of consumer sales

2.4.1 General

Articles 1649*bis* to 1649*octies* of the Civil Code regulate consumer sale agreements.

As discussed earlier in this thesis,⁶⁹⁰ the two common law duties of the seller (duty of delivery and the warranty against latent defects) has been combined into a single duty being that the goods must be delivered in accordance with and in conformity with the agreement.⁶⁹¹

Article 1649*ter* § 1 of the Civil Code sets out the criteria (“de cummulative overeenstemmingscriteriën”)⁶⁹² to be followed to determine whether or not goods were

⁶⁸⁴ 87.

⁶⁸⁵ *Ibid.*

⁶⁸⁶ *Ibid.*

⁶⁸⁷ *Ibid.*

⁶⁸⁸ *Ibid.*

⁶⁸⁹ A clear confirmation of a 1644 of the Civil Code.

⁶⁹⁰ See chapter 9 Part E 2.2.1.1 & 2.3.1.

⁶⁹¹ Peeters 2005 443. See also Claeys & Van Strydonck 316; Tilleman & Verbeke (2009) 37-38.

⁶⁹² Tilleman & Verbeke (2009) 39.

delivered in conformity with the agreement. The first criteria, is a conformation of the common law duty to deliver,⁶⁹³ whereas the rest of the criteria substitute the common law warranty against latent defects.⁶⁹⁴

There is a rebuttable presumption in terms of article 1649*ter* that goods sold in terms of a consumer agreement will conform to the agreement.⁶⁹⁵

Tilleman & Verbeke discuss case law to illustrate the problem regarding the fragmented character of consumer legislation.⁶⁹⁶ *In casu*⁶⁹⁷ the buyer of a second-hand motor vehicle based his claim of rescission on the right to rescission in terms of the common law of sale as well as the right to rescission as provided for in terms of consumer legislation. The reason being that the buyer was uncertain as to which regime (the common law position or the position in terms of consumers) where applicable.⁶⁹⁸

The goods must in general conform to the agreement between the parties but must also in particular comply with the conformity criteria provided for in terms of article 1649*ter* of the Civil Code.⁶⁹⁹

2.4.2 Liability for defects in consumer sales (defects in conformity with the agreement). Dekkers⁷⁰⁰ explains that sellers will only be liable if the five following requirements are met:

- a. the consumer goods do not conform to the agreement;
- b. the defect in conformity to the agreement existed at the time of delivery thereof;
- c. the defect manifested within two years from date of delivery (also referred to as the guarantee period);
- d. the seller is informed of the defect within the prescribed period of manifestation (two years for normal consumer goods and one year in the case of second-hand goods); and

⁶⁹³ *Idem* 40; Dekkers 548-549.

⁶⁹⁴ *Ibid.*

⁶⁹⁵ See also Peeters 2005 447.

⁶⁹⁶ Tilleman & Verbeke (2009) 38.

⁶⁹⁷ Bergen 20 April 2007, *J.L.M.B* 2008, 1178.

⁶⁹⁸ *Ibid.*

⁶⁹⁹ Dekkers 548.

⁷⁰⁰ 547-548.

- e. a claim must be brought within the prescribed period.

2.4.2.1 “Conformity criteria”

A product has to answer to the “conformity criteria” governed by article 1649*ter* of the Civil Code.⁷⁰¹

The onus is on the consumer to prove that at least one of the conformity criteria has not been complied with.⁷⁰² It may be impossible for the seller to comply with some of the criteria (because of public regulation for example).⁷⁰³ In such instances only the relevant criteria will apply.⁷⁰⁴

Goods are presumed to be in conformity with the agreement if:⁷⁰⁵

- a. it corresponds with the description given by the seller and presents the quality of the goods presented by the seller as a sample or model to the consumer;⁷⁰⁶
- b. the consumer informs the seller of the specific use of the goods at the time of the conclusion of the agreement and the seller accepts;
- c. goods are fit for the uses to which goods of the same type are usually used for; and
- d. it presents the quality of goods of the same type, a quality which the consumer may reasonably expect, taking into account the nature of the goods and eventually the public declaration made by a professional seller, for instance through publicity or labelling.⁷⁰⁷

According to Tilleman & Verbeke the first criterion is nothing new to Belgian law.⁷⁰⁸ It is identical to the common law requirement with regard to delivery of goods as agreed

⁷⁰¹ Toussaint & Verstrepen 88.

⁷⁰² Dekkers 548.

⁷⁰³ *Ibid.*

⁷⁰⁴ *Ibid.*

⁷⁰⁵ *Idem* 548-549. See also Toussaint & Verstrepen 87-88.

⁷⁰⁶ A professional seller has a duty in terms of article 4 of the WMPC 2010 to inquire the specific use the consumer intends for the goods.

⁷⁰⁷ Dekkers 459 makes the important point that a seller not only stands in for his own public statements but also for those of the manufacturer.

⁷⁰⁸ Tilleman & Verbeke (2009) 40.

upon.⁷⁰⁹ The second and third criteria are similar to the provisions in terms of common law.⁷¹⁰ The fourth criterion regarding what a consumer may reasonably expect seems broad at first glance but the nature of the goods and the public declarations made by the seller will limit the interpretation thereof.⁷¹¹

2.4.2.2 Rebuttable presumption regarding the existence of the defect

Article 1649*quater* § 4 of the Civil Code provides a rebuttable presumption that where a defect in the goods are discovered within six months after delivery, the defect existed at time of conclusion of the contract. After six months the consumer has to prove that the defect existed at time of delivery.⁷¹²

2.4.3 Distinguish between guarantee period, reporting period and prescription period

The period of guarantee for defects in conformity to the agreement is two years from date of delivery. This means that the defect has to manifest within two years from delivery for the consumer to be protected under consumer legislation.⁷¹³ In the case of second-hand goods the parties may agree on a shorter period but it may not be less than one year.⁷¹⁴ The guarantee period is suspended where goods are being repaired or replaced or where the parties are in the process of negotiations with the purpose of a possible settlement.⁷¹⁵ According to Peeters a consumer may still rely on a commercial guarantee if such a period is included in the commercial guarantee.⁷¹⁶

The reporting period (“meldingstermyn”) refers to the period in which a consumer is obliged to report the defect to the seller.⁷¹⁷ There is no obligation on the parties to include such a period in the consumer agreement but if it is to be included, it may not be less than two months from the date that the defect is discovered.⁷¹⁸

⁷⁰⁹ *Ibid.*

⁷¹⁰ *Ibid.*

⁷¹¹ *Ibid.* See also Van Oevelen 133-134.

⁷¹² Dekkers 550.

⁷¹³ A 1649*quater* § 1 Civil Code.

⁷¹⁴ *Ibid.*

⁷¹⁵ Dekkers 551.

⁷¹⁶ Peeters 2005 451.

⁷¹⁷ Dekkers 551.

⁷¹⁸ A 1649*quater* § 2 Civil Code.

The prescription period is the maximum period in which the consumer has to institute action against the seller for a defect. The consumer must institute action against the seller within one year after the discovery of the defect.⁷¹⁹

2.4.4 Exclusion of warranty

Article 1649*octies* of the Civil Code provides that any provision in a consumer sale agreement which purports to limit or exclude any rights of the consumer in terms of the applicable legislation is void.⁷²⁰

Article 10 § 1 of Act 1991 provides that the liability of a manufacturer may not be excluded by way of agreement.

The provisions of article 74° 14 of the WMPC 2010 confirms the legal position that the warranty regarding defects in the goods may not be excluded. The article states that in contracts concluded between a business and a consumer, the terms and conditions or combinations of terms and conditions shall be unfair in all circumstances if they have the object of deleting or reducing the statutory guarantee in respect of hidden defects, provided for under articles 1641 to 1649 of the Civil Code, or the statutory obligation to deliver goods in conformity with the contract, provided for under article 1649 of the Civil Code.

Where uncertainty exists regarding a written consumer agreement, article 40 § 2 of the WMPC 2010 provides that an interpretation most beneficial to the consumer should be followed.

Despite the above legislative provisions confirming that the warranty may not be excluded, there is however one situation that provides interpretational issues. Article 1649*ter* § 3 of the Civil Code provides that the conformity criteria will not apply to goods if the consumer was aware of the defect at the time of conclusion of the contract or should reasonably have been aware thereof.

Based on the provisions of article 1649*ter* § 3 of the Civil Code, Samoy argues that liability for defects may be excluded where the consumer is informed of the defect (or non-conformity to the agreement) at the time of conclusion of the contract (or should

⁷¹⁹ A 1649*quater* § 3 Civil Code.

⁷²⁰ See also Samoy 261; Tilleman & Verbeke (2009) 35.

reasonably have been aware thereof) and still wants to continue with the agreement.⁷²¹ The writer argues that the consumer may choose to waive his rights where he discovers the defect and so informs the seller.⁷²² Samoy warns however that this does not constitute a complete exclusion of the seller's liability.⁷²³ Van Oevelen states that this is logical because the buyer knew or reasonably should have known of the defect and agrees to buy it anyway.⁷²⁴ The goods technically do comply with the agreement in this instance.⁷²⁵ The writer compares this to the common law position in terms of article 1642 of the Civil Code where the consumer (buyer) buys defective goods that are obviously defective and in plain sight of the buyer.⁷²⁶

The test applied to determine whether or not the consumer reasonably should have known of the defect is that of a normal, careful and reasonable consumer (buyer).⁷²⁷

The consumer is then not compelled to enforce the rights given to him by law.⁷²⁸ The consumer may for example choose a reduction in the purchase price for a future sale between himself and the seller.⁷²⁹ Samoy nevertheless warns that such a situation must be treated with great caution.⁷³⁰ A seemingly valid waiver by the consumer of his consumer rights in terms of consumer legislation in choosing rights in terms of the common law of sale instead may be due to his ignorance rather than an informed choice.⁷³¹ Steennot follows the same line of reasoning and argues that a waiver of a right is only possible where the consumer is properly informed of all the rights available to him (including his rights in terms of consumer legislation).⁷³²

Another point of contention is discussed by Tilleman & Verbeke.⁷³³ Because of the compulsory nature of the conformity criteria, parties are not allowed to exclude one

⁷²¹ Samoy (2005) 122.

⁷²² *Ibid.*

⁷²³ *Ibid.*

⁷²⁴ Van Oevelen 135.

⁷²⁵ *Ibid.*

⁷²⁶ *Ibid.* This would seem to be the classification of patent instead of latent defects.

⁷²⁷ *Ibid.*

⁷²⁸ *Ibid.* See also Tilleman & Verebeke (2009) 35.

⁷²⁹ *Ibid.*

⁷³⁰ *Idem* 122-123.

⁷³¹ *Ibid.*

⁷³² Steennot (2006) 254-255.

⁷³³ 44-45.

or more of the criteria by way of general wording in the contract.⁷³⁴ There is also a presumption in terms of the EU Consumer Sales Directive that the conformity criteria will not affect the parties' freedom of contract.⁷³⁵ Goods will therefore conform to the agreement where it conforms both to the particular condition the parties agreed upon as well as the criteria in terms of article 1649*ter* § 1 of the Civil Code.⁷³⁶ The writers argue that parties may deviate from the conformity criteria by agreeing to sell goods that still conform to the agreement even if those goods are no longer suitable for ordinary use. Relevant examples are where consumers buy goods only for decorative or collection purposes or where only component parts of the goods want to be salvaged.⁷³⁷ "Defective" goods may therefore be the subject of a consumer sale provided the defect was brought to the attention of the consumer at the time of conclusion and the consumer consented to buy the goods in this condition.⁷³⁸

The writers agree with Van Oevelen⁷³⁹ that such an agreement between the parties falls under the concept of a content defining clause ("inhoudbepalende beding")⁷⁴⁰ and is valid since its only purpose is to give content to the primary agreement.⁷⁴¹ If however, the result of the clause is the exclusion or limitation of the seller's liability, the content defining clause will be reclassified as an exemption clause which is prohibited in terms of article 1649*octies* of the Civil Code.⁷⁴² In the latter instance, the court will most likely find the clause to be a "disguised" exemption clause in which the seller is attempting to avoid or reduce his warranty duties and declare such a clause void.⁷⁴³

Tilleman & Verbeke argue that there will be many borderline cases in practice and that one finds oneself in a grey zone ("men bevindt zich hier ongetwijfeld in een grijze zone").⁷⁴⁴ A clause that for instance brings under the attention of the consumer

⁷³⁴ *Idem* 44.

⁷³⁵ *Ibid.*

⁷³⁶ *Ibid.*

⁷³⁷ *Ibid.*

⁷³⁸ *Ibid.*

⁷³⁹ 135.

⁷⁴⁰ Tilleman & Verbeke (2009) 44.

⁷⁴¹ *Ibid.*

⁷⁴² *Ibid.* See also Van Oevelen 135-136.

⁷⁴³ *Ibid.*

⁷⁴⁴ *Idem* 45.

that the goods bought might slightly differ in colour than the sample is argued by the writers to be valid.⁷⁴⁵ An even more problematic clause might be the standard clause contained in the sale of natural products such as fabrics with the possible non-conformity to the sample.⁷⁴⁶

2.4.5 Liability of professional sellers

The question may be asked whether the implementation of consumer provisions have amended the position with regard to professional sellers in the case of consumer sales. The question is answered in the affirmative. The position is substantially amended.⁷⁴⁷

Claeys & Van Strydonck⁷⁴⁸ apply summarises the most significant changes. Firstly the agreement of sale must fall within the scope of a consumer sale in terms of the Civil Code.⁷⁴⁹ The relevant provisions no longer refer to a warranty against latent defects. A defect is regarded as a defect in relation to the conformity of the agreement that existed at time of delivery and manifests within two years thereafter (one year if second-hand goods were sold).⁷⁵⁰ The remedies available to the buyer (consumer) also changed. There is now a hierarchy of remedies available to the consumer starting with a claim for the repair or replacement of the goods, thereafter rescission or a claim for a reduction in the purchase price. Together with these remedies the consumer will also have a claim for damages and whether the professional seller acted in good or bad faith has become irrelevant.⁷⁵¹ Any provision in the consumer sale where the claim for damages by the consumer is excluded is void.⁷⁵² This is also confirmed by article 74 of the WMPC 2010.

Samoy explains that the professional seller will be liable for a period of two years from date of delivery in terms of consumer legislation for defective goods and after two years liable only for latent defects in terms of the common law of sale.⁷⁵³

⁷⁴⁵ *Ibid.*

⁷⁴⁶ *Ibid.*

⁷⁴⁷ Claeys & Van Strydonck 316-317.

⁷⁴⁸ *Idem* 316-318.

⁷⁴⁹ A 1649*bis*.

⁷⁵⁰ A 1649*quarter* Civil Code.

⁷⁵¹ Claeys & Van Strydonck 317.

⁷⁵² 1649*octies* Civil Code.

⁷⁵³ Samoy 260.

Claeys & Van Strydonck further argue that the wording of article 1649*sexies* of the Civil Code has the effect that both the manufacturer and the merchant seller will be jointly and severally liable for a defect in the conformity to the agreement.⁷⁵⁴

Steennot discusses the responsibility of professional sellers to provide accurate and correct information in the marketing of their products.⁷⁵⁵ The writer refers in particular to article 4 of the WMPC 2010 and the liability of professional sellers to consumer in this regard.⁷⁵⁶

2.4.6 Consumer remedies

Consumer remedies in the Civil Code conform to the remedies in terms of the EU Consumer Sales Directive. There is a hierarchy in which consumers may institute the consumer remedies. Firstly in terms of article 1649*quinquies* the consumer can choose repair or replacement of the goods free of charge⁷⁵⁷ as well as damages.⁷⁵⁸ The consumer has a duty however to limit the damages. The duty is on the seller to prove that it would be unreasonable or impossible to repair or replace the defective product. Repair means to bring defective goods in conformity with the agreement. The consumer will lose his right to free repair or replacement if it is not instituted within a reasonable time.

The choice of repair or replacement according the Peeters, is part of the *naturalia* of the consumer agreement.⁷⁵⁹ The consumer must institute this remedy within a reasonable time and it may not be a serious burden on the consumer. The possible scapegoat where the seller may refuse the remedy of repair or replacement would be where the repair or replacement of the goods is unnecessarily harsh on the seller compared to other remedies. The onus will be on the seller to prove and factors such as the value of the goods without the defect, the seriousness of the defect and the availability of alternative goods will be taken into account.⁷⁶⁰

⁷⁵⁴ Claeys & Van Strydonck 317-318.

⁷⁵⁵ Steennot 530-531. A comprehensive discussion of this particular subject falls outside the scope of this thesis.

⁷⁵⁶ *Ibid.*

⁷⁵⁷ Dekkers 553 gives examples of charges such as labour, the cost of shipment and repair parts to be borne by the seller.

⁷⁵⁸ *Idem* 552.

⁷⁵⁹ Peeters 2005 450.

⁷⁶⁰ *Idem* 451.

Only after repair or replacement is no longer possible can the consumer claim a reduction in the purchase price or rescission where the defect is of a serious nature. The use of the goods by the consumer will be taken into account with the latter two remedies.

In the case of a claim for the reduction in the purchase price, the amount will be determined taking into account the non-conformity of the goods and the effect thereof on the value of the goods.⁷⁶¹ Article 1644 of the Code provides that such a reduction in the purchase price must be determined by a specialist (“deskundigen”). This will cause problems in practice as most consumer’s will not have the financial means to make use of the services of a specialist. It would also not be practical to make use of a specialist to determine a reduction in the purchase price where the goods itself were not expensive to start with.

2.4.7 Second-hand goods

Peeters discusses the case of second-hands goods. The guarantee period may be reduced to a minimum of one year or may be increased to a maximum of two. The question asked by the writer is what would the case be if a defect was discovered after the reduced one year-period but before two years have lapsed. The consumer still only had the first year in which to claim based on the defect and is not allowed to “wait” until the full two years has lapsed before claiming based on the warranty against latent defects. Peeters criticises this approach and argues that such a result would defeat the purpose of the incorporation.⁷⁶²

Peeters is of the opinion that the implementation of the EU Consumer Sales Directive has practical problems with regard to second-hand goods.⁷⁶³ He argues that second-hand goods may be sold without a guarantee but that the EU Directive still compels sellers to sell second-hand goods free from defects for at least one year.⁷⁶⁴

⁷⁶¹ Tilleman (2012) 629.

⁷⁶² Peeters 2005 550.

⁷⁶³ Peeters 2001 551.

⁷⁶⁴ *Ibid.* Defects as defined in terms of the EU Consumer Sales Directive. Peeters describes the duty of the seller as follows: “De verkopers dienen er bijgevolg op toe te zien dat deze goederen minstens een jaar gebreksvrij zullen werken, teneinde geen boze consumenten over de vloer te krijgen.”

2.4.8 Revival of the common law warranty against latent defects in consumer sales

Should the consumer discover a defect in the goods after two years from date of delivery and the defect is latent, the consumer will only be able to use the common law warranty against latent defects and its particular remedies as provided for in the Civil Code articles 1641 to 1648.⁷⁶⁵ Where a defect therefore manifests in the goods after the two years (or one year if it is second-hand goods) the consumer may still have the protection of the common law warranty against latent defects.⁷⁶⁶ This is confirmed by article 1649*quater* § 5 of the Civil Code.⁷⁶⁷

Where a commercial guarantee is for a period of more than two years, it goes without saying that such a guarantee will take precedence over the common law warranty against latent defects until such time as the commercial guarantee has lapsed.⁷⁶⁸

2.4.9 Legislative versus commercial guarantees

Peeters distinguishes between “wettelijke guarantees” (where express consensus is not a requirement) and “commerciele guarantees” (where express consensus is a requirement and the agreement between the parties pertaining to particular goods will serve as a guideline).⁷⁶⁹

The legislative guarantee with regard to the quality of the goods is contained in article 1649*septies*.⁷⁷⁰ The guarantee is subject to the provisions and procedures contained in the same article and no specific contractual provision needs to be present in the consumer sale for the legislative guarantee to be applicable. The legislative guarantee is an implied warranty. It provides that where an “end-seller” (“eindverkoper”) is held liable, the end-seller will have a right of recourse against the manufacturer or any other person in the supply chain, provided the defect was a result of an act or omission of the manufacturer or somebody else higher up in the supply chain.⁷⁷¹ Although the end-seller has a right of recourse against for example the distributor or manufacturer,

⁷⁶⁵ *Idem* 451.

⁷⁶⁶ *Idem* 551.

⁷⁶⁷ See also Samoy 260.

⁷⁶⁸ Van Oevelen 154.

⁷⁶⁹ *Ibid.*

⁷⁷⁰ The guarantee that the goods conform to the agreement and that no defect with regard to non-conformity is present.

⁷⁷¹ Dekkers 553.

Peeters correctly argues that the buyer would be in a very bad position where the end-seller disappears (“verkoper in de tussentijd met de noorderzon verdwijnt”).⁷⁷²

The commercial guarantee is enforceable against all sellers in the supply chain having bearing on the guarantee given.⁷⁷³ The guarantee is given on a voluntary basis and in practice would also include the so called “factory guarantee”, certificate of guarantee or warranty and guarantees made as part of the marketing or packaging of the goods. The commercial guarantee is additional to the legislative guarantee.⁷⁷⁴ According to Peeters the commercial guarantee will either complete or extend the protection of consumers as provided for by the legislative guarantee.⁷⁷⁵

2.5 Product liability

2.5.1 General

The definitions of “defect” and “safe products” have already been discussed earlier in this chapter.⁷⁷⁶ Dekkers explains that the common law position regarding liability for latent defects is no longer sufficient in modern times taking into account the technical, sophisticated industrial development in product manufacturing, distribution and sale.⁷⁷⁷ Though courts have assisted in the development of liability for defective products to keep up with modern times it remained insufficient.⁷⁷⁸

Articles 1382 to 1386 of the Civil Code set out the general principles of the tort regime. According to article 1382, “[a]ny act whatever of man which causes damage to another obliges him by whose fault it occurred to make reparation”. Under this article the buyer or claimant has to prove fault, damage and a causal link between the fault and the damage.⁷⁷⁹ The basis of the claim is an obligation of safety of the goods. Negligence is included because article 1383 provides that each party is liable for the damage which he causes not only by his own act but also by his negligence or

⁷⁷² 2005 445.

⁷⁷³ Dekkers 553-554.

⁷⁷⁴ Peeters 2005 445.

⁷⁷⁵ *Idem* 445-446.

⁷⁷⁶ See Part E 2.2.2 above.

⁷⁷⁷ Dekkers 554.

⁷⁷⁸ *Ibid* where the writers give the example of case law shifting the onus of proof in the case of professional sellers from the buyer to the professional seller. See also Part E 2.4.3 above.

⁷⁷⁹ Similar to the elements of a delict in South African law.

imprudence. The liability is extended by article 1384 of the Civil Code to the acts of persons for whom one is responsible for or by things that one has in his keeping. Dekkers argues however that this form of liability provided insufficient protection, particularly with regards to third person not directly linked to the contract of sale.⁷⁸⁰

Act 1991 introduced a new product liability regime into Belgian law for damages caused by unsafe goods. There is no longer a distinction between the legal position of the buyer and a third party who also suffered damages.⁷⁸¹

Protection is further reinforced with the introduction of the WMPC 2010 which regulates the marketing practices of professional sellers as well as their conduct towards consumers.

Belgian legislation imposes the same strict liability on producers and importers for harm caused by defective products as EU legislation.⁷⁸²

A claimant has three years from the date on which he became aware or should have become aware of the damages, the defect and the identity of the producer in which to institute action.⁷⁸³ Aside from actions already instituted against the manufacturer, a manufacturer will only be liable for damages caused by products for the first ten years from the date the products were put into circulation.⁷⁸⁴

Persons liable in terms of product liability law in Belgium may not exclude their liability by agreement.⁷⁸⁵ The amount of damages claimed may be limited where damages were also due to the fault of the claimant.⁷⁸⁶

It is important to note that a product liability claim is in addition to any other claim authorised by law.⁷⁸⁷ This means that a consumer may also claim in terms of consumer legislation for defective products that did not conform to the agreement.⁷⁸⁸

⁷⁸⁰ Dekkers 554.

⁷⁸¹ *Ibid.*

⁷⁸² Toussaint & Verstrepen 87. For a comprehensive discussion on the influence of the EU Product Liability Directive on Belgian law see Bocken 358-361.

⁷⁸³ A 12 § 2 Act 1991.

⁷⁸⁴ A 12 § 2 Act 1991. See also Dekkers 557.

⁷⁸⁵ A 10 § 2 Act 1991. See also Dekkers 557.

⁷⁸⁶ *Ibid.*

⁷⁸⁷ *Ibid.*

⁷⁸⁸ A 1649^{ter} – 1649^{octies} Civil Code.

The following will be taken into account to determine the safety of a product in terms of article 1 of Act 1994:⁷⁸⁹

- a. The characteristics of the product, including its composition, packaging, instructions for assembly and, where applicable, for installation and maintenance;
- b. The effect on other products, where it is reasonably foreseeable that the product in combination with other products will be used;
- c. The presentation of the product, the labelling, any warnings and instructions for its use and disposal and any other indication or information regarding the product and
- d. The categories of users when using the product and the seriousness of the risk, especially children and the elderly.

2.5.2 Who may be held liable?

In summary, the buyer of a defective product can bring an action against his immediate seller as well as against the previous seller, importer or manufacturer (producer) provided that all parties are bound in a chain of contracts of sale.⁷⁹⁰

According to article 1 of Act 1991, the producer is responsible for the damage caused by the defect in the product. Articles 3 and 4 of the Act define the notion of “producer” by distinguishing between the real producer, the apparent producer and the presumed producer.⁷⁹¹ The court has held that a producer who fails to carry out a normal step in the production process and delivers an untransformed product does not for this reason cease to be a producer.⁷⁹²

The real producer is the one who actually manufactures the product. Article 3 of the Act defines the “producer” as the manufacturer of a finished product, the manufacturer of a component part of a finished product, or the producer of any raw material. According to Toussaint & Verstrepen this definition is broad.⁷⁹³ The writers give the example of a plane crash due to the defect of the metal used in the

⁷⁸⁹ Act governing products and services safety.

⁷⁹⁰ Bocken 371-373.

⁷⁹¹ See also Toussaint & Verstrepen 88.

⁷⁹² Court de Cassatie (2007) NjW 460 (6 April 2006).

⁷⁹³ *Ibid.*

manufacturing of screw bolts used for the engine. The steel producer, the screw bolts producer, the engine producer and the plane producer will all be liable in terms of article 3.⁷⁹⁴

The apparent producer is any person presenting himself as a manufacturer or producer by affecting on the product his name, trademark or other distinguishing feature.⁷⁹⁵ Toussaint & Verstrepen argue that the seller who affects his name on a product for marketing reasons does not present himself as a “producer”.⁷⁹⁶ However, supermarkets selling products which they have asked smaller companies to manufacture and which are commercialised under their own brands, must be considered as “producers” in the meaning of article 3.⁷⁹⁷

According to article 4 § 2 of Act 1991, the supplier is deemed to be a producer when the producer of the product cannot be identified unless he (the supplier) informs the injured person, within a reasonable time, of the identity of the producer or of the person who has supplied him with the product.

According to article 4 § 1⁷⁹⁸, any person who imports a product into the European Community shall be responsible as a producer. Toussaint & Verstrepen argue that this article protects the consumer who will not be obliged to bring a case against a producer established outside of the Community.⁷⁹⁹ If it is impossible to determine the identity of the producer, the injured party is allowed to act according to article 4 § 2 of Act 1991, against the supplier. If the injured party cannot identify the producer or the supplier, he has no right of action.⁸⁰⁰

2.5.3 Professional sellers

Legislation regulating product liability also has an effect on the common law liability of professional sellers.⁸⁰¹ A manufacturer will be liable in terms of article 1 of Act 1991 for

⁷⁹⁴ *Ibid.*

⁷⁹⁵ A 3 Act 1991.

⁷⁹⁶ Toussaint & Verstrepen 88.

⁷⁹⁷ *Ibid.*

⁷⁹⁸ Act 1991.

⁷⁹⁹ Toussaint & Verstrepen 88.

⁸⁰⁰ *Idem* 89.

⁸⁰¹ Claeys & Van Strydonck 318.

any damages caused by a defect in his product. Such liability may not be contractually excluded.

2.5.4 Products

Article 15 of Act 1991 is applicable to all moveable corporeal goods (even if such goods eventually form part of immovable property such as windows to a house). Electricity is incorporated in the application of Act 1991 (contrary to the provisions regarding quality liability articles 1649*ter* to 1649*octies* of the Civil Code).⁸⁰²

2.5.5 Damages

Article 11 of Act 1991 defines “damage” as damage caused to a natural person including pain and suffering, damage to property (if used for private purposes) except the damage to the product itself. It covers in particular bodily injuries, loss of income and esthetical damages. Damages to property are subject to a lower threshold of €500.⁸⁰³ This means that any damages over €500 may be claimed in terms of Act 1991 but the first €500 must be paid by the consumer himself.⁸⁰⁴

As a general rule, the injured person bears the onus of proof to prove the defect, the damage caused by the defect and the causal link between the defect and the damage.⁸⁰⁵ The exception is in the case of professional sellers. The professional seller will be liable for the damages suffered by the claimant if the existence of the defect is established unless the seller can prove that the defect could not be detected.⁸⁰⁶

2.5.6 Defences

Article 8 of Act 1991 provides six defences for defective product liability. The producer must prove one of the following:

- a. the producer did not put the product into circulation,⁸⁰⁷

⁸⁰² See also Bocken 366-370.

⁸⁰³ Dekkers 557. (£275 in Scotland) no such provision in South Africa.

⁸⁰⁴ *Ibid.* See also Bocken 363-364.

⁸⁰⁵ A 7 Act 1991. See also Bocken 364-366.

⁸⁰⁶ Toussaint & Verstrepen 89. See also Part E 2.4.3 above.

⁸⁰⁷ *Idem* 90, for example the product had been stolen. See also Bocken 374-376.

- b. having regards to the circumstances, the defect which caused the damage did not exist at the time when the product was put into circulation by the producer, or the defect came into being afterwards;⁸⁰⁸
- c. the product was neither manufactured for sale or for any form of distribution for the economic purpose of the producer, nor manufactured or distributed by the producer in the course of his business;⁸⁰⁹
- d. the defect is due to compliance of the product with mandatory regulations issued by the public authorities;⁸¹⁰
- e. the state of scientific and technical knowledge at the time when the producer put the product into circulation was not such as to enable the existence of the defect to be discovered;⁸¹¹
- f. for the producer of a component or for the producer of a raw material, when the defect is attributable to the design of the product in which the component or the raw material has been built-in or to the instructions given by the producer of this product.

F. CONCLUSION AND RECOMMENDATIONS

1. Definition of defect

1.1 *Influence of CPA on common law definition*

As discussed earlier⁸¹² the common law definition of a latent defect has been confirmed by the CPA (section 53) but has also been developed and extended. Subsection 55(5)(a) (it is irrelevant whether the defect is latent or patent) should be included as part of the definition for greater certainty and a legislative amended is recommended.

⁸⁰⁸ *Ibid*: “.....under the cover of granting to the producer a defence, article 8, b, of the Product Liability Act reverses the burden of proof. Indeed the liability of the seller towards the buyer and third parties only covers the risk existing at the moment of delivery. It is in principle up to the injured party to establish the existence, at the moment of delivery, of the latent defect alleged. The Act derogates to this principle by obliging the producer to prove that the defect came into being after he was put into circulation.”

⁸⁰⁹ *Idem* 88. This provision exempts, for example, a person who donates blood as this was not manufactured for sale or for any kind of distribution with an economic purpose.

⁸¹⁰ Toussaint & Verstrepen 90 argue that there is no fault in complying with an act ordered by the law or a public authority but the exemption nevertheless does not apply if the public authority intervention is limited to mere recommendations or authorisations. See also Bocken 376-378.

⁸¹¹ Also referred to as the so-called “development risk” the details of which falls outside the scope of this thesis.

⁸¹² See Part D 1 above.

1.2 Recommendations taking into account comparative discussion

In Scotland and Belgium a distinction is made between the definition of a defect in terms of the quality of the product itself⁸¹³ and where the product causes damages (product liability) which focuses more on the safety rather than the quality of the goods.⁸¹⁴

This is contrary to the position in South Africa governed by the CPA. The definition of a defect in section 53 is applicable to the whole of Part H (including both the warranty of quality⁸¹⁵ as well as product liability for defective goods).⁸¹⁶ For this reason the definitions of defects relating to product quality as well as the definition of defects relating to product safety (liability) in Scotland and Belgium must be taken into account for a proper comparison with the South African position.

In Scotland the quality of goods have to be of satisfactory quality and the concept of satisfactory quality contains several elements which have to be looked at individually and certain factors need to be taken into account.⁸¹⁷ A defect in terms of product liability on the other hand is specifically governed by section 3 of the UK CPA 1987. The definition of a defect in terms of section 3 of the UK CPA 1987 only relates to situations where the defective product caused some sort of harm and not defective products and the standard of their quality *per se*.⁸¹⁸ Section 3 of the UK CPA 1987 defines a defect as a defect in a product if the safety of the product is not such as persons generally are entitled to expect; and for those purposes safety, in relation to a product, shall include safety with respect to products comprised in that product and safety in the context of risks or damage to property, as well as in the context of risks of death or personal injury.

In Belgium the common law warranty against latent defects in the case of consumer sales have been substituted by the provisions of articles 1649*bis* to 1649*octies* of the Civil Code. Goods have to conform to the agreement between the seller and the consumer and must comply with the conformity criteria as governed by article 1649*ter* of the Civil Code. However, in terms of product liability article 5 of Act 1991 regards a product as being defective when it is not as safe as a person is

⁸¹³ Scotland: S 14 SOGA; Belgium Arts 1649*bis* – 1649*octies* Civil Code.

⁸¹⁴ Scotland s 3 UK CPA 1987; Belgium: A 12 of Act 1991.

⁸¹⁵ S 55 CPA.

⁸¹⁶ S 61 CPA.

⁸¹⁷ S 14 SOGA. See also Part E 1.2 above.

⁸¹⁸ Ervine 50 & 92-93.

generally entitled to expect taking into account all the surrounding circumstances including the presentation of the product, the normal or reasonably foreseeable use thereof as well as the time when it was put into circulation. A product is not considered to be defective in terms of article 5 simply because a better product was put into circulation. A “safe product” in terms of article 1 of Act 1994 is a product which, under normal or reasonably foreseeable conditions of use including its duration and possible entry into circulation, installation and maintenance requirements, does not present any risk or only the minimum risks compatible with the use of the product and from the perspective of a high level for the health and safety of persons, are considered acceptable.

1.2.1 What a person is reasonably entitled to expect

In Scotland what a reasonable person is entitled to expect is an objective test.⁸¹⁹ A reasonable person is not an expert.⁸²⁰ Ervine argues that section 3 of the UK CPA 1987 is concerned with relative safety.⁸²¹ The reason for this is that there is no such thing as a completely safe product.⁸²² The focus in each case should be whether or not the safety of the product is the degree of safety as persons are generally entitled to expect and in determining the former taking all relevant circumstances into account. Section 3(2) sets out the factors to be taken into account which are the marketing, warning and instructions regarding the goods, the reasonable expectations about the use of the goods and the time of their supply.

In Belgium, due to the existence of different regimes of liability, the definition of a defect varies accordingly. A product will for instance be considered as defective if it is unsuitable for the use for which it is intended,⁸²³ if it does not provide the safety which a person is legitimately entitled to expect,⁸²⁴ it does not conform to certain norms,⁸²⁵ or does not meet consumer expectations concerning safety or presents a risk.⁸²⁶ The

⁸¹⁹ *Ibid.* See also *Jewson Ltd v Boyhan* [2003] EWCA Civ 1030 par 78.

⁸²⁰ *Clegg v Anderson* [2003] 1 All E.R. (Comm) 721 par 73.

⁸²¹ Ervine 93.

⁸²² *Ibid.*

⁸²³ A 1641 Civil Code .

⁸²⁴ A 5 Act 1991.

⁸²⁵ Belgian norms, European standardised norms.

⁸²⁶ A 1 Act 1994 as part of the definition of a “safe product”.

latent defect can be a structural or a functional⁸²⁷ defect. A structural defect can be defined as one that affects the product intrinsically and a functional defect as one that renders the product unfit for its expected purpose.⁸²⁸

It is clear therefore that “what persons are reasonably entitled to expect” in terms of section 53 of the CPA in South Africa, is an objective test and that such a person (consumer) is not an expert. More importantly, the focus when dealing with the implied warranty of quality in terms of section 55 of the CPA is what a reasonable consumer is generally entitled to expect with regards to the *quality*⁸²⁹ of the goods whereas the focus of the definition when dealing with the liability for damages in terms of section 61 is more what consumers are generally entitled to expect with regard to the *safety*⁸³⁰ of the product.

What a consumer is reasonably entitled to expect in the *circumstances*⁸³¹ will always play a very important role and is clearly a critical part of the courts analysis in Scotland⁸³² and Belgium.⁸³³ The marketing of the products, whether or not the product is new or second-hand and the intended use of the goods are all factors to be taken into account as part of the circumstances to determine what a consumer is reasonably entitled to expect. These examples have crystallised during the comparative discussion above.

2. Common law warranty against latent defects, right to safe, good quality goods and the implied warranty of quality (CPA)

In terms of the section 55 read together with section 56 of the CPA, the consumer has a right to safe good quality goods and there is an implied warrant of quality regarding the sale of consumer goods. The CPA provides that a consumer has a right to expect the following from a quality product:

⁸²⁷ Court of appeal of Liege, 14 January 2000, *SA Mondial Auto vs Jourdain and Consorts*.

⁸²⁸ Demarsin 38-39. See also Chritiaens 18.

⁸²⁹ Own emphasis.

⁸³⁰ *Ibid.*

⁸³¹ *Ibid.*

⁸³² See Part E 1.2 above.

⁸³³ See Part E 2.2, 2.4 & 2.7.1.1 above.

- a. that it is reasonably suited for the purposes for which it is generally intended;⁸³⁴
- b. are of good quality, in good working order and free of any (latent or patent)⁸³⁵ defects;⁸³⁶
- c. will be useable and durable for a reasonable period of time, having regard to the use to which they would normally be put and to all surrounding circumstances;⁸³⁷ (The surrounding circumstances include but are not limited to the manner in which the goods are marketed, packaged and displayed; the possible uses of the goods and the time when the goods were produced or supplied).⁸³⁸
- d. comply with any applicable standards in terms of the Standards Act.⁸³⁹

The warranty against latent defects has been amended by the CPA. The warranty is extended to include both latent and patent defects and a heavier duty rests upon a seller who is also a supplier in terms of the Act with regards to the goods sold by him. The provisions of section 55(2) and (3) always have to be taken into account and the warranty of quality is an implied term of every consumer agreement.

2.1 Recommendations taking into account comparative discussion

In Scotland the warranty against defects in consumer sales is given in the form of a warranty that goods are of satisfactory quality and indicates that the goods must meet the standard that a reasonable person would regard as satisfactory, taking into account any description of the goods, the price (if relevant) and all other relevant circumstances. The quality of goods include their state, condition and *inter alia* their fitness for all the purposes for which goods (of the kind in question) are commonly supplied, appearance and finish, freedom from minor defects, safety and durability (at time of delivery).⁸⁴⁰

The common law warranty against latent defects in the case of consumer sales in Belgium have been substituted by the provisions of articles 1649*bis* to 1649*octies* of

⁸³⁴ S 55(2)(a).

⁸³⁵ S 55(5)(a).

⁸³⁶ S 55(2)(b).

⁸³⁷ S 55(2)(c).

⁸³⁸ S 55(4)(a)-(c) CPA.

⁸³⁹ 29 of 1993.

⁸⁴⁰ S 14(2A) and (2B). See Black 191 where all the former requirements are considered to be part of the definition of suitable goods.

the Civil Code. Goods have to conform to the agreement between the seller and the consumer and must comply with the conformity criteria as governed by article 1649^{ter} of the Civil Code

In Belgium, goods are presumed to be in conformity with the agreement if:⁸⁴¹

- a. if it corresponds with the description given by the seller and presents the quality of the goods presented by the seller as a sample or model to the consumer;
- b. the consumer informs the seller of the specific use of the goods at the time of the conclusion of the agreement and the seller accepts;
- c. goods are fit for the uses to which goods of the same type are usually used for;
- d. if it presents the quality of goods of the same type, a quality which the consumer may reasonably expect, taking into account the nature of the goods and eventually the public declaration made by professional sellers, for instance through publicity or labelling.

As seen above⁸⁴² the implied warranty of quality in terms of section 55 of the CPA contains most of the concepts and elements that forms part of the warranty in terms of Scotland and Belgium. It is also clear from the opinions of foreign legal writers as well as the case law from both jurisdictions that the particular circumstances of each case will have an effect on the application of the relevant provisions.⁸⁴³ Scottish law provides some guidance as to interpreting section 55(2) (surrounding circumstances of their supply). Section 14(2A) refers to “other relevant circumstances” which may be taken into account in addition to the price and description. Case law interprets circumstances to be relevant if a reasonable person would regard it as relevant.⁸⁴⁴

⁸⁴¹ A 1649^{ter} Civil Code.

⁸⁴² Part F 1.2.

⁸⁴³ For Scotland see Part E 1.2. For Belgium see Part E

⁸⁴⁴ *Clegg v Anderson* [2003] 1 All E.R. (Comm) 721 par 67.

2.1.1 Onus of proof regarding breach of warranty and existence of defect

In terms of South African common law, the onus is on the buyer to prove that there has been a breach in the seller's warranty and that the defect existed at time of conclusion of the contract.⁸⁴⁵

In terms of the CPA however a consumer only has to prove that the supplier breached the implied warranty of quality.⁸⁴⁶ If the seller however avers that the defect did not exist at time of conclusion of the contract, the consumer will have the evidentiary burden to prove the contrary.⁸⁴⁷ It is therefore recommended that the consumer also prove the existence of the defect at time of conclusion of the contract from the outset as part of his pleadings in the case of a claim against the supplier. Unfortunately the Act is silent on the onus of proof in the case of Part H except to provide in terms of section 117 that the standard of proof is on a balance of probabilities.

In both Scotland⁸⁴⁸ and Belgium⁸⁴⁹ a reverse burden of proof exists where a defect is discovered within six months after delivery of the goods. A rebuttable presumption exists that a defect discovered within six months after delivery, already existed at time of conclusion of the consumer sale. The onus of proof will therefore be on the supplier to prove the contrary.

A recommendation is made that a similar burden of proof is incorporated into the CPA by way of regulation, practice note to Part H or an amendment to the Act itself.

3. Exclusion of warranty

3.1 *Voetstoets sales in terms of the CPA*

The argument for and against the survival of the voetstoets clause in consumer sales have been discussed comprehensively earlier in this chapter.⁸⁵⁰ The argument against the survival of the voetstoets clause is supported and the recommended viewpoint.⁸⁵¹

⁸⁴⁵ See Part B 2.1 above.

⁸⁴⁶ Ss 55 read together with s 56 CPA.

⁸⁴⁷ A discussion of the difference between the onus of proof and the onus of proof for evidentiary purposes falls outside the scope of this thesis. For a comprehensive discussion on the rules of evidence in civil matters see Schmidt & Zeffertt (9) Laws para 800-820.

⁸⁴⁸ S 48A(3) SOGA. See also Part E 1.4.3 above.

⁸⁴⁹ See Part E 2.4.2.2.

⁸⁵⁰ See Part D 6.

⁸⁵¹ See Part D 6.2 above.

Section 2(10) provides that no provision of the Act (such as section 55(6)) may be interpreted so as to preclude a right that a consumer would have in terms of the common law (like the warranty against latent defects). Section 56(4) provides that the implied warranty of quality is in addition to any other warranty in terms of the common law. A fortification of the exclusion of voetstoots sales is also contained in section 51(1)(b)(i) which provides that a supplier must not make a transaction or agreement subject to any term or condition if it directly or indirectly purports to waive or deprive a consumer of a right in terms of the Act. Such a transaction, agreement, provision, term or condition will be void.⁸⁵² Selling goods in terms of a general “umbrella” voetstoots clause is a clear waiver and deprivation of a consumer’s right. Whether a voetstoots clause is worded as a condition or term or if it boils down to a waiver or deprivation, it will still be invalid. The fact that goods should not only be free of any defects but also useable and durable and comply with any publically regulated standard makes the reliance on a voetstoots clause even more difficult.

Section 55(6) can be construed to have more than one meaning. Section 4(3) provides that in such an instance, the Tribunal or court must prefer the meaning that best promotes the spirit and purposes of the Act, and will best improve the realisation and enjoyment of consumer rights. Section 4(4)(a) further provides that any ambiguity that allows for more than one reasonable interpretation of a part of a document is resolved to the benefit of the consumer. This approach is more in line with the purposes of the Act. Goods may no longer be sold “as is” or voetstoots.⁸⁵³

Nothing prevents a supplier (seller) however from selling goods in a particular condition.⁸⁵⁴ (The sale of second-hand goods and goods sold by pawn brokers are good examples). This would mean describing the quality of the goods as well as the defects in detail and also proving that the consumer was informed and accepted goods on that basis. The “loophole” for shrewd suppliers will most likely be to argue that even though the consumer did not expressly accept the goods in that particular condition they did act in a way compatible with accepting the goods.⁸⁵⁵ The supplier still needs to keep a sales

⁸⁵² S 51(3).

⁸⁵³ For a comprehensive discussion see Part D 1.3.3.

⁸⁵⁴ S 55(6).

⁸⁵⁵ S 55(6)(b).

record of the transaction which must also include proof that the consumer was in fact informed and accepted the goods or acted in a way compatible with accepting the goods.⁸⁵⁶

3.2 Recommendations taking into account comparative discussion

Provisions in both Scottish and Belgian law prohibited terms in a consumer sale that exclude or restricts the seller's liability or has the purpose of excluding the implied warranty as to quality.

In Scotland section 20 of UCTA 1977 provides that any term of a contract which purports to exclude or restrict liability for breach of the obligations arising from the seller's implied undertaking as to quality for fitness for a particular purpose in terms of section 14, will be void.

Though the warranty against latent defects could be excluded in terms of the common law in Belgium,⁸⁵⁷ various provisions amended this position in the case of consumer sales.⁸⁵⁸ Article 1649*octies* of the Civil Code provides that any provision in a consumer sale agreement which purports to limit or exclude any rights of the consumer in terms of the Act⁸⁵⁹ or excludes the application of consumer legislation is void.⁸⁶⁰ Where uncertainty exists regarding a written consumer agreement, article 40 § 2 of the WMPD 2010 provides that an interpretation most beneficial to the consumer should be followed.

3.2.1 "Specifically brought to the attention of the consumer" and consent of the consumer regarding condition of goods

Goods may however be sold in a certain condition as long as the consumer is informed of the particular condition and consents thereto.⁸⁶¹ Sec 55(6) of the CPA provides that the right to good quality, fair value and safety does not apply in a consumer sale if the

⁸⁵⁶ S 26.

⁸⁵⁷ A 1643 Civil Code. See also Part E 2.3.2 above.

⁸⁵⁸ See Part E 2.4.4 for a comprehensive discussion.

⁸⁵⁹ A 1649*bis-octies* Civil Code.

⁸⁶⁰ See also Samoy 261; Tilleman & Verbeke (2009) 35.

⁸⁶¹ S 55(6) CPA. For a comprehensive discussion see also Part D 1.3.3 and 1.3.4.

consumer has been expressly informed of the condition of the goods *and*⁸⁶² expressly agreed to accept goods in that condition (or acts in a manner consistent with accepting goods in that condition).

It would also seem that section 14(2C) of SOGA in Scotland contains a similar limitation on the warranty as its South African counterpart (section 55(6) of the CPA). The test for satisfactory quality will not apply where the defect was specifically drawn to the attention of the buyer (consumer) before conclusion of the contract.⁸⁶³

Similarly in Belgium, article 1649*ter* § 3 of the Civil Code provides that the conformity criteria will not apply to goods if the consumer was aware of the defect at the time of conclusion of the contract or should reasonably have been aware thereof. The test applied to determine whether or not the consumer reasonably should have known of the defect is that of a normal, careful and reasonable consumer (buyer).⁸⁶⁴

In Belgium⁸⁶⁵ parties may deviate from the conformity criteria by agreeing to sell goods that still conform to the agreement even if those goods are no longer suitable for its ordinary use and thereby selling “defective” goods. The uncertainty regarding these types of goods are also avoided in South Africa. Goods of this nature (goods bought for decorative purposes for example a damaged motor vehicle bought as a centre piece in the middle of a restaurant) might be considered “defective” in relation to its ordinary use but will then fall under the application of section 55(3) of the CPA being goods bought for a particular purpose. The purpose of the goods bought will also be taken into account as part of the surrounding circumstances of its supply in terms of section 55(2)(c) of the CPA.

It is clear from the analysis of both the CPA in South Africa as well as the foreign law (Scotland and Belgium), that a supplier (seller) may not in any way exclude or waive his liability in terms of the consumer agreement. More importantly the supplier (seller) may also not exclude or limit the rights of the consumer.

The question remains however to what extent would a supplier be able to sell defective goods to a consumer if the seller can prove that the consumer was informed

⁸⁶² Own emphasis.

⁸⁶³ S 14(2C)(a) and (b) is, however, *contra* to the CPA.

⁸⁶⁴ *Ibid.*

⁸⁶⁵ Tilleman & Verbeke (2009) 44-45.

of the condition (and defects) of the goods and that the consumer consented to buy goods in such a condition.

The comments by Van Oevelen give to most accurate summary of the position and correct interpretation.⁸⁶⁶ The writer correctly argues that such an agreement between the parties falls under the concept of a content defining clause (“inhoudbepalende beding”)⁸⁶⁷ and is valid since its only purpose is to give content to the primary agreement.⁸⁶⁸ If however, the result of the clause is the exclusion or limitation of the seller’s liability, the content defining clause will be reclassified as an exemption clause (which is specifically prohibited in terms of legislation in South Africa, Scotland and Belgium).⁸⁶⁹ In the latter instance, the court will most likely find the clause to be a “disguised” exemption clause in which the seller is attempting to avoid or reduce his warranty duties and will declare such a clause void.⁸⁷⁰

In South Africa (just as is the case in Belgium) there will be many borderline cases in practice and one finds oneself in a grey zone (“men bevindt zich hier ongetwijfeld in een grijze zone”).⁸⁷¹

4. Revival of the common law warranty against latent defects

The question may be asked whether the common law warranty against latent defects is revived after the six month-period in terms of section 56 has lapsed or does the implied warranty of quality remain intact? A further question may be whether the warranty (and exclusion thereof) is revived after the supplier has failed to repair goods within a three month period and the goods are replaced in terms of section 56(3) of the CPA?

In Belgium claims for defects in consumer goods (goods that do not conform to the agreement) may be based on the seller’s warranty against latent defects only after the two year-period (one year for second-hand goods) have lapsed.⁸⁷² The warranty may not be excluded by agreement and therefore goods may not be sold voetstoots

⁸⁶⁶ Van Oevelen 135-136.

⁸⁶⁷ Tilleman & Verbeke (2009) 44.

⁸⁶⁸ *Ibid.*

⁸⁶⁹ *Ibid.* See also Van Oevelen 135-136.

⁸⁷⁰ *Ibid.*

⁸⁷¹ Tilleman & Verbeke (2009) 845.

⁸⁷² A 1649*ter.* See also Peeters 2005 450.

even after the two year-period in which to use the consumer remedies have lapsed.⁸⁷³ The choice of repair or replacement according to the Peeters, is part of the *naturalia* of the consumer agreement.⁸⁷⁴ The consumer must institute this remedy within a reasonable time and may not be a serious burden on the consumer. The possible scapegoat where the seller may refuse the remedy of repair or replacement would be where the repair or replacement of the goods is unnecessarily harsh on the seller compared to other remedies. The onus will be on the seller to prove and factors such as the value of the goods without the defect, the seriousness of the defect and the availability of alternative goods will be taken into account.⁸⁷⁵

No such provision exists in South Africa although it may be argued that the above factors may be taken into account as “surrounding circumstances” in terms of the section 55(2) of the CPA.

Uncertainty exists in South African law whether or not the common law warranty (as well as the exclusion thereof) is revived after the six month period. Though an interpretation confirming the indefinite application of the implied warranty of quality in term of section 55 is possible, legislative amendments would be more appropriate and provide for better certainty. Two recommendations are made in this regard:

- a. that the Minister of Trade and Industry publish guidelines with the regard to the application and interpretation of Chapter 2 Part H and more specifically the implied warranty of quality and consumer remedies contained therein.
- b. when faced with the abovementioned uncertainties it is further recommended that courts take sections 56(4)(a) and 51(1)(b) and 2(10) of the CPA into consideration. These sections support the argument that the implied warranty of quality is over and above any other implied warranty or condition imposed by common law.⁸⁷⁶

⁸⁷³ A 74 WMPC 2010. See also Peeters 2005 451.

⁸⁷⁴ Peeters 2005 450.

⁸⁷⁵ *Idem* 451.

⁸⁷⁶ S 56(4)(a).

5. Consumer remedies

5.1 *Did the aedilician actions and the actio empti survive the CPA?*

As discussed earlier in this chapter,⁸⁷⁷ the aedilician actions (*actio quanti minoris*⁸⁷⁸ and *actio redhibitoria*⁸⁷⁹) are still applicable where the CPA regulates consumer sale agreements. This is confirmed by section 2(10) of the Act which provides that a consumer may not be precluded from exercising any common law right (and it is assumed common law remedies are also included). As was the case where the CPA is not applicable,⁸⁸⁰ it is submitted that the aedilician remedies should only be applied to consumer sale agreements where no other remedy is available either in terms of the common law or the Act itself.⁸⁸¹ The reason is that no damages can be claimed with the aedilician actions.

It is submitted that the aedilician actions are included in some form in Scotland⁸⁸² as well as Belgium⁸⁸³ and re-enforces the argument that they would still be applicable to consumer sale agreements in South Africa. These remedies will become relevant where the remedies as provided for in terms of the CPA are no longer available (for example where a defect is discovered after six months from date of delivery).⁸⁸⁴

5.2 *Consumer remedies: Time periods*

5.2.1 Summary of consumer remedies in Scotland

Because consumer remedies in Scotland are available in two tiers, the implementation of the remedies can be complex⁸⁸⁵ and would certainly have to be explained properly to consumers by way of adequate consumer education. The investigation into the remedies does however provide guidance. Where a defect exists in the goods various remedies may be applicable.⁸⁸⁶ Where the consumer examines the goods within a

⁸⁷⁷ Part D 1.3.4.

⁸⁷⁸ Claim for a reduction in the purchase price.

⁸⁷⁹ Claim for restitution.

⁸⁸⁰ Part B 1.3.1.

⁸⁸¹ For a comprehensive discussion see Part D 1.3.4.

⁸⁸² S 15B, 48C SOGA and s 25 UCTA 1977 (Scotland).

⁸⁸³ S 1644 Civil Code. See also Part E 1.2.3 above.

⁸⁸⁴ S 56 CPA.

⁸⁸⁵ For a comprehensive discussion see Part E 1.1.4.

⁸⁸⁶ Either in terms of the “original remedies” ss 14 and 15 of SOGA or the “consumer remedies” ss 48A-48D SOGA.

reasonable time and did not accept delivery thereof, the consumer can either choose to reject the goods⁸⁸⁷ (original remedy) or choose to repair or replace the goods (consumer remedy).⁸⁸⁸ Where the consumer chooses to reject the goods the consumer returns the goods and obtains a full refund. Where the consumer chooses to repair or replace the goods there is a six month rebuttable presumption that the defect existed at time of conclusion of the contract.⁸⁸⁹ The seller can only refuse repair or replacement where it would be impossible or disproportionate. If the seller does not act within a reasonable period of time or where repair or replacement is disproportionate the consumer may rescind the agreement or claim a reduction in the purchase price.⁸⁹⁰ A claim for any other losses caused by the faulty goods in the form of damages may be claimed regardless of which of the former remedies are chosen.⁸⁹¹

If the consumer did not examine the goods or did not reject the goods within a reasonable time and accepted delivery a distinction is made where the defect is discovered within six months from delivery or after six months from delivery. If the defect is discovered after acceptance of the goods but within six months from delivery the rebuttable presumption will apply and the consumer will follow the route of rejection or replacement (and then rescission or a reduction in the purchase price) as explained in the previous paragraph. If the defect is discovered after six months from date of delivery but within five years from delivery the onus of proving that the defect existed at time of purchase rests on the consumer. If the consumer succeeds in proving the existence of the defect at time of purchase the consumer will follow the route of rejection or replacement (and then rescission or a reduction in the purchase price) as explained in the previous paragraph. If the consumer cannot prove the existence of the defect or five years have lapsed from the time of purchase of the goods, the consumer will have no legal remedy.

⁸⁸⁷ S 14 SOGA.

⁸⁸⁸ S 48B SOGA.

⁸⁸⁹ S 48A SOGA.

⁸⁹⁰ S 48C SOGA.

⁸⁹¹ Ss 14 & 48D SOGA.

5.2.2 Summary of consumer remedies in Belgium

The implied warranty of quality in terms of Belgian legislation⁸⁹² is also referred to as the “legislative guarantee”.⁸⁹³ The implied warranty provides that a consumer may institute a claim for replacement or repair of the defective goods within a reasonable period of time. The type of goods may influence what is reasonable and a period is usually agreed upon in practice.⁸⁹⁴ After a reasonable time a consumer may either institute a claim for the reduction of the purchase price or rescission of the agreement.⁸⁹⁵ These two remedies are still part of the implied warranty of quality.⁸⁹⁶ The consumer may therefore still base his claim on the legislative guarantee or implied warranty of quality after a reasonable period of time but within two years from date of conclusion. In the case of second-hand goods the two year-period may be reduced to a minimum of one year but only by agreement. After the two year-period (or one year-period if the goods are second-hand goods) has lapsed the consumer may again rely on the common law warranty against latent defects.⁸⁹⁷ One would think that the exclusion of the common law warranty against latent defects may then also be enforced after two years but article 74 of the WMPC 2010 states clearly that an exclusion of any kind of warranty (common law or legislative) in consumer agreements will be void.

5.2.3 Consumer remedies in South Africa and recommendations

5.2.3.1 *Current position where the CPA is applicable*

The position regarding remedies available to a consumer in the case of breach of the warranty of quality (section 55) can be summarised as follows:

- a. if the goods fail to satisfy the requirements and standards contemplated in section 55, the consumer must discover and report this within six months after the date of delivery;

⁸⁹² A 1649ter Civil Code.

⁸⁹³ Peeters 2005 450-451. For a comprehensive discussion of consumer remedies in Belgium see also Part E 1.2.5.

⁸⁹⁴ *Ibid.*

⁸⁹⁵ Rejection or rescission will only be granted where the defect is material. A 1649ter Civil Code.

⁸⁹⁶ *Ibid.*

⁸⁹⁷ Peeters 2005 451.

- b. the consumer must institute the remedies in terms of section 56 within six months after the date of delivery;
- c. the remedies available to the consumer are repairing the goods, replacing the goods or claiming a refund of the purchase price;
- d. the consumer will have the common law remedies available to him in addition to the consumer remedies for the six month-period after the date of delivery;
- e. the consumer remedies of repair, replace and refund (section 56(2)) will not be available to a consumer after six months from the date of delivery;
- f. though there are conflicting viewpoints on this matter;⁸⁹⁸ the preferred interpretation provides that even though the consumer remedies are no longer available to the consumer after six months, the implied warranty of quality remains an implied term of the consumer sale indefinitely;
- g. the consumer will have the common law remedies to his disposal after the six month-period provided for in terms of section 56(2) and such common law remedies may not be excluded by way of agreement between the parties;
- h. because the implied warranty of quality remains in tact after six months, a voetstoets clause will never become operational in the case of a consumer sale. Not even after the expiration of any additional contractual guarantees given by the supplier; and
- i. the six month-period in which to institute the consumer remedies is unfair and warrants legislative amendment as proposed below.

5.2.3.2 Recommendations regarding consumer remedies in South Africa

A six month-period in which to claim a refund (reject the goods) can be beneficial but also disadvantageous depending on the type of goods bought.

In the case of perishable goods for example, it is clearly beneficial for the consumer to have a period of six months in which to claim a refund. From a practical perspective however six months in which to claim a refund may not be sufficient where goods are of a particular good quality or made to last longer (for instance a geyser or a 4x4 all-terrain vehicle).

⁸⁹⁸ See Part D 4 above.

The CPA provides that the six month-period is additional to any other guarantees given by the seller.⁸⁹⁹ It is my submission that additional guarantees would usually be given in the case of good quality goods and is usually more than six months. Problems arise however if for example a defect only materialised after 15 months. In terms of South African law where no additional guarantees were given the remedy of claiming for a refund will not be available to the consumer in terms of the CPA in these circumstances. The consumer will still have the common law remedies⁹⁰⁰ but it may be costly to institute and time consuming.

It is for this reason (and taking into account the comparative positions in both Scotland and Belgium) that a division of the consumer remedies in terms of section 56(2) is proposed.

Claiming a refund (rejecting the goods) should be dealt with separately and a legislative amendment is proposed in this regard.

The consumer should be given six months from the date of delivery in which to claim for a refund but with the additional proviso that such a period may be increased or decreased depending on the purpose, type and quality of the goods. The period in which to claim a refund should for example be decreased in the case of perishable goods and increased in the case of good quality goods meant to last for a long time. The Minister of Trade and Industry should publish industry guidelines and regulations in this regard.

It is further recommended that the remedies of repair or replacement (section 56(2)) should be available to consumers for a period of two years in the case of new goods and a minimum of one year in the case of second-hand goods from the date of delivery. Legislative amendment of the wording of section 56(2) is suggested in this regard.

It is also recommended that after the period of two years (in the case of new goods) or one year (in the case of second-hand goods) from the date of delivery, the consumer will only have the common law remedies to his disposal. In the latter instance

⁸⁹⁹ S 56(4).

⁹⁰⁰ The aedilician remedies or the *actio empti*.

the normal periods of prescription as provided for in the Prescription Act⁹⁰¹ should apply. This will have the result of preventing claims based on a breach of the implied warranty of quality in perpetuity.

Clarifying the use of the consumer remedies will also assist any judicial officer or institution (albeit the NCT, NCC, magistrates, judges or arbitrators) set to the task of having to award or interpreted consumer remedies in terms of the Act as part of a complaint or dispute.⁹⁰² (Especially since the application of consumer legislation of this magnitude is fairly new to South Africa).

6. Second-hand goods

Section 55(6) provides some relief for sellers of second-hand goods including pawn- or consignment stores. That being said, the seller still has the onus of proving that the buyer understood the condition of the goods *and*⁹⁰³ accepted the goods in this condition or acted in a manner suggesting acceptance.⁹⁰⁴

The “surrounding circumstances of the supply” as provided for in terms of section 55(2)(c) will play a prominent role in the case of the implied warranty of quality of second-hand goods.

It is submitted that a possible way to circumvent the stringent consequences of the Act would be for sellers of for example second-hand vehicles to sell the vehicles on behalf of owners rather than buying and reselling it themselves. The second-hand vehicle dealership only acts as an agent in the selling of the vehicle. In other words the dealership only provides space for the second-hand vehicle on its selling floor and it is sold on behalf of the seller.

The Second-Hand Goods Act⁹⁰⁵ does not provide any guidance as to the interpretation of Part H of the CPA as the main purpose and aim of the Act is to prevent the trade in stolen goods and promote ethics in the trade of second-hand goods.⁹⁰⁶

⁹⁰¹ 68 of 1969. See s 11 of the Prescription Act regarding the relevant periods of prescription.

⁹⁰² S 69 CPA.

⁹⁰³ Own emphasis.

⁹⁰⁴ Requirements of s 55(6).

⁹⁰⁵ 6 of 2009.

⁹⁰⁶ Preamble to the Second-Hand Goods Act 6 of 2009.

The condition of second-hand (or pawned goods) will differ from the condition of newly manufactured goods. The interpretation in terms of South African positive law where the CPA is not applicable, is important in this regard.⁹⁰⁷

To say for example that a second-hand vehicle is in good condition means that the vehicle is in good condition *for what it is*⁹⁰⁸ being an old, used vehicle and temporary breakdowns are to be expected and might even be caused by ordinary wear and tear.⁹⁰⁹

It is recommended that the Minister of Trade and Industry publish industry codes to provide guidance for suppliers of second-hand goods.⁹¹⁰

The position of instituting consumer remedies in the case of second-hand goods is discussed above.⁹¹¹

7. Product liability

Product liability in South Africa is amended where the CPA is applicable. The main amendments to the common law position are that negligence is no longer a requirement to prove liability⁹¹² on the part of the producer or manufacturer and all relevant parties in the supply chain will be jointly and severally liable.⁹¹³ This conforms to the position in both Scotland⁹¹⁴ and Belgium⁹¹⁵

Although it is irrelevant whether a defect in consumer goods sold in terms of the CPA is latent or patent,⁹¹⁶ two problem areas are identified. The first problem area deals with the measure included in the definition of a defect in terms of section 53 of the CPA: “What a person generally would reasonably be entitled to expect.”⁹¹⁷ Many South African writers⁹¹⁸ criticise the test and point out concerns as to when and where the test would apply. Neethling⁹¹⁹ correctly argues that an objective standard of reasonableness

⁹⁰⁷ See Part D 8 above.

⁹⁰⁸ Italics in original.

⁹⁰⁹ Kerr 118-119.

⁹¹⁰ S 82.

⁹¹¹ See Part F 6 above.

⁹¹² S 61(1) CPA. For a comprehensive discussion see Part D 1.4.

⁹¹³ S 61(3) CPA. For a comprehensive discussion see Part D 1.4.

⁹¹⁴ S 2(1) UK CPA 1987.

⁹¹⁵ Act 1991.

⁹¹⁶ S 55(5)(a) CPA.

⁹¹⁷ S 53(1)(a) CPA.

⁹¹⁸ Van Eeden 245; Loubser & Reid 327; Neethling 2011 814; Jacobs *ea* 363. See also Part D 1.1 above.

⁹¹⁹ 2011 363.

should be applied. Even though the wording of section 53 of the CPA is very similar to the definitions given to a defect in terms of both Scottish legislation⁹²⁰ and Belgian consumer legislation⁹²¹ the objective test of what a person generally would reasonably be entitled to expect as a consumer in South Africa would differ greatly from what a consumer in a first world country such as Belgium generally would reasonably be entitled to expect.

Section 2(2)(a) of the CPA deals with the interpretation of the Act and provides that foreign and international law may be considered. Though Scottish law and Belgian law should in my opinion be considered, the fact of the matter is consumer expectations in South Africa will differ from Scotland or Belgium (or any other country for that matter). There may be many economic and social reasons for the former, not least of which are the average literacy of consumers,⁹²² consumer education and the fact that consumer protection and fundamental consumer rights are fairly new in South Africa.

Secondly “defect” in terms of the CPA should, in my opinion, expressly include functional as well as structural defects as is the case in Belgium.⁹²³ Loubser & Reid argues that it is included by application.⁹²⁴ It is my suggestion that the Minister of Trade and Industry publish guidelines for the effective application of Part H of the Act relating to defects and what kinds of defects (structural and functional) are included.

7.1 Liability of suppliers in terms of section 61 of the CPA

With regard to the exclusion of “supplier” in section 61(1) of the Act, what seems to have been an unintended consequence of the CPA is perhaps an intended consequence when looking at other jurisdictions such as Scotland and Belgium.

In Scottish Law, a supplier will only be secondary liable if he is unable to identify his own suppliers.⁹²⁵ The UK CPA 1987 provides that strict liability for damages caused by defective products can be placed on a range of possible defendants.⁹²⁶ Where a

⁹²⁰ S 3 UK CPA 1987. See also Part E 1.1.2 above.

⁹²¹ Art 5 Act 1991. See also Part E 1.2.1 above.

⁹²² This was discussed earlier as part of the requirements relating to formalities and the use of plain language. See Part 1 chapter 7.

⁹²³ Part E 1.2.1 above. See also a 1641 of the Civil Code and Demarsin 38-39. See also Chritiaens 18.

⁹²⁴ 452. See also Botha & Joubert criticism on 216.

⁹²⁵ S 2(3) UK CPA 1987. For a comprehensive discussion see Part E 1.1.5.

⁹²⁶ Dobson & Stokes 135. Damage to non-business property allowed if it exceeds £275 in value.

defective product injures a consumer (buyer), both the implied terms of SOGA and the UK CPA 1987 will apply and the buyer may choose to institute action either against the manufacturer (in terms of the UK CPA 1987) or the retailer (in terms of SOGA).⁹²⁷ Apart from suppliers, the abovementioned provisions simply give the consumer a choice as to who should be claimed from first but does not retract from the joint and several liability of the supply chain.

This is confirmed by section 2(1) of the UK CPA 1987 which provides that where any damage is caused wholly or partly by a defect in a product, every person to whom subsection 2 applies shall be liable for the damage jointly and severally. Liability cannot be limited or excluded by any contractual term or otherwise.⁹²⁸ Parties liable in terms of legislation are therefore the “producer” of the defective article, including manufacturers, processors, own-branders and importers. A supplier will *only*⁹²⁹ therefore be liable where the supplier does not disclose its suppliers. In other words, if the supplier fails to identify the producer or the party who supplied the goods to him, the supplier will be liable as if he had been the producer himself. (Suppliers will most certainly provide the information of his suppliers rather than face liability).

Just as is the case in Scottish Law, the position in Belgium is that a supplier will only be liable if the producer cannot be identified or if there is a failure to indicate to the injured person the identity of the manufacturer or the importer “within a reasonable time”.⁹³⁰

As part of the guidelines to be published by the Minister of Trade and Industry recommended earlier in this chapter,⁹³¹ guidelines should be included when (or if at all) suppliers (end-suppliers) will be liable in terms of section 61 of the CPA. The alternative would be a legislative amendment to section 61 of the CPA but it is highly unlikely that this will occur. The reason being that suppliers are generally excluded from strict liability (with the proviso that they must identify their suppliers) in other countries with similar consumer protection legislation such as Scotland and Belgium.⁹³² If suppliers are not

⁹²⁷ *Idem* 131.

⁹²⁸ S 7 UK CPA 1987, similar to s 61 of the CPA South Africa.

⁹²⁹ Own emphasis.

⁹³⁰ S 4 Act 1991. For a comprehensive discussion see Part E 1.2.7.

⁹³¹ See paragraph 3 above.

⁹³² See previous paragraph.

included in the application of section 61 of the CPA they would still be liable based on the breach of contract or based on delictual liability in terms of South African common law.

7.2 Defences for distributors and retailers in terms of section 61(4) of the CPA

Botha & Joubert⁹³³ refer to the defences against product liability contained in section 61(4) and more specifically section 61(4)(c).⁹³⁴ It is argued that the wording of section 61(4)(c) provides some form of strict liability for manufacturers and importers but not for distributors and retailers.⁹³⁵ They also argue that distributors and retailers can escape liability by proving that “it is unreasonable to expect the distributor or retailer to have discovered the unsafe product characteristic, failure, defect or hazard, having regard to that person’s role in marketing goods to consumers”.⁹³⁶ The writers argue that the liability of distributors and retailers are still fault-based where reference is made to reasonableness. If the Act is interpreted in this manner (and it is submitted that importers and retailers will rely heavily on the defence contained in section 61(4)) this would be an unfair outcome and defeat the whole purpose of holding parties in the supply chain jointly and severally liable. Distributors and retailers should take better responsibility in the marketing of goods.

In Scotland distributors are strictly liable together with producers but retailers are only secondary liable.⁹³⁷ The court will however take the marketing of the product into account when considering a claim for damages and this may hold the retailer responsible.⁹³⁸

The buyer who suffered damages because of a defective product in Belgium can bring an action against his immediate seller as well as against the previous seller, importer or manufacturer provided that all parties are bound in a chain of contracts of

⁹³³ 305-319, 318. See also Jacobs *ea* 388-389; Loubser & Reid 451-452.

⁹³⁴ S 61(4)(c) provides that liability for a particular product does not arise if it is unreasonable to expect the distributor or retailer to have discovered the unsafe product characteristic, failure, defect or hazard, having regard to that person’s role in marketing the goods to consumers.

⁹³⁵ The application of the interpretation rule *unius inclusio est alterius exclusio* will have the effect that the producer and importer (in contrast with the distributor and retailer) will still be liable even if it would be unreasonable to expect them to have discovered the defect.

⁹³⁶ S 61(4)(c).

⁹³⁷ In terms of SOGA. See also Part E 1.1.7.

⁹³⁸ S 3(2) UK CPA 1987.

sale.⁹³⁹ This could be problematic as it seems a contractual *nexus* between the parties is a requirement.

It is recommended that any defence raised by retailers or distributors in terms of section 61(4) of the CPA should be interpreted strictly against the distributor or retailer and the marketing of the goods should always be taken into account.

8. Final remarks & table of comparison

It is clear that the CPA is not the “Armageddon” many thought it to be. Many agreements of sale will fall outside the ambit of the Act and in such situations the common law position will remain in tact. It would also seem that consumers who are buyers will always have the common law remedies to their disposal over and above the legislative remedies provided for in terms of the Act.

This being said however, possible oversights, interpretational as well as practical problems need to be corrected to provide more certainty. Consumers and suppliers need to understand the practical application of Part H of the Act. Not only the implied warranty of quality (section 55), the remedies available to the consumer in terms of section 56 but also the implications of section 55(6) on the supplier’s liability.

Though the liability of the supplier may be reduced in terms of section 55(6), a voetstoots clause will no longer hold water where the CPA is applicable.

Industry codes with regard to second-hand goods are of paramount importance. Such codes might even provide a life-line to prevent these types of industries from going under. The product liability regime introduced in terms of section 61 has its own interpretational problems and the true effect of the section remains to be seen. It is hoped that the interpretation thereof by the courts will shed some light on the questions raised.

When interpreting or applying the CPA, a person or court may consider appropriate foreign and international law.⁹⁴⁰ It is clear from the in-depth discussion of the applicable law in terms of Scotland and Belgium that foreign law will provide

⁹³⁹ It is similar to s 61 of the CPA but with a contractual *nexus* requirement.

⁹⁴⁰ S 2(2)(a) CPA.

valuable guidelines regarding the interpretation of provisions in the CPA that are ambiguous, unclear or new to our law.

	South Africa	Scotland	Belgium
Type of goods	Movable and immovable	Movable	Movable
Type of consumer	Natural and juristic persons (juristic person not exceeding asset value or annual turnover of R2 million)	Natural persons	Natural persons
Type of defect	Latent or patent; Material imperfection in manufacture of goods making it less acceptable than persons reasonably entitled to expect; Characteristic that renders goods less useful, practical or safe than persons reasonably entitled to expect	Goods do not conform to the contract; Satisfactory quality: goods must meet the standard that a reasonable person would regard as satisfactory, fitness for all the purposes for which goods (of the kind in question) are commonly supplied, appearance and finish, freedom from minor defects, safety and durability (at time of delivery)	Goods do not conform to the contract; Conformity criteria must be complied with: it corresponds with the description or sample given by seller; consumer informs seller of specific use of goods at time of conclusion and seller accepts; goods are fit for uses to which goods of same type are usually used for; goods presents quality of goods of same type, a quality which consumer may reasonably expect, taking into account nature of goods and eventually public declaration made by professional sellers
Type of warranty or guarantee	Implied warranty of quality ito ss 55 & 56 CPA; Additional to common law, legislative or express warranty	Implied warranty in terms of SOGA	Distinguish between: Legislative/consumer guarantee; Commercial guarantee; Common law warranty against latent defects
Period in which to institute claim for defective goods	Within 6 months after date of delivery	5 yrs from date of purchase	2 yrs from date of delivery; Second-hand goods: min 1 yr
Period in which consumer can reject goods?	Within 6 months from date of delivery	Original remedy s 14 SOGA: Within reasonable time after delivery, may not accept goods may claim refund for amounts already paid for	Within "short time" or reasonable time
When can consumer claim for replace or	SS 56 & 56 Within 6 months from date of delivery or replace within 3 months after	Ss 15 & 48A-D SOGA: Where consumer lost right to reject and claim refund and accepted goods;	Act 1991, Act 2004, Arts 1649 <i>bis</i> -1649 <i>octies</i> ; Within 2 yrs from date of delivery after the consumer

repair?	repair	Consumer may claim damages either to rejection or to accepting goods; If defect discovered within first 6 months after delivery and within 5 years: rebuttable burden of proof on seller that defect existed at time of delivery if defect discovered after 6 months but within 5 years of purchase: consumer has to prove it existed at time of delivery and may still repair/replace	has lost his right to reject within a "short" time or reasonable; Min 1 yr in case of second-hand goods but only by agreement
Damages claimable for faulty goods?	Yes When? Replace, refund or repair	Yes When? Rejection of goods or Accepting goods	Yes When? Replace, refund or repair
When can consumer use aedilician actions?	From date of delivery but will have to choose between replace, repair, refund on the one hand and the aedilician actions on the other (s 56(4)(a) CPA)	Within 5 yrs from date of purchase where: Consumer did not reject within reasonable time; or Unreasonable to repair or replace What can be claimed? Reduction in purchase price; or Rescission but use of goods may be deducted by supplier	Within 2 yrs (1 yr for second-hand goods) where: Seller proves that unreasonable/impossible to replace/repair; What can be claimed? Reduction in purchase price / where defect serious rescission; Use of goods by consumer will be taken into account; Aedilician actions to Civil Code
Return of the warranty against latent defect?	No but s 56 remedies not available after 6 month-period	No	Yes, after 2 yrs; or second-hand goods: 1 yr
Damages claimable to product liability	Death, injury, illness, economic loss and damage to property; Includes consequential loss	Death, injury, illness, economic loss and damage to property; Includes consequential loss	Death, injury, illness, economic loss and damage to property; Includes consequential loss
Strict or no-fault liability?	Yes (wrongfulness still requirement)	Yes	Yes
Jointly & severally liable?	Yes	Yes	Yes
Warranty of repair?	Yes, 3 months	No unless by agreement	No unless by agreement
Exclusion of implied legislative warranty?	No S 50 prohibits excl of implied ss 55 & 56 warranty	No S 25 UCTA 1977	No A 74 ° 14 WMPC 2010
Exclusion of common law	No, where CPA applicable (see s 50 read	N/A	No, where sale is consumer sale arts 1649 <i>bis</i> -1649 <i>octies</i>

<p>warranty against latent defects?</p>	<p>together with s 56(4)(a) Yes where CPA is N/A goods may still be sold voetstoets</p>		<p>apply, incl commercial guaranties (may not be excluded) Yes, where sale is not consumer sale, may exclude warranty against latent defect by way of agreement in terms of art 1641</p>
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12 CONCLUSIONS AND RECOMMENDATIONS

- A. INTRODUCTION
 - B. TABLE OF CONCLUSIONS AND RECOMMENDATIONS
 - C. FINAL REMARKS
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A. INTRODUCTION

The purpose of this thesis was to investigate the influence of the CPA on the common law of sale in South Africa. It was necessary to determine which provisions of the common law of sale have been confirmed, amended or completely excluded in the case of consumer sales.

Prior to discussing the relevant common law principles and the influence of the CPA thereon, it was necessary to sketch a background of the reasons behind the implementation of the CPA.¹ A brief overview of the purpose, application and interpretation of the CPA was also necessary.²

To keep the research and investigation to the point and in line with the original purpose, certain parameters, restrictions and exclusions were established and indicated throughout the chapters.³

From the outset it was clear that a proper investigation of the relevant provisions of the CPA (and its influence on the common law of sale) can only be done with the constant reminder of the scope and application of the Act. The result was that many sale agreements fall outside of the scope of the CPA and are still regulated by the common law.⁴

In order to determine the influence of the CPA on the common law of sale, an investigation into the origins of the common law principles in both Roman law and Roman-Dutch law were discussed. A thorough investigation into the common law position where the CPA is not applicable was also done.⁵

¹ See chap 3.

² *Ibid.*

³ For a summary of the exclusions see chapters 1 & 2.

⁴ See chapter 4 Parts D & F.

⁵ See Parts A & B chapters 4-11.

The relevant provisions of the CPA were discussed and comprehensively evaluated to determine its influence on the common law of sale in South Africa.⁶ The result was a confirmation of common law principles (for example the confirmation that the *essentialia* for a valid sale remain the same in the case of consumer sales).⁷ It was also found that certain common law provisions have been amended by the CPA (for example the doctrine of the passing of risk and benefit).⁸ However, many ambiguities, oversights by the legislature and questions were also laid bare.

An attempt was made to resolve some of these issues by an investigation into the relevant provisions in Scotland and Belgium.⁹ The purpose thereof was, in the first instance, to provide guidelines for the interpretation of the CPA in South Africa (without unnecessary legislative amendments to the Act) and in the second instance, should legislative amendments be warranted, to provide guidelines as to the proper form they should take. Section 2(2) of the CPA substantiates the importance of a comparative investigation by providing that where a person, the Tribunal,¹⁰ Commission¹¹ or court interprets the provisions of the Act they may consider any appropriate foreign and international law.¹²

Due to the comprehensive conclusions and recommendations given at the end of each chapter, and to avoid unnecessary repetition, a summary of the conclusions and recommendations (taking into account the comparative study regarding both Scotland and Belgium) are given below.

⁶ See Parts C & D chapters 4-11.

⁷ See Part D chapters 4-6.

⁸ See Part D chapter 8.

⁹ See Part E chapters 4-11.

¹⁰ National Consumer Tribunal (NCT).

¹¹ National Consumer Commission (NCC).

¹² S 2(2)(a).

B. TABLE OF CONCLUSIONS AND RECOMMENDATIONS¹³

<p>Chapter 4: <i>Essentialia of sale: Consensus to buy and sell</i></p>
<p>Conclusions¹⁴</p>
<p>a. The <i>essentialia</i> for the common law of sale are included in the CPA.</p> <p>b. Sale agreements form part of the scope and application of the CPA.</p> <p>c. Sale agreements regulated by the common law are included in the application of the CPA.</p> <p>d. Movable and immovable property are included under the definition of “goods” in section 1 of the Act.</p> <p>e. Once-off sales (transactions) are excluded from the application of the Act.</p> <p>f. The supply of goods in the ordinary course of the supplier’s business to consumers for consideration is governed by the CPA.</p> <p>g. Consumers include natural and juristic persons.</p> <p>h. In terms of section 1 “juristic persons” include trusts, partnerships and body corporates.</p> <p>i. Juristic persons with an annual turnover or asset value of more than R2 million will not be regarded as consumers in terms of section 6 of the Act.</p> <p>j. Additional protection is given to individual consumers regarding unfair terms in consumer sales in terms of regulation 44 to the Act.</p>
<p>Recommendations¹⁵</p>
<p>a. The lack of complete integration of consumer provisions into South African law in terms of the CPA causes uncertainties and ambiguities between the CPA and the common law and between the CPA and other statutes regulating sales.</p> <p>b. The influence of the CPA on each particular common law duty of the seller should be</p>

¹³ The comparative study regarding Scotland and Belgium is discussed in Part E of chapters 4-11 of this thesis and is taken into account.

¹⁴ Chapter 4 Parts D 1, 2.1 & F 1.

¹⁵ Chapter 4 Parts D & F.

investigated and addressed.

Chapter 5: *Essentialia of sale: The thing sold*

Conclusions

Essentialia of sale: Consensus on the thing sold¹⁶

- a. The definition of “goods” in section 1 of the Act includes all goods that could form part of a sale at common law. This includes corporeal movables, immovable property as well as material and immaterial goods.
- b. The common law principles that any goods that form part of commercial life (are merchantable) can be sold also apply in terms of the CPA.¹⁷
- c. Goods that are specifically ordered by the consumer from the supplier (“special-order goods”)¹⁸ may also be the *merces* in terms of a consumer sale agreement.
- d. Section 20 read together with section 21 confirms the common law position with regard to the *essentialia* of the thing sold in that the parties must have consensus on the thing sold.
- e. Section 20 does not substitute the right that every consumer has in respect of the return of unsafe or defective goods, nor does it substitute any other right that exists between a supplier and consumer to return goods for a refund in terms of the Act. It provides for an additional right, to the benefit of the consumer, to return goods within ten business days.

Goods sold by description or sample or both: Generic sales and the sale of future goods¹⁹

- a. The definition of goods on “display” includes generic sales.
- b. Section 18 regulates goods sold by description or sample or both and includes both generic sales and the sale of future goods.
- c. The common law position is confirmed by the Act in that where goods are sold by

¹⁶ Chapter 5 Parts D 1 & F 1.

¹⁷ *Ibid.* See also chapter 5 Part B 2.1.

¹⁸ See s 1 definition CPA.

¹⁹ Chapter 5 Parts D 2 & F 2 & 3.

description or sample the goods must (and it is an implied term) in all material respects and characteristics correspond to what an ordinary alert consumer would have been entitled to expect, taking into account the description and the opportunity of reasonable inspection as the case may be.

- d. The common law position with regard to goods sold by sample and description is also confirmed by section 18(4) which provides that it is not sufficient that any of the goods correspond with the sample if they do not also correspond with the description.

Res aliena²⁰

- a. It is an implied term of any consumer sale agreement in South Africa that the seller has the legal right or authority to sell the goods.
- b. A valid consumer sale agreement cannot be concluded where the seller does not have the legal right to sell the goods (and the sale of stolen consumer goods is therefore excluded).
- c. The intention of the legislator in terms of section 44 is to exclude the sale of stolen goods in terms of the CPA.

Unsolicited goods²¹

- a. The regulation of unsolicited goods forms part of the CPA in South Africa and gives greater protection to consumers than that which existed prior to the implementation of the Act.
- b. The type of consumer goods that will be regarded as unsolicited goods are very similar to those regarded as such in Scotland and Belgium. The purpose of the provisions regarding unsolicited goods in South Africa, Scotland and Belgium is to prevent inertia selling of unwanted goods to consumers as well as the prohibition of negative option marketing.
- c. Section 21 which governs unsolicited goods should not include immovable property and this can be implied by the wording of the section.
- d. Uncertainty exists in South Africa regarding section 21(5) of the CPA and whether “retain” means a transfer of ownership as is the case in Belgium.

²⁰ S 44 CPA. See also chapter 5 Part F 4.

²¹ Chapter 5 Parts D 3 & F 5. See also s 21 CPA.

Recommendations

- a. Immovable property should be excluded from the application of section 21 which regulates unsolicited goods. This should be done by the publishing of further regulations to the Act.
- b. With regard to the transfer of ownership of unsolicited goods and the definition of “retain” in section 21(5) of the Act, the position in Scottish law should be followed where ownership regarding unsolicited goods does not transfer to the consumer.
- c. It is further recommended that the Minister²² publish a practice directive or guideline with regard to section 21 and the treatment of unsolicited goods for greater certainty in practice.
- d. Criminal sanctions as provided for in Scotland should also be introduced in South Africa regarding unsolicited goods.

Chapter 6: *Essentialia of sale*: The purchase price

Conclusions

*Price display*²³

- a. The common law position regarding the *essentialia* of sale and consensus on the purchase price between the parties is confirmed by the CPA.
- b. Conflicting viewpoints exist regarding section 23 and whether it amends the common law principle (in the case of a consumer sale) that the purchase price must be determined or determinable.
- c. The viewpoint that the common law principle is amended by section 23 is supported. The purchase price must therefore be fixed and sure prior to the sale being concluded (not just determinable at the time of conclusion of the contract).
- d. The concept of consensus on the purchase price is confirmed where the CPA is applicable in terms of regulation 44(3)(h) (in the case of consumers who are natural persons) because the supplier must give the consumer the opportunity to cancel the

²² Minister of Trade and Industry. Hereinafter referred to as the “Minister”.

²³ Chapter 6 Parts D 1.1, 1.2 & F 1.

agreement where he (the supplier) unilaterally increases the price as agreed upon.

Price as a core term to a consumer sale and an unfair, unjust & unreasonable price²⁴

- a. All terms in all agreements governed by the CPA are subject to review for unfairness in terms of Chapter 2 Part G of the Act.
- b. Price is a core term or definition of the main subject matter of a consumer sale and subject to review.

Applicability of the doctrine of laesio enormis²⁵

- a. Uncertainty exists amongst legal writers whether the *laesio enormis* doctrine is applicable in terms of section 48(1)(a)(i) of the CPA.
- b. Conflicting provisions within the CPA create uncertainty whether or not the doctrine should apply.

Common law duty of the buyer to pay the purchase price

- a. The common law duty of the buyer (consumer) to pay the purchase price is confirmed by section 5 and regulation 44(1) of the CPA. The CPA will only be applicable where goods are supplied in the ordinary course of the supplier's business to a consumer *for consideration*.²⁶

Recommendations

- a. Price as a core term or definition of the main subject matter of a consumer sale should be excluded from review in terms of Chapter 2 Part G of the Act.
- b. It is recommended that the Minister provide for the exclusion of core terms from review by including wording to such effect in regulation 44 to the Act.
- c. The courts should interpret provisions regulating the purchase price in a consumer sale agreement as core terms and exclude it from the review as provided for in terms of section 48(2).
- d. Alternatively, the courts should not apply the test for unfairness in terms of section 48(2) to the purchase price but rather develop a separate test taking into account the

²⁴ Chapter 6 Parts B 2.1, 2.2 & F 2.1.

²⁵ Chapter 6 Parts D 2.3 & F 2.1-2.3.

²⁶ Own emphasis.

factors listed in section 52(2) of the CPA.

- e. The common law position should be confirmed regarding an unfair price in that only a price that is manifestly unfair, unreasonable and unjust should be reviewed.²⁷
- f. The doctrine of *laesio enormis* should not be included in the application of section 48(1)(a)(i).²⁸

Chapter 7: Formalities and Plain Language

Conclusions

Cooling-off rights²⁹

- a. A cooling-off right is only available to a consumer in terms of a consumer agreement or legislation.
- b. The application of the cooling-off right available to a consumer in terms of section 16 is reduced by the meaning of “direct marketing” in terms of section 1 of the Act.³⁰
- c. Due to the fact that “goods” in terms of section 1 of the CPA include immovable property, the wording of section 16 regarding *delivery*³¹ causes ambiguity and uncertainty in the case of immovable consumer goods.
- d. The cooling-off right in terms of section 16 of the CPA and the cooling-off right in terms of section 29A of the ALA apply concurrently because of the wording of section 16(2).
- e. Section 16 of the CPA is a combination of both distance selling and doorstep selling as found in Scotland and Belgium.
- f. Section 16 of the CPA is restrictive because the consumer’s cooling-off period in terms of section 16 of the CPA (five days) is less than either Scotland (seven days) or Belgium (14 days in the case of distance selling).

²⁷ Chapter 6 Parts D 2.3 & F 2.1-2.3.

²⁸ Chapter 6 Part F 2.3

²⁹ Chapter 7 Parts D 1 & F 1.

³⁰ *Ibid.* See also definition of “direct marketing” s 1 CPA.

³¹ Own emphasis.

Written consumer agreements³²

- a. As a general rule consumer sales do not have to comply with formal requirements to be valid. This is a confirmation of the common law position in South Africa.
- b. Many consumer agreements are in not writing, and even if they are, consumers do not necessarily receive a copy of the standard printed forms or the signed contracts.
- c. Section 50(2) – which provides that if a consumer agreement is in writing such a written agreement applies irrespective of whether the consumer signs it – causes uncertainty and is open to more than one contradictory interpretation.³³
- d. If a document is not signed by the consumer, it still has to comply with the provisions of section 22 of the CPA regarding plain language.³⁴
- e. Where the formal requirements of section 50 are not met, section 52 of the CPA will be applicable implying that non-compliance may result in the contract term being unfair, unreasonable or unjust under section 48 of the CPA.
- f. In the case of the sale of immovable consumer goods section 2(1) of the ALA and section 50(2)(a) of the CPA apply simultaneously and are in conflict with each other.³⁵ The contradictory position of the formal requirements for the sale of immovable consumer goods will be abused by both suppliers and consumers in practice who wish not to be bound or wish to enforce agreements in this regard.

Plain and understandable language³⁶

- a. It is unclear what is meant by the words “undue effort” in section 22 regarding plain language in consumer sales and what the responsibility of the consumer is in this regard.
- b. The plain language requirement will depend on the particular consumer or group of consumers and will also depend on the kind of goods sold as well as the terminology and practice within a particular industry providing goods to consumers in the ordinary course of their business.
- c. The plain language provisions of section 22 are complex and not defined within the

³² Chapter 7 Parts D 2 & F 2.

³³ See interpretation by legal writers in chapter 7 Part B 2.4 & D 2.3.

³⁴ Chapter 7 Part D 2.3.

³⁵ Chapter 7 Part F 2.2.

³⁶ Chapter 7 Parts D 3.2, 3.3 & F 3.2.

CPA.

- d. The meaning of an “ordinary consumer with average literacy skills and minimal experience” in terms of section 22 provides uncertainty in practice. The wording is included in section 22 as a means to protect vulnerable consumers as provided for in section 3(1)(b) of the CPA.
- e. The application of the test for an ordinary consumer will depend on the type of consumer sale, the type of goods bought and the surrounding circumstances at the time of conclusion of the agreement.

Recommendations

Cooling-off rights³⁷

- a. Section 16 should contain provisions regarding the depreciation of value of the goods similar to those provided for in section 121 of the CPA.
- b. The provisions of section 29A of the ALA (in the case of the sale of immovable property) and section 121 of the NCA (in the case of instalment sale transactions of movable goods which are also credit agreements) should take precedence over the provisions of section 16 where they are applicable as their provisions are more beneficial to the consumer.
- c. In the case of immovable goods, the legislature should regard the date of conclusion of the contract to be the date from which the consumer’s cooling-off period is to be calculated.
- d. Alternatively and more appropriately, immovable consumer goods should be excluded from the application of section 16.
- e. The cooling-off period in terms of section 16 should be increased to at least seven business days, preferably 14 days.
- f. The legislature should compel suppliers to inform consumers of their cooling-off rights in a prescribed manner either by way of regulation or by way of an inclusion of such a prescribed form in sections 16 and 32 of the CPA.
- g. The legislature should publish a list of the exclusions suggested below to simplify the application of a consumer’s cooling-off right in the case of section 16. Exclusions

³⁷ Chapter 7 Part F 1.

such as food, drink or other goods intended for current consumption by use in the household that are supplied by regular delivery. This provision will eliminate the issues surrounding rapidly consumable goods.

- h. Section 16(2) should be struck out as it causes confusion and uncertainty resulting in less protection for consumers.
- i. The consumer in South Africa should not have access to the cooling-off right contained in section 16 of the CPA in the case of special order goods. Wording to this effect should therefore be added to the exclusions contained in section 16(1) of the CPA.

Written consumer agreements³⁸

- a. The Minister should specify by regulation the time period in which a copy of the agreement or access to a copy of the agreement is to be provided by the supplier.
- b. Section 50 of the CPA should not apply to the sale of immovable consumer goods and should be excluded by the Minister by way of regulation.

Plain and understandable language³⁹

- a. The Minister should publish guidelines as to when the requirement of plain language in terms of section 22 will be complied with within a particular industry, taking into account the standard and common terminology and practice for that particular industry (for example the wording of consumer sales agreements in respect of motor vehicles in the motor industry).
- b. The test for an ordinary consumer as applied in Scotland is supported which states as a benchmark that a consumer is someone who is reasonably well-informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors.
- c. It is further recommended that the term “ordinary consumer” in the CPA be substituted with the term “average consumer” to bring South Africa more in line with international provisions regarding plain language requirements.
- d. Plain language compliance should be compulsory on all levels of drafting of agreements including self-evaluation, company evaluation and industry evaluation.

³⁸ Chapter 7 Parts D 2.4 & F 3.

³⁹ Chapter 7 Part F 3.2.

- e. The comparative approach of “plainness” and “intelligibility” should also be followed in South Africa to simplify the interpretation of section 22 of the CPA.

Chapter 8: The duty of safe-keeping and the passing of risk and benefit doctrine

Conclusions

Consumer sales subject to suspensive conditions⁴⁰

- a. The wording of section 18(3) of the CPA includes consumer sales which are subject to suspensive conditions and thus confirms the common law position in this regard.
- b. Acceptance of goods sold by description or sample or both in terms of sections 18, 19 and 20 of the CPA causes practical problems because it is subject to the suspensive condition that the consumer had an opportunity to examine the goods.
- c. It is unlikely that consumers will be knowledgeable about the fact that they do have a right to examine the goods or that the supplier will inform the consumer of such a right prior to acceptance of the goods sold by description or sample or both.

The doctrine of benefit and risk⁴¹

- a. Where the parties to a consumer sale do not agree otherwise, the common law position regarding the doctrine of risk and benefit has been amended by section 19(2)(c).
- b. It is an implied term of every consumer sale (unless the parties agree otherwise) that the risk will remain on the seller until the consumer has accepted delivery of the goods as described in terms of section 19.⁴² This will be the case even if the sale has become *perfecta* prior to acceptance of the goods by the consumer.
- c. Contradictory provisions exist in the case of consumers who are natural persons. Section 19(2) provides that a supplier may contract out of the provisions of section 19(2)(c) as long as the consumer agrees thereto, whereas regulation 44(3)(g) provides that any provision in a consumer agreement where the supplier modifies the rules regarding the distribution of risk to the detriment of the consumer is

⁴⁰ Chapter 8 Parts D 1.1 & F 1.

⁴¹ Chapter 8 Parts D 1.2 & F 1.

⁴² *Ibid.*

presumed to be unfair.

Safe-keeping of the things sold (lay-by agreements)⁴³

- a. The common law position regarding the seller's duty of safe-keeping of the things sold has been amended by sections 62(1)(a) and 65 of the Act which provide that the risk will remain on the supplier for the whole period that goods are in the possession of the supplier and the parties may not agree otherwise.
- b. The degree of care, diligence and skill differ between situations where the supplier manages the property or where another person manages the property of the consumer.
- c. The intention of the legislator in this regard is to require a different degree of skill from ordinary suppliers where the suppliers themselves take possession of the goods than from a professional person who assumes control of a supplier's property.
- d. Lay-by agreements do not exist in either Scotland or Belgium.

Recommendations

Consumer sales subject to suspensive conditions⁴⁴

- a. It is recommended that the Minister publish regulations and a standard clause to be included in all agreements with consumers where goods are sold by description or sample or both.
- b. The consumer should not only be made aware of his right to inspect the goods as provided for in terms of section 18(3) in the abovementioned standard clause but the onus must also be on the supplier to prove that the clause was directed to the attention of the consumer and was worded in plain language as required by section 22 of the Act.

The doctrine of benefit and risk

- a. In the case of consumers who are natural persons the provisions of regulation 44(3)(g) to the CPA should take preference over section 19(2). Such an interpretation is more beneficial to the consumer and in line with the purposes of the Act as set out in section 3 thereof.

⁴³ Chapter 8 Parts D 2 & F 2.

⁴⁴ Chapter 8 Parts D 1.2.1 & F 1.

- b. Taking into account the position in Scotland, the wording of section 19(2) should be amended so that suppliers may not contract out of the distribution of risk.

Safe-keeping of the things sold (lay-by agreements)

- a. Trustees should also be included under the provisions of section 56 of the CPA.

Chapter 9: Delivery and transfer of ownership

Conclusions

Time and place of delivery⁴⁵

- a. The CPA confirms the common law position with regard to the time and place of delivery in that it is an implied term that the supplier must deliver the goods at the agreed time and place.
- b. If no time is agreed upon, delivery must be within a reasonable time (confirming the common law position).
- c. If no place is agreed upon the place of delivery will either be the supplier's place of business or in the absence of such an address the supplier's residence (also confirming the common law position).

Acceptance of goods by the consumer⁴⁶

- a. Acceptance of the goods by the consumer (and the forms of acceptance) is relevant not only because the consumer may lose the right to reject the goods in terms of the Act but acceptance will also determine when the risk in the goods as well as ownership will transfer in the case of a credit sale for movable consumer goods.
- b. Acceptance of delivery of consumer goods is deemed when a consumer expressly or implicitly communicates to a supplier that he has accepted delivery of such goods.⁴⁷ An implicit communication means that the onus of proof would be on a supplier to prove that a consumer seems to have accepted goods in this manner.
- c. A consumer accepts goods in terms of section 19(4) if he does anything in relation to the goods that is inconsistent with the supplier's ownership and the consumer will

⁴⁵ Chapter 9 Parts D 1 & F 2.

⁴⁶ Chapter 9 Parts D 2.1 & F 3.

⁴⁷ S 19(4) CPA.

lose his right to reject the goods in terms of section 20.

- d. The consumer is regarded to have accepted goods in terms of section 19(4) where he keeps the goods for an unreasonable time without informing the supplier that he does not want them. What constitutes an unreasonable period of time is a factual question. An unreasonable period of time should be a period that runs beyond the periods of time provided for in the Act in which a consumer may reject the goods or institute his cooling-off right in terms of section 16.
- e. Where goods are unsafe or defective in terms of section 56 and the implied warranty of quality applies, an unreasonable period of time will not be less than six months. The reason is that the consumer has a right to reject, replace or claim a refund within six months (from date of delivery).
- f. Defective goods may therefore be in the possession of the consumer for a period of six months from date of delivery without it being regarded as acceptance of the goods by the consumer in terms of section 19(4) (in other words merely because the consumer keeps them for six months before exercising his right to reject in terms of section 56). The six month-period should therefore not be regarded as an unreasonable period of time to keep consumer goods taking into account that the goods must be unsafe or defective for section 56 and the six month-period to apply.

Rejection of goods by the consumer⁴⁸

- a. A consumer may reject goods in terms of section 20(2)(b) solely on the fact that he did not have an opportunity to examine them, without determining whether or not the goods do in fact conform to the description or sample or both or the material specifications of the special order.
- b. The common law position with regard to cancellation and positive malperformance is amended. In terms of the common law and in the absence of a cancellation clause, a party is only entitled to cancel a contract where the malperformance is substantial whereas in terms of section 20(2)(c) the consumer may reject the goods and claim a refund if a mixture of goods were delivered to the consumer *regardless*⁴⁹ of whether the incorrect delivery of mixed goods was substantial or not.

⁴⁸ Chapter 9 Parts D 2.2, 2.2.1, 2.3 & F 3.

⁴⁹ Own emphasis.

- c. Uncertainty exists where goods were bought to satisfy a particular purpose and sections 20, 55 and 56 must be read together to determine how and when a consumer may reject the goods.
- d. Before a consumer can reject goods bought for a particular purpose in terms of section 20(2)(d), the provisions of section 55(3) must be complied with.
- e. There are two opportunities for the consumer to reject (return) the goods:
 - I. Firstly, where the goods are unfit for the particular purpose for which they were bought they may be returned in terms of section 20(2)(d) within ten business days after delivery at the supplier's risk and expense;
 - II. Secondly, because the implied warranty of quality is also applicable to goods bought for a particular purpose, such goods may be returned within six months after delivery at the supplier's risk and expense. The only difference between the sections is the time periods in which to return goods sold for a particular purpose.
- f. Where the consumer returns goods bought for a particular purpose in terms of section 55(3) (read together with section 56), the consumer may return the goods but has a choice of either claiming a full refund, or a replacement of the goods or repair of the goods. There is no provision in terms of section 56 (as is the case in terms of section 20(3)) whereby the consumer is prohibited from returning the goods and a supplier may also not charge any penalty where goods are returned in terms of the same section.
- g. The difference in the wording of sections 20 and 56 is cumbersome for the consumer and a stumbling block for the proper interpretation of the consumer's rights.
- h. Suppliers will not be able to argue that consumers who have accepted goods in terms of section 19 will lose their right to reject and return the goods in terms of section 56 (even if there is a defect in the goods) due to the fact that the right to return the goods in terms of section 56 is *additional*⁵⁰ to any other right in terms of the Act or the common law.
- i. In all three jurisdictions the period in which a consumer may reject goods remains a

⁵⁰ *Ibid.*

factual question. What is clear, however, is that consumers in terms of the CPA have greater protection in that the CPA provides that the rights contained in section 20 are additional to any other right given to consumers in the Act, the common law or any other law.

Delivery and transfer of ownership⁵¹

- a. The mere conclusion of a contract of sale does not constitute the transfer of ownership in South Africa.
- b. The intention of the parties will indicate whether it is a cash or credit sale but mere conclusion of the sale will also not constitute a transfer of ownership without some form of recognised delivery.
- c. The problem that currently exists in Scotland where two systems for the transfer of ownership overlap in the case of consumer sales is avoided in South Africa since the CPA does not (as is the case with SOGA in Scotland) introduce a new system of transfer.⁵²
- d. The CPA is silent on the distinction between cash and credit sales of movable goods and the common law position with regard to the transfer of ownership in cash and credit sales will still be applicable.
- e. The scope and application of the NCA will assist in determining whether a consumer sale is one of credit in South African law.
- f. The common law position with regard to the seller's duty of delivery is confirmed in the CPA.
- g. Section 44 only guarantees the consumer's right of quiet possession and the disclosure of charges or encumbrances but it does not guarantee ownership.
- h. The fact that section 44 provides that the supplier has the authority to supply the goods is also not a guarantee for the transfer of ownership.
- i. The transfer of ownership may become problematic in two instances:
 - I. Firstly, where goods (for example motor vehicles) are sold in a chain of transactions which also include financing and entails sequential ownership;
 - II. Secondly, where the seller is either unsure of whether he is in fact the owner

⁵¹ Chapter 9 Parts D 3 & F 1.

⁵² Chapter 9 Parts E 2 & F 1.

or where the seller is not the owner at time of conclusion of the sale but will become owner in the near future.

- j. There is nothing in the CPA that conflicts with the common law position that a seller may sell goods of which he is not the owner. The seller is not required to make any pre-contractual or contractual statement in this regard because it is an implied term of section 44.⁵³ The common law position is therefore confirmed.
- k. The purpose of section 44 is not to guarantee the transfer of ownership but rather to better protect consumers where suppliers act *mala fide* or fraudulently in their dealings with them.

Recommendations

Delivery and transfer of ownership⁵⁴

- a. Where goods are sold in a chain of transactions which also include financing of the goods and entails sequential ownership, the common law position⁵⁵ should apply.
- b. It is recommended that the Minister publish industry codes to regulate consumer sale agreements that are prone to “chain selling” (as in the case of motor vehicles).
- c. The purpose of these codes would be to clarify the situation and the manner in which agreements are concluded and ownership is (or is not) transferred. The meaning of “quiet possession” in section 44 as well as the remedy available to a consumer if section 44 is not complied with should be clarified by the Minister since no remedy is provided for by the section itself.
- d. If the Minister fails to bring clarity and it is left to the courts, NCT or NCC to interpret the position, the common law position must be used as a guide. It would also be valuable for the courts to consider foreign law in terms of section 2(1)(a) of the CPA. Section 12 of SOGA as well as the applicable case law discussed⁵⁶ in Scotland are helpful in this regard.
- e. With regard to the interpretation of the intentions of the parties as to when and how ownership will transfer it is recommended that the rules as set out in section 18 of

⁵³ S 44 CPA.

⁵⁴ Chapter 9 Parts D 3 & F 1.

⁵⁵ Chapter 9 Part B 2.2-2.5.

⁵⁶ Chapter 9 Part E 1.7.1.

SOGA in Scotland and the manner in which the courts in Scotland have interpreted these rules be considered as guidelines in respect of consumer contracts in South Africa.

- f. The Minister should also consider publishing similar rules with regard to the application of the CPA.
- g. The exceptions to the general rule of transfer of ownership in Belgian law can serve as guidelines when determining the true intentions of the parties to South African consumer sale agreements. The most relevant of these would be the transfer of ownership in terms of Belgian law in generic sales, the sale of future goods, sales subject to suspensive conditions and selling in a chain.⁵⁷

Chapter 10: Warranty against eviction

Conclusions⁵⁸

- a. The consumer has the right to assume that a supplier has the right or authority to sell goods and this is an implied term as provided for by section 44(1) of the CPA. It is not, however, a guarantee of the transfer of ownership. In this regard the common law position remains unchanged and the *nemo plus iuris* rule⁵⁹ remains intact. This approach is also in line with the relevant foreign law.⁶⁰
- b. The terms “charges” and “encumbrances” are not defined in the CPA.
- c. Charges and encumbrances do not affect the validity of the sale of goods in terms of consumer sale agreements.
- d. Section 44(1)(d) governing the guarantee of quiet possession is a confirmation of the seller’s common law warranty against eviction.
- e. Therefore, the consumer has a statutorily entrenched contractual guarantee as to the undisturbed use and enjoyment of the thing sold.
- f. The common law is amended in that the buyer does not need to follow the common

⁵⁷ Chapter 9 Part E 2.

⁵⁸ Chapter 10 Parts D & F.

⁵⁹ The principle that no person may transfer more rights than he himself possesses.

⁶⁰ S 12 SOGA Scotland: Chapter 9 Part E 1.

law rules when threatened with eviction nor bears the onus of proving that the rules were not followed because of a defective title of the seller or an unassailable title of the third party.

- g. It is an oversight on the part of the legislature not to have included any remedies for the breach of the guarantee of quiet possession in the CPA.
- h. Contradictory provisions exist in the CPA as to whether a seller may exclude or limit his liability:
 - I. On the one hand the seller may do so provided the terms of the exclusion are not unfair, unreasonable or unjust and any provision in an agreement which excludes the seller's liability will be interpreted and construed against him.
 - II. On the other hand, the Act provides that any right available to a consumer in terms of South African common law may not be excluded and in the case of contradictory provisions, an interpretation most beneficial to the consumer should apply.
- i. It follows therefore that the common law position with regard to the exclusion of a claim for damages in the case of eviction has been amended in the case of consumer sales and the seller may not exclude or limit such a claim in the consumer agreement.
- j. The prohibition of an exclusion or limitation of a claim for damages is reinforced by regulations 44(3)(e) and (x) in the case of consumers who are natural persons.

Recommendations

- a. With regard to the meanings of "charge" and "encumbrance", it is recommended that the interpretations that crystallised in terms of South African case law be followed in consumer sales.
- b. Due to the fact that no remedies are provided for a breach of the implied warranty of quiet possession in terms of the CPA, it is recommended that the common law remedies available to the buyer in the case of eviction should be followed. This is confirmed by section 2(10) of the Act as well as applicable foreign law.⁶¹

⁶¹ Chapter 10 Part E 1.4.

Chapter 11: Warranty against latent defects

Conclusions

Definition of defect⁶²

- a. The common law definition of a latent defect has been confirmed by section 53 of the CPA but has also been developed and extended.
- b. The wording “what persons are reasonably entitled to expect” in section 53 is an objective test and the “person” mentioned is not an expert.
- c. A distinction should be made between the provisions of section 55 and section 61 and what a consumer is reasonably entitled to expect:
 - I. In the case of section 55 dealing with the implied warranty of quality, what a reasonable consumer is generally entitled to expect pertains to the *quality*⁶³ of the goods;
 - II. The focus of the definition when dealing with the liability for damages in terms of section 61 is more on what consumers are generally entitled to expect with regard to the *safety*⁶⁴ of the product.
- d. What a consumer is reasonably entitled to expect in the *circumstances*⁶⁵ will always play a very important role and is clearly a critical part of the courts’ analysis in Scotland and Belgium. The marketing of the products, whether or not the product is new or second-hand and the intended use of the goods are all factors to be taken into account as part of the circumstances to determine what a consumer is reasonably entitled to expect.

Common law warranty against latent defects, right to safe, good quality goods and the implied warranty of quality⁶⁶

- a. The common law warranty against latent defects has been amended by the CPA.
- b. The warranty is extended to include both latent and patent defects and a heavier

⁶² Chapter 11 Parts D 1 & F 1.

⁶³ Own emphasis.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ Chapter 11 Parts D 3-8 & F 2-2.

duty rests upon a seller who is also a supplier in terms of the Act with regard to the goods sold by him.

- c. The provisions of section 55(2) and (3) always have to be taken into account and the warranty of quality is an implied term of every consumer agreement.
- d. The implied warranty of quality in terms of section 55 read together with section 56 of the CPA in South Africa, contain most of the concepts and elements that form part of the warranty in terms of Scots and Belgian law.
- e. The common law position regarding the onus of proof is amended by the CPA.
- f. A consumer only has to prove that the supplier breached the implied warranty of quality. If the seller, however, avers that the defect did not exist at the time of conclusion of the contract, the consumer will have the evidentiary burden of proving the contrary.
- g. In both Scotland⁶⁷ and Belgium⁶⁸ a rebuttable presumption exists that a defect discovered within six months after delivery, already existed at the time of conclusion of the consumer sale. The onus of proof will therefore be on the supplier to prove the contrary.
- h. Contradictory provisions exist within the CPA regarding the inclusion of a voetstoots clause in a consumer sale.
- i. Contradictory interpretations by legal writers exist regarding the inclusion of a voetstoots clause in a consumer sale.
- j. Goods may not be sold “as is” or voetstoots in terms of a consumer sale agreement and the voetstoots clause will not apply.
- k. A seller may, however, sell consumer goods in a particular condition provided that the requirements of section 55(6) have been met. This is of particular importance in the case of the sale of second-hand goods.
- l. A general or “umbrella” exclusion of liability is no longer possible where the CPA is applicable to a sale.
- m. A supplier may not in any way exclude or waive his liability in terms of a consumer agreement. More importantly the supplier (seller) may also not exclude or limit the

⁶⁷ Chapter 11 Part E 1.4.3.

⁶⁸ Chapter 11 Part E 2.4.2.2.

rights of the consumer.

- n. Uncertainty exists in South African law as to whether the common law warranty (as well as the exclusion thereof) is revived after the six month-period. Though an interpretation confirming the indefinite application of the implied warranty of quality in terms of section 55 is possible, legislative amendments would be more appropriate and provide for better certainty in this regard.

Second-hand goods⁶⁹

- a. Section 55(6) provides some relief for sellers of second-hand goods including pawn or consignment stores.
- b. The seller still has the onus of proving that the buyer understood the condition of the goods *and*⁷⁰ accepted the goods in this condition or acted in a manner suggesting acceptance.
- c. The “surrounding circumstances of the supply” as provided for by section 55(2)(c) will play a prominent role in the case of the implied warranty of quality of second-hand goods.
- d. A possible way to circumvent the stringent consequences of the act would be for sellers of for example second-hand vehicles to sell them on behalf of their owners rather than buying and reselling them in their own name.
- e. The Second-Hand Goods Act⁷¹ does not provide any guidance as to the interpretation of Part H of the CPA as the main purpose and aim of the Act is to prevent the trade in stolen goods and promote ethics in the trade of second-hand goods.
- f. The condition of second-hand (or pawned goods) will differ from the condition of newly manufactured goods.
- g. The interpretation of the South African positive law where the CPA is not applicable is important in this regard.
- h. Trade-in transactions include the trading-in of second-hand goods as part of the sale and will also have to conform with the provisions of the CPA where the Act is

⁶⁹ Chapter 11 Parts D 8 & F 7.

⁷⁰ Own emphasis.

⁷¹ 6 of 2009.

applicacble on such transactions.

Remedies⁷²

- a. The aedilitian actions (*actio quanti minoris* and *actio redhibitoria*) are still applicable where the CPA regulates consumer sale agreements. This is confirmed by section 2(10) of the Act.
- b. The *actio empti* is in addition to the aedilitian remedies as well as the remedies provided for by section 56 of the CPA (also referred to as the consumer remedies).
- c. Where goods do not comply with the implied warrant of quality in terms of section 55 of the CPA and this is discovered within six months from the date of delivery, it is the consumer and not the supplier's choice to institute either of the consumer remedies provided for by section 56 of the Act, namely, refund, repair or replace or the common law remedies.
- d. If, however, the consumer chooses to repair the goods, the provisions of section 56(3) of the Act will be applicable and if any failure, defect or unsafe hazard is not remedied within three months after the repair, the supplier (and not the consumer) will have the choice of either replacing the goods or giving the consumer a refund of the purchase price.
- e. Contrary to the common law, the defect in terms of section 55 does not have to be material for the consumer to reject the goods.
- f. If the goods fail to satisfy the requirements and standards contemplated in section 55, the consumer must discover and report this within six months after the date of delivery.
- g. The consumer must institute the remedies in terms of section 56 within six months after the date of delivery.
- h. The remedies available to the consumer are repairing the goods, replacing the goods or claiming a refund of the purchase price.
- i. The consumer will have the common law remedies available to him in addition to the consumer remedies for the six month-period after the date of delivery.
- j. The consumer remedies of repair, replace and refund (section 56(2)) will not be available to a consumer after six months from the date of delivery.

⁷² Chapter 11 Part F 6.

- k. Though there are conflicting viewpoints on this matter,⁷³ the preferred interpretation is that even though the consumer remedies are no longer available to the consumer after six months, the implied warranty of quality remains an implied term of the consumer sale indefinitely.
- l. The consumer will have the common law remedies to his disposal after the six month-period provided for in terms of section 56(2) and these remedies may not be excluded by way of agreement between the parties.
- m. Because the implied warranty of quality remains intact after six months, a voetstoets clause will never become operational in the case of a consumer sale – not even after the expiration of any additional contractual guarantees given by the supplier.
- n. The six month-period in which to institute the consumer remedies is unfair and warrants legislative amendment as proposed below.

Product liability

- a. The requirements established in the South African positive law for the liability of merchant sellers (liability on a contractual basis) and manufacturers (liability on a delictual basis) for latent defects remain intact where the Act is not applicable.
- b. Although it is irrelevant whether a defect in consumer goods sold in terms of the CPA is latent or patent, “what a person generally would reasonably be entitled to expect” (section 53) is problematic as it is uncertain when and where this test will apply.
- c. Though the wording of section 53 is very similar to the definitions given to a defect in terms of both Scottish legislation⁷⁴ and Belgian consumer legislation⁷⁵ the objective test of a what a person generally would reasonably be entitled to expect as a consumer in South Africa would differ greatly from what a consumer in a first world country such as Belgium generally would reasonably be entitled to expect.
- d. Product liability in South Africa is amended where the CPA is applicable.
- e. Negligence is no longer a requirement to prove liability on the part of the producer or manufacturer.

⁷³ Chapter 11 Part D 4.

⁷⁴ S 3 UK CPA 1987. See also Part E 1.1.2 above.

⁷⁵ Art 5 Act 1991. See also Part E 1.2.1 above.

- f. All relevant parties in the supply chain will be jointly and severally liable without having to prove a contractual *nexus*.
- g. Wrongfulness must still be proved.
- h. South African writers are in conflict with regard to whether or not retailers, suppliers and importers are also liable.⁷⁶
- i. Due to the wording of section 61(4)(c), distributors and retailers will attempt to escape liability by proving that “it is unreasonable to expect the distributor or retailer to have discovered the unsafe product characteristic, failure, defect or hazard, having regard to that person’s role in marketing goods to consumers”.
- j. Taking the comparative positions into account it would seem that retailers are only secondarily liable in Scotland and that a contract *nexus* is a requirement in the case of Belgium.

Recommendations

Definition of defect

Subsection 55(5)(a) (which states that it is irrelevant whether the defect is latent or patent) should be included as part of the definition of “defect” in section 53 for greater certainty and a legislative amendment is recommended.

Common law warranty against latent defects, right to safe, good quality goods and the implied warranty of quality

- a. In determining the application of the warranty of quality in terms of the CPA, the particular circumstances of each case will have an effect on the application of the relevant provisions and must be taken into account
- b. It is further recommended that the judicial interpretation of “other relevant circumstances” in Scotland be used as a guideline by South African courts in this regard.
- c. Regarding the burden of proof in the case of the warranty of quality in terms of the CPA, it is recommended that the consumer also prove the existence of the defect at the time of conclusion of the contract from the outset as part of his pleadings in his claim against the supplier.

⁷⁶ Chapter 11 Part D 1.4.2.

- d. It is recommended that the Minister implement a statutory rebuttable presumption to the effect that a defect discovered within six months after delivery, already existed at the time of conclusion of the consumer sale.
- e. The Minister must further implement a reverse burden of proof on the supplier to prove that the defect did not exist at the time of delivery thereof.
- f. With regard to the uncertainty as to whether the implied warranty of quality applies after the six month-period in terms of section 56(2), two recommendations are made:
 - I. The Minister should publish guidelines with regard to the application and interpretation of Chapter 2 Part H and more specifically the implied warranty of quality and consumer remedies contained therein.
 - II. When faced with the abovementioned uncertainties it is further recommended that courts take sections 56(4)(a), 51(1)(b) and 2(10) of the CPA into consideration. These sections support the argument that the implied warranty of quality is over and above any other implied warranty or condition imposed by common law.⁷⁷

Second-hand goods

It is recommended that the Minister publish industry codes to provide guidance for suppliers of second-hand goods.

Remedies

- a. A division of the consumer remedies in terms of section 56(2) is proposed.
- b. Claiming a refund (rejecting the goods) should be dealt with separately and a legislative amendment is proposed in this regard.
- c. The consumer should be given six months from the date of delivery in which to claim a refund but with the additional proviso that such a period may be increased or decreased depending on the purpose, type and quality of the goods.
- d. The Minister should publish industry guidelines and regulations in this regard.
- e. It is further recommended that the remedies of repair or replacement (section 56(2)) should be available to consumers for a period of two years in the case of new goods and a minimum of one year in the case of second-hand goods from the date of delivery. Legislative amendment of the wording of section 56(2) is suggested in this

⁷⁷ S 56(4)(a).

regard.

- f. It is also recommended that after the period of two years (in the case of new goods) or one year (in the case of second-hand goods) from the date of delivery, the consumer will only have the common law remedies at his disposal.
- g. The normal periods of prescription as provided for in the Prescription Act should apply. This will have the result of preventing claims based on a breach of the implied warranty of quality in perpetuity.

Product liability

- a. The definition of “defect” in section 53 of the CPA should expressly include functional as well as structural defects as is the case in Belgium.⁷⁸
- b. The Minister must publish guidelines for the effective application of Part H of the Act relating to defects and what kinds of defects (structural and functional) are included.
- c. An objective standard of reasonableness should be applied regarding “what persons are reasonably entitled to expect” (section 53 of the CPA).
- d. With regard to the uncertainty as to whether suppliers and retailers are liable in terms of section 61 of the Act, guidelines must be published by the Minister in this regard.
- e. The alternative would be a legislative amendment of section 61 of the CPA to clarify the liability of distributors and retailers but it is highly unlikely that this will occur. The reason is that suppliers are generally excluded from strict liability (with the proviso that they must identify their suppliers) in other countries with similar consumer protection legislation such as Scotland and Belgium.
- f. If suppliers are not included in the application of section 61 of the CPA they would still be liable based on breach of contract or in delict in terms of South African common law.
- g. It is recommended that any defence raised by retailers or distributors in terms of section 61(4) of the CPA should be interpreted strictly against the distributor or retailer and that the marketing of the goods should always be taken into account.

⁷⁸ Chapter 11 Part E 1.2.1.

C. FINAL REMARKS

Due to the wording of section 2(10) of the CPA, the common law of sale will still play an important role and will also be the “safety net” to ensure that a consumer is never without a remedy or protection.

Unfortunately, this also causes confusion regarding the interpretation of the provisions of the CPA and an attempt must be made to bring uncertain and ambiguous provisions in line with the golden rule as mentioned in the introductory chapter of this thesis:⁷⁹ An interpretation and approach that is most beneficial to the consumer.

In conclusion the prophetic words of Sachs J regarding the importance of protecting consumers and the common law are most apposite:⁸⁰

“Given the scale of injustice in our past, it is not surprising that the theme of consumer protection has not loomed as large in this country as it has in other parts of the industrialised world. Yet just as the best should not be the enemy of the good, so the worst should not be the friend of the bad. As our society normalises itself, issues that were once relatively submerged now surface to claim full attention. In this way achievement of the larger constitutional freedoms enables us to attend to and develop the smaller freedoms so necessary for enabling ordinary people to live dignified lives in an open and democratic society. People should not feel that arcane, lawyer-made and highly technical rules beyond their ken, leave them with a sense of having been cheated out of their rights by the big enterprises with which they perforce have to do business. And as long as government and the legislature continue to be preoccupied with major questions of social transformation, and only now begin to tackle consumer protection in a comprehensive way, the common law, under the impulse of the values of our new constitutional order, is called upon to shoulder the burden of grappling in its own quiet and incremental manner with appropriate legal regulation to ensure basic equity in the daily dealings of ordinary people.”

⁷⁹ See chapter 1 of this thesis.

⁸⁰ *Barkhuizen v Napier* 2007 5 SA 323 (CC) 323 at 381.

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South Africa

Consumer Protection Bill 3 rd [B 19 -2008]	Consumer Protection Bill
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National Credit Act 34 of 2005	NCA
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United Kingdom & Scotland	
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Price Marking Order of 2004 (SI 2004/102)	Price Marking Order 2004
Sale and Supply of Goods to Consumers Regulations 2002 (SI 2002/3045)	Consumer Sale Regulations
Sale of Goods Act 1979	SOGA
Unfair Contract Terms Act 1977	UCTA 1977
Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999/2083)	UCTA Regulations 1999
Unsolicited Goods and Services Act 1971	UGSA 1971
Belgium	
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<i>Wet betreffende de bescherming van de consumenten bij verkoop van consumptiegoederen</i> (Act of September 1, 2004 on the protection of consumers in respect of the sale of consumer goods)	Act 2004
<i>Wet betreffende de handelspraktijken, de voorlichting en bescherming van de consument</i> (Act of July 14, 1991 on trade practices) Replaced by Act of April, 6 2010 (WMPC)	TPA 1991

2010)	
<i>Wet betreffende de veiligheid van producten en diensten</i> (Act of February 9, 1994 on products and services safety)	Act 1994
<i>Wet betreffende marktpraktijken en consumentenbescherming</i> (Act of April 6, 2010 on the market practices and the protection of consumers) The WMPC 2010 replaces the TPA 1991	WMPC 2010
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European Union	
Directive 2011/83/EU of the European Parliament and of the council of 25 October 2011 on Consumer Rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of The European Parliament and of the council and Repealing Council Directive 85/577/EEC and Directive 97/7/EC of The European Parliament and of the council	EU Consumer Rights Directive
Misleading Advertising Directive of 1984/450/EEC 10 September 1984 OJ L250/17	Misleading Advertising Directive
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