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CONTRACT LAW AND CONSUMER PROTECTION IN ISRAEL

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I. INTRODUCTION

This Article analyzes the relationship between consumer protection law and modern contract law in Israel. The analysis is centered around three main issues: (1) to what extent do the rules governing consumer contracts depart from those governing general contracts; (2) to the extent that there is a substantial departure, does this departure suggest that the law applied to consumer contracts is a special branch of contract law; and (3) to what extent do additional laws need to be enacted to adequately protect consumers in consumer contracts? Such legislation, it should be noted, will widen the gap between the rules governing consumer contracts and those applied in general contract law.

These three issues will be examined in light of the following concepts of contract law: (1) the generality of contract law; (2) the freedom of contract principle; and (3) the conflicting principles of *caveat emptor* and consumer protection.

This Article is based on the premise that contract law is an important tool in the consumer protection field. It should be noted, however, that some leading scholars in the area of consumer protection disagree with this premise and prefer government intervention to private remedies.[1]

The author's view, based on twelve years of observation as the legal adviser of the Histadrut Consumer Protection Authority, is that although

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1. *See* John Goldring, *Consumer Law and Legal Theory: Reflections of a Common Lawyer*, 13 J. CONSUMER POL'Y 113 (1990). In his Article Goldring claims that to consider contract as the basis of consumer law is a false start. *Id.* at 121-23. His conclusion is that "contract law is not a useful vehicle for consumer law, though it may have a minor part to play." *Id.* at 130. He suggests a shift to preventive law, which requires the intervention of the state. *See also* SIR GORDON BORRIE, THE DEVELOPMENT OF CONSUMER LAW AND POLICY—BOLD SPIRITS AND TIMOROUS SOULS (1984).

private litigation cannot serve as the only means of consumer protection, it is still of great value. Sole reliance on the efficacy of state intervention is a mistake because of insufficient funding and the lack of governmental commitment. Therefore, private remedies based on contract law are not to be neglected.[2] Contract law is not the only basis for these remedies. Tort law and other rules of private law are also relevant. This Article, however, will concentrate on contract law and its relation to consumer protection.

The influence of consumer protection on modern contract law is well presented in the eleventh edition of *Cheshire, Fifoot and Furmston's Law of Contract*.[3] In a new chapter dealing with the factors affecting modern English contract law, Furmston cited subjects such as economic theory, inequality of bargaining power, the use of standard form contracts, and consumer protection. He concluded his survey by questioning whether one general law of contracts still exists that applies to all types of contracts or whether consumer contract law has become a separate body of contract law with different legal principles than those embodied by traditional contract concepts.

The influence of consumer protection law on contract law is part of the broader subject of the crisis of modern contract law. Some of the leading scholars of contract law question the validity of traditional contract concepts and rules in today's society. Those questions are raised by leading Anglo-American scholars, such as Atiyah,[4] Gilmore,[5] MacNeil,[6] and Farnsworth,[7] to name a few.[8] The very doubt as to the applicability of general contract rules in a modern market supports the view that consumer contracts, in particular, should have special rules.

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2. *See* Sinai Deutch, *Standard Contracts—Methods of Control: The Conceptual Framework of the 1982 Law*, 7 TEL AVIV U. STUD. L. 160, 182-84 (1985-86) [hereinafter Deutch, *Methods of Control*].

3. M.P. FURMSTON, CHESHIRE, FIFOOT & FURMSTON'S LAW OF CONTRACT 17-25 (11th ed. 1986).

4. PATRICK S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT (1979).

5. GRANT GILMORE, THE DEATH OF CONTRACT (1974).

6. IAN R. MACNEIL, THE NEW SOCIAL CONTRACT: AN INQUIRY INTO MODERN CONTRACTUAL RELATIONS (1980).

7. E. ALLAN FARNSWORTH, CONTRACTS 20-27 (2d ed. 1982).

8. *See also* JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS 1-13, 23 n.7 (3d ed. 1987) (listing of authors dealing with the philosophical foundations of contract law). *See also* CONTRACT LAW TODAY, ANGLO-FRENCH COMPARISONS (Donald Harris & Denis Tallon eds., 1989); *see generally* Robert A. Hillman, *The Crisis in Modern Contract Theory*, 67 TEXAS L. REV. 103 (1988-89).

Similar issues can be raised with regard to the relationship between Israeli contract law and Israeli rules of consumer protection relating to consumer contracts, such as: (1) whether consumer protection laws change the rules of consumer contracts to such an extent as to divide contract law into two branches—commercial contracts and consumer contracts; (2) whether the changes are substantial enough to consider consumer contracts a special type of contract law or whether they are merely technical devices to correct some of the flaws in the traditional contract concepts; (3) whether, in light of the second issue, the rules governing consumer contracts are sufficient to protect consumers, or whether it is necessary that further consumer legislation be enacted in order to adequately protect the consumers.

Classic contract law is premised on the generality of contract principles, freedom of contract principles and the principle of *caveat emptor* (let the buyer beware). In the following sections, the validity of these concepts in relation to the law governing consumer transactions will be examined.

This Article concludes that consumer law has deviated from some of the basic principles of contract law. These deviations are meaningful in certain areas of the law and only of little value in others. Thus, additional legislation is required to clarify the law.

II. GENERAL CONTRACT LAW AND CONSUMER PROTECTION LAW

Contract law has general rules that are common to all contracts and more particular rules for specific types of contracts.[9] Most contract textbooks deal with the general rules of contracts.[10] This general approach is also the structure of contract law in Israel. The main law on contracts in Israel is the Contracts (General Part) Law, 5733-1973,[11] which includes

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9. *See, e.g.*, 7 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW *Contracts in General* (Arthur von Mehren ed., 1982-92); 8 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW *Specific Contracts* (Konrad Zweigert ed., 1980-83); *see also* CHITTY ON CONTRACTS, GENERAL PRINCIPLES (26th ed. 1989) [hereinafter CHITTY ON CONTRACTS].

10. *See, e.g.*, FURMSTON, *supra* note 3; G.H. TREITEL, THE LAW OF CONTRACT (7th ed. 1987); FARNSWORTH, *supra* note 7; GABRIELA SHALEV, THE LAW OF CONTRACT (1990) (in Hebrew); *cf.* CHITTY ON CONTRACTS, *supra* note 9.

11. 27 LAWS OF THE STATE OF ISRAEL (L.S.I.) 117-27; two other general contract laws are the Contract (Remedies for Breach of Contract) Law, 5731-1971, and the Standard Contracts Law, 5743-1982. *See* Gabriela Shalev, *Forty Years to the Laws of*

rules governing contract formation, rescission by reason of defect in the formation, the form and content of contracts, and performance of contracts. Additionally, there are a number of special contract laws that deal with the specific features of various transactions.[12] The proposed Code of Civil Laws incorporates all of these laws.[13]

There is no special consumer contract law, nor is consumer contract law treated as a special type of contract under Israeli law. However, differences between consumer contracts and general contracts justify such consideration.

Before we analyze the difference between the rules of consumer contracts and general contracts, one preliminary remark is necessary. Consumer protection legislation does not necessarily use the term "consumer." There is only one law where the "consumer" is overtly mentioned,[14] the Consumer Protection Law, 5741-1981.[15] Other laws use terms such as "customer," "purchaser," or "buyer," instead of the term "consumer," although consumer protection is one of the main goals of

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Contracts, 19 MISHPATIM 651, 658 (1989).

12. *See, e.g.*, Agency Law, 5725-1965, 19 L.S.I. at 231-34; Guarantee Law, 5727-1967, 21 L.S.I. at 41-43; Bailees Law, 5727-1967, 21 L.S.I. at 49-52; Pledges Law, 5727-1967, 21 L.S.I. at 44-49; Gift Law, 5728-1968, 22 L.S.I. at 113-14; Sale Law, 5728-1968, 22 L.S.I. at 107-12; Transfer of Obligations Law, 5729-1969, 23 L.S.I. at 277-78; Hire and Loan Law, 5731-1971, 25 L.S.I. at 152-57; Contract for Services Law, 5734-1974, 28 L.S.I. at 115-17.

13. *See* BILL OF EDITING THE COLLECTION OF CIVIL LAWS, 5780-1980, *published in* HATZAOT CHOCK 282. The *Bill of Editing the Collection of Civil Laws,* although never passed as an act, was the basis of the establishment of a committee of leading jurists, who are in the process of preparing the code. The project may take another ten years to complete. When the project is completed, the laws will be compiled under this code, which will incorporate 18 existing laws, most of which deal with general and special contracts.

14. There are, however, several laws where the terms "consumer" or "consumer organization" are mentioned in the context of representation of consumers in public bodies and tribunals. *See, e.g.*, Restraint of Trade Law, SEFER HACHUKIM, 5748-1988, at 128-39, § 32(d); Standard Contracts Law, 5743-1982, 37 L.S.I. at 6, § 6(d); Telecommunication Law, 5742-1982, § 6B(b)(2) (a 1986 amendment—the council of cable broadcasting).

15. 35 L.S.I. at 298-311. The Consumer Protection Law deals with pre-contractual duties, such as misrepresentation, extortion, various duties of disclosure, misleading advertisement, notification of details in credit transactions, door-to-door sales, and labeling of goods. None of these issues are dealt with under any of the special contract laws. The special contract laws regulate the relation between parties, including the duty of conformity and the duty to deliver on time. None of these issues are covered by the Consumer Protection Law. *See infra* notes 95-96, 126, 165-67 and accompanying text.

these laws.[16] This tendency may reflect different views as to whether legislation designed to correct market failures, such as in the area of standard contracts, should be limited to consumers only or whether they should apply to all customers.[17] In sum, while much of the legislation designed to protect consumers does not use the term "consumers," it is quite clear from the content and purpose of these laws that consumer protection was their main goal or, at least, one of their essential objectives.

III. DISTINCTIONS BETWEEN CONSUMER PROTECTION LEGISLATION AND GENERAL CONTRACT PRINCIPLES

Five general rules of contract law will be examined in relation to consumer protection legislation to illustrate the extent to which this legislation deviates from traditional contract law.

A. The Freedom Not to Enter into a Contract

The first section of the General Contracts Law states that "a contract is made by way of offer and acceptance."[18] Accordingly, when one party is unwilling to offer or to accept, there can be no contract. Traditionally, a party cannot be compelled to make or accept an offer.[19] However,

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16. The term "consumer" is defined under § 1 of the Consumer Protection Law: "A person who buys a commodity or receives a service from a dealer in the course of his business for mainly personal, domestic or family use." The term "customer" means every purchaser not only a person who fits the definition of consumer. *See, e.g.*, Sale (Housing) Law, 5733-1973, 27 L.S.I. at 213-16; Small Claims (Jurisdiction) Law, 5736-1976, 30 L.S.I. at 240-43; Banking (Service to Customer) Law, 5741-1981, 35 L.S.I. at 312-18; Insurance Business (Control) Law, 5741-1981, 35 L.S.I. at 243-76; Defective Products (Liability) Law, 5740-1980, 34, L.S.I. at 92-95.

17. *See, e.g.*, Sinai Deutch, *The Small Claims Court in Israel as a Shield to Consumers*, 8 TEL AVIV U. L. REV 345, 349-51 (1981) (in Hebrew) [hereinafter Deutch, *Small Claims*]; SHALEV, *supra* note 10, at 620-21; Ewoud H. Honduis, *Unfair Contract Terms: New Control Systems*, 26 AM. J. COMP. L. 525, 546 (1978); Sinai Deutch, *Control of Unfair Terms in Consumer Contracts in Israel: Law and Practice*, 13 J. CONSUMER POL'Y 181, 185 (1991) [hereinafter Deutch, *Unfair Terms*].

18. General Contracts Law, 5733-1972, 27 L.S.I. at 117.

19. *See* Migael Deutch, *Compulsory Contracts and the Freedom from Contract*, 16 TEL AVIV U. L. REV. 35 (1991) (in Hebrew); *see also* Gabriela Shalev, *What Remains of the Freedom of Contract*, 17 MISHPATIM 465 (1987); ATIYAH, *supra* note 4, at 742-45. There are, however, some Israeli jurists who contend that due to the principle of good faith in bargaining, a contract can be made in exceptional cases without fulfilling the rules

under Section 22 of the Commodities and Services (Control) Law, 5718-1957, there is a duty under which "a person cannot unreasonably refuse to sell any controlled commodity, which he has in stock."[20] Infringement of that duty is subject to criminal penalties,[21] but can also serve as the basis for a suit under the tort law rule of breach of a statutory duty.[22] By its terms, this law imposes restrictions on the freedom not to contract, in contradiction to general contract principles. Provisions which impose a duty to enter into agreements exist in other laws as well. For instance,[23] under Section 2 of the Banking (Service to Customer) Law, 5741-1981, a duty is imposed on a banking corporation to perform certain services. A banking corporation that breaches such a duty is subject to fines,[24] and can also be sued for compensation.[25] Neither law mentions the term consumer,[26] nor are they limited solely to consumer transactions; but consumer protection is clearly one of the main goals of these laws, which deviate from the traditional contract law concept: the freedom not to enter into a contract.[27]

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of offer and acceptance. *See* Nili Cohen, *Contract Rules and Good Faith in Bargaining: Formalism v. Principles of Justice,* 37 HAPRAKLIT 13 (1986) (in Hebrew).

20. 12 L.S.I. at 24, § 22.

21. *Id.* § 39.

22. 2 L.S.I. at 5, § 63. For a liberal interpretation of this provision, see C.A. 245/81, Sultan v. Sultan, 38(3) P.D. 169 (1984). *See generally* Ada Bar-Shira, *Breach of Statutory Duty* (2d ed. by D. Levinson-Zamir), *in* THE LAW OF CIVIL WRONGS: THE PARTICULAR TORTS (Gad Tedeschi ed., 1989).

23. There are also other provisions that impose a duty to contract. *See, e.g.*, Restrictive Trade Practices Law, 5748-1988, SEFER HACHUKIM 128, § 29 (a monopolist should not unreasonably refuse to supply goods and services); *see also* Tourist Services Law, 5736-1976, 30 L.S.I. at 223, § 6 (prohibition of refusing to service).

24. 35 L.S.I. at 312, § 10.

25. *Id.* § 15.

26. The definition of "consumer" in § 1 of the Consumer Protection Law, 5741-1981, is "a person who buys a commodity or receives a service from a dealer in the course of his business for mainly personal, domestic or family use." *Id.* at 298-311.

27. *See* Deutch, *supra* note 19 (arguing that today some contracts are imposed on the consumer). There is ground to distinguish between the cases discussed in Migael Deutch's Article and the provisions intended to protect consumers. His examples deal with situations where the bargaining created reliance which justified enforcement of the promise. Contracts imposed due to consumer protection considerations are based on a duty to sell or to deliver services in order to protect consumers and not due to any prior relations.

B. One-Sided Cancellation of a Contract

After a contract has been formed, it cannot be rescinded by one party without the consent of the other party. One-sided withdrawal from a contract is considered a breach of the contract. In certain consumer transactions, however, a contract can be rescinded after it has been made. For example, under Section 14 of the Consumer Protection Law 5741-1981,[28] a door-to-door transaction can be rescinded under certain conditions. When a dealer comes to a consumer's residence or work place, the consumer may cancel the agreement within seven days.[29] A similar provision appears in Section 59 of the Insurance Business (Control) Law, 5741-1981.[30] An insurance transaction consummated at a person's residence or place of employment can be canceled within three business days if the insurer was not invited by the insured person.[31] As such, the power of a consumer to cancel a contract after it has been made is in direct conflict with general contract rules.

C. Extortion in Consumer Contracts

Chapter 2 of the General Contracts Law prescribes various grounds for invalidating contracts due to defects in their formation.[32] There are more specific rules for invalidating contracts in consumer transactions.[33] The rules for extortion in consumer contracts are of special interest. Under Section 18 of the General Contracts Law, only a combination of taking unfair advantage of another party's distress (or mental or physical weakness), together with greatly unreasonable terms can justify the cancellation of the contract.[34] Under a 1988 amendment of the Consumer Protection Law,[35] however, taking advantage of a consumer's mental or

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28. 35 L.S.I. at 298-311.

29. There are many more details in that section which are irrelevant to the main point. 35 L.S.I. at 298, § 14.

30. It is a door-to-door service transaction. It appears in chapter 5 of the law, which deals with protection of the interests of insured persons. 35 L.S.I. at 243-76.

31. *Id.*

32. 27 L.S.I. 117-27.

33. *Compare* § 15 of the General Contracts Law *with* §§ 2 and 32 of the Consumer Protection Law dealing with misrepresentation. *See* Gad Tedeschi, *Advertising and Contract*, 16 ISR. L. REV. 405, 435-38 (1981).

34. 27 L.S.I. at 117, § 18. *See* Sinai Deutch, *Economic Duress in Contract Law*, 2 BAR-ILAN L. STUD. 1 (1982).

35. SEFER HACHUKIM, 5748-1988, at 2, § 3(a).

physical weakness alone is an infringement of the law, which can lead to invalidation of the sale.[36] Thus, procedural unfairness in consumer contracts is sufficient in itself to invalidate a transaction without the additional requirement of substantive unfairness. This indicates a more protectionist attitude in consumer transactions. Therefore, sellers must be careful not to enter into a transaction with a mentally or physically handicapped consumer, even when the terms of the agreement are not grossly unfair.

D. Requirements Regarding the Mode and Formation of Contracts

Section 23 of the General Contract Law indicates that "a contract may be made orally, in writing or in some other form unless a particular form is a condition of its validity by virtue of Law . . . ."[37] In several types of consumer transactions,[38] there is a requirement that the contract be in writing. Furthermore, in certain consumer contracts there are rules regulating not only the form of the contract, but also its content.[39]

The reason for requiring a written agreement in consumer contracts is substantially different from that requiring written agreements in other contracts. The use of a written document to effect a transaction in real property under the Land Law, 5729-1969,[40] or to effect the making of a gift,[41] serves as the actual form of the contract without which the transaction is invalid. The written agreement in consumer contracts does not serve as the form of the contract, but rather as a means of protecting the consumer. The rationales for both requirements are also different. In land and gift contracts the writing is required to affirm the seriousness of the transaction. In consumer contracts it serves as a means of disclosure, which is an important device of consumer protection.

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36. A sale under such conditions is a criminal offense under the Consumer Protection Law. The transaction can be invalidated under § 32 of the law when such act is "material in the circumstances of the case." 35 L.S.I. at 228, § 32.

37. 27 L.S.I. at 117, § 23.

38. *See, e.g.*, 35 L.S.I. at 228, § 5 (authorizing the Minister to require certain consumer contracts in writing). In most consumer credit transactions, a writing is required under §§ 9-11 of the Consumer Protection Law, 35 L.S.I. at 228, §§ 9-11.

39. *See, e.g.*, Sale (Housing) Law, 5733-1973, 25 L.S.I. 223, § 3; Insurance Business (Control) Law, 5741-1981, 35 L.S.I. 243, § 38(a). Several policies were drafted in regulations based on this provision and are in common use in Israel.

40. 23 L.S.I. at 283, § 8.

41. 22 L.S.I. at 113, § 5.

E. Freedom of Contract

Freedom of contract is one of the main principles of contract law and will be discussed in detail in the next section. In many consumer contracts, there are limitations on the power of a seller to impose unfair terms in transactions. Those limitations are imposed through general contract doctrines such as good faith and extortion,[42] through direct legislation such as the Standard Contracts Law, 5743-1982,[43] and through specific consumer laws and regulations.[44]

IV. FREEDOM OF CONTRACT AND CONSUMER PROTECTION

The differences outlined above are sufficient to consider consumer contracts a special type of contract, in the same way that sales contracts, bailee contracts, and pledge contracts are special types of contracts.[45] Still, they do not resolve the issue of whether the rules governing consumer contracts are so varied from general contract rules as to consider them two different branches of law.[46] This section will suggest a resolution to this issue by examining the relationship between the principles of freedom of contract and consumer protection.

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42. Those doctrines are general contract doctrines and as such should not be limited to consumer contracts. In fact, courts are inclined to intervene more frequently in consumer contracts than in commercial contracts. Accordingly, good faith, extortion, and similar rules are generally applied in consumer contracts as a shield to consumers. *See, e.g.*, C.A. 838/75 Spector v. Zorfati, 32(1) P.D. 231 (1977) (a commercial case); F.H. 7/81 Fanidar v. Castro, 37(4) P.D. 673 (1983) (a consumer case); F.H. 22/82 Bet-Yooles Ltd. v. Raviv-Moshe & Company Ltd., 43(1) P.D. 441 (1989) (a commercial case); C.A. 719/78 Elit Ltd. v. Elco Ltd., 34(4) P.D. 673 (1980) (a commercial case); C.A. 403/80 Sasi v. Kikaon, 36(1) P.D 763 (1981) (a non-commercial case).

43. 37 L.S.I. at 6.

44. *See infra* part IV and notes 68-89.

45. There is room to distinguish between "natural" categories of contracts, such as sale, gift, loan, or insurance, and between complicated categories, such as services contracts. Consumer contracts belong to the second group because of the great diversity of situations that answer to the notion of "consumer contracts," including sales, hiring, services, and more. *See* Uri Yadin, *The Contract for Services Law, 1974*, 9 ISR. L. REV. 569, 569-70 (1975).

46. A type of contract that is considered in Israel to be a special branch of contract law is employment contracts. Labor law is distinguished from contract law. *See* ZEEV W. ZELTNER, THE LAW OF CONTRACTS OF THE STATE OF ISRAEL 21, 26-27 (1974). Labor laws are not part of the *Bill of Editing the Collection of Civil Laws*. However, sale guarantee and hire are part of the contract laws. *See* SHALEV, *supra* note 10, at 15. They are also part of the *Bill of Editing the Collection of Civil Laws*.

Freedom of contract is a leading principle in Israeli contract law. One facet of this freedom, the freedom to set the terms of an agreement, is directly acknowledged in Section 24 of the General Contracts Law.[47] While this section does not acknowledge the other part of the principle—the freedom to contract or not to contract[48]—both parts of the principle of freedom of contract are well established in Israeli law.[49]

Today, the principle of freedom of contract has a strong influence on both legislation and case law. Almost all Israeli contract laws include a provision allowing them to be varied by agreement,[50] and even those laws which do not expressly include such a provision are interpreted as subject to alteration by agreement.[51]

This attitude is not unique to Israeli law; it can also be found in ancient Jewish law. The Mishna and the Talmud in *Baba Mezia*[52] stated: "In civil matters [a stipulation contrary to Scriptural law] is valid." This rule is stated according to Rabbi Judah who, about 1,900 years ago, said: "In respect to money matters [a condition against the Torah] is valid."[53] This rule was accepted as binding by Maimonides[54] and other leading authorities of Jewish law.[55]

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47. 27 L.S.I. at 117 § 24 (the contents of a contract may be whatever is agreed upon by the parties).

48. Section 8 of the *Bill of Basic Law: Human and Citizens Rights*, HATZAOT CHOCK 448 states, "Every person has the right to contract and purchase property." *See* Deutch, *supra* note 19, at 44-45 nn.33-37.

49. *See* Shalev, *supra* note 19; SHALEV, *supra* note 10, at 23; Deutch, *supra* note 19.

50. *See, e.g.*, SHALEV, *supra* note 10, at 29 n.12.

51. The General Contracts Law does not include a provision that its provisions may be varied by agreement. The accepted view is that its provisions can be varied subject to several limitations, such as good faith and public policy. *See* SHALEV, *supra* note 10, at 89, 45, 113. *See also* Beit Yooles Ltd. v. Raviv Moshe, 43(1) P.D. 462-63 (1982). There are different views as to whether the parties have the power to vary the provisions of the Contract (Remedies for Breach of Contract) Law, 5731-1971, 25 L.S.I. at 11. The conflicting views were emphasized in the subject of contractual restitution. *See* C.A. 156/82, Lipkin v. Dor HaZahav, 39(3) P.D. 85 (1985). I support the majority, which is that variations are permitted. *See* DANIEL FRIEDMAN, DENEY ASIYAT OSHER VE LO BEMISHPAT 66 (1982); SHALEV, *supra* note 10, at 570; C.A. 187/87, Levi v. Deutsch, 43(3) P.D. 309, 317 (1989).

52. *Baba Mezia* 94a [SEDER NEZIKIM] BABYLONIAN TALMUD.

53. *Id.*

54. Maimonides, Moses (1135-1204, *Rambam*), THE CODE OF MAIMONIDES, Book of Civil Laws, Hiring, ch. 2 § 4 vol. II (1949).

55. *See, e.g.*, SHULCHAN ARUCH, CHOSEN MISHPAT, ch. 271 § 17 (1959).

Although freedom of contract principles are documented in ancient Jewish law, these principles were introduced into Israeli law through case law,[56] which has been unquestionably influenced by Anglo-American law.[57] Freedom of contract principles in turn have also had a profound influence on case law involving contract interpretation. Israeli laws are concise and leave courts with broad discretion for interpretation. Thus, in many cases the attitude toward the viability of the freedom of contract principle was the determining factor in the application of the "good faith" and "public policy" doctrines.

One case in particular, the famous English case, *Printing and Numerical Registering Co. v. Sampson*,[58] has had great influence on Israeli law. In that case, Lord Jessel stated:

> [I]f there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice.[59]

This statement was cited with only slight variation in several Israeli cases involving the freedom of contract issue. For example, it was the basis for Justice Landoi's decision in *Spector v. Zorfati*.[60] In *Spector*, the court relied on the doctrine of freedom of contract to reject an argument that the contract was not entered into in good faith.[61] The same attitude was presented by Justice Menahem Elon in *Rot v. Yeshope B'nai Ltd.*,[62] and

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56. Even in early Israeli cases the principle of freedom of contract was firmly acknowledged. In *Zvoolun v. Meleck*, the Supreme Court decided: "Every Ordinance which limits freedom of contract has to be interpreted strictly and when it can be interpreted in several ways, it should be limited to correcting the wrong for which the limitation was designed." C.A. 61/48, Zvoolun v. Meleck, 2 P.E. 70, 73 (1949). This decision cited many sources in English law. The principle of freedom of contract also serves as a means of interpreting legislation. *See also* C.A. 309/54, Neeman v. Rosh Eryat T.A., 27 P.E. 1311 (1950); Beit Yooles Ltd. v. Raviv Moshe, 43(1) P.D. 445 (1982).

57. *See, e.g.*, ATIYAH, *supra* note 4; FARNSWORTH, *supra* note 7; CALAMARI & PERILLO, *supra* note 8.

58. (1875) L.R. 19 Eq. 462.

59. *Id.* at 465.

60. C.A. 838/75, 32(1) P.D. 231 (1977).

61. *Id.* at 244.

62. C.A. 148/77, 33(1) P.D. 617, 629 (1979). Justice Elon stated:

in several other decisions as well.[63] Lord Jessel's ruling became so influential in Israeli case law that his words were cited by Israeli judges almost verbatim without even referring to his decision as the source of the argument.[64] Thus, it is clear that the principle of freedom of contract has had great influence on Israeli contract law. The question, therefore, is whether there is a significant departure from this principle in dealing with consumer contracts.

After reviewing some of the latest legislation in Israel, one can argue that freedom of contract plays a limited role in rules governing consumer contracts. While there are some provisions in the general contract law which cannot be changed or limited, such as Section 16 of the Sale Law (concealment of non-conformity) and certain aspects of public policy and good faith, these provisions are the exceptions, not the rule in general contract laws. By contrast, while general contract laws are subject to alteration by mutual agreement, consumer legislation is not.

The reason for the deviation from the principle of freedom of contract in consumer legislation stems from the need to protect consumers. Thus, in the interest of public policy many types of consumer contracts cannot be varied, even by agreement, since the individual consumer suffers from an inequality in bargaining power and must often agree to the supplier's terms. Further, most transactions involve only a small amount of money,

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> When we invalidate a contract or a section of a contract we intervene in the free and clear will of the parties who agreed upon a mutual obligation. This should not be done except for those exceptional cases where public policy is so disturbed that keeping the public interest is preferred to the great principle of honoring the free will of the parties to the contract. All this because the fulfillment of the obligations of the parties is also a great principle of public policy. We have the duty to enforce obligations undertaken by the parties and a principle of public policy which comes to invalidate a contract is not greater than the power of the principle of public policy which comes to give power to the contract unless it hurts the very basic fundamentals of public order.

Id. (translated by author from Hebrew). For criticism of this decision, see Daniel Friedman, *Issues in the Area of Standard Contracts*, 6 EYUNEI MISHPAT 490 (1978) (in Hebrew).

63. *See* C.A. 573/82, Barak v. Barak, 38(4) P.D. 626, 632 (1982) (Dov Levin, J.); *see also* C.A. 101/74, Hiran Lando Ltd. v. Pitua Mekorat Maim, 30(3) P.D. 661, 666 (1974). The argument of frustration was rejected, *inter alia*, on the ground that agreements should be honored and that this is the basic foundation for a healthy commercial life. *See also* C.A. 618/85, Mainot HaGalil HaMaaravi Ltd. v. Bet Haroshet LeMashkaot, 40(4) P.D. 343, 350 (1985). Justice Elon reiterated his argument against legal paternalism since it contradicts the basic notions of freedom of contracts. *See* F.H. 72/82, Beit Yooles Ltd. v. Raviv Moshe, 43(1) P.D. 445, 470-73 (1982) .

64. *See, e.g.*, C.A. 148/77, Rot v. Yeshufe B'nai Ltd., 31(1) P.D. 617, 629 (1979).

which does not justify the cost of professional counseling or litigation to iron out specific terms for each agreement.[65] Consumers who agree to adhesive contracts have no freedom to determine the terms of the contract, and, in many cases, do not have the option of choosing another party with whom to contract. Even when a monopolistic market does not exist and the market is more efficient, the individual consumer often has no choice but to accept similar contract provisions.[66] The lack of real freedom of contract in consumer transactions justifies the need for laws tailored to protect consumers.[67] The following laws illustrate the limitations on the rights of the parties to change provisions in consumer transactions.

First, the Defective Products (Liability) Law, 5740-1980,[68] imposes strict liability for personal injuries caused by defective products. Section 7 of this law states: "A stipulation limiting the manufacturer's liability under this law shall be void."[69] This provision precludes the application of traditional tort law principles under which liability can be limited or completely excluded.

Second, the Banking (Service to Customer) Law, 5741-1981,[70] requires banks to provide various services to customers, which seemingly contradict notions of freedom of contract. The law also imposes a duty to enter into various contracts[71] with customers and to provide certain services, such as checking accounts. The law imposes broad duties of disclosure[72] that are much more detailed than the disclosure duties under, for instance, Section 15 of the General Contract Law. These duties cannot be changed or limited as stated in Section 17: "The provisions of this law shall apply notwithstanding any waiver or agreement to the contrary."[73] In the General Contracts Law, duties of disclosure[74] and the rules of

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65. *See* Deutch, *Small Claims*, *supra* note 17, at 346-49.

66. *See* Deutch, *Methods of Control*, *supra* note 2, at 164-70.

67. For a detailed explanation of the philosophy and politics of consumerism, see BRIAN W. HARVEY, THE LAW OF CONSUMER PROTECTION AND FAIR TRADING 13-27 (1978).

68. 34 L.S.I. at 92.

69. *Id.* § 7.

70. 35 L.S.I. at 312.

71. *Id.* § 2; *see supra* text accompanying notes 18-27.

72. 35 L.S.I. at 315, § 5.

73. *Id.* § 17.

74. 27 L.S.I. at 119, §§ 12, 15. Although § 12 cannot be completely negated, the parties can set the standards of certain notions of good faith. *See* Beit Yooles Ltd. v. Raviv Moshe, 43(1) P.D. 445, 460-63. *See also* SHALEV, *supra* note 10, at 45. Similar

misrepresentation can be varied by agreement so long as the limitations do not conflict with the duties of good faith and public policy. Hence, the banking law also deviates from traditional notions of freedom of contract.

Third, the 1981 Consumer Protection Law imposes a variety of disclosure duties on consumer credit contracts and other consumer transactions. It also enables consumers to invalidate door-to-door sales within seven days after delivery and sets out more protective rules to guard against misrepresentation and extortion.[75] Breach of these duties can serve as grounds for rescission of a contract,[76] for compensation,[77] and for administrative and criminal sanctions.[78] The provisions of this law apply notwithstanding any waiver or agreement to the contrary.[79]

Fourth, the 1981 Insurance Contract Law[80] presents a set of terms, warranties, duties, and obligations which cannot be varied unless the changes are for the benefit of the insured person.[81] Insurance businesses are also regulated by the Insurance Business (Control) Law, 5741-1981.[82] This law also dictates the conditions for insurance policies generally[83] and for private homeowners and automobile insurance, two of the most common forms of insurance policies.[84] The massive regulation of insurance contracts, especially with regard to consumer insurance, clearly weakens the application of the principle of freedom of contract.

Fifth, in the Sale (Housing) Law, 5733-1973,[85] there are many rules that differ from the traditional notions of freedom of contract. This law, while not limited to consumers, benefits them greatly as consumers constitute the majority of people who purchase new apartments. This law

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rules should apply to the disclosure requirements of § 15.

75. *See* 35 L.S.I. at 228, § 2; 229, § 3; 230, §§ 4, 7; 232, §§ 9-11; 233, §§ 12-14; 234, § 15; *see also supra* notes 27-30.

76. 35 L.S.I. at 228, § 32.

77. *Id.* § 31.

78. *Id.* §§ 23, 38.

79. *Id.* § 36.

80. 35 L.S.I. at 91.

81. 35 L.S.I. at 99, § 39(a)(b) (28 of the 38 provisions cannot be varied).

82. 35 L.S.I. at 243 (chapter five is designed for the protection of insured persons).

83. 35 L.S.I. at 243, §§ 33, 37.

84. Regulations of Insurance Business (Control) (Contract Rules for Home and Content Insurance) 5746-1986, KOVETZ HATAKANOT 882; Regulations of Insurance Business (Control) (Contract Rules for Private Car Insurance) 5746-1986, KOVETZ HATAKANOT 1469.

85. 27 L.S.I. at 213.

deviates considerably from the Sale Law, 5728-1968,[86] the provisions of which are not designed to protect consumers and can be varied by mutual agreement. In the Sale (Housing) Law, the seller has the duty to deliver to the buyer a signed building specification of the apartment; otherwise, the builder will be bound to a building specification that is customary in the circumstances of the case. This duty of conformity is broader than that required by the Sale Law and cannot be modified by agreement of the parties. Further, many of the rules developed by the Israeli Supreme Court[87] during the 1970s to protect consumers in this area are not necessary under the new law. Many unfair exemption clauses in construction contracts are now void under this law, dispensing with the necessity of intervention by the courts. In addition, a 1990 amendment to the Sale (Housing) Law states that the provisions of the law cannot be varied unless the changes are for the benefit of the buyer.[88]

These laws and others[89] mark a substantial deviation from the traditional notions of freedom of contract in the general contract law in several ways. First, legal duties are mandatory and cannot be varied by agreement of the parties. Also, the content of various contracts is dictated by the authorities and comprehensive and detailed duties of disclosure are obligatory. Further, courts have broad authority to intervene in the terms of unfair standard contracts, which can also be invalidated by the Standard Contracts Tribunal.[90] The subject of standard contracts is, however, beyond the scope of this Article and has been analyzed in detail in many law journal articles and books.[91]

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86. 22 L.S.I. at 107.

87. *See, e.g.*, C.A. 198/77, Rot v. Yeshoofa (Beniya) Bea'm, 33(1) P.D. 617 (1977) (implementing the doctrines of good faith and public policy to protect consumers.) For criticism on this case, see FRIEDMAN, *supra* note 51. *See also* C.A. 659/77, Shooreka v. Karim, 32(1) P.D. 393 (1977) (utilizing means of interpretation to protect consumers).

88. *See* Sale (Housing) (Amendment No. 3) Law, 5750-1990, SEFER HACHUKIM 184.

89. *E.g.*, Credit Card Law, 5746-1986, SEFER HACHUKIM 187 (imposing liability on card issuers which cannot be varied by agreement).

90. *See* Standard Contracts Law, 37 L.S.I. at 6. The power of the tribunal was broadened in two Supreme Court decisions. *See* C.A. 1/79, Keshet Cleaning Enterprises Ltd. v. A.G., 34(3) P.D. 365 (1980); C.A. 449/85, A.G. v. Gad Construction Co., Ltd., 43(1) P.D. 183 (1989).

91. *See, e.g.*, GABRIELA SHALEV, EXEMPTION CLAUSES 36-44 (1974); Daniel Friedman, *Reflections on the Topic of Standard Contracts*, 6 IYUNEI MISHPAT 490 (1979); Sinai Deutch, *Standard Contracts Act: Failure and Recommendation*, 1 BAR-ILAN L. STUD. 62 (1980); Gabriela Shalev, *Government as a Party to a Standard Contract*, 12 MISHPATIM 595 (1982); Bin Nun, *Reform in the Law of Standard Contracts*, 12 MISHPATIM 616 (1982); Sinai Deutch, *Controlling Standard Contracts—The Israeli*

This legislation, however, does not signal the end of the reign of freedom of contract in the rules and laws that apply to consumer contracts in Israel. There are distinctions between consumer contracts in general and specific areas of consumer transactions. In dealing with consumer contracts generally, the principle of freedom of contract still prevails, although it is not as evident as in commercial contracts. In specific areas, however, freedom of contract is quite limited. This distinction presumably represents the legislature's view that, in general, freedom of contract should prevail with respect to consumer contracts while serious limitations should be imposed only in specific areas. This distinction is based upon a need to balance the need to protect consumers from abuse resulting from inequality in bargaining power, against the need to maintain the basic notions of a free market. This balance is seemingly achieved by applying the principles and rules of general contracts to most consumer contracts, while imposing restrictions in specific areas where such restrictions are necessary.

The legislation briefly described above illustrates this distinction. The mandatory rules in the Defective Products Law have little effect on the existing law in this area since the rule of public policy, as interpreted by Israeli courts, invalidates contract terms attempting to exclude liability for personal injury.[92] The new law is broader and clearer than the previous case law; but in principle, the change is not substantial.

The mandatory duties under the Banking Law deal with only a limited range of transactions: namely, those not involving the granting of credit to customers. Since banking services are a monopoly in Israel and cannot be given by other institutions, basic services should be guaranteed to the public. The law does not deal with the greater part of banking services, which include granting credit, nor does it deal with the content of banking documents. The duty to accept money deposits[93] does not specify the terms of such a transaction. The banks still have wide discretion in imposing their terms on the public in standard form contracts, which might include harsh terms. Accordingly, general contract law applies in banking contracts with consumers. The main protection to the consumer in

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Version, 30 MCGILL L.J. 458 (1985) [hereinafter Deutch, *Controlling Standard*]; Sinai Deutch, *Methods of Control*, *supra* note 2; Deutch, *Unfair Terms*, *supra* note 17, at 181-99; SHALEV, *supra* note 10, at 603-44.

92. *See, e.g.*, C.A. 461/62, Zim v. Maziar, 17 P.D. 1319 (1962); C.A. 285/73, Lagil Trampolin v. Nachmias, 29(1) P.D. 63 (1973).

93. 34 L.S.I. at 92, § 2(a)(1).

banking contracts is the control of the Standard Contracts Law[94] and not the specific banking legislation presumed to protect banking customers.

The effect of the Consumer Protection Law on most consumer contracts is quite limited. Only in specific areas, such as door-to-door sales and consumer credit transactions, are particular duties imposed on dealers. In the great majority of consumer contracts this law has a very limited effect. The author's experience as the legal advisor for the largest consumer organization in Israel for more than twelve years revealed that over ninety percent of consumer complaints were solved by general contracts and sale laws[95] and not by the Consumer Protection Law.[96]

By contrast, laws dealing with insurance and the sale of new apartments are much more effective in limiting the freedom of dealers to impose their own terms in consumer transactions. Although these laws cover only part of the relevant contract terms, the restrictions are not merely symbolic.

The insurance field is an area traditionally regulated by the authorities due to the special character of the business and the common use of highly unintelligible wording in standard insurance policies. The recent legislation in this area consolidated the common attitudes in this field. The current degree of regulation in the insurance industry is certainly a restriction of the freedom of contract. This regulation does not, however, always favor the consumer. Over-regulation has led to the protection of the industry rather than the consumer. The desire to protect the stability of the insurance companies has led to the affirmation of various arrangements which in turn led directly to increased insurance premiums, a prohibition on discounts to consumers, and to a degree of intervention which prohibited the granting of better terms to individual insurance consumers.[97] These limitations on the freedom of contract result in price

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94. *See, e.g.*, D.M. (Je') 3086/85, Titelbaum v. Zefon America Bank, 1987(3) P.M. 212 (1987); *see also* Deutch, *Unfair Terms, supra* note 17, at 186-87, 189.

95. The problem, however, with the contract and sale laws is that they were not designed to protect consumers. *See* Sinai Deutch, *The Law of Sale: An Outline for Its Interpretation and Thoughts about Seller and Consumer Relations*, 19 MISHPATIM 493, 512-25 (1990) [hereinafter Deutch, *Law of Sale*]. *See also infra* note 137.

96. The Consumer Protection Law is mainly a criminal and an administrative law. Its civil provisions have rarely been utilized. In most cases violation of the law does not justify a civil suit since the tools of class action and punitive damages are nonexistent in Israeli consumer law.

97. Under regulations imposed in 1986, an insurance company was not permitted to grant greater discounts than those approved by the Superintendent of Insurance. *See* Regulations of the Control of Insurance Business (Insurance Premium that an Insurer is allowed to take in Motor Vehicle Insurance) 5746-1986, KOVETZ HATAKANOT 1441. The

increases and a less efficient, competitive market. It is time to introduce legislation designed to deregulate the insurance industry to induce real competition. This industry serves as an example to demonstrate that too little freedom of contract can be more harmful to consumers than too much freedom.

By contrast to the laws governing the insurance industry, the Sale (Housing) Law is an example of a balanced level of intervention in freedom of contract to protect consumers in an important area of consumer transactions.[98] The law intervenes in areas regulating the conformity of the apartment and leaves the rest of the terms to the forces of the free market,[99] subject to disclosure duties.[100]

Freedom of contract is not a concept designed to suppress benefits to consumers in a system of free enterprise. In consumer contracts, freedom of contract should be controlled, not disregarded. Insurance contracts were discussed to illustrate an instance where freedom of contract is unduly restricted and where over-regulation eventually has worked to the consumers' detriment. There are also other areas where regulations forbid discounts to consumers, such as air travel[101] and legal services.[102] Freedom of contract can play a major role in freeing the market from too much bureaucratic involvement. Thus, freedom of contract can enhance

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Superintendent of Insurance approved the organization of all cars in Israel into 50 groups of insurance premiums. This regulation eventually led to a major increase in premium prices and to a great similarity of premiums among the Israeli insurance companies. Several years ago the Histadrut Consumer Authority asked the State Comptroller to initiate an investigation on this and other claims. The finding of the State Comptroller supported many of the complaints. *See* 40 STATE COMPTROLLER REP. 26-36 (in Hebrew).

98. *See* C.A. 148/77, Rot v. Yeshoofe B'nai BeAam, 33(1) P.D. 617, 625 (1977) (discussing the inequality of bargaining parties in sale of apartment contracts and the fact that freedom of contracts does not exist in such transactions).

99. Most terms in sale of apartments contracts are not regulated by the law. Additional protection is found in the Standard Contracts Law and other consumer laws such as Sale (Apartments) (Assurance of Investment of Persons Acquiring Apartments) Law, 5735-1974, 29 L.S.I. at 18.

100. It is possible, however, to claim that due to amendments of the Sale (Housing Amendment No.3) Law, there is much more statutory intervention in the freedom to set the terms of the agreement. 27 L.S.I. at 213, §§ 4, 4A, 4B, 7A.

101. *See* Aviation Services Licensing Regulations (Offer and Sale of Flight Tickets in Regular Flights) 5746-1986, KOVETZ HATAKANOT 519.

102. *See* Chamber of Advocates Law, 5721-1961, 14 L.S.I. at 196, § 81 (the right of the National Council of the Chamber to prescribe a minimum tariff of fees for the services of advocates).

consumers' interests, and any measure taken towards severely restricting it should be considered with great caution.

On the other hand, unchecked application of the doctrine of freedom of contract in most consumer contracts leads to abuse of consumers who suffer from inequality in bargaining power, lack of legal advice, and little influence over content of the contract. This situation has not been changed appreciably by the consumer laws outlined above. Thus, despite minor changes, contract principles and rules continue to govern consumer contracts in most areas.

The limitations on freedom of contract in consumer legislation justify the consideration of consumer contracts as a special type of contract, albeit not as an independent body of contract law. Even in areas where regulation is substantial, such as in the area of new apartments, the great majority of contract terms are open to negotiation. The duty to deliver a signed building specification is a disclosure duty and leaves the content of the contract terms open for negotiation when such negotiation is feasible. Even in the area of insurance, where basic terms of the insurance policy are mandatory, there is room for negotiating many of the policy terms. In sum, the number of mandatory terms in consumer legislation leads to the conclusion that consumer contracts should be considered a special type of contract embodied under the umbrella of general contract law. Since most terms are subject to the principles of common contracts, common contracts cannot be considered a separate body of law with separate legal principles.

V. *CAVEAT EMPTOR* AND CONSUMER PROTECTION

A. Caveat Emptor *in General*

The rule of *caveat emptor* has lost most of its influence in General Contracts Law and Sale Law.[103] Therefore, it should be less influential in the more protective area of consumer protection law. This section will show that although this rule has lost most of its effect in contract law, the consumer still must to be careful when entering into a transaction.

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103. *See, e.g.*, SHALEV, *supra* note 10, at 230, 233 n.35; EYAL ZAMIR, THE SALE LAW 5728-1968, INTERPRETATION OF CONTRACTS LAW 236 (Gad Tedeschi ed., 1987) [hereinafter ZAMIR, THE SALE LAW]; Devorah Pilpel, *Caveat Emptor, Caveat Vendor*, 5 IYUNEI MISHPAT 94, 333 (1977); EYAL ZAMIR, THE CONFORMITY RULE IN THE PERFORMANCE OF CONTRACTS 206, 252, 265 (1990) [hereinafter ZAMIR, THE CONFORMITY RULE] (in Hebrew).

The rule requiring consumers to be cautious and not to rely on the seller for information developed during the seventeenth century in England and reached its peak in the first part of the nineteenth century.[104] This principle was applied less often during the later part of the nineteenth century,[105] when commerce became more institutionalized and products more complicated. The consumer movement and the positive attitude toward consumer protection also played a role in imposing a higher level of duties on sellers and suppliers, relaxing the application of *caveat emptor*. Today, even in Anglo-American sale laws there are duties of conformity[106] and merchantability,[107] which shift the duty of care from the buyer to the seller. Similarly, the Israeli Sale Law[108] is interpreted by at least one Israeli scholar as a complete rejection of the rule of *caveat emptor*.[109]

The provisions in the Sale Law contradicting the principle of *caveat emptor* can be found in those sections which impose various duties of conformity on the seller. However, these provisions are part of the general Sale Law, which was not designed to protect consumers and is thus inadequate for consumer protection.[110] The duties of conformity can be limited by mutual agreement[111] and, in fact, are so limited in many

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104. For the history of caveat emptor in English Law, see ATIYAH, *supra* note 4, at 178, 464; Walton H. Hamilton, *The Ancient Maxim Caveat Emptor*, 40 YALE L.J. 1132, 1136 (1931); ZAMIR, THE CONFORMITY RULE, *supra* note 103, at 72-73, 90, 175-76. *See also* PATRICK S. ATIYAH, THE SALE OF GOODS 123-24 (8th ed. 1990); MICHAEL G. BRIDGE, SALE OF GOODS 429-30, 451-52 (1988).

105. *See* ATIYAH, *supra* note 4, at 774-75; ZAMIR, THE CONFORMITY RULE, *supra* note 103, at 73-78, 175-76.

106. *See generally* BENJAMIN'S SALE OF GOODS 725 (1987) (especially part four, "Defective Goods"); *see also* PATRICK S. ATIYAH, THE SALE OF GOODS 100, 183 (7th ed. 1985).

107. U.C.C. §§ 2-314, 2-315. *See generally* J.J. WHITE & R.S. SUMMERS, UNIFORM COMMERCIAL CASE 466-486 (3d ed. 1988); RICHARD M. ALDERMAN, A TRANSACTIONAL GUIDE TO THE UNIFORM COMMERCIAL CODE 91-102 (1983).

108. 22 L.S.I. at 107, §§ 11-18.

109. *See* ZAMIR, THE CONFORMITY RULE, *supra* note 103, at 252 (noting that in the new civil (Israeli) legislation there is not even a reference to *caveat emptor*).

110. *See* Daniel Friedman, *The Remedies of Rescission and Enforcement for Breach of Contract*, *in* COLLECTION OF THE LECTURES DELIVERED AT THE SEMINAR FOR JUDGES 87, 90 (1976); Daniel Friedman & Nina Zalzman, *Market Overt and Its Effect on Seller-Buyer Relations*, 5 TEL AVIV U. L. REV. 122, 123-25 (1976-77) [hereinafter Friedman & Zalzman, *Market Overt*]; Daniel Friedman, *Subjects in the Area of Standard Contracts*, 6 TEL AVIV U. L. REV. 490-99 (1978-79) (in Hebrew). *See also* Deutch, *Law of Sale*, *supra* note 95, at 493, 512-25.

111. 22 L.S.I. at 107, § 4(b). The rules of conformity can be varied by agreement.

consumer contracts.[112] The Sale Law also imposes on the buyer the duty to immediately notify the seller of any nonconformity,[113] which is a heavy burden on consumers.[114]

It is therefore evident that the duty of conformity in the Sale Law does not, in and of itself, absolve the application of the principle of *caveat emptor*, as demonstrated by the above requirements on the buyer and various other provisions of the Sale Law.[115] Notwithstanding these

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On the importance of legal rules which can be varied (*ius dispositivum*), there are different views. *See* Uriel Procaccia, *On Laws, Contracts and Things; An Economic Approach to Basic Jurisprudential Concepts*, 18 MISHPATIM 395, 401 (1988); Guido Tedeschi, *On Dispositive Law (Ius Dispositivum)*, 15 TEL AVIV U. L. REV. 5 (1990); Uriel Procaccia, *A Response to Professor Tedeschi*, 18 MISHPATIM 385 (1980) (in Hebrew). *See also* ZAMIR, THE CONFORMITY RULE, *supra* note 103, at 205.

112. For example, contracts for sale of new cars include in many cases a provision that the seller's liability is limited to repairs and not to replacement of the car or refund of the money, thus limiting the liability and remedies for even seriously defective cars ("lemons"). *See* Deutch, *Law of Sale*, *supra* note 95 and accompanying text.

113. 22 L.S.I. at 109, §§ 13, 14.

114. *See* ZAMIR, THE CONFORMITY RULE, *supra* note 103, at 295-97, 392; Deutch, *Controlling Standard*, *supra* note 91, at 502, 518-19.

115. Eyal Zamir, in his book *The Sale Law*, criticized 17 out of 37 sections of the law. *See* Deutch, *Law of Sale*, *supra* note 95, at 500. Many of the suggested amendments were not designed to protect consumers and, as a matter of fact, consumer contracts were barely mentioned in Zamir's book. *See id.* at 511. In his second book *The Conformity Rule*, consumer contracts play an important part. At least 15 provisions of the Sale Law which might damage consumers were enumerated in the *Law of Sale*. Zamir, in *The Conformity Rule*, recommended a whole list of suggested changes regarding the duty of conformity alone. ZAMIR, THE CONFORMITY RULE, *supra* note 103, at 389-95. Some of the changes that are relevant to consumers are as follows: (1) the duty of conformity to regular use should detail aspects of conformity such as safety of the product, its convenience and more; (2) when the supplier knows the relevant use the buyer intends to make there should be a presumption that the product should conform to meet the special use; (3) the conformity requirement should include the package of the product and its common accessories; (4) the conformity rule should include a presumption that when a defect in a product is detected within the period in which the product is expected to operate properly it will be the supplier's duty to prove that the product was in conformity when it was delivered; (5) it is suggested to change the buyer's duty of immediate inspection and notification to inspection and notification within a "reasonable period;" (6) when the seller knows about the nonconformity in the product, the buyer should be exempt from the duty of notification; (7) there should be a distinction between the duty of inspection and notification of a consumer from the duty of a buyer who is not a consumer. In consumer transactions there should be a presumption that the supplier is aware, or should be aware of nonconformity in products that he supplies. When a supplier cannot remove his duty within the special circumstances of the case, the consumer should be released from the consequences of nonconformity.

restrictions on sellers, the consumer is insufficiently protected under the general Sale Law.[116] It is possible that had a distinction between commercial and consumer contracts been made[117] a more desirable outcome would have resulted.

The pre-contractual disclosure requirements, which have become part of the new legislation in contracts, have an additional effect on the *caveat emptor* principle. Prior to the 1973 General Contracts Law, some decisions declared: "In a common contract the principle of *caveat emptor* applies and a party to a contract could be liable for a false statement but not for his silence."[118] Today, Section 15 of the General Contract Law imposes duties of disclosure,[119] as does Section 12 which imposes a duty of good faith requiring disclosure during negotiations.[120] In addition, there is liability under tort law for negligent misrepresentation.[121]

Pre-contractual duties of disclosure are even broader under the 1981 Consumer Protection Law, which includes specific duties of disclosing defects in goods.[122] Those requirements also have an effect on contract law since noncompliance with the statutory requirements of disclosure can serve as the basis for contractual misrepresentation.[123] In addition, this

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116. *See infra* notes 137-59.

117. *See* Deutch, *Law of Sale, supra* note 95, at 513, 508-09 (various distinctions of the Anglo-American law were designed to protect consumers). *See also* ZAMIR, THE CONFORMITY RULE, *supra* note 103, at 78; 28, at 247 (warranty of habitability). For a different view which claims that consumers are over-protected, see *id.* at 176 n.29. *See also* U.C.C. § 2-607(3)(a) (official comment).

118. C.A. 444/70, Nehorai v. Reigritch, 25(1) P.D. 449, 453 (1970); *see also* C.A. 293/70, Morduck v. Daabul, 24(2) P.D. 811 (1970).

119. *See, e.g.*, C.A. 373/80, Vopone v. Ogush, 36(2) P.D. 215 (1981); C.A. 488/83, Zanani v. Agnon, 38(4) P.D. 141 (1984); C.A. 643/83, Domb v. Domb, 40(3) P.D. 792 (1986); C.A. 273/78, Grosman v. Caspi, 33(3) P.D. 300 (1979).

120. *See* SHALEV, *supra* note 10, at 48-50; Cohen, *supra* note 19, at 13. *See, e.g.*, C.A. 838/75, Spector v. Zorfati, 32(1) P.D. 231 (1975); C.A. 488/83, Zanani v. Agmon, 38(4) P.D. 141 (1984); F.H. 7/81, Fanidar v. Kastro, 37(4) P.D. 673 (1981); C.A. 311/78, Howard v. Mayara, 35(2) P.D. 505, 511 (1978); Pilarski v. Prezes, C.C. (Ha') 5430/83(1) P.M. 63 (1986); C.C. (T.A.) 94/79, Avivi v. Karaso Ltd., 1980(2) P.M. 426, 433 (1979).

121. *See* C.A. 86/76, Amidar v. Aahron, 32(2) P.D. 337 (1978); C.A. 783/83, Kaplan v. Novograzky, 38(3) P.D. 477 (1983); C.A. 790/81, American Microsystems v. Albit, 39(2) P.D. 785 (1985). *See also*, C.A. (T.A.) 419, 433/85, Shikun Ovdim v. Blibaum, 1987(1) P.M. 89 (1985) (a tort remedy imposing liability on a contractor for a defective building).

122. 35 L.S.I. at 230, § 4.

123. There are also other provisions in other laws which impose special duties of

law forbids a dealer from misleading a consumer with a long list of details; when such a misleading act is substantial, under the circumstances of the case, the consumer may cancel the sale.[124]

However, these requirements[125] add little to the existing rules of general contract law. It is more complicated to cancel a contract under the Consumer Protection Law than under the General Contracts Law.[126] The consumer law does not change the basic contractual rules in this area, and it does not address the requirement of conformity.

In specific areas of law governing contracts, such as the sale of new apartments[127] and the insurance business,[128] the changes are more meaningful. Duties of disclosure are strict and detailed. As discussed above, when a party does not disclose the specifications of the apartment, he is bound to reasonable standards.[129] Duties of merchantability and conformity are binding by law.[130] Even building regulations and official standards become parts of the agreement,[131] which cannot be disclaimed. It is, therefore, clear that under the new contract and consumer laws there are substantial duties of disclosure and conformity on the suppliers of goods and services.

Do all these new duties mean that the consumer is adequately protected and that the seller, rather than the buyer, has to beware? There is no simple answer to this question. If the test of *caveat emptor* is based on the traditional English test of the nineteenth century,[132] *caveat emptor*

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disclosure. *See* SHALEV, *supra* note 10, at 230-31.

124. 35 L.S.I. at 237, § 32.

125. Similar prohibitions on misrepresentation exist also under the Banking (Service to Customer) Law 5741-1981, 35 L.S.I. at 312; Insurance Business (Control) Law, 5741-1981, 35 L.S.I. at 243.

126. Section 32 of the consumer law requires that invalidation be made in writing within two weeks from the day of the sale.

127. *See* 27 L.S.I. at 213.

128. *See* 35 L.S.I. at 243

129. 27 L.S.I. at 213, § 2 (imposes a duty to deliver a specification, and § 5 details the results of not delivering a specification).

130. *Id.* § 4.

131. *Id.*; On the other hand, in other sale contracts the official standards are not automatically part of the requirement of conformity. *See* C.A. 391/80, Laserson v. Shikun Ovdim, 38(2) P.D. 237; ZAMIR, THE CONFORMITY RULE, *supra* note 103, at 246-50.

132. *See* ZAMIR, THE CONFORMITY RULE, *supra* note 103, at 72-73, 175-76. Under English Law the seller's liability was limited to fraud and to express warranties, and even in those cases in a very limited and formalistic way. "The doctrine of *caveat emptor* can

does not formally exist[133] in Israeli law. However, because Section 11 of the Sale Law 1968 and Sections 12 and 15 of the General Contracts Law are regularly enforced in courts and impose various duties of conformity and disclosure on sellers, the consumer must still be careful when entering into a transaction. Further, there are still substantial issues yet to be resolved under the new attitude of Israeli legislation and case law; as such, the buyer must still be cautious.

B. Evidence of Caveat Emptor *in Israeli Law*

There is ample evidence to demonstrate that the principle of *caveat emptor* is still well-embedded in Israeli law. First, the principle is still influential in Israeli case law. Second, most rules designed to protect purchasers can be disclaimed. Third, there is little protection for any advance payments made by consumers. Fourth, there is no warranty of durability in Israeli law. Fifth, beyond the initial burden of "awareness" on the part of the consumer, there is the problem of implementing consumer rights due to the high costs of litigation. These manifestations of the principle of *caveat emptor*, along with defects of the Sale Law,[134] demonstrate the need for additional remedies to protect supplier-consumer relations.

1. *Caveat Emptor* and Israeli Case Law

In *Simchon v. Redinger*,[135] a person purchased a used car from a dealer in cars. It was later discovered that the car had been stolen, and the vehicle was returned to the original owner. When the purchaser sued the seller for selling a car with defective title, the Supreme Court decided that the buyer lost his right to get back his money from the dealer because the car was returned to the original owner and hence could not be returned

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be said to represent the apotheosis of nineteenth century individualism." ATIYAH, *supra* note 4, at 464.

133. *See* ZAMIR, THE CONFORMITY RULE, *supra* note 103. *See also supra* notes 95, 105-106 and accompanying text.

134. *See* Friedman & Zalzman, *Market Overt*, *supra* note 110, at n.101 and accompanying text.

135. C.A. 31/75, 29(2) P.D. 610 (1975).

to the dealer.[136] This decision was criticized,[137] and it is possible that it does not represent the modern attitude on this subject. It demonstrates, however, that some traces of *caveat emptor* still remain in Israeli case law.

In *Nes v. Golda*,[138] a person purchased an apartment which could not be registered in the Land Registration Office. In all other relevant offices, however, it was registered under the name of the seller, and the buyer relied on those registrations. The seller, however, had not fulfilled his obligations to the previous owner who invalidated the contract. Accordingly, the buyer had to return the apartment to the original owner. The court explained that the buyer was negligent in not checking the terms of the seller's contract with the original owner and, not verifying whether these obligations had been fulfilled. This case was also criticized.[139] It proves, however, that a buyer is not relieved from making a reasonable investigation into the validity of the sale, even if it requires making inquiries to the original owner.[140] This modern version of *caveat emptor* can hardly be justified in a non-commercial setting.

2. Disclaiming Rules Designed to Protect Consumers

The fact that rules protecting buyers can be varied by agreement presents a serious problem to consumers in consumer transactions. Where parties can vary the contract terms, the risk of *caveat emptor* is increased and the ability to realize the reasonable expectations of the parties is reduced. Further, while the parties are free to change the terms of the agreement, most consumers are not usually aware of a contract's terms.

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136. The buyer could, of course, sue the owner according to the rule of market overt, § 34 of the Sale Law. Such a claim does not necessarily promise the return of the money but it has a good promise of lengthening litigation under the Israeli court system.

137. *See* Friedman & Zalzman, *Market Overt, supra* note 110.

138. C.A. 482/79, 36(1) P.D. 402.

139. *See* Nili Cohen, *Rescission of Contract and Its Impact Transaction in Unregistered Land*, 35 HAPRAKLIT 215 (1983).

140. The leading case, C.A. 838/75, Spector v. Zorfati, 32(1) P.D. 231 (1977), was not mentioned here. Although the majority view, outlined in an opinion written by Justice Landoi, was that a party does not have the duty to disclose facts which could have been discovered by the other party, the case cannot be considered as supporting *caveat emptor* since the plaintiff was granted relief on the ground of non-conformity of the land. In C.A. 590/88, Abraham Rubinshtien v. Fisher, 44(1) P.D. 730 (1990), the Supreme Court decided that liability for pre-contractual non-disclosure can be divided between the seller and the buyer (contributory negligence) when the buyer failed to examine the relevant facts. These two cases dealt with commercial transactions.

Thus, that freedom is infrequently utilized by the consumer in consumer contracts.

In addition to the heavy duties of inspection and notification imposed on buyers,[141] the seller's duties can be varied by agreement. This presents a serious problem to consumers. The Israeli Standard Contracts Law is applied in only a few cases.[142] The great majority of consumer contracts are open to free negotiations—which in practice are not "free" at all. For instance, in contracts for the sale of new cars in Israel, the importers exercise a provision limiting their liability to only first year repairs, and a car will neither be replaced nor the money be refunded, even if serious defects are found. This kind of situation is even more problematic than most sales situations since the buyer is often not sophisticated enough to recognize any potential problems in an automobile. Also, when a consumer is in the market to buy a new car, these contracts offered by the importers are normally the only terms available.

Personal guarantee contracts provide another example of an instance in which consumers have to beware. In guarantee contracts, the guarantor is in many cases unaware of the obligations he undertakes. A personal guarantee contract is not a traditional consumer transaction in the narrow sense. But, in cases when the guarantee is given by a private person to a bank in a noncommercial setting, it resembles a consumer transaction, since it involves inequality in bargaining power as well as other elements of a traditional consumer transaction. This undesirable situation led to a 1990 bill[143] that attempted to protect private guarantors. This type of transaction also demonstrates the vulnerability of consumers despite the application of rules of disclosure and conformity.

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141. *See* ZAMIR, THE CONFORMITY RULE *supra* note 103, at 295-96, 310, 392 n.24; Deutch, *Law of Sale*, *supra* note 95, at 502, 518-19.

142. The Israeli Standard Contracts Law does not standardize contracts. It authorizes courts or tribunals to invalidate unfair terms in a standard contract, resembling the doctrine of unconscionability in the United States. *See* Deutch, *Unfair Terms*, *supra* note 17.

143. *See* Bill of Guarantee Law (Amendment), 5751-1990, HATZAOT CHOCK 67. Guarantees became the main security for lending money in private loans. The guarantors, in many cases, were not aware of the obligations they undertook. This phenomenon became a major problem leading to strong public reaction and to the suggestion of this bill. It imposes broad duties of disclosure, inflicts limitations on executing the guarantee and prohibits any waiver of provisions designed to protect guarantors. Further details regarding this issue are beyond the scope of this Article. In the meantime the bill was approved as the Guarantee Law (Amendment) 5752-1992, SEFER HACHUKIM 144-47. This law led to major changes in bank-consumer guarantor relationship.

3. Lack of Protection for Advance Payments Made by Consumers

The requirement of conformity relates only to the quality and title of goods and services.[144] It does not relate to the protection of payments made by the consumer, the other side of the duty of delivery and transfer. However, in the last two decades a practice has developed in Israel wherein many consumer transactions are carried out on a pre-paid basis. Consumers who pay in advance, however, have no guarantee for their money. In a case where the supplier goes bankrupt, the consumer is always the last in line to receive payment. Bankruptcies of suppliers are quite common in Israel and the buyer must be careful not to lose her money.[145] The Consumer Protection Law[146] gives the Minister of Commerce the authority to limit and secure payments of consumers by order. But such an order has never been published and unless the consumer acts in her own interests by paying only a small amount of money as a down payment she undertakes a serious risk.

Generally, the principle of *caveat emptor* is not applied to situations dealing with advance payments. Nevertheless, the application of *caveat emptor* may be appropriate as down payments made by consumers have become increasingly more problematic in Israel.[147]

4. The Lack of a Warranty of Durability in Israeli Law

The duty of conformity minimizes the application of the rule of *caveat emptor* and assists in the realization of the reasonable expectations of the contracting parties.[148] However, a duty of conformity is not easily applied

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144. Service contracts are dealt with under the Contract for Services Law. Contract for Services Law, 5734-1974, 28 L.S.I. at 115-17. This law is extremely terse and was, therefore, criticized. ZAMIR, THE SALE LAW, *supra* note 103, at 190-91, 211-12, 262-64, 301-4. For a discussion of the problem of terseness of Israeli legislation in general, see Sinai Deutch, *Uri Yadin: Contracts Law (Remedies for Breach of Contract) 5731-1970*, 8 MISHPATIM 364, 366 (1977).

145. *See* Deutch, *Law of Sale*, *supra* note 95, at 514-15, 516-17, 521-22.

146. Section 13(a) dictates that the Minister may designate by order transactions in which the dealer may not "receive an advance payment from the consumer at a rate exceeding that prescribed in the order 'unless' he has given the consumer security as prescribed in the order." 35 L.S.I. at 298-311, § 13(a).

147. A partial solution to the problem of protecting the payments in advance of consumers is found in the Sale (Apartments) (Assurance of Investments of Persons Acquiring Apartments) Law, 5734-1974, 29 L.S.I. at 18. This law deals only with new apartments and its application was not successful.

148. *See* ZAMIR, THE CONFORMITY RULE, *supra* note 103, at 146-65.

to durable goods, which are intended for use beyond one year after purchase. Examples of durable goods include refrigerators, televisions, and cars. The reasonable expectations of the parties are that these products will operate properly for a longer period of time. The rules of conformity require only that the goods be in the condition to provide ordinary use at the time of delivery, but do not guarantee that the product will operate for a reasonable duration of time thereafter.[149] Common written guarantees are limited to only one year,[150] while the expected use of such products may be more than ten years. In addition to the short period of the written warranties, the Sale Law states a short period of limitations of two or four years.[151] Except for a relatively recent amendment concerning new apartments,[152] there is no warranty of durability of the product. This means that the consumer is not protected[153] and has to beware, albeit not in the same sense of the ancient maxim.

5. Consumers: Beware of the Courts

Last, but not least, the consumer has serious difficulties in implementing his substantive rights. Even if most aspects of *caveat emptor* are no longer valid under the Israeli legislation, an individual consumer might have serious problems in realizing his remedy due to the high costs of litigation. Some aspects of this problem are solved by the

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149. In some countries a warranty of durability is recognized as part of the requirement of conformity. *See* BENJAMIN'S SALE OF GOODS, *supra* note 106, at 467-69; R.M. GOODE, COMMERCIAL LAW 288-90 (1982); ZAMIR, THE CONFORMITY RULE, *supra* note 103, at 274-76.

150. There is no law that covers the subject of written guarantees in Israel, although there are some regulations on written guarantees relating to specific goods. This subject is dealt with in detail in other legal systems. *See, e.g.*, BARNEY CLARK & CHRISTOPHER SMITH, THE LAW OF PRODUCT WARRANTIES (1984).

151. This is one of the reasons why in certain cases the suit was based on tort rather than Sale Law. *See, e.g.*, C.A. (T.A.) 419, 433/85, Shikun Ovdim v. Blibaum, 1985(1) P.M. 89.

152. In a leading decision, C.A. 449/85, Attorney General v. Gad Hebra Lebinyan, 43(1) P.D. 183 (1989), the Supreme Court invalidated several provisions in construction standard contracts. The only argument that was rejected was a suggested list of periods of liability for new apartments (since it requires legislation). *See* Deutch, *Unfair Terms*, *supra* note 17, at 192-93. The above decision led to an amendment of the law. *See* Sale (Housing) Law (Amendment No. 3), 5750-1990, SEFER HACHUKIM 184. The suggested detailed list became a mandatory law.

153. *See* ZAMIR, THE CONFORMITY RULE, *supra* note 103, at 274-76.

use of small claims courts.[154] Still, many consumers hesitate before turning to the courts.[155] Class action suits are not recognized in Israel,[156] nor are treble damages for violations of consumer contracts.[157] In most cases, consumers prefer to give up their small claims rather than get involved with the often burdensome court system.

The problems have forced consumers in dealing with the court system in Israel only a tenuous attachment to the traditional application of the principle of *caveat emptor*. But it is applicable in the sense that the consumer has to be careful at the time of the purchase in order to avoid litigation later. Finally, it is not always certain that the consumer will win in court. The consumer faces a system that is structurally geared against him. Consumers rarely benefit from the laws designed to assist them because of exemption clauses in consumer contracts, and are often the victims of conservative interpretation of contracts and sales laws.

In sum, while traditional notions of *caveat emptor* no longer exist in modern Israeli contract and sale laws, the consumer continues to be inadequately protected in many consumer transactions.[158] These failings are evidenced by the consumer's inability to evaluate the complexity of product evaluation, the lack of reliable information in the consumer market, and the inability of individual consumers to obtain and process all relevant information. Thus, additional protection is required.

VI. SHOULD A CONSUMER TRANSACTIONS LAW BE ENACTED?

Recognizing that the rules relating to consumer transactions should be considered a special type of contract, the question remains whether such

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154. *See* Deutch, *Small Claims*, *supra* note 17.

155. The Israeli consumer organizations play a vital role in assisting consumers to sue in court, mostly in small claims (up to NIS 5,000, which is about $1,667).

156. *See* Steven Goldstein, *Class Action: What and Why?*, 9 MISHPATIM 416 (1979).

157. There are several exceptions that are rarely used. Section 31(b) of the Consumer Protection Law authorizes the court to grant special damages (four times the amount of damage caused to the plaintiff) to a consumer organization that represented a consumer in a suit under this law. The scope of this law is so narrow that this provision was never used. *Cf. supra* note 1 and accompanying text; Deutch, *Law of Sale*, *supra* note 95, at 512. Another example is the 1988 amendment to the Insurance Contract Law, which empowers the court to inflict penalties on an insurance company that evaded paying on policies.

158. Despite recent changes in the rules of *caveat emptor* there is still a feeling that consumers have to beware. *See, e.g.*, ROGER M. SWAGLER, CAVEAT EMPTOR: AN INTRODUCTORY ANALYSIS OF CONSUMER PROBLEMS (1975).

changes should take place as an amendment to the Sale Law[159] or by enactment of a Consumer Transactions Law.

The Israeli Sale Law of 1968 is based on the 1964 Hague Convention and the Uniform Law on International Sale of Goods. The 1964 Convention dealt with international commerce and was drafted by developed countries, which sell industrial products to the developing world. The delegates of the developing world did not take part in that convention.[160] Therefore, it may come as no surprise that some legitimate interests of customers were disregarded so that the law favors sellers over buyers. Some faults were amended in the 1980 convention,[161] but neither the Israeli Sale Law of 1968, nor the Contract for Services Law of 1974 was amended.[162] Further, since the requirements for conformity to the Contract for Services Law is more restrictive than the Sale Law, it is substantially more defective than the Sale Law.[163]

There are numerous provisions in the Sale Law that favor the seller.[164] While further details on this subject are beyond the scope of this Article, one example will, however, reemphasize the problematic situation of consumers under the Sale Law. Usually, ownership passes to the buyers upon delivery. Delivery is defined in the Sale Law as placing the goods at the disposal of the buyer. An interpretation[165] of this law suggests that delivery for the purpose of ownership should be defined as "actual transfer of possession." Thus, for the purpose of transfer of ownership the date of delivery is postponed until delivery is actually performed. It is customary in Israel that many goods and services are paid for in advance, before the delivery of the goods or services. In the advent the seller goes bankrupt, the consumer, who is an unsecured creditor is last in the line of the creditors and usually does not recover any of the money paid in advance. When the goods are appropriated and identified, a more liberal interpretation could have assisted the consumer who paid for the goods since in such a case the goods could have been considered as already delivered to the consumer and thereby excluded from the assets of the

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159. Similar to the suggested amendment to the Guarantee Law. *See* Cohen, *supra* note 139.

160. *See* Deutch, *Law of Sale*, *supra* note 95, at 508 n.147.

161. *Id.* at 510 n.148.

162. Contract for Services Law, 5734-1974, 28 L.S.I. at 115.

163. For severe criticism on the provisions of this law, see ZAMIR, THE CONFORMITY RULE, *supra* note 103, at 211-12, 224, 289.

164. *See supra* text accompanying notes 110-14, 137-59.

165. *See* ZAMIR, THE SALE LAW, *supra* note 103, at 328, 384-85, 484-85, 664-67.

bankruptcy.[166] This suggested liberal interpretation is not, however, the only one possible under the existing wording of the Sale Law. Since this interpretation has not yet been adopted the consumer is not protected if the seller goes bankrupt.

Reliance on the existing consumer legislation to eradicate the faults of the Sale Law is misplaced. Most issues dealt with in the Sale Law, such as the duties of delivery, transfer, and title are not addressed by consumer protection legislation. Nor are other important issues such as conformity, defects of title, and obligations of the buyer, dealt with in any of the consumer laws, except for the law of sale of new apartments, which is a specific type of consumer transaction. Even the relatively successful Standard Contracts Law[167] can be of little help to the buyer because while it can cure unreasonable deviations from existing legal rules, it cannot remedy a contract term when the law itself favors the seller.

Assuming that existing consumer protection laws and general contracts and sale laws are insufficient to protect the consumer, Israel must determine whether the amendments to protect consumers would best be located as part of the Sale Law or as an independent Consumer Transactions Law. There are strong arguments for each alternative. On one hand, specific consumer legislation might become counterproductive at a certain point. Also, even detailed consumer protection laws will leave many consumer contracts to the interpretation of the general concepts of contract law. It will, however, strengthen the argument that since consumers are already protected, contracts have to be interpreted disregarding the nature of the parties involved, and rules such as *interpretatio contra stipulatore* (interpreted against that agreed upon) might be limited or altogether disregarded.[168] In the end, such interpretation is harmful to consumers since most contract terms will be dealt with under general contract laws, which favor the seller, and not under consumer protection laws, which favor the buyer.

Another flaw in specific consumer protection legislation is the difficulty of its implementation. The civil parts of the Consumer Protection Law have been rarely implemented. There is almost no litigation regarding the law.[169] As such, it is possible that amendments in

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166. *See* Deutch, *Controlling Standard, supra* note 91, at 514-15, 521-22.

167. *See generally* Deutch, *Unfair Terms, supra* note 17.

168. *See* GABRIELA SHALEV, THE CONTENT OF THE CONTRACT, THE CONTRACTS (GENERAL PART) LAW, 5733-1973 74 (1988). For a criticism on this attitude, see Sinai Deutch, *G. Shalev: The Content of the Contract*, 15 MISHPATIM 395, 400 (1990).

169. Out of ten published cases that mentioned the Consumer Protection Law only

the Sale Law might be more effective than passage of a special consumer law that would not be considered as part of the Israeli civil law.[170]

On the other hand, amendments to the Sale Law can be only a partial solution to the problems involved with consumer transactions. First, they will not cover the problems involved in services to consumers. Second, they will blur the recognition of consumer contracts as a special type of contract, a recognition which is important to the regulation of the entire area of consumer contracts. Third, amendments that will be part of the existing Sale Law will, after all, be part of a contract law still influenced by the traditional notions of contract law such as freedom of contract. Fourth, legislation that will remain part of the Sale Law will be drafted concisely, the same way as other contract laws, while consumer legislation requires detailed provisions in order to give specific solutions to specific problems.

Comparing the arguments for and against, a special law is preferable over an amendment to the existing Sale Law. It is therefore suggested that a law of consumer transactions dealing with both sales and services transactions be enacted.

Even when such legislation materializes, consumer contracts will still remain part of contract law. It will, however, be officially acknowledged that consumer contracts are a specific type of contract such as services contracts, insurance contracts, or bailees contracts. If such legislation passes, then it will be a step in the right direction, a step in the direction of regulating consumer-supplier relations.

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one dealt directly with consumer protection. *See* C.A. 490/85, Milchey Yericho v. Mifaley Yam Hamelach, 39(3) P.D. 525 (1985) (questioning whether a commercial plaintiff can sue in reliance on the Consumer Protection Law); H.C. 476/82, Orlogad v. Rasham HaPatentim VeHamidgamim VeSimanei Mischar, 39(2) P.D. 148 (1985) (a commercial case); H.C. 573/87, S. Eastline v. Sar Hamischar VeHataasiya, 41(4) P.D. 550 (1987) (a commercial claim); C.A. 490/85, Milchey Yericho v. Mifaley Yam Hamelach, 41(4) P.D. 401 (1987) (a commercial case); C.C. (T.A.) 2969/84, Telsa International v. Telem 555 Ltd., 1985(3) P.M. 89 (can a commercial plaintiff sue according to the Consumer Protection Law); C.C. (Haifa) 15340/83, Pilarski v. Prezes, 1986(1) P.M. 63 (suit based on general contract law rather than on consumer misrepresentation); C.C. (B.Sh) 804/82, Mifeley Yam Hamelach v. Milchey Yericho, 1986(1) P.M. 133 (a commercial case); C.C. (T.A.) 1769/83, Boeing Co. (Delaware Corp.) v. Boeing Nesiot and Tayarut Ltd., 1989(3) P.M. 108 (a commercial dispute holding that only a consumer can sue under the consumer protection law); B.R.E. (B.Sh.) 496/96, Meir v. Bank Leumi LeIsrael, 1990(2) P.M. 42 (the only case acknowledging, in principle, the right of a consumer to sue because of consumer misrepresentation).

170. A special consumer transactions law will probably not become part of the suggested *Bill of Editing the Collection of Civil Laws*. *See supra* note 13.