

COMMERCIAL COURIER
LEGAL DEVELOPMENTS AFFECTING YOUR BUSINESS

This column looks at new laws and regulations which will have an impact on your business.

SALE OF GOODS AND GUARANTEES

*by Dr. Frank Chetcuti Dimech**

*Partner, CDF Advocates (<http://www.cdf.com.mt> - Telephone 21223334, Mobile 79223334, Fax 21248594, e-mail: fcd@cdf.com.mt). CDF Advocates specialise in commercial law, company law, financial services, taxation, telecommunications, privatisation and alignment with EU law. This article is for information purposes and must not be relied upon as advice.

Introduction

Those who read last month's column regarding liability for defective products and thought that selling goods has become slightly harder, will probably have to revise their thoughts very closely after reading this month's article. Part VIII of the Consumer Affairs Act, entitled "Sale of goods to consumers" will make many traders revise the mentality "sell and then we'll see", into "see very well before you sell".

The source of the new Part VIII of the Consumer Affairs Act is once again another EU Directive, this time Directive 99/44 of 25 May 1999 "on certain aspects of the sale of consumer goods and associated guarantees". This is a very recent addition to the *acquis communautaire*, and the European Union Member States were all required to bring into force their national laws implementing Directive 99/44 by the 1st January 2002, and indeed a significant number of Member States failed to meet the deadline, although others even went beyond the minimum rights imposed by the Directive. Unfortunately there is little guidance on this Directive even from the European institutions themselves, particularly there is no interpretation of this Directive by the European Court of Justice.

Overview

Part VIII of the Consumer Affairs Act, like the EU Directive, is primarily concerned with what can be called a "legal guarantee" and regulates also the minimum content of "commercial guarantees".

The concept of legal guarantee introduces legal protection of the purchaser in respect of defects in the goods acquired, resulting directly from the law, as a collateral effect of the contract of sale. The law here deals with the principle of the conformity of the product with the contract. The concept of commercial guarantee, on the other hand, expresses the will of one person, the guarantor, who assumes personal liability for certain defects.

Under the Directive, “consumer goods” are defined as any tangible movable item, with the exception of goods sold by way of execution or otherwise by authority of law, water and gas where they are not put up for sale in a limited volume or set quantity and electricity. Member States have the option of excluding from this definition second-hand goods sold at public auction where consumers have the opportunity of attending the sale in person. Under our law however, "goods" means any tangible movable item of property, and therefore does not incorporate any of the exclusions contemplated by the EU Directive.

The law also applies to contracts for the supply of consumer goods to be manufactured or produced – e.g. furniture. Luckily for most readers, Part VIII of the Consumer Affairs Act is only applicable to contracts of sale of goods to consumers concluded or executed after the law comes into force. Furthermore, where the trader as the final seller of goods is liable to the consumer because of a lack of conformity resulting from an act or omission by the producer, a previous seller in the same chain of contracts or any other intermediary, the trader as final seller is entitled to pursue remedies against the person or persons liable in the contractual chain. Of course however, it is the trader as final seller who is on the front line.

It is important to note that the provisions of Part VIII of the Consumer Affairs Act apply in all cases where the contract for the sale of goods to a consumer has been concluded in Malta or otherwise has a close connection with Malta, or such other countries or group of countries as the Minister may from time to time designate for the purpose of this provision by notice published in the Government Gazette. Accordingly the rights arising in favour of consumers under the new provisions will remain applicable and shall not be affected by the adoption of the law of a foreign country not being Malta or one of the countries or group of countries designated as aforesaid.

Minimum Legal Rights included in the Sale

Traders are obliged to deliver to consumers, goods which are in conformity with the description and specifications in the contract of sale, and shall accordingly be obliged to ensure that the goods –

- (a) comply with the description given by the trader and possess the characteristics, features and qualities of the goods which the trader has promised or has shown or otherwise held out to the consumer as a sample or model;
- (b) are fit for the particular purpose for which the consumer requires them and which he made known to the trader at the time of conclusion of the contract;
- (c) are fit for the purpose for which goods of the same type are normally used; and
- (d) show the quality and performance which are normal in goods of the same type and which the consumer can reasonably expect, given the nature of the goods and taking into account any public statements on the specific characteristics of the goods made about them by the trader, the producer or his representative, particularly in advertising or on labelling.

The above-mentioned obligations of the trader at the time when the contract was concluded, shall lapse and cease in the following circumstances:

- (a) where the consumer was aware, or could not reasonably be unaware, of the lack of conformity, or
- (b) where the lack of conformity has its origin in materials supplied by the consumer.

The trader is bound by public statements, including those in advertising and labelling, unless he:

- (a) shows that he was not, and could not reasonably have been, aware of the statement in question, or
- (b) shows that by the time of conclusion of the contract the statement had been corrected, or
- (c) shows that the decision to buy the goods could not have been influenced by the statement.

Any lack of conformity resulting from incorrect installation of the goods is deemed to be equivalent to lack of conformity of the goods if the installation is part of the contract of sale of the goods and the goods were installed by the trader or under his responsibility. This also applies if the product, intended to be installed by the consumer, is installed by the consumer and the incorrect installation is due to a shortcoming in the installation instructions.

The trader is liable to provide a remedy to the consumer for any lack of conformity in the goods which existed at the time the goods were delivered by the trader to the consumer. The consumer has the option either:

- (a) to have the goods brought into conformity free of charge by repair or replacement, or
- (b) to a refund of an appropriate reduction in the price or by having the contract rescinded with regard to those goods.

These remedies are in addition to – and are more extensive than – the traditional remedies of the Civil Code, namely the *actio redhibitoria* (to restore the thing to the seller and have the price repaid to the consumer) or the *actio aestimatoria* (to retain the thing and have a part of the price repaid to the consumer).

Additional rights are also available for maintenance and spare parts. If the goods being the object of a contract of sale to a consumer, are of a nature that may require maintenance, or possible replacement of parts, then replacement parts and appropriate repair service must be made available for a reasonable time from the date of the delivery of the goods by the trader to the consumer. The trader or the producer may release himself from this obligation by specifically and expressly warning the consumer in writing, before the contract is entered into, that he does not supply replacement parts or repair service.

Remedy 1: Repair or Replacement

Unless it is impossible or disproportionate, the consumer may, in the first instance, require the trader to repair the goods or else to replace them, in either case free of charge. This type of remedy is deemed to be disproportionate if it imposes costs on the trader which, in comparison with the alternative remedies available under Part VIII of the Act, are unreasonable, taking into account –

- (a) the value of the goods had there not been lack of conformity,
- (b) the significance of the lack of conformity, and
- (c) whether the alternative remedy could be completed without significant inconvenience to the consumer.

Any repair or replacement shall be completed, as soon as practicable, within a reasonable time and without any significant inconvenience to the consumer, taking account of the nature of the goods and the purpose for which the consumer required the goods.

Remedy 2: Reduction of Price or Rescission

The consumer may require an appropriate reduction of the price or have the contract rescinded –

- (a) where the consumer cannot obtain either the remedy of repair or of replacement, or
- (b) if the trader has not completed the remedy of repair or replacement within a reasonable time, or
- (c) if the trader can only provide or complete the remedy of repair or replacement with significant inconvenience to the consumer.

However, the consumer is not entitled to have the contract rescinded if the lack of conformity is minor or insignificant.

Time Limits

First of all, the law reverses the burden of proving defects occurring in the first six months. In fact, unless proved otherwise, any lack of conformity which becomes apparent within six months of delivery of the goods is presumed to have existed at the time of delivery, where this presumption is broadly compatible with the nature of the goods or the nature of the lack of conformity. Any contractual clauses or agreement concluded by the consumer with the trader before the lack of conformity is brought to the attention of the trader, are not binding on the consumer if such clauses or agreement directly or indirectly waive or restrict the rights available under the law.

The trader is liable to provide one of the remedies described above where the lack of conformity becomes apparent to the consumer within two years from the delivery of the goods. This period of prescription is suspended for the duration of negotiations carried on between the trader and the consumer with a view to an amicable settlement. Therefore the minimum “legal guarantee” applies for two years from the sale: during the first six months it is the trader who has to prove that the goods were in conformity, while for the remaining eighteen months, the burden of proof shifts back to the consumer. Those who think that two years is too long should be thankful that the legislator did not consult the Finnish law while drafting ours – in Finland the minimum legal guarantee is of 10 years! And those who think that the reversal of burden of proof for the first six months is unfair on the trader, should also be thankful that the Portuguese law was not followed locally since in Portugal the burden of proof is on the trader for the whole two years.

However, in order to benefit from the remedies, a consumer must notify the trader of any lack of conformity in writing within two months from the date on which the consumer detected such lack of conformity. It is considered sufficient proof of notification if the consumer informs the trader by a judicial act within the prescribed period, or if the consumer shows that the letter was sent by registered mail within the prescribed period.

These time limits are more extensive than those provided for the traditional Civil Code remedies since both the *actio redhibitoria* and the *actio aestimatoria* are subject to a prescriptive period of six months for movables.

Commercial Guarantees

A commercial guarantee is an additional guarantee which places the beneficiary of such a guarantee in a more advantageous position than that established under the minimum “legal” guarantee described above. A commercial guarantee does not adversely affect other available remedies under any other law governing contractual or delictual liability.

The law requires a commercial guarantee to be drawn up in written form in a clear and legible manner, in plain language and it must also:

- (a) be formulated in at least one of the official languages of Malta;
- (b) set out the name and address of the guarantor, and clearly state the permanent address of the place of trade or business and the name of the person who is supplying the consumer with the commercial guarantee;
- (c) clearly state the contents of the guarantee including its territorial scope if this is limited as well as the duration of the guarantee from the date of purchase and different periods may be stipulated for different components of any goods;
- (d) clearly specify the manner how a consumer is to proceed to make a claim and to obtain execution of the commercial guarantee, the person authorised to execute the commercial guarantee and an address in Malta where claims may be sent. If a person who in supplying a commercial guarantee, fails to provide the consumer with the information required under this paragraph he shall then be responsible for the execution of the commercial guarantee at his expense;
- (e) clearly state whether the commercial guarantee may be transferred to others. Unless otherwise stipulated the commercial guarantee may also be availed of by any subsequent owners of the goods to which the commercial guarantee refers. However, unless the commercial guarantee specifically states otherwise, it is assumed that in the case of goods, the commercial guarantee covers any defects that may result during the period of guarantee;
- (f) provide a clear description of the goods or services covered under the commercial guarantee;
- (g) clearly stipulate what the guarantor undertakes to do if there is a defect in the goods covered by the commercial guarantee or if the services covered by the guarantee are not properly carried out; and
- (h) state clearly that the consumer enjoys certain rights at law in relation to the sale of goods to consumers and that those rights are not adversely affected by the guarantee.

At the request of the consumer, the trader shall make the commercial guarantee available to the consumer in writing or in another durable medium accessible and available to the consumer. Where a commercial guarantee does not comply with the above requirements, the validity of the guarantee shall not be affected and the consumer shall remain entitled to claim under it and require that it be honoured.

There is no need for the commercial guarantee to be specifically mentioned in the contract of sale, since if it is mentioned in a statement or advertisement by any person it is still binding on that person even if not specifically mentioned in the contract of sale.

Where a trader or any other person gives a commercial guarantee to a consumer, irrespective of when or how it is given, then that trader or other person shall be liable to the consumer for the observance of the terms and execution of the commercial guarantee as if he were the guarantor, unless that trader or other person, as the case may be, proves that he had expressly and clearly informed the consumer to the contrary at the time of the delivery of the goods or performance of the service. The designation by the guarantor of a third person to execute a commercial guarantee does not free the guarantor from the obligation towards the consumer pursuant to the commercial guarantee given to the consumer.

A commercial guarantee and any rights granted to a consumer under the guarantee cannot in any way, whether directly or indirectly, exclude or limit the rights of a consumer under the Act or under any other law. Any such exclusion or limitation stipulated in violation of this prohibition is null and ineffective. Furthermore, a guarantor cannot, when performing or executing a commercial guarantee, request a consumer to pay any fee or any charge however designated, unless this had been expressly and clearly stipulated in the commercial guarantee. The guarantor must assume the cost of any carriage incurred in respect of the performance of a commercial guarantee unless otherwise stipulated in the commercial guarantee.

The duration of a commercial guarantee is considered automatically extended for a period equal to the time during which the guarantor had the goods or part of the goods in his possession in order to perform or execute the commercial guarantee or as a result of the recall of the goods or part thereof by the manufacturer.

In proceedings against a guarantor who fails to observe any of the terms or undertakings stipulated in a commercial guarantee, the Court may:

- (a) order the guarantor to take such remedial action as may be necessary to observe the terms of the guarantee, or
- (b) order the guarantor to perform his obligations under the commercial guarantee to its satisfaction within such period as the court may establish. In doing so the court may order the guarantor to pay to the consumer a sum not exceeding fifty liri for each day of default in case of non-compliance after the lapse of the period established by the court.

Conclusion

The impact on the Maltese business community after the coming into force of Part VIII of the Consumer Affairs Act can therefore be summarised as follows:

1. consumers are required to have unassailable rights under the so-called "legal guarantee" for two years from purchase;
2. during this time, the consumer can claim against the seller for any hidden or other defects that existed at the time of purchase or delivery of the goods. Any defects that arise thereafter, e.g., due to mishandling, or wear-and-tear, are obviously not covered by the legal guarantee;
3. for the first six months after purchase, the consumer will not have to prove that the defect existed in the goods at the time of sale. However, after six months, this burden of proof will be on the consumer;
4. the consumer's rights will exist vis-à-vis the seller. The consumer can claim first that the goods be repaired or replaced. If this is not possible, or is disproportionate to the defect in the goods, the consumer can get a reduction in price, or a full refund, as appropriate.
5. however, the seller may be able to obtain redress from the previous seller, (who may also be the manufacturer), and therefore all sellers must pay close attention to their contracts with their suppliers – especially those outside the EU – who may attempt to limit the seller's right of recourse against them.

The new provisions will have the inevitable effect of increasing consumers' rights throughout the European Union and in Malta, when they buy any goods, whether manufactured in the EU or imported from third countries, and whether bought over the Internet or in the traditional manner, e.g., from shops or catalogues. As a result of the new legislation, local retailers and wholesalers, and even manufacturers exporting goods for sale to Malta must be fully aware with the provisions, or else face unexpected sudden costs due to claims for compensation made by consumers in enjoyment of their increased rights.