

5

Defective Goods and Services Purchased Online The Extent of Protection Afforded to the Consumer Under Maltese Law

Brigitte Zammit, BA, LL D

Each and every one of us plays the role of a consumer in our daily life. The advent of the Internet offers us a new way of shopping, irrespective of our geographic location or that of the seller. Today an Internet consumer may go online twenty-four hours a day to shop for practically any good or service, and conclude transactions even where sensitive data is involved. From books and compact discs to software products or pharmaceuticals, and increasingly even financial or insurance services – you name it, it will probably be available online.

Although such e-consumers recognize the benefits that they may gain by being able to buy goods and services from online businesses world-wide however, they harbour high expectations of receiving adequate consumer protection under the law.¹ In view of this, not only has the Maltese Consumer Protection Act been revamped by means of the 2000 amendments; the newly-enacted Maltese E-Commerce Act 2000 further lays down provisions that supplement these rules and applies them within the e-commerce scenario.

This article starts out by briefly setting the context of consumer protection legislation within the e-commerce scenario and then focuses on the extent to which such legislation in Malta protects the online consumer when the latter purchases goods or services that later reveal themselves to be defective.

The Raison d'Être and Scope of Consumer Protection Law as Applicable to Online Transactions

In line with the E-Commerce Directive, the Maltese E-Commerce Act defines a consumer as any 'natural' person who acts 'for purposes outside his or her trade, business or profession'.² A person usually acts in such capacity when he or she buys goods or services from a business.³

Any discussion concerning consumer contracts usually starts off from the premise that the consumer is in a weaker bargaining position than the supplier. Very often the consumer has no say in the drafting of the contract and finds himself in a position where he or she must either decide to accept the contract as it is or else remain without the good or service in question.⁴ This is especially relevant in the case of standard form contracts, which can today be performed with greater ease over the Internet.⁵ A typical example would be the online purchase of airline tickets.⁶ Thus, although the general principle remains that the parties should be free to contract, this rule cannot remain so rigid within the realm of consumer contracts.

Within the realm of consumer contracts the Maltese Consumer Affairs Act and regulations enacted thereunder today protects all areas of consumer protection including advertising, product liability and, as from September 2001, even distance selling. This whole body of legislation also applies to online consumer transactions, in the same way as all existing consumer-related Directives under EU law, which constitute the source of our current consumer legislation, are applicable to online transactions by virtue of Recital 11 of the E-Commerce Directive. The Maltese E-Commerce Act further empowers the Minister of Communications to regulate on specific consumer-related issues within the e-commerce realm.⁷

Implied Contractual Terms of Quality and Remedies for Breach Thereof

The global and virtual nature of the Internet creates new concerns regarding the way in which contractual terms and conditions may adequately be displayed. A clickable icon or hyper-

¹ Simon Lowe & Thomas Limouzin-Lamothe, *Formation and Proof of Electronic Agreements in France*, [1999] ICCLR Special Issue, p. 37; Reuters, *Europeans Uninterested in Shopping Online*, 22. 2. 2000 at <http://home.cnet.com/category/0-1007-200-1554830.html>.

² E-Commerce Act, Section 2.

³ Julia Hörnle, *Consumer Protection and the Internet*, <http://pittance.ccls.edu>

⁴ Stephen Weatherill & Geraint Howells, *Consumer Protection Law*, (Dartmouth Publishing Co. 1995), ch. 1, p. 20.

⁵ Michael Chissick & Alistair Kelman, *Electronic Commerce: Law and Practice*, (Sweet & Maxwell, 2000) p. 92; Olivier Hance, *Internet e la Legge*, (McGraw-Hill, 1997) p. 128:

Tali contratti sono già molto frequenti su Internet: le condizioni generali di vendita sono inserite su dei server e la sola scelta lasciata all'utente, contraente potenziale, è quella di accettarle o di non stipulare il contratto!

⁶ One of many examples is British Airways (<http://www.britishairways.com>), which allows passengers to book their seat online.

⁷ E-Commerce Act, Section 25 (1) (a) (iv).

link on the site usually serves this purpose, so long as it is visible and easily accessible to the consumer before the contract is formed.⁸

Express terms may however sometimes be too cumbersome and commercially unrealistic to incorporate in a contract.⁹ Most developed legal systems, including Malta, have consequently identified the terms that should be implied into contracts for the provision of goods or services independently of negotiation between the parties.¹⁰

Existing rules on implied terms clearly also apply to easily definable goods or services supplied via the Internet. The problem arises in the case of information products, such as customized package software, supplied as discrete packages via Internet download.¹¹ Computer software is unfortunately by its very nature susceptible to contain minor 'bugs'.¹² Not only is it impossible to test even the simplest program in an exhaustive fashion; it is further to be expected that every piece of software will contain errors that may only materialize when a particular, and perhaps unrepeatable, set of circumstances occurs.¹³ In such cases should the traditional implied terms still be applied? It has been suggested that in such cases the implied terms should still, as a minimum, cover delivery and quality but the content of such terms may have to be different from normal implied terms relating to conventional goods or services.¹⁴

The Maltese Consumer Affairs Act provides for implied terms of quality on the basis of conformity with description and fitness for purpose.¹⁵ Yet these provisions of the Act only relate to 'goods', defined in section 72 as any tangible movable item of property, and to consumer contracts of sale. Section 60 further deems a product to be defective if it fails to provide the safety that a person is entitled to expect, considering, among other things, the use to which such product could reasonably be expected to have been put.¹⁶ If on coming into force this Part of the Act¹⁷ will be deemed applicable to digitized products, then even online suppliers will

be held liable as producers if the latter or the importer cannot be identified and the person injured by the defective product has conformed to the provisions of section 59 (2).

The consumer is moreover afforded an action for damages under section 61, including damages amounting to damage to or loss or destruction of any item of property other than the defective product itself.¹⁸ Thus if as a result of defective software the consumer's hardware has been damaged, and such hardware is of a type ordinarily intended¹⁹ and so used for private use or consumption by the consumer, the latter has an action for damages. It is important to note that a producer may not contract out of such liability in any manner whatsoever.²⁰ Such action is furthermore without prejudice to any rights that the consumer may have under any other law,²¹ as for example the *actio redhibitoria* and *actio estimatoria* remedies available under the Civil Code.

The applicability or otherwise of these provisions of the Act is however not as straightforward as it may prima facie seem to be. In a clear-cut case, as for example where a Web site indicates a shirt on sale as being 100% cotton, there would not be any problem; it is obvious that such a shirt must conform to the description and be 100% cotton. Problems may however arise in the case of digital information products, not only as a result of their inherent versatility,²² but also because what may seem to be a contract of sale in their regard may actually constitute a mere licence agreement.²³

Digital information products are not easily classifiable as either goods or services.²⁴ This classification is nonetheless important in that the provisions of the Consumer Affairs Act relating to product liability do not apply to services, although such an extension had originally been proposed by the drafters. The definition of 'products' on its part is wide in scope, including in its indicative list intangibles such as electricity and gas. Although some authors describe digitized products as dematerialized versions of goods,²⁵ it is arguable whether the Maltese courts would deem such products to

⁸ Hörnle, op. cit.; Chissick & Kelman, op. cit. p. 93.

⁹ Chris Reed, *Internet Law*, (Butterworths 2000) p. 183.

¹⁰ Weatherill & Howells, op. cit. p. 26.

¹¹ Reed, op. cit. p. 183.

¹² That is, defects. Ian J. Lloyd, *Information Technology Law*, (Butterworths 2000) p. 213; Chissick & Kelman, op. cit. p. 102.

¹³ Lloyd, *Ibid.* p. 193.

¹⁴ Reed, op. cit. p. 183.

¹⁵ Consumer Affairs Act, section 73 (1).

¹⁶ Section 60 (1) (b).

¹⁷ Part VII.

¹⁸ *Ibid.*, section 61 (b).

¹⁹ *Ibid.*, section 61 (b) (i).

²⁰ *Ibid.*, section 68.

²¹ *Ibid.*, section 69.

²² Reed op. cit. p. 185.

²³ Hörnle, op. cit.

²⁴ Reed, op. cit. p. 182.

²⁵ Chissick & Kelman, op. cit. p. 100.

fall within the scope of the said definition of a product or whether such products would be deemed to have a hybrid nature, and consequently qualify both as a good and as a service.

English law is drafted in similar terms to the Consumer Affairs Act. A reference to the situation as developing in this jurisdiction is therefore relevant to this article. The English courts have described a software program as:

instructions or commands that tell the hardware what to do...

A program in machine readable form must be contained on a machine readable medium, such as... disks.²⁶

While the disk itself would clearly fall within the statute law definition of 'goods', the actual program would not, even though it may be classified as a product.²⁷ This may arguably be extended to software programs downloaded directly via the Internet.

The next question concerns the quality terms that are to be implied into contracts involving such products. In the *St Albans* case cited above Sir Iain Glidewell LJ, held that in the absence of any express terms as to quality or fitness for purpose, a contract for the transfer into a computer of a program intended by both parties to instruct or enable the computer to achieve specified functions is subject to an implied term that the program will be 'reasonably fit for achieving the intended purpose'.²⁸ Given the inherently versatile nature of software products however, the problem as to whether any precise purpose can be stipulated in regard to digital information products subsists.²⁹

Another problem referred to above relates to the fact that the downloading of software from the Internet might not even classify as a sale in the first place, but rather as a licence.³⁰ The implied conditions as to description, satisfactory quality and fitness for purpose would consequently not apply since the purchaser will not become owner of the information but merely a licensee thereof. Should he therefore receive merely a limited protection against interferences by the third party having a right to use the product?³¹ In many cases the issue

as to whether or not the scope of such use rights should extend beyond mere right of common use of the information by the purchaser will be settled by express licence terms.³² Where no such express licence exists, some foreign courts have sought to construe an implied licence to resolve the matter.³³

The greatest challenge to the courts in this area is that of determining standards for software and other digitized products. Given that software products will almost inevitably have bugs,³⁴ it must be determined whether such defects are to be deemed to constitute a breach of section 73 of the Maltese Consumer Affairs Act, which sets out the terms of quality that are to be ensured by traders when selling goods to consumers. English courts appear to measure quality of software on a case-by-case basis.³⁵ Thus while in the landmark *Saphena* case³⁶ the English Court of Appeal held that 'no buyer should expect a supplier to get his programs right first time', in the *St Albans* case it came out stricter against the software supplier and awarded damages to the consumer plaintiff. In Malta too it will eventually be up to the courts to imply into e-commerce agreements such terms that seek to ensure the protection of consumer interests but at the same time create legal certainty for the online merchant.

*Remedies Afforded by the Distance Selling Regulations 2001*³⁷

In addition to the legal protection described above, further legal remedies may be sought by an aggrieved online consumer under the Distance Selling Regulations 2001, modelled on the EC Directive on Distance Contracts.³⁸ These Regulations are particularly relevant within the online scenario, where it is easier for fraudulent sellers to succeed because consumers have less time to consider their choices.³⁹

The consumer's right of withdrawal provided by these Regulations is an important right especially on the Internet, where the consumer may easily have second thoughts as soon

²⁶ Sir Iain Glidewell in *St Albans City and District Council v. International Computers Limited*. [1996] 4 All E. R. 481.

²⁷ *Ibid.*

²⁸ Peter Sinnett, 'St Albans and the Millenium Time Bomb', *Computers and Law*, Vol. 7. Issue 5 (Dec. 1996/Jan. 1997) p. 8.

²⁹ Reed, 'Internet Contracting', *Computers and the Law*, Vol. 9 (February/March 1999) p. 37.

³⁰ Reed *op. cit.* at footnote 12, p. 184.

³¹ *Ibid.*

³² *Ibid.*

³³ *Trumpet Software Pty Ltd v. OzE-mail Pty Ltd.*, [1996] 34 IPR 481 where the Australian Federal Court suggested that such an implied licence could allow the licensee to make any use of the information that does not infringe upon the owner's right to exploit the information product commercially.

³⁴ Chissick & Kelman, *op. cit.* p. 102; Ian J. Lloyd, *op. cit.* p. 213.

³⁵ Chissick & Kelman, *op. cit.* p. 103.

³⁶ *Saphena Computing Ltd. v. Allied Collection Agencies Ltd.*, [1995] F. S. R. 616.

³⁷ Legal Notice 186 of 2001.

³⁸ Directive EC/97/7, OJ L 144, 4. 6. 1997; This Directive has been complemented by a draft Directive on the Distance Marketing of Financial Services, 14. 10. 1998, COM (1998) 468 final, at <http://europa.eu.int/comm/dg15/en/index.htm>

³⁹ *Ibid.*

as he submits the order. Regulation 6 thus gives the consumer the right to withdraw from such a contract within 15 days from the day he receives the goods⁴⁰ or, in the case of services, from the day of conclusion of the contract.⁴¹ This applies provided the supplier satisfies his obligations under Regulation 5 to provide the consumer with written confirmation of details relating to the supplier.⁴² This 15-day period may extend to up to 3 months if the supplier does not comply with the said information requirements. The consumer may make such withdrawal without any need to give reasons and without incurring any penalty.⁴³ The sole costs that the consumer must bear are ones involved in returning the goods. Moreover, if the consumer has already paid the price of the goods, totally or partially, he is to be reimbursed with this sum within 30 days.⁴⁴

It is very interesting to note that in this regard Maltese law thus affords the consumer a wider protection than the Directive, which only allows the consumer a 7 working day period of withdrawal.⁴⁵

Under both the Directive and the Maltese Regulations however this right of the consumer to withdraw from a con-

tract does not apply to contracts where such right would be unfair and disproportionate towards the supplier. These contracts, listed in Article 6 (3) of the Directive and Regulation 6 (5) (d) of the Maltese Regulations respectively, include contracts for the supply of software that has already been unsealed by the purchaser or ones for the supply of goods clearly personalized to the consumer.⁴⁶ Nonetheless consumers will arguably still have a right to withdraw from a contract of digital supply of information against immediate payment via the Internet unless such information is packaged in the form of a video recording, computer software or any of the above categories.⁴⁷

Conclusion

Needless to say this article has merely considered one aspect of consumer protection law, which is today widespread in scope and covers numerous issues. In this context Maltese legislation today seeks to provide adequate legal protection on all such issues to both aggrieved online consumers and ones in conventional transactions alike.

⁴⁰ Regulation 6 (1) (a).

⁴¹ Regulation 6 (1) (b).

⁴² Regulation 4 lists the content of such information.

⁴³ Article 6 (1).

⁴⁴ Article 6 (2).

⁴⁵ Dir. EC/97/7, Article 6.

⁴⁶ Clive Davies, 'Electronic Commerce – Practical Implications of Internet Legislation', *Tolley's Communications Law Journal*, Vol. 3, No. 3, 1998.

⁴⁷ Reed, *op. cit.* at footnote 12, p. 258.