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CONSUMER CONTRACTS LAW AS A SPECIAL BRANCH OF CONTRACT LAW—THE ISRAELI MODEL

*Sinai Deutch**

I. INTRODUCTION—CONSUMER CONTRACTS LAW AS A SPECIAL BRANCH OF CONTRACT LAW

This Article highlights the distinction between many of the rules governing consumer contracts and those governing general contracts. The rules governing consumer contracts differ considerably from those governing general contracts, and it has even been suggested that these differences justify the classification of consumer contracts as a special branch of contract law.

Acknowledging the frequent differences between the rules of consumer contracts law and those of general contract law yields the conclusion that there are a number of “laws of contracts” and not just one unified “contract law.” The varied “laws” of contracts apply different rules to different forms of contracts, such as commercial contracts, consumer contracts, labor contracts, standard contracts, and relational contracts as well as to other branches of contract law. This observation undermines, to a certain extent, the concept of the generality of contract law.

Having concluded that consumer contracts should be classified as an independent branch of contract law, two issues arise: first, it is necessary to clarify the defining features of a consumer contract. Second, it is necessary to consider the implications of acknowledging consumer contracts as a special branch of contract law. These questions will be discussed briefly in the introduction, and will be elaborated on in the following Sections.

* Professor, Dean of Netanya Law School, and Associate President of Netanya Academic College. This Article is based on a paper that was submitted in the Symposium: “Law of Contract or Laws of Contracts?” The Symposium took place at the Netanya Academic College Law School in collaboration with Touro Law School on December 14, 2011.

A “consumer contract,” in the narrow sense of the term, is concerned with the domestic consumer as defined in section 1 of the Consumer Protection Law (“CPL”).¹ The definition of “consumer” 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.”² In that section the term “dealer” is defined as, “[A] person who sells a commodity or performs a service by way of business and includes a producer.”³ Similar definitions exist in many consumer laws around the world.⁴

However, the rules of consumer contracts law are not limited to the CPL. Many rules which affect consumer contracts law originate in other consumer laws. Most of the consumer protection laws altogether omit the term “consumer.” The terms used are “customer,” “purchaser,” “buyer,” and other terms relevant to the transaction,⁵ and the question is why?

The reason is that the principal addressee of consumer laws is indeed the domestic consumer who requires the highest level of protection.⁶ The domestic consumer is the consumer in the narrow sense of the term. However, a purchase of assets and services from a dealer by someone who is not purchasing them in the course of his business is also entitled to protection against the inequality of bargaining power between the parties.⁷ Accordingly, the term “consumer” should be

¹ Consumer Protection Law, 5741-1981, 35 LSI 298 (1980-1981) (Isr.).

² *Id.*

³ *Id.*

⁴ *See, e.g.*, U.C.C. § 9-102(a)(23) (2001) (defining consumer goods as “goods that are used or bought for use primarily for personal, family, or household purposes”); *cf.* Unfair Contract Terms Act, 1977, c. 50, § 12(1) (Eng.) (providing, in pertinent part: “(a) he neither makes the contract in the course of a business . . . (b) the other party does make the contract in the course of a business; and (c) . . . the goods passing under or in pursuance of the contract are of a type ordinarily supplied for private use or consumption”). Similar definitions of “consumer” appear in many countries.

⁵ For instance, 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 LSI 213 (1972-1973) (Isr.); Small Claims (Jurisdiction) Law, 5736-1976, 30 LSI 240 (1975-1976) (Isr.); Banking (Service to Customer) Law, 5741-1981, 35 LSI 312 (1980-1981) (Isr.); Insurance Business (Control) Law, 5741-1981, 35 LSI 243 (1980-1981) (Isr.); Defective Products (Liability) Law, 5740-1980, 34 LSI 92 (1979-80) (Isr.).

⁶ *See Consumer Protection*, JEWISH VIRTUAL LIBR., http://www.jewishvirtuallibrary.org/jsource/judaica/ejud_0002_0005_0_04595.html (last visited Feb. 21, 2013) (acknowledging that legal protection is required for the consumer).

⁷ *See generally* Daniel D. Barnhizer, *Inequality of Bargaining Power*, 76 U. COLO. L. REV. 139 (2005) (discussing the harsh realities of the inequalities of bargaining power in the world of contract law).

defined more broadly, so as to enable the inclusion of any person who purchases assets and services from a dealer as the final user of the assets and services, not as part of his occupation.⁸

Consumer legislation which uses the term “customer” or “purchaser” and not the term “consumer” reflects the understanding that consumer law should protect the weaker party in a transaction between a customer on the one hand, and a dealer, a banker, or an insurance company on the other, and should not be limited to the “classic” domestic consumer. Since consumer protection law extends its protection beyond the “consumer” as defined in the CPL, there is a need to address two issues: First, why is the CPL limited strictly to the domestic consumer? There is a need to characterize the situations in which the law will be regarded as a consumer law even when the term “consumer” is not used. This issue will be addressed in the next Section. The answer to the first question is that the domestic consumer requires the highest level of protection.⁹ Therefore, the CPL deals exclusively with the domestic consumer. Other consumer laws are broader in order to protect other customers as well.

The second question is: What are the consequences of recognizing consumer contracts law as a special branch of contract law? Obviously, consumer contracts law cannot be considered as an entirely separate body of law governed by an entirely different set of legal rules. Even the most detailed consumer laws do not replace many of the rules of contract law. There is no Consumer Transactions Law in Israel, which covers the whole process of contracting. This means that in any consumer transaction, many of the regular contract rules will continue to apply.

The two most important contract laws in Israel are the Contracts (General Part) Law,¹⁰ and the Contracts (Remedies for Breach of Contract) Law.¹¹ These laws include the most important rules of contract law such as contract formation, rescission by reason of defect in formation, the form and content of contracts, rules of interpretation, performance of contract, and contract remedies.¹² Generally

⁸ See Commodities and Services (Control) Law, 5718-1957, 12 LSI 24 (1957-1958) (Isr.) (defining consumer of a product as “a person who buys or otherwise acquires such commodity for any purpose whatsoever, other than manufacture or sale”).

⁹ Barnhizer, *supra* note 7, at 150.

¹⁰ Contracts (General Part) Law, 5733-1973, 27 LSI 117 (1972-1973) (Isr.).

¹¹ Contracts (Remedies for Breach of Contract) Law, 5731-1971, 25 LSI 11 (1970-1971) (Isr.).

¹² See *id.* at 11-16; see also Contracts (General Part) Law, 5733-1973, 27 LSI 117-127

the rules of these laws are relevant to consumer contracts as well, since there are no provisions in the consumer legislation, which relate to these issues. Section 41 of the CPL declares that, “[t]his Law shall be in addition to, and not in derogation of, any other law.”¹³

Accordingly, the proposal to recognize consumer contracts law as a special branch of contract law should not be regarded as the establishment of an entirely different and distinct area of contract law. Rather, the proposal is for the imposition of different rules of interpretation of a contract and enforcing contract law in a more liberal way, in cases where strict enforcement of the rules of contract law might undermine the protection of consumers. This suggestion will be elaborated on in Section V of this Article. The first question—“what is a consumer contract?”—will be answered in greater detail in the next Section.

II. WHAT ARE CONSUMER CONTRACTS?

A consumer contract has both a narrow and a wide definition. The narrow definition only deals with the domestic consumer as defined in section 1 of the CPL.¹⁴ Most consumer laws do not use the term “consumer” and are not limited strictly to domestic consumers. It is therefore necessary to explain what a consumer law is, even when the term is not mentioned in the law.

Consumer law in the wide sense of the term relates to transactions in which one party is a professional, such as banks and insurance companies, and in which the other party is a customer who purchases the product or the service from that dealer as the final user of the product or the service, not for production or resale.¹⁵

There are sound reasons for broadening consumer law beyond the definition of the domestic consumer. The position of a small businessman who receives a loan from a bank is no better than that of a consumer who receives a similar loan.¹⁶ Accordingly, in both cases

(1972-1973) (Isr.).

¹³ Consumer Protection Law, 5741-1981, 35 LSI 311 (1980-1981) (Isr.).

¹⁴ *Id.* at 298.

¹⁵ *Id.*

¹⁶ *See, e.g., Trade Practices Act 1974* (Cth) s 4b (Austral.) (defining consumer as “any person who purchases goods or services if the price of the goods or services do not exceed \$40,000, or even when the price exceeds the prescribed amount if the goods or services are of the kind ordinarily acquired for personal, domestic or household use”). For an interpretation of this section see JOHN GOLDRING ET AL., CONSUMER PROTECTION IN AUSTRALIA 219

special protection is required.

The understanding that consumer law cannot be limited strictly to domestic consumers compels the establishment of guidelines for determining which legislation can be considered as consumer law, even when the term “consumer” is not mentioned in that law.¹⁷

I would suggest four characteristics that distinguish between general contract legislation and consumer legislation. The four main characteristics of general contract law are: (1) contract legislation is neutral with regard to the parties, as it does not seek to protect one of the parties to the transaction;¹⁸ (2) provisions in contract legislation may be varied by agreement since the content of the contract may be whatever is agreed between the parties;¹⁹ (3) contract legislation is drafted laconically, briefly, and concisely since the details are left for the parties to decide²⁰ and; (4) contract legislation does not include criminal sanctions or administrative regulations.²¹

The characteristics of consumer legislation, which regulate consumer contracts, are the precise opposite of those mentioned in the context of contract legislation. First, consumer legislation is not neutral. It was enacted for the protection of the purchaser, who is the weaker party in the transaction.²² Second, in consumer legislation, the provisions of the law are *jus cogens* and apply despite any waiver or contrary agreement.²³ Third, consumer legislation is detailed and precise.²⁴ Fourth, consumer legislation generally also includes criminal sanctions and administrative regulations.²⁵

Based on these distinctions, I have identified more than twenty

(Austral., Butterworths Pty. Ltd. 3d ed., 1987).

¹⁷ See SINAI DEUTCH, THE LAW OF CONSUMER PROTECTION VOL.1 294-98 (2001) (in Hebrew) (listing twenty-two laws which can be considered as consumer laws).

¹⁸ See generally RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981) (defining contract in a neutral sense with respect to the parties' rights).

¹⁹ Subject, naturally to the obligation of good faith, diligence, reasonableness, and care. U.C.C. § 1-102(3) (2001); Contracts (General Part) Law, 5733-1973, 27 LSI 121 (1972-1973) (Isr.).

²⁰ See, e.g., U.C.C. § 2-204(3) (2012) (stating that open terms are left to the parties' intent).

²¹ U.C.C. § 1-305(a) (2012). The purpose of remedies is to put the aggrieved party “in as good a position as if the other party had fully performed.” *Id.* The remedies for contract law were not designed to be punitive. *Id.*

²² See Insurance Business (Control) Law, 5741-1981, 35 LSI 260 (1980-1981) (Isr.) (protecting the interests of those persons who are insured).

²³ Consumer Protection Law, 5741-1981, 35 LSI 310 (1980-1981) (Isr.).

²⁴ See generally *id.* at 298-311 (explaining the law for consumer protection).

²⁵ See *id.* at 306 (detailing the penalties available under the Consumer Protection Law).

ty Israeli laws as consumer laws.²⁶ Naturally, these laws affect the law of consumer contracts.²⁷ The effect of these laws on consumer contracts will be discussed in the following Sections.

III. THE CHANGES IN ISRAELI CONSUMER PROTECTION LAW FROM THE EARLY 1990S TO 2012

In an article published almost fifteen years ago, *Contract Law and Consumer Protection in Israel*,²⁸ I was skeptical as to whether consumer contracts law could be regarded as a special branch of contract law.²⁹ My conclusion then was that “consumer law . . . deviated from some of the basic [rules and] principles of contract law.”³⁰ These deviations were meaningful in certain areas of the law, and of only minimal effect in other areas. Therefore, additional legislation and development were required in consumer law in order to strengthen it. Consequently, I concluded that: “Since most terms [in consumer contracts] are subject to the principles of common contracts, [consumer] contracts cannot be considered a separate body of [contract] law with separate legal principles.”³¹

This conclusion was based on data gathered in the early 1990s, although the article was published in 1993.³² At that time, consumer law in Israel was still in the early stages of its development. Limitations on freedom of contract in consumer law were restricted to specifically defined issues. Even in areas where statutory regulation was substantial, such as in the area of the sale of new apartments,³³ only a few of the contractual conditions were mandatory. Until the amendment of the Sale (Apartments) Law in the 1990s,³⁴ there were only a few mandatory rules in this law. In other consumer laws, mandatory conditions of the contract were the excep-

²⁶ See DEUTCH, *supra* note 17, at 294-98.

²⁷ See Sinai Deutch, *The Law of Consumer Contracts versus the Law of Commercial Contracts*, 23 TEL AVIV U. L. REV. 135, 153-57 (2000) (in Hebrew) [hereinafter Deutch 2000].

²⁸ Sinai A. Deutch, *Contract Law and Consumer Protection in Israel*, 14 N.Y.L. SCH. J. INT'L & COMP. L. 261 (1993) [hereinafter Deutch 1993].

²⁹ *Id.*

³⁰ *Id.* at 263.

³¹ *Id.* at 279.

³² See generally Deutch 1993, *supra* note 28.

³³ Sale (Housing) Law, 5733-1973, 27 LSI 213 (1972-1973) (Isr.).

³⁴ Sale (Housing) (Amendment No. 3) Law, 5750-1990, 45 LSI 229 (1989-1990) (Isr.). Several additional important amendments have since been passed.

tion and not the rule.³⁵

Consumer legislation during the 1990s and the first decade of the Twenty-first Century introduced major changes in Israeli Consumer Law. Due to these changes, which will be presented in the following Sections, it is now feasible to suggest that consumer contracts law has become a separate branch of contract law. This suggestion is based on several foundations.

First, the massive number of amendments in consumer laws, between the years 1990-2012, has increased the gap between the rules of consumer contracts versus those of the regular contracts. These amendments support the claim that consumer contracts law should be considered as a special branch of contract law. The approach guiding the amendments of consumer law differs greatly from the approach governing legislation in contract law. While amendments in consumer law are common, frequent and substantial, contract legislation has remained largely unchanged. The two central contract laws were enacted in the early 1970s,³⁶ and in the forty years since their enactment, there have been scarcely any amendments.³⁷ The substantial amendments in consumer law during the years 1990-2012 have had a great effect on consumer contracts law, and added numerous mandatory duties on dealers. Legislation in the area of consumer law has become increasingly substantive and not only symbolic.

Second, consumer law has not only changed in terms of volume and substance; it has also undergone exponential growth in terms of consumer case law. Until the 1990s, there were virtually no consumer cases.³⁸ By 2012, more than 2000 cases had been pub-

³⁵ Many of the consumer laws, until the amendments of the 1990s and the 2000s, were primarily concerned with the process of contracting and not the substance of the contract. *See, e.g.*, The Banking (Service to Customer) Law, 5741-1981, 35 LSI 312 (1980-1981) (Isr.). Due to substantial amendments in this law, the number of sections of this law has almost doubled. *See* The Banking (Service to Customer) Law, 5741-1981 (2013) (Isr.). The changes and amendments have been even more substantial in other consumer laws. The CPL has been amended frequently over the years and the Consumer Protection Law of 2012 is very different from original law that was enacted during the 1980s. *Compare* Consumer Protection Law, 5741-1981, 35 LSI 298 (1980-1981) (Isr.), *with* Consumer Protection Law, 5741-1981 (2013) (Isr.).

³⁶ *See supra* nn. 5 & 8.

³⁷ Contracts (Remedies for Breach of Contract) Law, 5731-1970, 25 LSI 11 (1970-1971) (Isr.) has remained unchanged since its enactment in 1970. Only one section in the Contracts (General Part) Law has been amended since its enactment in 1973.

³⁸ Between the enactments of the CPL in 1981 to 1995, there was no substantial case law on consumer protection. There were a few references to the CPL in some cases, but without

lished in the area of consumer law.³⁹ Consumer law has become an integral part of Israeli case law, and the rules of consumer law are implemented in courts on a regular basis.

Third, the changes in consumer law are not limited to the changes in the law that establish the rights and the duties of the parties, but also encompass special consumer remedies and procedural law. There has been a clear transition from contract remedies to tort remedies in consumer law.⁴⁰ There is also a long list of punitive damages in section 31A of the CPL.⁴¹ Criminal sanctions are part of consumer law and administrative regulations also have an effect on consumer contract law. The most efficient tool for protecting consumers is consumer class actions,⁴² which were only introduced into Israeli consumer law in 1994⁴³ and re-enacted in 2006.⁴⁴

These changes have also influenced market behavior. The possibility of suing dealers in small claims court, the threat of criminal proceedings, and class actions have transferred consumer law into a meaningful, albeit imperfect way of protecting consumers. Consumer law in 2012 is significantly different from the consumer law of the early 1990s.⁴⁵ These changes have greatly influenced consumer contracts law. Accordingly, while in 1993 I wondered whether con-

any reliance on the law.

³⁹ There are more than 2,000 references to the CPL in the leading legal data resources. In many of these cases consumer protection is the main issue. These significant changes have its origin in three causes: (a) greater awareness of consumer protection; (b) the influence of consumer class actions; and (c) the great increase of publications of lower court decisions due to the digital media.

⁴⁰ In all consumer laws, the essential remedy is compensation, a remedy based on torts law.

⁴¹ This section is very long and includes a long list of cases where the court has the discretion to impose exemplary damages of up to 10,000 Shekel and in some cases of up to 50,000 Shekel. There are also other sources of punitive damages in consumer cases. *See, e.g.*, Ben David v. Wisman, *Th – Sh*. C.C. (Petach Tikva) 3568/05, 2006 (4) 3352 (2006).

⁴² *See* Sinai Deutch, *Consumer Class Actions: Are they a Solution for Enforcing Consumer Rights? The Israeli Model*, 27 J. OF CONSUMER POL'Y 179 (2004) [hereinafter Deutch, *Consumer Class Actions*] (explaining that consumer protection law was revived once class actions were introduced under the CPL). The majority of class actions in Israel are related to consumers. *See Class Actions as a Shield to Consumers*, 13 ORECH HA-DIN 42-46 (Oct. 2011) (in Hebrew).

⁴³ Consumer Protection (Amendment no. 3) Law, 5754-1994, *Sefer Ha-Chukim* 252.

⁴⁴ The Class Actions Law, 5766-2006, *Sefer Ha-Chukim* 264, introduced sweeping reforms in class actions, broadened the scope of consumer class actions and cancelled the chapter of class actions in the CPL.

⁴⁵ *See* Deutch, *Consumer Class Actions*, *supra* note 42, at 179 (showing the difference in number between the number of consumer protection laws available in the late 1960s and 1970s, to the number now available).

sumer contract rules could be considered as a separate branch of contract, in 2012, I can state with certainty that it is time to recognize consumer contracts as a special branch of contract law.

IV. THE SPECIAL RULES OF CONSUMER CONTRACTS

The law of consumer contracts differs from general contract law with respect to a wide range of issues. This Article only presents five important subjects of contract law, the ones which touch upon the core subjects of consumer law.⁴⁶ In order to emphasize the main changes, this Section deals with the following issues:

1. Formation of Contract—Dealers' Duty to Contract with Consumers.
2. Consumer Rights to Unilateral Cancellation of Consumer Contracts (cooling-off period).
3. Dealers' Duties of Writing in Consumer Contracts.
4. The Rules of Deceit in Consumer Contracts.
5. Different Rules of Interpretation.

A. Formation of Contract—Dealer's Duty to Contract with Consumers

The first section of the General Contracts Law states: "A contract is made by way of offer and acceptance."⁴⁷ 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.⁴⁸ However, the Commodities and Services (Control) Law, 5718-1957⁴⁹ imposes a duty on dealers to sell controlled commodities and to perform controlled services.⁵⁰ The list of controlled commodities and controlled services is based on section 4 of this law and is quite long. It includes most commodities and many services.⁵¹ Section 22

⁴⁶ For instance, the following issues of consumer law are not dealt with in this Article: (1) standard consumer contracts; (2) criminal sanctions and administrative regulations of consumer contracts; (3) duties of disclosure in consumer contracts; and (4) special remedies in consumer transactions.

⁴⁷ Contracts (General Part) Law, 5733-1973, 27 LSI 117 (1972-73) (Isr.).

⁴⁸ See Miguel Deutch, *Compulsory Contracts and the Freedom from Contract*, 16 TEL AVIV U.L. REV. 35 (1991) (in Hebrew); PATRICK S. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* 742-45 (1979).

⁴⁹ 5718-1957, 12 LSI 24 (1957-1958) (Isr.).

⁵⁰ *Id.*

⁵¹ *Id.* at 26. The details of the list are not relevant to this paper.

of this law states that: “A person shall not unreasonably refuse to sell any controlled commodity which he has in stock at the price displayed as provided in section 21.”⁵² In a free and open market, this rule is of little importance, because it is in the interest of the seller to sell.

Of greater importance is section 28(a), which states: “A person whose business or a part of whose business is the performance of controlled service shall not unreasonably refuse to perform such service”⁵³ Although there are only a few controlled services, surprisingly, there are many cases,⁵⁴ most of them concerning taxi drivers who were unwilling to perform services or who asked for prices that were higher than those prescribed by law. The sanctions for infringement of these duties are criminal penalties.⁵⁵ Although the actual implementation of this provision is not extensive (except for taxi drivers) it imposes restrictions on the freedom to refuse to enter into a contract.

Similar provisions which impose a duty to enter into agreements are found in other laws as well. Section 2 of the Banking (Service to Customer) Law⁵⁶ states that banks shall not unreasonably refuse to provide services in certain categories; the duties imposed on the bank are limited to very specific services such as accepting money deposits and it may be reasonably presumed that banks have no good reasons to refuse such service.⁵⁷ Most of the cases, concerning section 2(a) of the Banking Law, indicate that the bank is under no obligation to grant credit to customers.⁵⁸ Section 2 of the Banking Law differs in principle from the rules of the freedom of contract, but has hardly affected actual transactions.⁵⁹

⁵² *Id.* at 32.

⁵³ *Id.* at 34. The seller has to perform the service for a remuneration of the amount displayed as provided in section 27 of the CSL. 5718-1957, 12 LSI 24.

⁵⁴ There have been one hundred cases concerning this issue between 2001-2012. *See id.*

⁵⁵ *See* 5718-1957, 12 LSI 24, at § 39.

⁵⁶ 5741-1981, 35 L.S.I. 312 (1980-1981) (Isr.).

⁵⁷ *See id.* at 315-17 (showing that a banking corporation that breaches such a duty is subject to a fine (section 10 of the Law) and can also be sued for compensation (section 15 of the Law)).

⁵⁸ *See generally id.* at 312-13.

⁵⁹ *See* Deutch, *supra* note 48 (arguing that today some contracts are imposed on the parties). There are grounds for distinguishing between the cases cited in Migael Deutch’s article and the provisions intended to protect consumers. *See id.* His examples concern situations where the bargaining created reliance, which justified enforcement of the promise. *Id.* Contracts imposed due to consumer protection considerations are based on a duty to sell or

Other provisions also impose a duty on dealers to sell their products or services. Under section 29 of the Restrictive Trade Practices Law⁶⁰ “[a] monopolist [should] not unreasonably refuse to supply” goods or services.⁶¹ This issue was discussed in several cases, some of which resulted in the imposition of a concrete imposed on monopolies to supply services to the public.⁶² Section 6 of the Tourism Services Law, 5736-1976⁶³ establishes a prohibition on refusing to supply services.⁶⁴ There are no relevant cases on this provision.

The laws that impose duties on the dealer to sell or provide particular services are actually quite limited, and are restricted to controlled commodities, monopolies,⁶⁵ and a small number of bank services. The duty of the seller to provide services in these laws is the exception rather than the rule; these laws represent a deviation from general contract law, but as stated are limited to only certain transactions.⁶⁶

In the year 2000, a law was enacted that established a general prohibition of discrimination in products, services, and entry into public places.⁶⁷ A seller or a provider of services to the public must provide them to any customer and has no discretion in deciding whether or not to enter into a contract, and for purposes of enforcement the law imposes civil remedies as well as criminal sanctions.⁶⁸

deliver services in order to protect consumers, irrespective of prior relations.

⁶⁰ 5748-1988, 42 LSI 135 (1987-1988) (Isr.).

⁶¹ *See id.* at 144-46 (defining the term “monopolist” in section 26 of the Law, which includes many details and generally means control of more than 50% of the market); *see also* 5748-1988, *Sefer Ha-Chukim* 128.

⁶² *See, e.g.,* Bikur Holim Hosp. v. Gen. Health Servs., C.A. 4300/07, *available at* <http://www.internationalcompetitionnetwork.org/uploads/library/doc611.pdf> (last visited Feb. 23, 2013) (explaining that since General Health Services is a monopoly, it has to provide services to the Bikur Holim Hospital); Ituran, Loc. & Control Servs. Ltd. v. The Attorney Gen., Cr.A 2030/01, *available at* <http://www.secola.org/vortraege/prague/IV-2Avner.pdf> (last visited Feb. 23, 2013) (stating that since Ituran controls 80% of the market, it cannot stop giving service, other than for good reason).

⁶³ 30 LSI 223 (1975-1976) (Isr.).

⁶⁴ *Id.* at 226.

⁶⁵ Restrictive Trade Practices Law, 5748-1988, 42 LSI 135-53 (1987-88) (Isr.).

⁶⁶ *See id.*

⁶⁷ *See Israel: Prohibition of Discrimination in Products, Services, and Entry into Public Places*, LIB. OF CONG., http://www.loc.gov/lawweb/servlet/lloc_news?disp3_1205402622_text (last updated Apr. 11, 2011) (“On March 30, 2011, the Knesset (Israel’s Parliament) passed a second amendment to the Prohibition of Discrimination in Products, Services, and Entry into Places of Entertainment and Public Places Law, 5761-2000.”); *see also* 5761-2000, *Sefer Ha-Chukim* 58.

⁶⁸ 5761-2000, *Sefer Ha-Chukim* 58.

This law has been amended on several occasions in order to strengthen its provisions.⁶⁹ The law establishes a presumption, which transfers the burden of proof to the defendant once the plaintiff has proved that the defendant refused to supply him products or services, although the grounds for discrimination are not unlimited.⁷⁰ This law, together with other consumer laws, clearly restricts the freedom of dealers to refuse to enter into consumer contracts. The combined effect of these consumer laws is to seriously restrict the freedom to refuse to enter into consumer contracts.

B. Consumer Rights to Unilateral Cancellation of Consumer Contracts (Cooling-off Period)

In general in contract law, after the contract has been formed, a party to a contract cannot unilaterally withdraw from the contract without the other party's consent.⁷¹ A unilateral "withdrawal from a contract is considered a 'breach of contract.'"⁷² The parties are bound by the contract and are obligated to perform their duties in accordance therewith.⁷³

In consumer contracts, on the other hand, the consumer has a variety of outlets that enable him to unilaterally withdraw from the contract within a cooling-off period.⁷⁴ In the original version of the Consumer Protection Law 1981, the only such outlet was in the case of door-to-door transactions.⁷⁵ Under the 1981 law, when an agreement was concluded in the wake of a dealer's coming to a consumer's residence or workplace, the consumer was entitled to cancel the agreement within seven days.⁷⁶

The rules that allowed consumers to unilaterally cancel a contract were quite limited in the 1980s. The right to cancel a door-to-

⁶⁹ *Id.* The last amendment was on April 6, 2012.

⁷⁰ *Id.*

⁷¹ Deutch 1993, *supra* note 28, at 267; Contracts (General Part) Law, 5733-1973, 27 LSI 117-27 (1972-1973) (Isr.).

⁷² Deutch 1993, *supra* note 28, at 267.

⁷³ *See generally* Contracts (General Part) Law, 5733-1973, 27 LSI 117-27 (1972-1973) (Isr.).

⁷⁴ *See generally* Consumer Protection Law, 5741-1981, 35 LSI 298 (1980-1981) (Isr.).

⁷⁵ *Id.* at 303-04. Section 14 of the CPL enables consumers to rescind such a transaction for a certain period under certain conditions. *Id.* The title under Israeli law is "[P]eddling [T]ransaction." *Id.* at 303.

⁷⁶ *Id.* at 301-04. There are many more details in that section that are not relevant to the thesis of this paper.

door sale within a specific period was amended and broadened several times.⁷⁷ The recent version of this provision includes a wide variety of transactions. In 1988, two additional provisions enabled unilateral cancellation in additional important areas: (1) acquisition of a vacation unit (“time sharing”);⁷⁸ and (2) “remote sale transactions”⁷⁹ which include “a dealer’s approach to a consumer by mail, telephone, radio, television, electronic communication of any kind whatsoever, facsimile, catalogs and others.”⁸⁰ This definition includes Internet sales.⁸¹ The sales referred to in these sections may be unilaterally cancelled by a consumer within fourteen days of the conclusion of the transaction.⁸²

These and several other provisions enable consumers to perform a unilateral cancellation of a variety of contracts even after the contract has already been agreed upon, signed, and sealed.⁸³ The greatest change in this subject, and which in fact constitutes a turning point in the laws of consumer contracts, is the broadening of the consumers’ right to unilaterally cancel contracts. This turning point found expression in the amendment to the CPL in 2005.⁸⁴ Section 14F of the CPL, enacted in 2005, entitles consumers to cancel transactions of certain goods and services, according to a list prepared by the Minister of Industry, Trade and Tourism, within a period fixed in

⁷⁷ See Consumer Protection Law, 5741-1981, 35 LSI 303-04 (1980-81) (Isr.). The amendments in the CPL, which were enacted on May 20, 1998 and January 17, 2010, substantially broadened the scope of the definition of door-to-door sales and broadened the scope of the cases in which there was a right of rescission.

⁷⁸ Consumer Protection Law (Amendment no.6), 5758-1988, *Sefer Ha-Chukim* 182. Section 14A of the CPL deals with time sharing transactions. *Id.* Section 14A(c) enables the purchaser to cancel the transaction within 14 days from the day the contract was signed. *Id.*

⁷⁹ *Id.* (referring to sections 14C, 14D and 14E).

⁸⁰ *Id.* (referring to section 14C(f)).

⁸¹ Consumer Protection Law (Amendment no.6), 5758-1988, *Sefer Ha-Chukim* 182; see also *id.* (outlining exceptions in sections 14B and 14C(d)).

⁸² Consumer Protection Law (Amendment no.6), 5758-1988, *Sefer Ha-Chukim* 182, § 14C(c).

⁸³ See, e.g., Land Law, 5729-1969, 23 LSI 293 (1968-1969) (Isr.) (enabling dwellers in a condominium to cancel the contract with the supplier of central gas facilities at any time, despite the fact that the contract is for several years); Consumer Protection Law (Amendment no.23), *Sefer Ha-Chukim* 493 (referring to section 13D, which allow consumers to cancel existing contracts unilaterally). Section 13F of the CPL is titled “Cancellation of long term medical services” and was enacted in 2010. *Id.* Sections 13D and 13F do not deal with cooling off periods but rather with the consumer’s right to conclude long-term contracts. *Id.* A close discussion of these sections exceeds the scope of this paper.

⁸⁴ Consumer Protection Law (Amendment no.16), 5885-2005.

the regulations.⁸⁵ These regulations are subject to approval by the Economic Committee of the Knesset (the Israeli Parliament).⁸⁶

Based on this legislation, in 2010, the Minister approved detailed regulations under the title Consumer Protection Regulations (Cancellation of a Transaction), 5771-2010,⁸⁷ which allows consumers to cancel a wide range of transactions within a certain period (cooling-off period) after the transaction has been made, even without any defects in the product or the service.⁸⁸ There is a long list of provisions, and their description is beyond the scope of this Article.

The major changes over the past twenty years regarding consumers' rights to a unilateral cancellation of contracts in a wide variety of consumer transactions can be viewed as a major departure from general contract law.

Twenty years ago, I wrote that the cases, in which consumers could cancel a contract unilaterally, were confined to definite issues, which represented but a small segment of a total range of consumer contracts.⁸⁹ Since then, the rules have undergone extensive change and it may fairly be stated that in a substantial portion of consumer transactions consumers are entitled to cancel their contracts unilaterally within a specific period. Namely, in Israeli law there is almost a general right to a cooling-off period. The default rule today is that such cancellation is possible and is no longer the exception. There is however, a list of consumer goods and services transactions, which cannot be cancelled.⁹⁰ Therefore, the rule is that in most regular

⁸⁵ *Id.*

⁸⁶ See *Economic Affairs Committee*, KNESSET COMMS., http://www.knesset.gov.il/committees/eng/committee_eng.asp?c_id=3 (last visited Feb. 24, 2013) ("The Committee deals with the following issues: Trade and industry, supply and rationing, agriculture and fisheries, all sectors of transportation, cooperative association, economic planning and coordination, development, state concessions and trusteeship over property, the property of absentee Arabs, the property of Jews from enemy states and of Jews who are no longer alive, public works, housing, communications, Israel Land Administration, energy, infrastructure, and water."); *The Knesset History—Introduction*, http://www.knesset.gov.il/history/eng/eng_hist.htm (last visited Feb. 24, 2013) ("The Knesset is the house of representatives of the State of Israel.").

⁸⁷ See generally Consumer Protection Regulations (Cancellation of a Transaction), 5771-2010, *Kovetz Ha-Takanot* 942.

⁸⁸ *Id.*

⁸⁹ See DEUTCH, *supra* note 17, at 364.

⁹⁰ *Id.* For instance, the rules of one-sided cancellation by consumers do not apply to transactions of less than fifty Shekel, which is the equivalent of approximately fifteen United States dollars. *Id.* There is a list of products that cannot be returned without a defect. It is much shorter than the list of products that can be returned with no questions asked. There are however distinctions between cancelling a contract during the cooling-off period because of a defect in the product and a cancellation without any defect. When there is no defect, the

transactions, consumers can cancel the contract within a stipulated short period, with exceptions in some cases.⁹¹ These rules are designed to enable consumers to reconsider whether they are interested in the deal and as such constitute a sharp departure from general contract law in which the rule is that a unilateral cancellation of the contract by one of the parties constitutes a breach of the contract.⁹²

It bears note that for more than two years after the regulations came into effect, they had no negative effect on the business community.⁹³ This means that better protection for consumers does not necessarily negatively affect the business community. It only brings more justice and decency into the market. Consumer protection can be reconciled with the interests of the market, even when it deviates substantially from general contract law.

C. Dealer's Duties of Writing in Consumer Contracts

Contracts are generally valid even without being in writing. Section 23 of the GCL states: "A contract may be made orally, in writing or in some other form unless a particular form is a condition of validity by virtue of Law or agreement between the parties."⁹⁴ The general rule in contract law is that there is no special form for a contract unless it is decided by the parties or required by law.⁹⁵ In land transactions and in gifts, the requirement of a document in writing is substantial, and its absence renders the contract invalid.⁹⁶

Many of the laws relating to consumer contracts contain a "requirement of writing," not as a condition to the validity of the contract, but rather as a means of protecting consumers.⁹⁷ A duty to put

consumer should pay five percent of the transaction's value or 100 Shekel for the expenses involved in the transaction (the lower of the two).

⁹¹ *Id.*

⁹² *Id.*

⁹³ DEUTCH, *supra* note 17, at 364. Certain terms in the regulations assure that there would not be a misuse of their provisions. In fact, most stores in Israel now publish their exchange policy, sometimes using even better terms than the regulations. Consumers buy even more, because they have the assurance that if the product is not satisfactory, they would be able to replace it.

⁹⁴ Contracts (General Part) Law, 5733-1973, 27 LSI 120 (1972-1973) (Isr.).

⁹⁵ *See id.*

⁹⁶ *See* Land Law, 5729-1969, 23 LSI 284 (1969) (Isr.); Gift Law, 5728-1968, 22 LSI 113 (1968) (Isr.).

⁹⁷ *See* Consumer Protection Law, 5741-1980, 35 LSI 300 (1980-1981) (Isr.) ("Where the Minister has reason to believe that it is necessary to do so to prevent the consumer being misled or his distress taken advantage of, he may, by regulations, require a dealer to make an

the contract in writing is imposed in order to ensure full disclosure of details to consumers and hence to ensure that they receive all of the information available before the transaction is concluded.⁹⁸

In the CPL, the requirement for the dealer to supply the consumer with a written contract appears in several sections.⁹⁹ Regulations based on these provisions provide details relating to cases in which the dealer is obligated to draw up a contract with the consumer in writing.¹⁰⁰ The dealer bears the “onus of writing.”¹⁰¹ From the customer’s perspective on the other hand, the contract is valid even without writing.¹⁰² As such, the requirement of writing in consumer laws differs from the requirement of writing in general contract law.¹⁰³ In general contract law, where the law stipulates that the contract must be in writing (e.g., land transactions) a contract which is not in writing is invalid.¹⁰⁴ The dealer who fails to comply with the duty of writing a document in consumer contracts, on the other hand, may be liable for criminal sanctions, administrative remedies and may also be liable in tort.¹⁰⁵ The demand for a written document as a means of protecting consumers appears in many consumer laws. The Sale (Housing) Law, 5732-1973¹⁰⁶ saddles the seller with broad duties of disclosure in writing.¹⁰⁷ The Insurance Contract Law, 5741-1981¹⁰⁸ requires that the insurance policy be in writing.¹⁰⁹ The Con-

agreement with the consumer, indicating therein the details prescribed in the regulations, and to deliver a signed copy of the agreement to the consumer.”).

⁹⁸ *Id.*

⁹⁹ See Consumer Protection Law, 5741-1981, 35 LSI 300-04 (1980-1981) (Isr.) (requiring written agreements in sections 5, 9(b), 13A(b), (d), 13C(c), 14A(a), and 14C(b)).

¹⁰⁰ See, e.g., *id.* at 303-05 (discussing making a contract in writing and details that a “peddler” has to disclose to the consumer; sale on credit; special sales; and sale by “peddling,” as well as the guarantee and after-sales service).

¹⁰¹ *Id.* at 300.

¹⁰² *Id.*

¹⁰³ Cf. *id.* at 300; Land Law, 5729-1969, 23 LSI 284 (1969) (Isr.).

¹⁰⁴ Land Law, 5729-1969, 23 LSI 284 (1969) (Isr.).

¹⁰⁵ See Consumer Protection Law, 5741-1981, 35 LSI 308 (1980-1981) (Isr.) (stating the criminal sanctions); *id.* at 305-06, 308 (discussing the administrative regulations); *id.* at 308-09 (citing the remedy of compensation and equating it to a wrong under the Civil Wrongs Ordinance).

¹⁰⁶ Sale (Housing) Law, 5733-1973, 27 LSI 213 (1972-1973) (Isr.).

¹⁰⁷ *Id.* at §§ 2, 3, 5 (stating that the law imposes a duty on *sellers* of new apartments to deliver a detailed specification in writing).

¹⁰⁸ Insurance Contract Law, 5741-1981, 35 LSI 91 (1980-1981) (Isr.).

¹⁰⁹ See *id.* (stating in section 2(a) that the law imposes a duty on *insurers* to deliver a specification in writing).

Control of Financial Services (Insurance) Law, 5741-1981,¹¹⁰ subjects the insurer, not only to a duty of drawing up a written insurance contract but also details the substance of certain personal insurance policies.¹¹¹ In the three aforementioned laws, the dealers bear the onus of ensuring that the contract is made in writing, although the contracts are valid even when not made in writing, since their purpose is consumer protection.¹¹²

The Real Estate Agents Law, 5756-1996¹¹³ requires that contracts in this field be made in writing.¹¹⁴ In addition, it also requires the signature of the customer.¹¹⁵ A non-written contract might be valid, but the broker will not be entitled to his fee.¹¹⁶ There are many more laws and regulations which impose a duty on the dealer to put the consumer contract in writing for the purpose of protecting consumers.¹¹⁷

The requirement of a writing in many consumer transactions, not as a requirement of form, but rather as a means of protecting consumers, is further evidence of the great divide between contract law and consumer contract law.

D. The Rules of Deceit in Consumer Contracts

The issue of deceit is one of the major issues in consumer protection law. Although deceit is one of the central defects in the making of the contract in general contract law under section 15 of the General Contract Law (“GCL”),¹¹⁸ the rules of deceit in contract law

¹¹⁰ Insurance Business (Control) Law, 5741-1981, 35 LSI 253 (1980-1981) (Isr.).

¹¹¹ *Id.* at § 38(a).

¹¹² See Sale (Housing) Law, 5732-1973, 27 LSI 213 (1972-1973) (Isr.) (stating that the seller bears the duty to deliver); Insurance Contract Law, 5741-1981, 35 LSI 91-92 (1980-1981) (Isr.); Control of Financial Services (Insurance) Law, 5741-1981, 35 LSI (1980) (Isr.).

¹¹³ Real Estate Agents Law, 5756-1996, *Sefer Ha-Chukim* 70, § 9.

¹¹⁴ See *Differences Between Israeli and American Legal Systems: Contract Law—Writing Requirement v. Statute of Fraud*, ISRAELI LAW RESEARCH SOCIETY, <http://israelresearchsociety.org/contract-law—writing-requirement-v-statute-of-fraud> (last visited Feb. 24, 2013) (discussing Israel’s property law).

¹¹⁵ See *id.*

¹¹⁶ Adv. Nir Segal, *Chapter 1: Real Estate Brokers*, <http://www.israel-flat.com/the-guide/chapter-i-real-estate-brokers/> (discussing Section 9 of the Real Estate Agents Law, 5756-1996 (Isr.)).

¹¹⁷ See Regulation of Non-Bank Loans Law, 5753-1993, *Sefer Ha-Chukim* 70, § 2 (stating that a document in writing is required in such agreements). Other laws deal with banking laws, credit cards, investment, guarantees and more.

¹¹⁸ Contracts (General Part) Law, 5733-1973, 27 LSI 119-20 (1972-1973) (Isr.).

differ significantly from their counterparts in consumer law. For the purpose of this Article only six changes will be presented.

(a). Prohibition of deceit by omission—section 2(a) of the CPL prohibits the dealer from doing anything, by act or omission, which is liable to mislead a consumer.¹¹⁹ The prohibition on deceit by omission is general and unqualified. In section 15 of the GCL—“ ‘deceit’ includes the nondisclosure of facts which according to the law, custom or the circumstances the other party should have disclosed.”¹²⁰ It is not always easy to prove a duty of disclosure. In such cases there would not be a cause of action in contract law, but a consumer could sue under the provisions of the CPL.¹²¹

(b). There is no need to prove that the mistake caused by the deceit was the reason for contracting—contractual deceit exists when “[a] person has entered into a contract [as a] consequence of a [mistake]” that is the result of the deceit.¹²² The plaintiff must prove a causal connection between the deceit and the formation of the contract.¹²³ The prohibition on deceit in the CPL is not subject to this rule. Although the deceit must be “any substantive element of the transaction,” which means that not every minor deceit will be prohibited under the CPL, the consumer does not have to prove that he entered into the contract because of the deceit.¹²⁴

(c). The CPL includes broad duties of disclosure; for instance, section 4 of the CPL imposes an obligation of full disclosure to consumers regarding defects or poor quality which significantly detract from the assets or service value.¹²⁵ There are no such clear provisions under the GCL. In addition, sections 9 and 10 impose a duty on the sellers to disclose information concerning the particulars of credit transactions.¹²⁶ These rules were detailed in the regulations.¹²⁷ The duties of disclosure in consumer credit transactions are much broader than the parallel rules in general contract law.

(d). Misleading advertising—there are only a few cases in

¹¹⁹ Consumer Protection Law, 5741-1981, 35 LSI 298 (1980-1981) (Isr.).

¹²⁰ Contracts (General Part) Law, 5733-1973, 27 LSI 120 (1972-1973) (Isr.).

¹²¹ See Consumer Protection Law, 5741-1981, 35 LSI 300 (1980-1981) (Isr.).

¹²² Contracts (General Part) Law, 5733-1973, 27 LSI 119-20 (1972-1973) (Isr.).

¹²³ See *id.* (defining deceit).

¹²⁴ Consumer Protection Law, 5741-1981, 35 LSI 298-301 (1980-1981) (Isr.).

¹²⁵ *Id.* at 300.

¹²⁶ *Id.* at 302; see also DANIEL FRIEDMAN & NILI COHEN, Contracts 280-92 (2003).

¹²⁷ See Consumer Protection (Credit Sales, Special Sales and Peddling Transactions) Regulations, 5743-1983, *Kovetz Ha-takanot* 571.

which misleading advertising serves as a basis for rescission in contract law. In consumer law the main remedy is compensation, and it is much easier to recover damages for misleading advertising in consumer law, than it is to rescind a contract under contract law.¹²⁸ Many cases of misleading advertising have served as the basis of consumer class actions.¹²⁹

(e). The prohibition of deceit in the CPL applies even when no specific act of deceit was committed. The prohibition in section 2(a) of the CPL includes anything which is “likely to mislead” even if the deception did not occur.¹³⁰ The remedies in such cases would for the most part be administrative or criminal.¹³¹ The civil remedy of injunction would also be available.¹³² Concededly, receiving damages might be problematic in the absence of a concrete act of deceit but, nonetheless, the prohibition of such behavior in consumer contracts is light years away from the rules of misrepresentation in contract law.

(f). Deceit after the contract was made—under general contract law, deceit constitutes a defect in the making of the contract.¹³³ Section 15 of the GCL states: “A person who has entered into a contract in a consequence of a mistake resulting from deceit . . . may rescind the contract.”¹³⁴ It is clear that the misrepresentation relates to facts and statements at, or before, the time that the contract was

¹²⁸ Several provisions under the CPL regulate misleading advertising. *See id.* at 300-01. There are numerous publications on misleading advertising. *See, e.g.*, JAMES R. MAXEINER & PETER SCHOTTHOFER, *ADVERTISING LAW IN EUROPE AND NORTH AMERICA* (2d ed., 1999) (dealing with nineteen different legal systems); MICHAEL M. GREENFIELD, *CONSUMER TRANSACTIONS* 52-120 (4th ed. 2003) (referring to chapter within: Deception—Legislative Solutions at the Federal Level: The Federal Trade Commission Act); IVAN L. PRESTON, *THE GREAT AMERICAN BLOW-UP—PUFFERY IN ADVERTISING AND SELLING* (rev. ed. 1996); JOHN A. SPANOGLE, RALPH J. ROHNER, DEE PRIDGEN & JEFF SOVERN, *CONSUMER LAW: CASES AND MATERIALS* 34-75 (3rd ed. 2007). There are numerous articles and cases on the subject. For two examples see *Kraft, Inc. v. Fed. Trade Comm’n*, 970 F.2d 311 (7th Cir. 1992); *Fed. Trade Comm’n v. QT, Inc.*, 512 F.3d 858 (7th Cir. 2008).

¹²⁹ *See generally* Deutch, *supra* note 48. One of the leading cases is *Barazani v. Bezek*, CA 1977/97, 55(4) PD 584 (2001) (Isr.).

¹³⁰ Consumer Protection Law, 5741-1981, 35 LSI 298-99. The same rules apply also in English and American Law. *See* Consumer Protection from Unfair Trading Regulations, 2008, Stat. R. & O. 1277, ¶ 3-5 (U.K.); *see also* *Charles of the Ritz Distrib. Corp. v. Fed. Trade Comm’n*, 143 F.2d 676 (2d Cir. 1944); *In re Thompson Med. Co.*, 104 F.T.C. 648 (1984), *aff’d*, 791 F.2d 189 (D.C. Cir. 1986).

¹³¹ Consumer Protection Law, 5741-1981, 35 LSI 306-07.

¹³² *Id.* at 307.

¹³³ *Contracts (General Part) Law*, 5733-1973, 27 LSI 119-20 (1972-1973) (Isr.).

¹³⁴ *Id.* 119.

made.¹³⁵ On the other hand, deceit under section 2(a) of the CPL includes the following provisions: “A dealer must not do anything by deed or omission” including after the date of making the contract—“which is liable to mislead a consumer.”¹³⁶ This is one of the major differences that distinguish between contractual deceit and consumer deceit. It is based on the 2005 amendment of the CPL.¹³⁷ I proposed this amendment in 2001¹³⁸ and in 2005 it became a part of the law. This amendment is primarily relevant to relational consumer contracts and long-term consumer contracts.¹³⁹ Since the main remedy for consumer deceit is compensation, and not the rescission of the contract, deceit should be relevant even when it occurs after the contract was made.¹⁴⁰

There are numerous other differences between contractual deceit and consumer deceit, including differences in the remedies and administrative and criminal sanctions, the discussion of which exceeds the scope of this Article.¹⁴¹ The differences discussed are clear indications that consumer contract law is not identical to general contract law.

E. Different Rules of Interpretation

The rules of interpretation of contracts are vital in many disputes. The purpose of interpretation is to establish the correct meaning of the parties’ joint intention. The most important source of contractual interpretation is the text of the contract, but the purpose and the context of the transaction also affect the interpretation of the con-

¹³⁵ *See id.*

¹³⁶ Consumer Protection Law, 5741-1981, 35 LSI 298-99.

¹³⁷ Consumer Protection (Amendment no. 18) Law, 5766-2005, *Sefer Ha-Chukim* 104.

¹³⁸ *See* DEUTCH, *supra* note 17, at 403-04.

¹³⁹ There is substantial writing on relational contracts. *See* IAN R. MACNEIL, *THE NEW SOCIAL CONTRACT: AN INQUIRY INTO MODERN CONTRACTUAL RELATIONS* 71 (1980); *THE RELATIONAL THEORY OF CONTRACT: SELECTED WORKS OF IAN MACNEIL* (David Campbell ed. 2001).

¹⁴⁰ Contracts (General Part) Law, 5733-1973, 27 LSI 119-20 (1972-1973) (Isr.).

¹⁴¹ As a matter of fact there are more than thirty-three differences between deceit in consumer contracts and deceit in general contracts. There are more than 600 cases on deceit in consumer contracts, about 500 civil cases, 200 of them class actions and almost 100 criminal cases. This is one of the main subjects, if not the most important one, in consumer law. A two volume book on this subject was published by the Israeli Bar Association in May 2012. SINAI DEUTCH, *THE LAW OF CONSUMER PROTECTION; THE SUBSTANTIVE LAW* (2012) (in Hebrew). It is a sequel to SINAI DEUTCH, *THE LAW OF CONSUMER PROTECTION—FOUNDATIONS AND PRINCIPLES VOL. 1* (2001) (in Hebrew).

tract. In general contracts, the interpretation should be based on the subjective intention of the parties to the contract.¹⁴² However, in consumer contracts, the parties to which are a consumer, who generally lacks a professional understanding of the transaction, and a professional dealer, it is difficult to establish the joint intention of the parties.¹⁴³ As such, greater importance attaches to the objective interpretation of the contract.

Consumer contracts should therefore be interpreted differently from general contracts. More emphasis should be given to rules such as good faith and the rules of the law, even when they can be varied by agreement. There is also room for interpretation, which increases the degree of protection given to the consumer.¹⁴⁴

A useful tool in the protection of the consumer is the rule of *contra proferentem*, which suggests that in a case where the text of a contract is subject to several interpretations, it should be interpreted against the drafter.¹⁴⁵ This rule has had a great effect on the interpretation of consumer contracts. It has been applied mostly in standard contracts and in insurance contracts.¹⁴⁶ Consumers in these cases are not aware of the details of the contract, and this rule was created to ensure that their basic interests are protected. In one case an insurance company claimed that the burglary was not covered by the insurance policy.¹⁴⁷ The court decided that the rule of *contra proferentem* should be applied in order to give effect to the reasonable expectations of the insured.¹⁴⁸ The insurance company had to pay

¹⁴² Contracts (General Part) Law, 5733-1973, 27 LSI 119-20 (1972-1973) (Isr.).

¹⁴³ See EYAL ZAMIR, INTERPRETATION AND GAP FILLING IN CONTRACTS 107-113 (1996) (in Hebrew).

¹⁴⁴ *Id.*

¹⁴⁵ This rule originates from Roman Law “*interpretatio contra stipulatorem*” Digesta 34.5.26; 45.1.38.18. See generally GABRIELA SHALEV, THE LAW OF CONTRACT—GENERAL PART 436-441 (2005) (in Hebrew). Shalev explains that this rule should be applied mostly in standard form contracts and in insurance contracts. See also FRIEDMAN & COHEN, *supra* note 126, at 280-92 (vol. 3 2003). The authors suggest that in consumer contracts and in contracts between a supplier and a customer, the contract should be interpreted according to the reasonable expectations of the consumer or the customer. *Id.* at 283-92.

¹⁴⁶ See Deutch 2000, *supra* note 27, at 181.

¹⁴⁷ See ZAMIR, *supra* note 143, at 53-55.

¹⁴⁸ *Id.*; see also *Product Liability-Israel*, INT’L LAW OFFICE (Dec. 26, 2006), <http://www.internationallawoffice.com/Newsletters/detail.aspx?g=5a450116-a58e-db11-8a05-001143e35d55> (citing Hamagen Ins. Co. Ltd. v. Medinat HaYeladim to illustrate that courts have used the rule of *contra proferentem* in similar cases against an insurance company).

damages.¹⁴⁹

In many consumer contract cases, courts choose an interpretation that is based on principles of justice, balance, and decency.¹⁵⁰ As such, the criteria for interpreting consumer contracts differs from those that guide the interpretation of other contracts, even when this interpretation is contrived, and deviates from the plain meaning of the text of the contract.¹⁵¹ In commercial cases, however, there is greater emphasis on the text of the contracts and on the subjective intentions of the parties.¹⁵²

The rule of *contra proferentem* was regarded as part of Israeli law without any specific statutory anchor.¹⁵³ In 2011, Section 25(b1) was added to the GCL and states: “Where a contract is subject to different interpretations, and one party has an advantage in shaping its terms, interpretation against him is preferable to interpretation in his favor.”¹⁵⁴ Thus, the rule of *contra proferentem* officially became part of general contract law, although its central field of application is that of consumer contracts and standard contracts.

My proposal that consumer contracts should be interpreted more objectively than subjectively has not yet officially been approved by Israeli case law, although it has received support of prominent scholars.¹⁵⁵ The understanding that consumer contracts are a special branch of contract law might facilitate this goal.

¹⁴⁹ ZAMIR, *supra* note 143, at 53-55.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² See Contracts (General Part) Law, 5733-1973, 27 LSI 121 (1972-1973) (Isr.) (indicating that commercial contracts should be interpreted based upon the intent of the contractual parties and that any expressions in the contract should be interpreted according to the meaning assigned to them within the actual contract).

¹⁵³ See, e.g., *Product Liability*, *supra* note 148 (indicating that Israeli law considers the rule of *contra proferentem* in the interpretation of contracts).

¹⁵⁴ Contracts (General Part) Law, 5733-1973, 27 LSI 121 (1972-1973) (Isr.) § 25(a).

¹⁵⁵ See AARON BARAK, PURPOSIVE INTERPRETATION IN LAW 254 (2003) (in Hebrew). (“[A] Consumer Contract has its distinctiveness. It requires special balancing between the consumer and the dealer. This balancing can be achieved by rules of interpretation . . . in the context of purposive interpretation; effect can be given to the consumer nature of the contract. This can be done, *inter alia*, by the objective purposive of the contract”). Barak concluded that “it is time to develop such rules—and it is an interesting question whether this rule is already part of the Israeli legal system—accordingly, in interpreting a consumer contract, the objective goals of the contract should be given greater weight.” *Id.* at 396 and n.122.

V. THE EFFECT OF ACKNOWLEDGING CONSUMER CONTRACTS LAW AS A SPECIAL BRANCH OF CONTRACT LAW

The next Section will elaborate on the special rules of consumer contracts, which justify their recognition as a special branch of contract law. This Section will explain the effect of such acknowledgement, and the difference between a special branch of contract law and specific contracts law.

Consumer contracts cannot be viewed as a specific type of contract in the same manner as, for example, a sale contract or contract for services. Specific contracts law deals with various types of transactions in order to facilitate the contract between the parties.¹⁵⁶ These laws contain only provisions, which were not specifically agreed to by the parties, and generally, the rules of the specific contracts law can be changed by agreement.¹⁵⁷ In addition, these laws are not intended to protect one of the parties to the agreement, but rather to bring both parties to more efficient results.

General Contract Law rules apply to all contracts, and specific contracts laws do not change the general rules of contract law.¹⁵⁸ For instance, Sale Law delineates the duties of the seller, the duties of the buyer, and the joint duties of both parties.¹⁵⁹ Thus, specific contract laws do not deal with the basic provisions of general contract law, such as formation of contract, defects in formation, and issues of form, interpretation, etc.¹⁶⁰ With regard to specific contract laws, it is clear that, as a rule, they are subject to general contract law except for particular subjects relevant to particular transactions. Most contracts textbooks deal only with the general rules of contracts and contract

¹⁵⁶ See, e.g., Agency Law, 5725-1965, 19 LSI 231-34 (1964-1965) (Isr.); Guarantee Law, 5727-1967, 21 LSI 41-43 (1966-1967) (Isr.); Bailees Law, 5727-1967, 21 LSI 49-52 (1966-1967) (Isr.); Pledges Law, 5727-1967, 21 LSI 44-49 (1966-1967) (Isr.); Gift Law, 5728-1968, 22 LSI 113-114 (1967-1968) (Isr.); Sale Law, 5728-1968, 22 LSI 107-112 (1967-1968) (Isr.); Transfer of Obligations Law, 5729-1969, 23 LSI 277-278 (1968-1969) (Isr.); Hire and Loan Law, 5731-1971, 25 LSI 152-157 (1970-1971) (Isr.); Contract for Services Law, 5734-1974, 28 LSI 115-117 (1973-1974) (Isr.).

¹⁵⁷ Sale Law, 5728-1968, 22 LSI 112 (1967-1968) (Isr.).

¹⁵⁸ See Contracts (General Part) Law, 5733-1973, 27 LSI 127 (1972-1973) (Isr.) (indicating that the law's provisions will apply when no alternative special provisions are applicable).

¹⁵⁹ Sale Law, 5728-1968, 22 LSI 107, 110.

¹⁶⁰ See Contracts (General Part) Law, 5733-1973, 27 LSI 117, 119-21 (indicating provisions in general contracts for formation of contracts, defects in formation, form, and interpretation).

remedies, and not with specific contract law.¹⁶¹ Nevertheless, many general contract rules are also relevant to consumer contracts, and there is, therefore, a need to recognize and explain the meaning of consumer contracts law as a special branch of contract law.

Before entering into the substantive differences between general contract law and consumer contracts law, it should be stressed that most contract rules are also relevant to consumer contracts. A few examples will clarify this matter. The rules of offer and acceptance are detailed in chapter one of the General Contract Law.¹⁶² In most cases, these rules are also relevant to consumer contracts. Most issues of chapter two of the GCL, which deal with “Rescission of Contract by Reason of Defect in Making it,” are not dealt with under the CPL.¹⁶³ Although there are specific rules in the CPL which deal with deceit and extortion,¹⁶⁴ the rules of the CPL are intended to add, and not to derogate, from any other enactment.¹⁶⁵ Other provisions of the second chapter in the GCL, such as mistake and duress,¹⁶⁶ are not dealt with at all in the CPL. Similarly, other important contract rules and principles, such as the duty to negotiate in good faith, do not appear in consumer legislation which relies on the arrangements prescribed in general contract law.¹⁶⁷ The same is true with respect to rules governing illegal contracts, or contracts contrary to public policy.¹⁶⁸ Most of the matters dealt with under chapters three to seven of the GCL are not dealt with in consumer legislation.¹⁶⁹ The same applies to the area of remedies for breach of con-

¹⁶¹ See, e.g., SIR WILLIAM R. ANSON, PRINCIPLES OF THE ENGLISH LAW OF CONTRACT AND OF AGENCY IN ITS RELATION TO CONTRACT (2d ed. 1907); MICHAEL FURMSTON, CHESHIRE, FIFOOT AND FURMSTON’S LAW OF CONTRACT (15th ed. 2007); EDWIN PEEL, THE LAW OF CONTRACT (12th ed. 2007); E. ALLAN FARNSWORTH, CONTRACTS (4th ed. 2004). But see H. G. BEALE, CHITTY ON CONTRACTS (28th ed. 1999), vol. 1 General Principles, vol. 2 Specific Contracts. Most textbooks on contracts, however, deal only with general contract law.

¹⁶² Contracts (General Part) Law, 5733-1973, 27 LSI 117-18.

¹⁶³ *Id.* at 119-20.

¹⁶⁴ Consumer Protection Law, 5741-1981, 35 LSI 298-99 (1980-1981) (Isr.). There are many differences between these provisions and the similar provisions of the GCL, but the rules of contract law can still be used in consumer contracts as well.

¹⁶⁵ *Id.* at 311. Until the 2010 amendment of the CPL, rules of rescission under the GCL led to better results for consumers than section 32 of the CPL, which deals with “cancellations of sale” in cases of deceit and distortion. *Id.* at 309. Discussion of their differences is beyond the scope of this Article.

¹⁶⁶ Contracts (General Part) Law, 5733-1973, 27 LSI 119-20.

¹⁶⁷ *Id.* at 119.

¹⁶⁸ *Id.* at 122.

¹⁶⁹ *Id.* at 120-27.

tract, which has no specific rules for breach of consumer contracts.¹⁷⁰ There are many remedies under consumer laws, but they do not deal with remedies for breach of contract.

It is therefore clear that consumer contracts are also subject to contract law. But at the same time, they are certainly not identical because consumer contracts are also subject to criminal law, torts, administrative law, and a variety of different rules.¹⁷¹ What then, is the effect of recognizing consumer contracts law as a special branch of contract law?

Almost all of the differences between contract law and consumer contract law are based on consumer legislation. Consumer legislation deviates in many ways from contract law. Naturally, when the rules of consumer contracts are different from general contract rules, they will prevail according to the rule that specific law overrides general law. But can the recognition of consumer contracts law as a special branch of contracts law have an effect on consumer contract law, even in areas in which there is no specific consumer legislation?

It is submitted here that since the differences between contract law and consumer contract rules relate to basic principles of contract law, it should affect the application of general contract rules, even when there are no special rules on these issues. Since “freedom of contract” is quite limited in many consumer contracts,¹⁷² there is no justification for the rule *caveat emptor* in consumer transactions.¹⁷³ Therefore, the acknowledgement of consumer contracts as a special branch of contract law should affect regular contract law in consumer transactions even without specific legislation.

To further explain this proposition, the Israeli rules of offer and acceptance originated from international business transactions.¹⁷⁴ These rules would apply, as a matter of course, to consumer contract law, but the special nature of consumer contract law should have an effect on these rules with regard to their validity. The conclusion, ac-

¹⁷⁰ Contracts (Remedies for Breach of Contract) Law, 5731-1970, 25 LSI 12 (1970-1971) (Isr.); see also Deutch, *supra* note 48, at 199 (stating that the CPL does not address remedies for breach of consumer contracts).

¹⁷¹ Consumer Protection Law, 5741-1981, 35 LSI 306-07 (1980-1981) (Isr.).

¹⁷² See Deutch, *supra* note 48, at 199-200 (stating that “consumer law is based on lack of freedom of contract”).

¹⁷³ See Deutch 1993, *supra* note 28, at 261, 278-89 (stating that the duty to disclose defects defeats the purpose and concept of *caveat emptor*).

¹⁷⁴ See Deutch 2000, *supra* note 27, at 142-43.

ording to my proposal, would therefore be that a clear promise in an advertisement of a dealer to consumers would be binding, even when not all the rules of offer and acceptance are fulfilled.¹⁷⁵

To sum up, most contract rules will continue to apply to consumer contracts. When there are special rules in consumer legislation, they will govern. In some cases, contract rules should be applied liberally in consumer transactions in order to promote consumer protection.

This proposal will affect contract rules when applied to consumer contracts, even where there is no specific legislation, especially in class actions. Concededly, this approach has yet to be accepted in courts. However, I would argue that even without accepting this novel proposal, the recognition of consumer contracts law as a special branch of contract law is already a legal reality.

VI. SUMMARY

There are many substantive differences between consumer contract law and general contract law that justify consideration of consumer contracts as a separate branch of contract law. The differences exist both on the level of principle and on a practical level. Most of the differences have a clear statutory basis while others were developed in case law. It is due time to recognize consumer contract law as a separate branch of contract law. The conferral of such recognition will affect both interpretation of consumer contracts and interpretation of the relevant legislation—both consumer legislation and general contract law legislation—which is applied in consumer contracts. It will also generate more liberal interpretation in areas such as consumer class actions, misleading advertising, and more.

¹⁷⁵ See, e.g., *Carlill v. Carbolic Smoke Ball Co.*, 2 Q.B. 484 (1982) (Eng.) (holding that an advertisement was recognized as a binding offer. The case was based on general contract rules of offer and acceptance.).