Recourse and Direct Action in the Netherlands: a Dutch Treat?

Bram Duivenvoorde and Ewoud Hondius

A. Introduction

In this paper an analysis of the prospects and consequences of a European right to a direct claim against the producer in the light of the implementation of the Consumer Sales Directive 99/44 (hereafter: the Directive) in Dutch law is endeavoured. To do so, some general issues concerning Dutch consumer sales law and the implementation of the Directive (see section B.) are discussed. After that attention is paid to the rights of the consumer against the final seller (see section C.), followed by the regulation of commercial guarantees and the rights of redress of the previous sellers (see section D. and E.). Finally, there will be focus on the direct claim against the producer, which is missing in both the Directive and in Dutch law (see section F.). The paper shall try to show that introduction of such a remedy, at least for Dutch law, would be most welcome.

B. General Remarks

I. Implementation and the New Civil Code

The Directive was implemented on the 1 May 2003, seventeen months after the deadline set by the Commission.[1] Transposition has taken place mainly by the introduction of new articles and the amendment of existing provisions in the title on sales in the Dutch Civil Code (the so-called Burgerlijk Wetboek or BW).[2]

With the introduction of the Civil Code (also called New Civil Code) on the 1 January 1992, the title on sales had already been revised. One of the major innovations was the replacement of the provisions on hidden defects by the notion of non-conformity. As the new provisions, like the Directive, had been based on the notion of non-conformity of the Vienna Sales Convention (CISG), the implementation of the Directive did not cause any major difficulties in the Netherlands. Another innovation of the 1992 Civil Code was the introduction of specific provisions on consumer sales. These have not been singled out in a separate section, but may be found as among those concerning sales in general. As opposed to the rules on sales in general, parties cannot derogate from the rules on consumer sales to the detriment of the buyer (Art. 7:6 BW). Due to the stratified structure of the Dutch

---

1 *Klik*, Consumentenkoop van roerende zaken, in: Hondius/Rijken (eds.), Handboek Consumentenrecht, Zutphen 2006, 94.

2 Book 7 BW, first title.

code, the general provisions on sales and the general part of patrimonial law are still relevant in case the specific consumer sales provisions do not apply.

II. Mandatory Rules

The title on sales is generally not of a mandatory nature, as is the case in the sales law of all other EU Member States.[3] This means that parties can derogate from the rules as long as they do so by agreement and do not act contrary to the general notion of good faith in contracts (Art. 6:248 BW). This is different for consumer sales, as Art. 7:6 BW prohibits derogations to the detriment of the consumer. This means that the rights of the consumer, both those under the sales title and those under general contract law cannot be limited.[4] If parties do derogate from the rules on sales to the detriment of the consumer contrary to Art. 7:6 BW, the consumer may avoid the contract.[5] For a number of provisions of the sales title, a special regime applies. Even in consumer sales these provisions may be derogated from by agreement, but they cannot be limited in a standard form contract (Art. 7:6(2) BW).[6] The provisions concerned, such as the costs of delivery, the moment of payment and the increase of the price after the conclusion of the contract, are not covered by the Consumer Sales Directive.

The rules of Art. 7:6 BW were already applicable as of the coming into force of the New Civil Code. However, before implementation, derogation was also allowed by means of "standard regulations" set by the government for a certain business sector.[7] As the Directive does not allow for such derogations, the Dutch legislator was forced to change this in the process of implementation.[8]

III. Conformity

The basic norm of the Directive is that goods delivered must be in conformity with the contract (Art. 2(1) Directive). This "principle of conformity" already applied to all sales

---

3 See *Zerres*, Die Bedeutung der Verbrauchsgüterkaufrichtlinie für die Europäisierung des Vertragsrechts, Munich 2007; *Zelst*, The politics of European sales law, PhD Amsterdam 2008, 153-157.

4 The latter category concerns particularly compensation for damages (Art. 6:74 BW) and rescission (Art. 6:265 BW). For a discussion on what rights are included, see *Hijma*, in: Mr. C. Asser's handleiding tot de beoefening van het Nederlands burgerlijk recht, Bijzondere overeenkomsten deel I (koop en ruil), Deventer 2007, no. 85.

5 Hence, the contract is not invalid as such; it has to be avoided by the consumer. See *Hijma* (op. cit. fn. 4), no. 84a, in which the author also discusses whether the action of avoidance ("vernietiging") offers sufficient protection taking into consideration Art. 7(1) of the Directive as well as a number of ECJ-cases in which national courts are required to go into the conformity of contracts with European consumer protection legislation.

6 It concerns Art. 7:11, 7:12, 7:13, 7:26 and 7:35 BW. Derogation in standard form contracts will be deemed "unreasonable" in the sense of Directive 93/13 on Unfair Contract Terms, implemented in Dutch law in Art. 6:231-6:247 BW.

7 See the old version of Art. 7:6(1) BW, which refers to Art. 6:214 BW.

8 See also *Hijma* (op. cit. fn. 4), no. 84.

contracts in Dutch law from the coming into force of the New Civil Code in 1992.[9] Most of the "indications of conformity" of Art. 2(2) of the Directive did not require implementation measures either, as these could already be found in Art. 7:17 BW, applying to sales in general. The only exception to this is subparagraph d on statements of previous sellers, which will be discussed in more detail below.

Some of the issues dealt with in Art. 2 of the Directive were not found suitable to apply to sales in general. They were therefore added to Art. 7:18 BW, which applies to consumer sales only. Before the implementation of the Directive, this article dealt with the liability of the seller for the statements of previous sellers only. It now also prescribes the presumption of non-conformity within six months after purchase of the good, and it includes defective installation in the definition of non-conformity (Art. 7:18(2) and (3) BW).

IV. Liability for Public Statements of Previous Sellers

As remarked above, liability for public statements of the previous sellers was already part of Dutch law, but for the implementation of the Directive it has been moderated. As in the Directive, the old Art. 7:18 BW stated that information given by previous sellers could be seen as information from the final seller for the determination of the non-conformity. It also gave two exceptions to liability that are still part of the law now. The first concerns the case in which the final seller did not know nor should have known about the statement, while the second concerns the case in which the final seller has contradicted the statements of the previous seller.

Some of the issues dealt with in the Directive, however, were not yet laid down in Art. 7:18 BW. To bring the provision in conformity with the Directive, a number of changes had to be made. As a consequence, liability is now also excluded by rectifications of the statement by the previous seller. Furthermore, the final seller is not liable if the consumer's decision to purchase the good was not influenced by the statement. Lastly, it was added that liability for statements can only be excluded through rectification prior to the purchase.

Although Art. 7:18 BW does not give specific rulings on the burden of proof for the exceptions to liability, the wording of the article as well as the preparatory documents indicate that the burden of proof lies with the final seller.[10]

C. Claims against the Seller in Consumer Sales

I. General Provisions of Contract Law

As stated above, the implementation of the Directive did not cause great change in Dutch law, as special provisions concerning consumer sales had already been introduced in the New Civil Code. Before 1992, consumer sales fell under the general provisions of patrimonial law and contract law. These provisions are still applicable if the special rules of consumer law do not apply.

---

9 Art. 7:17(1) BW. See *Klik*, Conformiteit bij koop, Deventer 2008.

10 Preparatory documents of the revision of Book 7 BW for the implementation of Directive 99/44, Tweede Kamer, vergaderjaar 2000-2001, 27 809, no. 3, 19.

In Dutch contract law the primary claim for non-performance and non-conformity is the claim for performance (Art. 3:296 and 6:82 BW). Only if performance cannot reasonably be claimed or if the debtor is at default, a claim for damages (Art. 6:74 BW) or rescission (Art. 6:265 BW) can be made. The latter provision also gives the possibility to partially annul a contract. In this way a buyer has an indirect claim for price reduction.

Although there was no legislation protecting the interests of the consumer before the coming into force of the New Civil Code, a number of Dutch Supreme Court cases did offer protection for weaker parties through the general provision of reasonableness in contracts (Art. 6:248 BW) as well as through interpretation of contracts.[11]

II. Subsequent Performance

Art. 7:21(1) BW offers the consumer the claims for subsequent performance, i.e. repair, replacement and delivery of what is lacking. These actions were already available before implementation of the Directive. However, in case of repair or replacement the seller had the right to choose between the two. This right has been terminated with the implementation of the Directive.[12] The claims for subsequent performance are applicable only in case the delivered goods are not in conformity with the contract, not if the goods are delivered too late or are not delivered at all. In those circumstances, the buyer can only use the general claims of contract law.[13]

III. Reduction of Purchase Price and Rescission

Before implementation of the Directive, there were no special provisions for consumer sales on rescission and reduction of the purchase price. The introduction of Art. 7:22 BW has filled that gap. Although the wording of the article is almost identical to that of the general provision on rescission (Art. 6:265 BW),[14] two limitations of the latter do not apply in consumer sales. It concerns (1) the impossibility to demand rescission if this is deemed unreasonable due to the particular nature of the non-conformity and (2) the requirement of default.[15]

---

11 Two of the classic cases are Saladin/HBU (Hoge Raad, 12 May 1976, Nederlandse Jurisprudentie (NJ) 1967/261) and Ermes c.s./Haviltex (Hoge Raad, 13 March 1981, NJ 1981/635).

12 However, it remains unlikely that the consumer can always choose for either of these remedies, taking into consideration that the consumer cannot claim these rights if it would be impossible or disproportionate to do so (see Art. 3(3) Directive).

13 *Klik* (op. cit. fn. 1), 111.

14 As observed in section C.I., the general right to rescission includes the right to price reduction through partial rescission.

15 See also *Klik* (op. cit. fn. 1), 116.

IV. Compensation for Damages

Compensation for damages caused to other goods or to persons can be sought from the producer through Art. 6:185 BW, which is part of the implementation of the Product Liability Directive.[16] Moreover, the consumer can obtain damages from the final seller through Art. 7:24 BW, which is a special provision for consumers. However, this article does not provide for extra consumer protection as it refers back to the general action for compensation for damages in case of non-conformity with the contract (Art. 6:74 BW). This also means that, in contrast to the actions for rescission, price reduction, and subsequent performance, default is required. Furthermore, if the non-conformity falls under the scope of Art. 6:185 BW (producer's liability), the seller will – in principle – not be liable for the damages.[17]

Apart from compensation for damages caused to other goods or to persons, a consumer can also suffer damages in the form of loss of value of the purchased good due to the non-conformity. These damages can be recovered through the procedure of price reduction or through Art. 6:74 BW.[18]

V. Limitation Periods

The consumer has to notify the seller of the non-conformity within reasonable time. The law mentions that "a term of two months after discovery" is a reasonable period (Art. 7:23(1) BW). It is uncertain whether this period of two moths is a maximum, a minimum, or just an indication.[19] If the consumer fails to notify the seller in time, he looses all remedies. After notification the consumer has two years to issue a claim against the seller (Art. 7:23(2) BW).

D. Commercial Guarantees

I. Introduction

Before the Directive was implemented, the notion of "guarantee" was not used in the Civil Code, and there were no rules specifically designed for this phenomenon. It was even held in legal writing that because, in practice, guarantees usually accorded consumers a position that was inferior to their legal rights, they should not be allowed.[20] For the implementa-

---

16 Directive 85/374 on product liability.

17 Art. 7:24(2) BW: "The seller will only be liable if (a) he knew or should have know about the defect, (b) he stated that the product would not have the defect, or (c) the damages do not exceed the lower threshold of Art. 6:190 BW" (implementation of the Product Liability Directive, Art. 8(b)).

18 *Klik* (op. cit. fn. 1), 116.

19 *Klik* (op. cit. fn. 1), 119.

20 It was the (British) National Consumer Council which first pointed out that consumers may in fact benefit from commercial guarantees, because retailers will be more prone to honour these than legal rights.

tion of Art. 6 of the Directive, the Dutch legislator added Art. 7:6a BW to the sales title.[21] This article is applicable only to consumer sales, not to sales in general.

II. Who Is the Guarantor?

Art. 7:6a(1) BW names the seller or producer as the possible "guarantor". The scope of "producer" is expanded in paragraph 5, which defines producers not only as manufacturers, but also as importers of the product into Community territory, and as people purporting to be a producer, by placing their name, trademark or other distinctive sign on the product. In other words, the Dutch legislator "copy-pasted" the definition of producer of Art. 1(2) of the Directive into the article on guarantees.

III. What Is a Guarantee?

In Art. 1(2), the Directive defines guarantees as:

> "any undertaking by a seller or producer to the consumer, given without extra charge, to reimburse the price paid or to replace, repair or handle consumer goods in any way if they do not meet the specifications set out in the guarantee statement or in the relevant advertising."

Although the Dutch implementation legislation does not adopt all of the elements of this definition, it does state that a guarantee must make "*toezeggingen*" (promises) concerning the product and that it must confer rights on the consumer for the case in which these promises are not met (Art. 7:6a(1) BW, read in conjunction with Art. 7:6a(5)(a) BW).[22] Moreover, both guarantee certificates and promises made in advertisements can be seen as guarantee statements (see section D.IV.).

Unlike the Directive, the Dutch implementation legislation does not state that guarantees must be given without extra charge. As a matter of fact, the preparatory documents of the implementation legislation explain that paid guarantees also fall under the scope of Art. 7:6a BW.[23] The reason for this is that the Dutch legislator did not want to exclude the consumer with a paid guarantee from the protection of the Directive. As the Directive is an instrument of minimum harmonisation, Member States are free to offer more protection than the minimum prescribed by the Directive, and this is exactly what has been done by the Dutch legislator.

One now knows what the scope of guarantee is under Dutch law, but how exactly should the guarantee be qualified? The preparatory documents indicate that it is a form of

---

21 Preparatory documents of the revision of Book 7 BW for the implementation of Directive 99/44, Tweede Kamer, vergaderjaar 2000-2001, 27 809, no. 3.

22 Hence, if a "promise" concerning a product is made, but no rights are conferred on the consumer, then this does not fall under the term guarantee of the Directive, and Art. 7:6a BW is not applicable. However, such promises do influence the expectations of the consumer, which is important for the determination of non-conformity in the light of Art. 7:17 BW.

23 Preparatory documents of the revision of Book 7 BW for the implementation of Directive 99/44 Tweede Kamer, vergaderjaar 2000-2001, 27 809, no. 3, 17.

contract, as it is talking of offer and acceptance.[24] *Hijma* rightly argues that this qualification of a guarantee is somewhat unnatural.[25] In practice, consumers often do not realise a guarantee is given at the moment of purchase. Moreover, there seems to be no reason to require the guarantee to be contractual as the rights of the consumer cannot be affected and because it does not fit within the broad definition of guarantee statements in the Directive. For these reasons, it would probably be better to qualify a guarantee as a promise, rather than as a contract. Unlike in English law, consideration is not a prerequisite for a contract in the Netherlands, and the promise in itself can be binding.[26]

IV. Guarantee and Advertisement

As stated above, guarantees in Dutch law do not only concern guarantee certificates but also advertisements (Art. 7:6(5)(a) BW). In the preparatory documents, it is remarked that an advertisement can be regarded as a guarantee only if it is sufficiently clear that it confers rights on the consumer. Moreover, some kind of acceptance of the guarantee by the consumer is needed – although, as discussed above, it is questionable whether this requirement is realistic. Apart from the fact that, under specific circumstances, advertisements can be regarded as guarantees, they can also help interpret written guarantee statements the consumer receives at the moment of purchase.[27]

V. Practical Significance of Liability Arising under the Guarantee

The main significance of liability through guarantees is that it can bring in the producer as a party liable for the non-conformity. This is especially so as the Netherlands does not have a direct action against the producer in consumer sales (unless there are damages in the sense of Art. 6:185 BW or if the case can be brought under the normal tort clause, Art. 6:162 BW). Of course, the final seller can also be the guarantor, but his statements already fall under the contract between him and the consumer, and for this reason his promises are enforceable under the normal actions for non-conformity, possibly expanded by the guarantee itself. Although the guarantee in this way can bring in an additional creditor, the practical problem remains that guarantees are often used to exonerate risks rather than to confer additional rights on the consumer.

---

24 Ibid, 16.

25 *Hijma* (op. cit. fn. 4), no. 89a.

26 For the English situation, see *Howells/Twigg-Flesner*, Much ado about nothing? The implementation of Directive 99/44/EC into English law, in: Schermaier (ed.), Verbraucherkauf in Europa. Altes Gewährleistungsrecht und der Umsetzung der Richtlinie 1999/44/EG, Munich 2003, 319.

27 Preparatory documents of the revision of Book 7 BW for the implementation of Directive 1999/44, Tweede Kamer, vergaderjaar 2000-2001, 27 809, no. 3.

E. Rights of Redress

I. Introduction

Redress in consumer law was already taken care of previous to implementation of the Directive, namely in Art. 7:25 BW.[28] For the implementation of the Directive, the provision has been changed on one point only. This is, however, an important change, as it forbids parties to derogate from the article to the detriment of the seller (the party seeking redress). Hence, the only change made in the course of implementation is a change that was not prescribed by the Directive, as Art. 4 gives Member States the opportunity to allow parties to derogate from the rules of redress in contract.[29] Art. 7:25 BW[30] now is as follows:[31]

> "(1) Where, in case of a failure as referred to in article 24,[32] the buyer has exercised one or more of his rights concerning that failure against the seller, the latter is entitled to reparation of damage with respect to the person from whom he has bought the thing, provided that this person too has, in contracting, acted in the course of his profession or business. Costs of defence are only reimbursed to the extent that the seller has reasonably incurred them.
> (2) Paragraph 1 cannot be deviated from to the detriment of the seller.

---

28 The article has been introduced in 1991 with the coming into force of the New Civil Code. There is only one other specific right of redress in Dutch law, which is the right of the insurance company in indemnity insurance.

29 See also *Smits*, De richtlijn consumentenkoop in perspectief, The Hague 2003, 21.

30 Art. 7:25 BW:
"(1) Heeft de koper, in geval van een tekortkoming als bedoeld in artikel 24, een of meer van zijn rechten ter zake van die tekortkoming tegen de verkoper uitgeoefend, dan heeft de verkoper recht op schadevergoeding jegens degene van wie hij de zaak heeft gekocht, mits ook deze bij die overeenkomst in de uitoefening van zijn beroep of bedrijf heeft gehandeld. Kosten ter zake van verweer worden slechts vergoed voor zover zij in redelijkheid door de verkoper zijn gemaakt.
(2) Van lid 1 kan niet ten nadele van de verkoper worden afgeweken.
(3) Het recht op schadevergoeding krachtens lid 1 komt de verkoper niet toe indien de afwijking betrekking heeft op feiten die hij kende of behoorde te kennen, dan wel haar oorzaak vindt in een omstandigheid die is voorgevallen nadat de zaak aan hem werd afgeleverd.
(4) Indien aan de zaak een eigenschap ontbreekt die deze volgens de verkoper bezat, is het recht van de verkoper op schadevergoeding krachtens lid 1 beperkt tot het bedrag waarop hij aanspraak had kunnen maken indien hij de toezegging niet had gedaan.
(5) Op het verhaal krachtens eerdere koopovereenkomsten zijn de vorige leden van overeenkomstige toepassing.
(6) De vorige leden zijn niet van toepassing voor zover het betreft schade als bedoeld in artikel 24 lid 2."

31 Except for the second paragraph, which was added in 2003, the translation is taken from *Haanappel/Mackaay*, Nieuw Nederlands Burgerlijk Wetboek, het vermogensrecht (New Netherlands Civil Code, patrimonial law; Nouveau Code Civil Néerlandais, le droit patrimonial), Deventer 1990, 376.

32 This concerns the definition of non-conformity for consumer sales.

(3) The seller has no right to reparation of damage pursuant to paragraph 1, if the deviation pertains to facts which he knew or ought to know, or if it finds its cause in a circumstance which has occurred after the thing was delivered to him.
(4) If the thing lacks a quality which, according to the seller, it possessed, the right of the seller to reparation of damage pursuant to paragraph 1 is limited to the amount to which he could have laid a claim if he had not made a promise.
(5) The preceding paragraphs apply mutatis mutandis to recourse pursuant to earlier contracts of sale.
(6) The preceding paragraphs do not apply to the extent that damage as referred to in article 24 paragraph 2 is concerned."[33]

II. Parties and Limitation of Liability

Art. 7:25(1) BW states that the seller can sue the previous seller for damages in case the consumer exercised one or more of his rights against him. Hence, the right to redress as laid down in Art. 7:25 BW is limited to cases concerning the sale of goods to consumers as defined in the Directive, and does not extend to services and immovable property. Moreover, the seller cannot choose a party from the contractual chain, but can use the remedy of redress against the previous seller only. However, this does not mean that the recovery of damages is brought to a halt at that point, given that paragraph 5 offers the same remedies to the previous sellers which have to recover damages in a claim for redress.[34]

As mentioned in section E.I., parties cannot limit the right of redress (Art. 7:25(2) BW).[35] As Art. 7:25(5) BW makes the rules of the entire article apply to all earlier sales contracts in the chain, limitation of liability is not possible in those earlier contracts either.

The old version of Art. 7:25 BW did allow parties to limit the right of redress, as long as these limitations were reasonable. In practice liability was often limited without the final seller daring to protest the reasonability. In this way the final seller was often left with the damages of the non-conformity of the product without being responsible for the defect. The adjustment of Art. 7:25 BW with the implementation of the Directive was meant to end this situation.[36]

III. Claim and Defences

The claim against the previous seller provided by Art. 7:25 BW is a claim for damages similar to the normal claim for damages in Dutch contract law, provided by Art. 6:74 BW.

---

33 For Art. 7:24(2) BW, see fn. 17.

34 In practice, it will be interesting for defendants to make previous sellers in the chain join the procedure, see *Klik* (op. cit. fn. 1), 95.

35 Germany opted for a less strong approach to the issue of excluding liability, by excluding the limitation of liability only if the defendant is unable to take redress on the previous seller himself (§ 478 BGB).

36 If the earlier seller does limit the right of redress, this limitation can be annulled on the basis of Art. 3:40 BW by the party taking redress. See also *Smits* (op. cit. fn. 29), 22.

As redress can only be taken against the previous seller, the remedy will always be of a contractual nature.

Comparing the remedy of Art. 7:25 BW to the normal claim for damages in contract law, it is important to note that the requirement of attribution does not have to be fulfilled in a claim pursuant to Art. 7:25 BW.[37] Hence, fault on behalf of the earlier seller is not required.[38]

At the same time Art. 7:25 BW does offer two defences to the earlier seller, which reintroduces some elements of fault. Firstly, no claim is possible if the party seeking redress knew or ought to know about the non-conformity, or if the non-conformity finds its cause after delivery to him (Art. 7:25(3) BW). In both cases the burden of proof lies with the previous seller.[39] Secondly, if the party seeking redress made certain promises concerning the product, the right of redress is limited to the amount to which he could have received compensation for if he had not made that promise (Art. 7:25(4) BW). In this way, the previous seller is not held responsible for additional promises made by the final seller.

IV. Damages

What losses are recoverable? In principle, all costs concerning the claims of subsequent performance, price reduction, rescission and compensation for damages have to be recovered by the previous seller. Moreover, costs concerning the defense against the claims of the consumer have to be reimbursed, including legal costs.[40]

For both types of damages there are a number of limitations. Firstly, costs only have to be reimbursed if they were *reasonably incurred* (Art. 7:25(1) BW).[41] Secondly, there is a limitation concerning product liability. If the claim of the consumer falls under the implementation legislation of the Product Liability Directive, but does not exceed the lower threshold of 500 EUR the final seller has to give compensation for the consumer's damages. By doing so, the final seller obtains the consumer's right against the producer. For this reason, he does not need the right of redress of Art. 7:25 BW.

V. Significance of the Claim in Practice

As mentioned above, Art. 7:25 BW was not functioning well previous to implementation, as earlier sellers in the chain excluded liability, leaving the final seller with the costs of the non-conformity. As paragraph 2 forbids the limitation of liability, the final seller has a stronger position towards the previous seller.

---

37 The damages are attributed to the previous seller "based on the law" in the sense of Art. 6:75 BW, see also *Hijma* (op. cit. fn. 4), no. 460. The question may still rise whether the previous seller has any possibility to prove the non-conformity did not exist at the time it was sold to the final seller. This would make sense taking practice into consideration, but it does not if one looks at the system of the law.

38 *Hijma* (op. cit. fn. 4), no. 460.

39 Parlementaire geschiedenis Boek 7 (inv. 3,5 en 6), 245.

40 This may include the legal costs of the consumer in case they had to be recovered by the final seller in trial.

41 See also *Hijma* (op. cit. fn. 4), no. 462a.

However, a number of objections can be made against the prohibition to exclude liability.[42] First of all, one may still question whether the final seller really is more willing to object (illegal) exclusions of liability. Secondly, the final seller often is not a weak party in need of protection.[43] Most shops are part of bigger companies (i.e. shop chains) or buy together with other retailers. However, in those cases in which the final seller is indeed stuck with the costs of the non-conformity, consumers are likely to be affected due to unwillingness of the seller to compensate for the non-conformity.[44]

Another problem is that of international sales. The prohibition to exclude liability is applicable to all earlier sellers, as long as Dutch law applies to them. If one of the earlier sales contracts in the chain does not fall under Dutch law, the seller can exclude liability.[45] This will leave the last seller applying Dutch law with the costs of the non-conformity, which means that the costs still do not reach the producer.[46] Moreover, sellers applying Dutch law have a weaker position on the market compared to sellers abroad, who may not have to bear these costs.

Taking into account these arguments, it is questionable whether under the new Dutch law the costs will actually reach the manufacturer and whether the interference with freedom of contract is justified.

F. Direct Claim against the Producer

I. Introduction

Although direct producers' liability was proposed in the preparations for the Directive, it was withdrawn at a later stage.[47] It came into discussion again in the EC Green Paper on the review of the consumer acquis in 2006, in the EC Communication on the implementation of the Directive in 2007.[48, 49]

Dutch law does not recognise a direct claim against the producer. The possibility of introducing a contractual remedy vis-à-vis the producer was discussed in legal writing prior to implementation of the Directive. Moreover, a number of court cases dealt with the

---

42 See *Koning/Meijer*, Verhaal op de voorschakel: gaat de Nederlandse wetgever te ver?, Nederlands Tijdschrift voor Burgerlijk Recht 2002, 291-297.

43 *Koning/Meijer* (op. cit. fn. 42), 295.

44 Of course the consumer has rights against the final seller, but in practice this could still be a problem, as consumers do not want to spend much time and money on proceedings over a defective product, unless it is very valuable.

45 For the relationship between the prohibition to exclude liability under national law and the application of the CISG, see *Janssen*, The final seller's right of redress under the Consumer Sales Directive and its complex relationship with the CISG, European Legal Forum 2003, 181-184.

46 *Koning/Meijer* (op. cit. fn. 42), 2002, 295 et seq.

47 *Bradgate/Twigg-Flesner*, Expanding the boundaries for quality defects, Journal of Consumer Policy 2002, 345.

48 COM (2006) 744, 30; COM (2007) 210, 10-12.

49 And in the stakeholders meetings in 2007 held in preparation of the Draft Common Frame of Reference, on the basis of *Hondius* et al. (eds.), Principles of European Law/Sales (Pel S), Munich 2008.

question of direct liability outside product liability law, but such a claim never was accepted by the courts.[50]

In our discussion on a possible direct action we first pay attention to the different possible conditions of direct claims, as they determine the effects of the claim to a large extent. After that we discuss the arguments in favour of and against a direct claim, taking into account the different conditions that the claim may have. Finally, we present our own view on the question whether a direct claim would be desirable in European law and in Dutch law specifically.

II. Conditions of the Direct Claim

A number of issues play a role in determining the character of the direct claim and its significance in practice. First of all, the direct claim against the producer can be either exclusive or supplemental, i.e. it can be the only action available to the consumer or it can be an alternative remedy next to the claim against the final seller.[51] Most countries that have a direct claim against the producer have it in the form of a supplemental claim. This was also the case with the direct claim in the proposal for the Directive.

Secondly, there are different options concerning the parties that can use the claim and against whom they can do so. The French "*action directe*", for example, is not only executable by the consumer against the producer, but by any buyer against any seller further up in the chain. Slightly less far-reaching was the proposal for the Directive, in which the producer and the producer's representative in the consumer's area of residence would be jointly and severally liable (Art. 4). Hence, in case of non-conformity the consumer often would have had three parties to seek compensation from: the producer, the producer's representative and the final seller.[52] Another option would be to have the producer – possibly including the importer – as the only liable party next to the final seller.

Thirdly, there are different remedies which can be brought under the direct claim. One option is to grant the consumer all remedies he has against the final seller, as is the case in Finland, Latvia and Sweden.[53] The direct claim can also be limited to e.g. repair and replacement, which is the case under Spanish and Portuguese law.[54] If the consumer is granted the remedy of damages or price-reduction, it is also relevant whether the producer can be held liable for the full retail price, or whether liability is limited to the amount received by the producer for the product from the next seller.

Finally, the system of redress in the legal system in which the direct claim applies is relevant, as the direct claim is likely to have less impact on sales practice if earlier parties have a right of redress against any party in the sales chain.

---

50 It concerns Hoge Raad, 6 November 1925, NJ 1926/199; Hoge Raad, 25 June 1954, NJ 1955/685 and Rechtbank Den Haag, 23 June 1970, NJ 1970/55. See *Schut*, Produktenaansprakelijkheid, Zwolle 1974, 193.

51 In some countries, the (supplemental) direct claim can only be used if it is impossible or disproportionate to sue the final seller. See COM (2007) 210 final, 11.

52 Portugal has the same system; ibid.

53 Ibid.

54 Ibid.

III. Arguments for and against a Direct Claim

1. Introduction

Having discussed the conditions under which a direct claim can exist, we now turn to the arguments for and against such a claim. As was observed above, the conditions to a large extent determine the practical significance of the claim. This also means that different arguments apply to different conditions. In the discussion below there is therefore the attempt to distinguish between such different conditions.

2. The Position of the Final Seller

A first set of arguments is concerned with the position of the final seller. Firstly, one could argue that the final seller should not bear the costs, as he is usually not causally responsible for the non-conformity. In many cases the final seller does not even get to see the products, as they are sold still being sealed.[55] Secondly, it is argued that especially the final seller should not bear the costs, as in relation to the earlier sellers and the producer he often is the weaker party. This can indeed be problematic if earlier sellers have excluded liability, leaving the final seller with the burden of the non-conformity. However, as argued in section E.V., the "weak party" argument is not applicable to all final sellers, as many retailers have strong bargaining power. Furthermore, this argument may not be of much value in the Netherlands, as exclusion of liability is prohibited in relation to consumer sales (see section E.I.). Finally, it is important to note that a direct claim against the producer will not bring about a great change in the position of the final seller, unless it concerns an exclusive claim: if the consumer is still able to go to the final seller, he is likely to do so in most cases.

3. Cutting down Litigation Costs

Apart from the argument that it is unfair for the final seller to bear the costs of the non-conformity, the direct claim can also have the advantage of bringing down litigation costs. In a system of final seller liability, it can take many steps for the costs to reach the manufacturer. If the consumer brings a claim directly against the producer, there are no further actions for redress needed to bring the costs to the manufacturer. This can save costs especially if the consumer has a claim against the producer only, so that redress is never required. However, if the direct claim is supplemental, the practical significance will be limited because the consumer is still likely to go to the final seller under most circumstances. As a matter of fact, one could object that the introduction of a supplemental direct claim is more likely to raise the costs rather than to decrease them, as both the final seller and the producer would need to be prepared to deal with consumer complaints. However, it is likely that the producer in practice would still deal with claims through the final seller, as is often the case with guarantee certificates.

---

55 *Bradgate/Twigg-Flesner* (op. cit. fn. 47), 352.

4. Standard of Service

Another set of arguments relates to the standard of service offered by producers and final sellers. In general, liability of the final seller has the advantage for the consumer that it enables him to turn to the retailer, who is often nearby. In this way the consumer can have face-to-face contact in order to find a solution, and because the final seller deals with customers all day, he is usually very competent to deal with them.

However, due to the growing number of long distance sales, including e-commerce, the considerable comfort of being able to go to the shop nearby for repair or replacement is not always in question anymore. Another issue is that because the consumer purchases products from different stores in different places, he will not always be sure where he bought the product, i.e. not knowing whom to address with the remedies in case of non-conformity.

5. Additional Creditor

If the direct claim against the producer is supplemental, it has the advantage of bringing in an additional creditor, offering the consumer more security to use the remedies he is entitled to. This is especially valuable if the final seller has gone out of business or is unwilling to help. The latter is often the case in the absence of a commercial guarantee, even though the final seller is required by law to offer remedies.

6. Internal Market

Two arguments can be brought concerning the effects of a direct claim on the internal market. First of all, a supplemental direct claim would increase consumer protection, which could make consumers more confident to purchase goods throughout Europe, being able to choose the best product for the best price without the need to worry about remedies if something goes wrong. However, as to this moment it is uncertain whether producers' liability would have such effect.[56] The second argument is that because the introduction of a direct claim at the European level would harmonise the law of the Member States, it would be easier for producers to offer their products abroad. While the first argument is only applicable to the introduction of a supplemental claim, the latter also counts for the exclusive variant.

IV. Weighing the Arguments

Taking into consideration the European Commission's aim of consumer protection, we argue against an *exclusive* direct claim against the producer. In our view, a decrease in litigation costs and an increase of the chance that the costs will in fact reach the producer, do not justify weakening the already vulnerable position of the consumer. Much better in this respect would be a *supplemental* direct claim. The consumer would be granted more protection due to the fact that he may address the producer if it is impossible to enforce his rights

[56] See COM (2007) 210 final, 12.

against the final seller, or if the final seller is unwilling to help. Experience in other jurisdictions, such as Belgium,[57] France[58] and the Nordic countries,[59] indicates that an "*action directe*" can be a valuable extra remedy for consumers.

For the remedies of price reduction and compensation for damages it may be a good idea to limit the amount to that received by the producer for the product from the next seller. In this way, the producer will not be liable for a disproportionate amount, while the consumer is still offered some protection for the case in which the remedies against the final seller prove to be unsatisfactory.

G. Conclusions

The Dutch were late in transposing the Directive, even though the difficulties which implementation posed were minor. One major novelty that the Directive did introduce in Dutch Law was the notion of commercial guarantee, although it is not yet sure what its impact is on practice.

Concerning the right of redress it is interesting to point out that the single change made to the existing legislation was not prescribed by the Directive. The Dutch legislator has chosen to strengthen the position of the final seller by forbidding parties to derogate from the right of redress in contract, but it is still questionable whether the costs of the non-conformity will really reach the manufacturer.

A direct claim of the consumer vis-à-vis the manufacturer or other previous sellers is lacking in Dutch law. The introduction of such a claim would strengthen the position of the consumer, as it can function as a back-up for the remedies against the final seller. Experience in Belgium, France and in the Nordic nations supports this view. This paper therefore argues for introduction of such remedy on the European level, albeit in a limited form.

---

57 *Carette*, Direct Contractual Claim of the Sub-buyer and International Sale of Goods: Applicable Law and Applicability of the CISG, European Review of Private Law 2008, 583 et seq.

58 *Jamin*, La notion d'action directe, Paris 1991.

59 *Bjoranger Torum*, Direktekrar red Kjop, tilrirkning of enterprise; Formueterettslige analyses: komparativ belysning, Ph.D. Bergen (2006).