

Application of Implied Terms in the Sales of Goods act to Consumer Transactions in Nigeria: Between Consumers Protection and Safeguarding the Sanctity of Contracts

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Abstract

This paper examines the meaning and application of Implied Terms in the Sale of Goods Act 1893 (SOGA) to consumer transaction. In doing this, the paper undertakes a comparative analysis of what is obtainable in other jurisdictions to discover where the Nigerian system lacks. The paper queries what it calls 'continued imposition of responsibilities and liabilities' on contracting parties under the guise of implied terms even where such terms were not contemplated by the contracting parties and as such, not expressly contained in the contract. The questions asked are: In examining the contractual principle of *consensus ad idem*, what rationale and legal justification could be placed on such term outside the express stipulations of the contracting parties? What is the justification for holding a party liable for breach of a term not expressly agreed upon but for customs of the trade or other extraneous considerations? The paper finds that the so-called implied terms in contract of sale are bunny traps which commercial men explore to deny liability arising from contracts freely entered by them or to hold innocent and uninformed party liable for breach of terms outside his contemplation. The paper advises that in developing economy like Nigeria where the level of literacy is low, it is undesirable to impute, inferred or implied duties and liabilities into contract outside those expressly agreed by contracting parties.

Keywords: Implied Terms, Sales of Goods, Consumer Transaction, Nigeria, Reform

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1. Introduction

The law governing Sale of Goods in Nigeria is the Sale of Goods Act² 1893 (SOGA), a statute of General Application in force in Nigeria. The rules of Common Law, including the Law Merchant which is not inconsistent with the express provisions of the Sale of Goods Act 1893 are also applicable. The study of sale of goods is only a specialized one in the sense that it is a contract involving sale of goods; otherwise it is essentially a part of the general law of contract. The Act has not therefore; done away with the general rules relating to contract hence, offer and acceptance, consideration and other elements of a valid contract must be present in a contract of Sale of Goods. Aside this, certain presumed 'safeguards' have been put in place by law to protect the interest of the buyer by implying terms concerning the standard and quality of product in commercial transaction of sale of goods in the Sale of Goods Act. Breach by the seller of any of these terms entitles the buyer to institute an action and gets remedies for such breach. These terms impose strict liability on the seller and they are actionable per se. It is irrelevant whether the seller was unaware of the alleged defect in the goods or not.³

Sale of Goods is defined in section 1(1) of the Sale of Goods Act, 1893 as: 'A contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration called the price.' This means that in addition to the ordinary elements of a contract, two other elements, goods and money consideration, must also be present in a contract of sale of goods. The above definition also envisages two situations namely:

- a. A contract of sale, in which the property in the goods is transferred from the seller to the buyer.
- b. An agreement to sell, in which the transfer of the property takes place 'in future' (at a future time), or a fulfillment of certain conditions.

²The Sale of Goods Act 1979 consolidates the Sale of Goods Act 1893. The primary source of law of sale of goods in the former territories of the British Empire and Commonwealth is the English Sale of Goods Act 1893 (Canada is an exception which has adopted hybrid legislation incorporating elements of the United States Uniform Commercial Code). In Nigeria, it has been held to be a statute of general application and so applicable in the country. See *Lawal vs. Younan* (1961), All N.L.R.245 at 255. The Sale of Goods Law in the Southern States of Nigeria is a verbatim reproduction of the 1893 Act. States in the northern Nigeria have their Sales of Goods Law with some variations.

³Kanyip B.B., 'Service Liability under Nigerian Consumer Law' *Consumer Journal*, (2005) 1(1), 90-95. See also Kanyip B.B., *Consumer protection in Nigeria: Law, Theory and Policy*, (2005) Abuja: Reckon Books Limited.

A contract for the sale of goods yet to be manufactured is an agreement to sell because the property in the goods cannot pass until they are manufactured and ascertained.

That the definition of a contract of sale is recognized in terms of two transactions is indicated by section 1(3) of the Act which states that

Where under a contract of sale the property in the goods is transferred from the seller to the buyer, the contract is called a sale; but where the transfer of the property in the goods is to take place at a future time or subject to some conditions thereafter to be fulfilled, the contract is called an agreement to sell.

The focus of this paper is on the application of implied terms in contract of sale of goods to consumer transactions with a view to unearthing the philosophy albeit the continued imposition of liabilities on the contracting parties for terms the parties did not contract for.

Part II of the paper defines key words such as; Contract, Contract of Sale of Goods, Goods, Expressed Terms in Sale of Goods, and Implied Terms in Sale of Goods among others. The paper distinguishes contract of sale of goods from other commercial contracts in the process. For instance, there are marked differences between the Contract of Bailment and that of Hire Purchase from the Contract of Sale of Goods. Part III discusses Implied Terms in Contract of Sale of Goods as Distinguished from other terms. It examines express terms of contract of sale of goods as distinct from the implied terms and espoused the philosophy for the distinction thereto. Part IV makes a comparative analysis of the application of Implied Terms to Contract of Sale of Goods in other jurisdictions and discusses the lessons Nigeria could learn from those countries. Part V makes a case for the imperative of reform. It reasons that for Nigeria to attain her goal of becoming one of the twenty leading economies of the world in the year 2020, deliberate and concerted efforts must be geared towards legislative and judicial rethinking. It concludes with a call for critical re-examination of the application of implied terms to sale of goods contract in Nigeria against the background of her economic peculiarities and exigencies.

2. Sale of Goods Contract Distinguished from Other Forms of Commercial Transactions

Sale of Goods in its ordinary signification refers to the ordinary commercial activity of buying and selling (which takes place on a regular or daily basis) of goods and services in society. It is basically contractual in nature and as such, is no more than a species of contract.

The implication is that the basic rules of contract law apply to a typical sale of goods contract. For this reason, the contractual rules on the issues of capacity, offer and acceptance, consideration, privity, and illegality, including agency rules apply with equal force to a sale of goods contract.

Thus the Sales of Goods Act in section 1 (1) defines a contract for the sale of goods as:

A contract whereby the seller transfer or agrees to transfer the property in the goods to the buyer for money a consideration called the price.

2.02 Elements of Sale of Goods

i. Property

Property refers to ownership over goods, the subject matter of a sale of goods contract. It must be distinguished from mere possession which is not more than mere physical control of the goods. It is also possible for one to have possession of goods without having property over them and vice versa.

In most cases, however, a person who has property over goods is also in possession. It is the law that he who is in possession of anything is the owner until the contrary is proved by he who asserts the contrary.

Often, goods which are the subject of sale are stolen or destroyed, seized by government or mistakenly sold to another person. The question will naturally arise as to who bears the loss or liability arising from such occurrence or incident.

Invariably, this will depend on the time at which property in the goods passed from the seller to the buyer. This will further depend to a large extent on whether the goods are specific or unascertained.

The law in this regard, attempts to answer the following questions:

- a. At what point can the buyer sell the goods to another person?
- b. At what point can the seller sue for the price of the goods?
- c. At what point does risk in the goods pass to the buyer?

1. Unascertained Goods

By section 16 of the Act, where unascertained goods are sold to the buyer, ownership thereof is not transferred to the buyer unless and until the goods are ascertained. Thus if something is yet to be done by or on behalf of both parties before the goods are delivered, property in the goods will not be transferred until the particular thing is done. Thus where goods are to be sold by measurement, the stipulation of measurement and of delivery at a particular place renders the sale conditional and incomplete until occurrence of those events.⁴

2. Specific Goods

In a contract for the sale of specific ascertained goods, the property in the goods passes from seller to the buyer at such time (if any) as the parties to the contract expressly or implied stipulate in the contract of sale.⁵ However, if the parties fail to stipulate the time at which the property is to pass, recourse must be had to certain rules laid down by the Act for this purpose namely:

- a. In an unconditional contract of the sale of specific goods which are in a deliverable state, the ownership of the goods is transferred to the buyer when the contract is made notwithstanding that the time payment is to be made or both are expressly postponed by the contract.⁶ Once the goods have been put in such condition that the buyer is bound to take them, they are in a deliverable state.⁷

⁴*Boro vs. Kenney* (1955) WACA 51.

⁵Section 17 of Sale of Goods Act 1893.

⁶Section 18 of Sale of Goods Act 1893.

⁷*Talabi vs. Mandila* (1976) 3 O.Y.S.H.C. 79.

- b. In a contract for the sale of specific goods to which the seller has to do something to put them in a deliverable state, ownership of such goods does not pass to the buyer until such thing is done and the buyer has notice thereof.⁸
- c. In a contract for the sale of specific goods which are in deliverable state, but which the seller has to weigh, measure, test, or do some other acts or things for the purpose of determining the price; ownership does not pass to the buyer until such act or thing is done and the buyer has notice thereof. This rule only applies if the act is to be done by the seller and the price to be paid is dependent upon such act of the seller.⁹
- d. When goods are delivered to the Buyer on 'approval' or 'on sale' or 'return' or other similar terms, the ownership of the goods is transferred to the buyer:
 - 1. When he communicates his approval or acceptance to the seller or does any other act adopting the transaction.
 - 2. Where he does communicate his acceptance or approval to the seller if he retains the goods, without giving notice of rejection, beyond the time (if any) fixed for rejection, or if no time is fixed, then beyond a reasonable time. However, this arm of Rule 4 will only apply if it is the buyer who retains the goods i.e. where the detention is done by the buyer himself. In *Re Ferrier*,¹⁰ the goods delivered 'on sale' or 'return' within one week, were retained, by a third party beyond the time fixed. It was held that the property had not passed to the buyer under Rule 4 (b).¹¹

In a contract for the sale of unascertained or future goods sold by description, the ownership of goods passes to the buyer when goods of that description and in a deliverable state are unconditionally appropriated to the contract by either party with the express or implied assent of the other; the property in the goods thereupon passes to the buyer. Such assent may be expressed or implied and may be given either before or after the appropriation is made.

⁸ Underwood Limited vs. Burgh Castel Brick & Cement Syndicate (1921) ALL ER Rep. 515.

⁹ Nanka Bruce vs. Commonwealth Trust Limited (1926) AC 77.

¹⁰ (1944) Ch. 295.

¹¹ Sales of Goods Act 1893.

ii. Parties

Parties to a Sale of Goods transaction refers to the seller and the buyer as the two parties to a sale of goods transaction are called. The seller is a person who sells or agrees to sell goods while buyer is a person who buys or agrees to buy goods.

iii. The Price

Much as sale of goods transaction is a typical contract, a given difference applied to it. With respect to a typical contract, the consideration, could be money, or money's worth, some forbearance or a *qui pro quo*. However, in sale of goods transaction the consideration must be money called the price. This of course implies the exclusion of trade by barter. Nonetheless the price could be partly money and partly goods.

By section 8 of the Act the price may be fixed:

- a. By the contract; or
- b. Be left to be fixed in a manner to be agreed; or
- c. May be determined by the course of dealing between parties; or
- d. Where no price is fixed as above, by payment of reasonable price depending on the circumstances of the case.

The section obviously envisages a situation where a contract of sale has been finally concluded. Thus in *May & Butcher Limited vs. R*,¹² A agreed to sell goods to Y at a price agreed at a later date. There was a provision in the agreement that parties would further discuss the price to be paid. The Court held that the parties were still negotiating and therefore no contract had been concluded.

iv. The Goods

Section 62 defines goods:

All personal chattels other than things in action and money and ... include emblements industrial growing crops and things attached to or forming part of the land which are greed to be severed before the sale or under the contract of sale.¹³

¹² (1934) 2 K.B. 17.

¹³ Sale of Goods Act 1893.

From the above definition, it is clear that money (except those that are no longer legal tender and therefore constituting collector's item) real property and right of action are not goods. However, even if accepted as goods, it is necessary to classify them for the purpose of passing of property. Thus goods are classified by the Act¹⁴ as follows:

1. *Existing Goods*: These are goods owned and possessed by the seller at the time of the contract of sale. E.g. particular furniture.
2. *Future Goods*: These are goods to be manufactured or acquired by the seller after the contract has been entered into.
3. *Specific (Ascertained) Goods*: These are goods identified and agreed upon at the time of the contract. E.g. A Mazda 625 Car with a given registration number, engine number and Chassis number.
4. *Unascertained Goods*: These are goods sold by description but which are not identified or agree at the time of contract but are included in a particular class or goods e.g. four kilograms of sugar or salt.

2.03 Sale of Goods and Other Types of Contract

It is necessary for purposes of clarity to distinguish a contract of the sale of goods from the following:

1. *Barter or Exchange*: In this case there is a mere exchange of goods for another set of goods rather than the use of money as the medium of exchange or consideration. The use of barter as a means of exchange is no longer practicable in the light of the complexities of modern business.
2. *Hire Purchase*: This is not sale of goods contract. Rather it is a situation where goods are let out to a hirer who makes installment payments (for its use) called the rent. He has the option to purchase the goods at the full payment of the installments where he decides to exercise the option to purchase. However, though he has immediate possession of the goods, he acquires no property in it (as in sale of goods) until he exercises the option.
3. *Conditional Sale*: This is a type of sale in which the purchase price or part thereof is payable by installments. The buyer has possession of the goods but property remains with the seller until the installments are paid. The buyer in a conditional sale agreement is buyer in possession and can pass good title.

¹⁴ *Ibid.*

4. *Contract of Skill and Labour*: This is situation where an agreement entered into for the purpose of the construction of a particular item of property. On completion, the one party collects the item and pays for it at the agreed price. The sale of Goods Acts does not apply to this kind of arrangement as it is not a sale contract. What is being paid for is mainly the skill of the craftsmanship rather than the item in question. In *Robinson vs. Graves*,¹⁵ Greer L.J. put it clearly stating thus:

If the substance of the contract is that skill and labour have to be exercised for the production of the article and it is only ancillary that they will pass from the artist to his client or customer some materials in addition to the skill involved in the production of the portrait, that does not make any difference to the result, because the substance of the contract is the skill and experience of the artist in producing the picture.

It may be gleaned from the above dictum however, that where the product is the substance of the contract it is that of sale goods. Thus in *Camel Laird & Co Ltd vs. Manganese, Bronze & Brass Co*¹⁶ the Court held that in a contract for the construction of ship's propeller, that it was one for the sale of goods. However, it will be that of skill and labour if the product is merely ancillary.

3. Conditions and Warranties

Writers and legal draughtmen have not agreed on a precise or single meaning of the term consumer. Without necessarily being entangled in definitional controversy, consumer is taken to mean one who buys goods or services for his domestic or personal or household use. Therefore, a product intended for a commercial, business or trade is not within the purview of consumer regulation in this sense. What is intended here is a consumer sale, that is, where the seller, in the course of business, sells goods that are ordinarily bought for private use or consumption to a buyer who wants them for his own private purposes. This is also referred to as private sales. The meaning of consumer in this sense conveniently falls within the ambit of the law. What the law seeks to protect in a consumer transactions are quite different from those of a purely commercial transaction. Consumer law is distinct from the law governing interaction between two or more commercial concerns.

¹⁵ (1935) 1K.B. 579.

¹⁶ (1934) AC 402.

To this end, every contract has its own terms which are often grouped into fundamental term, conditions and warranties. Since a sale of goods transaction is essentially a contract, the same rules apply with equal force to it. It is equally a fact that such terms could be express or implied. Certain terms are implied into a sale of goods contract by the Sale of Goods Act by virtue of sections 10-15 thereof.

However, at common law, no condition or warranties as to the quality or fitness of goods for any particular purpose will be implied. A buyer must therefore satisfy himself that there are no defects in the goods he wishes to purchase. Thus if goods, open to inspection, are purchased by a buyer, he cannot, (unless the seller is guilty of a misrepresentation) complain of any defect which he subsequently discovers in the goods. Hence the rule at common law is articulated in the maxim, *Caveat Emptor*, buyers beware.

This maxim however, has to a large extent been ousted by the Sale of Goods Act 1893 which has implied, in the absence of any contrary agreement, certain conditions and warranties into every contract of sale of goods. For this reason, in *Akoshile vs. Ogidan*,¹⁷ the court held that the maxim cannot operate to oust the provisions of S.12 (1) of the Act.¹⁸

The Sale of Goods Act 1893 provides that certain terms are implied in every transaction for the transfer of goods. Terms of the contract are those statements made by the parties, which may be regarded as incorporated into or as forming part of the obligations undertaken by the parties. Such terms may be express or implied. Express terms refer to terms specifically agreed upon by the parties and incorporated into their agreement. Further terms may in some circumstances be read into contracts by custom and usage. These are implied terms. It seemed well settled that terms of a contract, whether express or implied, are conditions or warranties. In *Mihalis vs. Angelos*,¹⁹ the traditional division into conditions and warranties was upheld.

¹⁷ (1950) 19 NLR 87.

¹⁸ See also *Rowland vs. Dival* (1923) 2 KB 500.

¹⁹ (1970) 3 All E.R. 125.

However, in *Chave NV vs. Bremer Handels Gasellschaft*,²⁰ approving it earlier decision in *Hong Kong Fir Shipping Co. Ltd. vs. Kawasaki Kisen Kaisha*,²¹ the court said that the division is not exhaustive.²² Neither the 1893 nor 1979 Act, has given the meaning of the word 'condition'. The Sale of Goods Law Kaduna State,²³ Northern Nigeria is helpful when it defines the word as:

A term which goes directly to the substance of the contract for the sale of goods and so essential to it very nature that it non-performance may fairly be considered by the other party as a substantial failure to perform the contract at all and so gives him the right to repudiate the contract and reject the goods, in addition to a claim for damages.

Uvieghara²⁴ writes that a condition is a term, which is essential to the main purpose of the contract so that if it is not performed it may be said that the contract has not been performed. The two definitions point to the fact that a condition is a vital term of a contract. Although the two Acts do not define condition, they both state the effect of breach of a condition and warranty as follows:

Whether a stipulation in a contract of sale is a condition, the breach of which may give rise to treat the contract as repudiated, or a warranty, the breach of which may give rise to a claim for damages but not a right to reject the goods and treat the contract as repudiated, depends in each case on the construction of the contract; and a stipulation may be a condition, though called a warranty in the contract.²⁵

Warranty as defined in section 61 of Sale of Goods Act, UK as:

An agreement with reference to goods, which are the subject of a contract of sale, but collateral to the main purpose of such contract, the breach of which may give rise to a claim for damages but not a right to reject the goods and treat the contract as repudiated.²⁶

²⁰ (1975) 3 All E.R. 739.

²¹ (1962) 1 All E.R. 474.

²² Other terms are innominate and fundamental terms.

²³ Section 3 (1).

²⁴ Op cit.

²⁵ In general, a warranty is a contractual promise by the seller regarding the quality, character, or suitability of the goods he has sold. See James Bannres et al., *Law for Business*, 10th ed, (New York: Hill Irwin, 2009), p.336.

²⁶ Ibid.

It is clear from the provision of the Act that a warranty is less important than a condition. A condition is of more importance than a warranty. A term which is only collateral to the main purpose of the contract is a warranty.

However, Monye²⁷ is of the opinion that contrary to the impression created by this provision, a warranty is a term of the contract and something collateral to it. Atiyah²⁸ notes in this regard that the term collateral, though hallowed by usage, is not very happily chosen, for it may give the impression that a warranty is a term which is somehow outside the contract; whereas it is in fact part of a term of the contract. The use of the word collateral may be useful in distinguishing between a condition and warranty. Sagay²⁹ states that a warranty is collateral to the main purpose of the contract, a condition must at least be essential to it.

In the interest of promoting higher standards in the marketplace, the law imposes certain responsibilities on the seller for the quality, character and suitability of the goods sold. The duties that a seller of goods owes his customer are the terms implied by the Act. An implied condition is a term created by operation of law rather than the seller's express statements. The terms implied by the Act are the right to sell, compliance with description, fitness for purpose, merchantable quality and compliance with sample. In practice, it is the implied terms of description, merchantable quality and fitness that are the most important of these provisions for product liability. In this work, the implied condition as to title shall not be discussed since product liability is concerned with health and safety of the consumers.

3.01 Implied Conditions: An Introduction

In the absence of any contrary agreement, the following conditions will be statutorily implied in every contract of sale of goods:

1. That the seller, in the case of a sale has the right to sell, and that in the case of agreement to sell, he will have a right to sell goods at the time the property is to pass.³⁰ In *Rowland vs. Divall*,³¹ S sold a car to B who used it for about three months and had to return it to the owner because it turned out to be a stolen car.

²⁷ F.N. Monye, *Law of Consumer Protection* (Ibadan: Spectrum Books Ltd, 2005) p. 196.

²⁸ P.S. Atiyah, *The Sale of Goods* (London: Pitman, 1995), p.63.

²⁹ I.E. Sagay, *Nigerian Law of Contract*, 2nd ed (Ibadan: Spectrum Books Ltd, 2000), p. 100.

³⁰ Section 12 (1) of Sale of Goods Act 1893. See *Akoshile vs. Ogidan* (1950) 19 NLR 87.

³¹ *Supra*.

The court held that in the circumstance B could recover the purchase price of the car as S had no title to the car when he sold it to B.

2. Section 13 of the Act provides that where there is a contract for the sale of goods by description there is an implied condition that the goods shall correspond with the description. But if the sale is by sample as well as by description, the goods must correspond with both the sample and the description. This applies particularly in a case where the purchaser has not seen the goods, but is merely relying on its description as given by the seller.³² Thus once it is demonstrated that the goods do not answer to the description, the buyer may reject them.³³
3. Where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not) there is an implied condition that the goods are of merchantable quality; provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed.³⁴

Goods are of merchantable quality when they are fit for use for the purpose for which such as an article is ordinarily used, and in such condition and of such quality that a reasonable man acting reasonably, would after a full examination accept them in performance of the contract.³⁵

Where the good have defects which are apparent and could be disclosed by proper examination, this implied condition will be ousted.³⁶

Where the buyer expressly or impliedly makes known to the seller the particular purpose for which the goods are required as to show that he relies on the seller's skill or judgment and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not) there is an implied condition that the goods shall reasonably be fit for such purpose, provided that in the case of contract for the sale of a specified article under its patent or other trade name, there is no implied conation as to its fitness for any particular purpose.

³² See *Varley vs. Whip* (1990) 1Q 513.

³³ *Re Moore & Co Limited vs. Launder & Co* (1921) 2 K.B. 519.

³⁴ Section 14 (2) of Sale of Goods Act 1893.

³⁵ *Morelli vs. Fitch & Gibbons* (1928) 2 K.B. 636.

³⁶ *British & Overseas Credit Limited vs. Animashaun* (1961) 1 ALL NLR 343.

It is obvious that before this condition may be implied:-

- a. It must be shown that the seller deals in goods of that description.
- b. That the seller knows the purpose for which the goods are required.
- c. That reliance was placed by the buyer on the seller's skill or judgment.

Where the purpose is obvious as in the case of a radio or calculator, knowledge of the purpose will be imputed to the seller. However, where the goods could be put to variety of use, the buyer must disclose the particular use to which he want to put items sought to be bought.

Often a situation arises where there is a latent defect in an article held by a seller to a purchaser and this cause injury to the buyer. This will amount to a breach of an implied warranty of fitness for purpose, for which the goods were bought.³⁷ This however, excludes a situation where the purchaser bought on the basis of a trade name.

Where the sale is by sample only there is an implied condition that:

- a. The bulk shall correspond with the sample in quality.³⁸
- b. The buyer shall have a reasonable opportunity of comparing the bulk with the sample.³⁹
- c. The goods are free from any defect rendering them unmerchantable which would not be apparent on reasonable examination of the sample.⁴⁰

In *West African Import & Export Co vs. Paul Jassar*,⁴¹ a contract of sale by order of sample was involved. The buyer proceeded to pay customs duties on behalf of the seller when it was clear to him that the goods do not correspond with the sample. The Court held that having taken that step it was an acceptance of the goods and he was estopped from subsequently rejecting them.

³⁷ *Godley vs. Perry* (1960) 1 ALL E, R 36.

³⁸ Section 15 (2) (a) of Sale of Goods Act 1893.

³⁹ Section 15 (2) (b) of Sale of Goods Act 1893.

⁴⁰Section 15 (2) (c) of Sale of Goods Act 1893.

⁴¹(1939) 15 NLR 2.

3.02 Implied Condition as to Description

Section 13 of the Sale of Goods Act 1893 provides that:

Where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description; and if the sale be by sample, as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the good do not also correspond with the description.

The courts have given wide meanings to the term 'Sale by Description'. It applied to all cases where the purchaser has not seen the goods but is relying on the description alone. In *Varley vs. Wipp*, the Defendant bought a reaping machine by description. Shortly after delivery, he complained that it did not correspond with the Plaintiff's statement. The sale was held as a sale by description and the Defendant was held entitled to reject the machine.

There may also be a sale by description of a specific article, which the buyer has inspected, but only if the description relates to something not apparent on inspection. It was thought that the original intention of the draftsmen of the Sale of Goods Act 1893 was that specific goods (i.e. goods identified and agreed upon at the time of the contracts) could not be the subject of a sale by description. The idea behind this was that if a buyer is buying something specific, he has the opportunity to examine it or have an expert examine it for him. If the goods then fail to correspond with the description, section 13 would not be breached (although the buyer might have a remedy for breach of an express term of the contract or for misrepresentation).⁴²

Accordingly, the buyer will fail if, viewed objectively, the court is satisfied that he did not rely on the description. The implied condition may only be breached if the buyer relies on the description. The section also applies to goods selected by the buyer at a self-service store or supermarket. This is the effect of section 13(3) of the Sale of Goods Act, United Kingdom.

⁴² *Beale vs. Taylor* [1967] 1 W.L.R. 1193.

Whilst some changes in the law in England have taken care of situations where there are microscopic or minor defects from the contract terms, the law still insists on protecting the consumer under the implied term of description. Section 4(1) of Sale and Supply of Goods Act 1994 inserts into the Sale of Goods Act, a new section 15A that provides as follows:

(1) Where in the case of a contract of sale:

- (a) the buyer would apart from the subsection have the right to reject goods by reason of a breach on the part of the seller of a term implied by Sections 13, 14 or 15 above, but;
- (b) if the breach is so slight that it would be unreasonable for him to reject them, then if the buyer does not deal as consumer, the breach is not to be treated as a breach of condition but may be treated as a breach of warranty.

In the leading case of *Arcos Ltd vs. Ronaasen*,⁴³ the sellers sold a quantity of wooden stoves to the buyers. The thickness was given as half an inch. When the goods were delivered the arbitration found that:

- (i) only five per cent were half an inch thick (ii) a large per cent were between half-an-inch and nine – sixteenths of an inch; (iii) some were between nine -sixteenths and five-eighths of an inch; (iv) a very small portion were more than five – eighths of an inch (v) the stoves were fit for the buyer's purpose and commercially within, and merchantable under the contract specification. Despite the finding in (v) the buyer claimed that he was entitled to reject them. The High Court, Court of Appeal and House of Lords upheld the buyer's claim. The Judgments in the House of Lords emphasize the need for strict compliance. The House of Lords however, noted that there might be microscopic deviations, which may be ignored; the right to ignore for minor breaches is restricted only to non-consumer.

It should be noted that if words have acquired a special trade meaning, there will be no breach of section 13 if they answer that meaning.

⁴³ [1933] A.C. 470.

3.03 Implied Condition as to Fitness for Purpose

The most common complain of the consumer is that the goods or services supplied or rendered were not up to the expected standard. If a contract is for the sale of goods, section 14 of both Acts implies a condition of reasonable fitness as well as the condition of merchantable or satisfactory quality. Section 14(1) of the 1893 Act reads:

Subject to the provisions of this Act or any statute in that behalf; there is no implied warranty or condition as to the quality of fitness for any particular purpose of goods supplied under a contract of sale, except as follows:

- (1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment and the goods are of a description which is in the course of the seller's business to supply (whether he be the manufacturer or not), there is implied condition that the goods shall be reasonably fit for such purpose, provided that in the case of contract for sale of a specified article under the patent or other trade name, there is no implied condition as to its fitness in any particular purpose.

A buyer comes under an obligation to supply goods that are reasonably fit for the purpose for which they are bought when the stipulated conditions are met. A particular purpose means specified or stated purpose. It means the purpose communicated expressly or impliedly to the seller by the buyer for which the goods are required. The buyer must have made known to the seller, either expressly or by implication, the particular purpose for which he requires the goods. Usually, this is the case where the goods have only one particular purpose. The purpose for which such goods are required is made known to the seller by implication, In *Priest vs. Last*,⁴⁴ it was held that the purpose of a hot water bottle was made known by implication. If the purpose is obvious as in case of single purpose goods, nothing need be said. This is notably true where the item is common place, such as bottled table water. In *Grant vs.*

⁴⁴ (1930) 2 K.B. 148.

*Australian Knitting Mills*⁴⁵, Grant bought a woolen underpant from the seller and upon wearing it, he contracted dermatitis. This is because the underwear contained excess sulphite. The court held that

There is no need to specify in terms the particular purpose for which the buyer requires the goods which is none the less the particular purpose within the meaning of the section, because it is the only purpose within the meaning of the section, because it is the only purpose for which anyone would ordinarily want the goods.

The implication of this is that a buyer or consumer does not have to go through the ritual of spelling out his purpose. This will be implied because it is self evident.

If there are special circumstances connected with the use of the goods, or the purpose is a special one, the seller will be liable only if that purpose was expressly made known.⁴⁶ Where goods are suitable for more than one purpose, the particular purpose for which the buyer requires them must be made known. The buyer must show reliance on the seller's skill and judgment.

It is clear that reliance must be brought home to the mind of the seller expressly or by implication. The reliance will be seldom expressed. It will usually arise by implication from the circumstances. The seller will be liable for unfitness of purpose only in respect of the reliance placed upon him. The condition of fitness is not implied if the seller can prove that the buyer did not rely on the seller's skill or judgment.

One important rule common to implied terms of fitness for purpose and quality is that the seller is only liable if he supplies the goods 'in the course of a business'. The reason for the exception in the provision is plain. If a man orders in express terms an article known by a patent or trade name under the name, and gets it, he cannot complain that it will not answer some specific purpose for which he wanted it, even though he told the vendor before he ordered it the purpose for which he required it.

⁴⁵ *Supra*.

⁴⁶ *Griffiths vs. Peter Conway* (1939) 1 All E.R. 685.

The provision assumes the absence of any express assurance by the seller and deals only with the case of express or implied information by the buyer of the purpose for which he requires the articles, so framed as to show that the buyer relied on the seller's skill or judgment.

It is also important to note under the subsection that the implied condition as to fitness for purpose applies to all the goods supplied under a contract of sale.⁴⁷ Indeed, the courts have given a sensible meaning to the term 'goods supplied' by giving the words their normal meaning. This is crucial in modern days of canned food and bottle drinks. Thus, the conditions of fitness and merchantable quality apply not only to the contents of a bottle or tin but also to the container, that is, the bottle or tin itself, even if it has to be returned; it is still supplied under the contract. Similarly, the meaning makes the seller liable if the goods actually supplied contain a foreign body, for examples, a worm, a snail a piece of glass. This affects the totality of goods supplied.

It is not certain whether advertising can contribute to the existence of an implied condition of fitness. A seller who advertises his product expects to persuade buyers that the product is suitable for a certain purpose or purposes. Many sellers also expect to create 'brand loyalty' by convincing the buyers that the seller's product is superior to the products of competitors. Sellers who engage in brand loyalty advertising may well have reasons to know of the buyer's particular purpose and of the buyer's reliance on the seller to provide suitable goods. In a context of intense competition and flamboyant advertising, implied condition of fitness might be implied even though the seller never meets the buyer.

3.04 Implied Condition as to Merchantable Quality

Under the Sale of Goods Act 1893 the implied condition as to merchantable quality assumes a technical connotation. Section 14 (2) of the Act provides: Where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality; provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed.

⁴⁷ Geddling vs. Marsh (Supra) n 268.

Where goods are bought by description from a seller who deals in goods of that description the seller must supply goods that are of merchantable quality. The meaning of the phrase 'deals in goods of that description' seems to be settled by a majority decision in *Ashington Piggeries vs. Christopher Hill*⁴⁸ as goods of that kind, that is, the seller deals in the kind of goods sold. They are not restricted to the contract description of the goods. In such a case, there is an implied condition that the goods supplied under the contract are of merchantable quality. However, this implied condition does not extend to matter making the quality of goods unmerchantable where examination of the goods is made by the buyer before the contract is made which the examination ought to reveal. This exception applies where the defect should have been revealed by the examination.

Numerous judicial definitions point to the controversial nature of the phrase merchantable quality. The difficulty stems from the fact that the phrase is a complex concept, which can only be determined on the merit of each particular case. As a result of the difficulty in forging a single definition of merchantable quality, the phrase has been replaced under the Sale of Goods Act 1979, (UK) with 'satisfactory quality'. Section 14 (2) of the Act as amended by the Sale and Supply of Goods Act, 1994 (UK), is an implied term that the goods supplied under the contract are of satisfactory quality. The UK Act provides an objective test to determine 'satisfactory', taking into account any description of the goods, the price (if relevant) and other relevant factors. By section 14 (2)(b), the quality of goods includes their state and condition and the following (among other things) are in appropriate cases, aspects of the quality of goods:

(a) Fitness for all the purposes for which the goods of the kind in question are commonly supplied, (b) appearance and finish, (c) freedom from minor defects, (d) safety, and (e) durability.

The courts have identified certain factors that may raise or lower the expectation of satisfaction. Second hand goods will attract a lower expectation. On the other hand goods of a reputable brand may attract a higher expectation. These factors are well illustrated in *Rogers vs. Parish (Scarborough) Ltd.*⁴⁹ Mr. Roger bought a Range Rover for £16,000 under a conditional sale agreement.

⁴⁸ Supra.

⁴⁹ (1987) Q.B. 933.

It was sold as new but it had defects in its engine, gearbox and bodywork and the oil seals were unsound at vital junctions. In the six months following, Mr. Roger drove the car some 5,500 miles while unsuccessful efforts were made to rectify the defects. At the end of the period he rejected the car and claimed the return of his payments and damages on the basis that the car was unmerchantable. The judge at first instance held that since the car was roadworthy, the defects did not make it unmerchantable. The Court of Appeal rejected the ruling and held that to indemnify the relevant expectation one must look at the relevant factors listed in the subsection. First, the description applied to the goods. In the present case the vehicle was sold as new. Deficiencies which might be acceptable in a second – hand vehicle were not to be expected in one purchased as new. Next, the description ‘Range Rover’ would conjure up a particular set of expectations, not the same as the one relating to an ordinary saloon car, as to the balance between performance, handling comfort and resilience. The factor of price was also significant. At more than £16,000 this vehicle was, if not at the top end of the scale, well above the level of the ordinary family saloon. The buyer was entitled to value for his money. Even if the car is in the middle or lower end of the market it will still be unmerchantable if the defects have a knock-on effect so that the car can never be restored to its previous condition, or the defects (e.g. oil leak) render it dangerous to drive the car. Though the provision is more comprehensive, it is doubtful whether the definition has taken care of all issues of quality that may arise in a given case. The implication is that the term is so elastic that it cannot be encompassed in single definition. These observations notwithstanding, ‘satisfactory quality’ is more appropriate to a consumer transaction than ‘merchantable quality’.

3.05 Implied Warranties

In the absence of any contrary agreement, the following warranties will be implied namely; that the buyer shall have and enjoy quiet possession to the goods.⁵⁰ If therefore the buyer’s possession or enjoyment of the goods is disturbed or interfered with by a third party with a superior title, the seller will be liable to the buyer for breach of the implied warranty. In *Akoshile vs. Ogidan*,⁵¹ the Plaintiff bought a saloon car from the Defendant and took possession. The Defendant had bought the car from a European who was subsequently indicted for stealing the car.

⁵⁰ Section 12 (2) of Sale of Goods Act 1893.

⁵¹ (1950) 19 NLR 87.

The police thereafter recovered the car from the Plaintiff who now sued the Defendant. The Court held that the Defendant was in breach of section 12(1) of the Act and therefore the Plaintiff was entitled to recover the purchase price from him.

Again it is an implied warranty that the goods are free from any charge or encumbrance in favour of any third party not declared or made known to the buyer before or at the time the contract is made.⁵²

3.06 Exclusion of Implied Terms

Under the 1893 Act the parties have complete freedom to exclude implied terms in the Act. Section 55 provides:

When any right, duty, or liability would arise under a contract of sale by implication of law, it may be negated or varied by express agreement or by the course of dealing between the parties, or by usage, if the usage be such as to bind both parties to the contract.

The above was the position but has been radically altered in the UK. Section 55 (1) of the Sale of Goods, UK states that:

When any right, duty, or liability would arise under a contract of sale of goods by implication of law, it may (subject to the Unfair Contract Terms Act 1977) be negated or varied by express agreement or by the course of dealing between the parties, or by usage as to bind both parties to the contract.

There are three basic rules contained in section 6 of the Unfair Contract Terms Act 1977:

- i. The conditions and warranties in section 12 (right to sell) can never be excluded.
- ii. Where the buyer deals as consumer the conditions under sections 13, 14 and 15 can never be excluded.

⁵² Section 12 (3) of Sale of Goods Act 1893.

iii. Where the buyer does not deal as consumer, a clause excluding or restricting the obligations referred to in (i) above will only be valid if it satisfies the test of reasonableness.

This paper finds that whilst it may be said that the provisions of the Sale of Goods Act apply indiscriminately to consumer transactions in Nigeria, statutory reforms in the UK protect the consumer within the Sale of Goods Act. Although many of the cases dealing with implied conditions arise from commercial situation the provision can be important in consumer transactions. The limitation imposed by the Act in the UK prohibiting a seller from excluding or limiting his liability in relation to the implied conditions, clearly supports the position that those implied conditions are applicable to consumer contract of sale as they apply to commercial transactions. The position of the law in Nigeria is that if a manufacturer or supplier of goods applies to his goods a false or misleading description, the buyer or user of the good has a remedy for breach of implied conditions under section 13 of the Sale of Goods Act 1893 or if the goods fail to comply with its description, or under section 14 if their quality is defective or not fit for its normal purpose. The shortcoming of the law in this respect lies in the fact that these implied conditions may not apply in most cases. This is because the Act permits a large measure of freedom of contract. Thus, the parties are still at liberty to exclude their liability. In practice, most manufacturers and suppliers readily exclude their liability with the use of standard form. Such exclusion clauses are subject to the usual rules of constructions, but if on the other hand, in the UK, the Act prohibits exclusion or restriction of manufacturer's or supplier's liability. In this sense, liability under the Sales of Goods of UK is strict. This means that the seller is liable for an occurrence, which could not have been avoided, however much care had been taken by all parties in the chain of supply. Such a provision in our law is highly desirable. An amendment to the Act should prohibit the exclusion or restriction of liability under sections 13 and 14 of the Sale of Goods Act, 1893, in the case of consumer sales.

The wide meaning given the word 'description' has brought the consumer within the purview of the Sale of Goods Act. The statutory provision in the UK allows goods being exposed for sale to be regarded as goods sold by description. This imposes liability on a seller in a self-service shop or supermarket where any of the implied conditions is breached. The provision supports the idea that goods can speak for themselves. The truth is that many consumers today patronize supermarkets to meet their domestic needs.

The provision therefore recognizes the reality of retail trading. This provision is recommended for the Sale of Goods Act and Sale of Goods Law of every state in Nigeria.

This right allowed the consumer to reject goods for minor deviation is commendable since a microscopic deviation may cause the consumer some health hazards. Section 15(a) of the 1979 Sale of Goods Act breaks a new ground by drawing a distinction between consumer and non-consumer. The requirement is that the buyer must deal as a consumer. So if a private individual buys a car from a finance house, he deals as a consumer. The development is aimed at every day consumer situation. The implied term of merchantability should be renamed simply as an implied term as to quality. It should be defined in terms of the goods being of such quality and in such state or condition as it is reasonable to expect having regard to any description applied to them, the price (if relevant) and all other relevant circumstance.

Furthermore, the proviso to section 14 of the Sale of Goods Act 1893 which excludes the implied term as to fitness in the case of contract for the sale of a specified article under its patent or other trade name should be deleted.

4. Prioritizing The Interest of the Consumer: Comparative Analysis

A consumer right is the hallmark of consumer protection law. There is an inequality of bargaining power between the consumer and the producer which leads to the exploitation of the consumer.⁵³ Consumer protection covers the rights and privileges of consumers and how these rights should be accorded to them. It also deals with several issues relating to the welfare of the consumer and is also concerned with raising the standard of living in terms of improving the political and social well-being of consumers. The major aim of consumer protection laws is to empower the consumer so as to enable him to enjoy these rights. The rights of consumers are becoming increasingly important around the world. Governments have passed numerous laws to assure that end user of products and services have the same rights as manufacturers and providers of services. However, the inclusion of consumer rights in the Constitution of a country will enhance effective consumer protection.

4.01 Who is a Consumer?

⁵³B.W. Harvey & D.L Parry; *The Law of Consumer Protection and Fair Trading*, (1996), London: Butterworth's, at pp.13-14.

There is no universally acceptable definition of a consumer as authorities are divided with respect to the meaning of the term 'consumer'.

The Black's Law Dictionary defines 'consumer' as a person who buys goods or services for personal, family, or household use, with no intention of resale; a natural person who uses products for personal rather than business purposes.⁵⁴ O'Grady defines 'consumer' as the final or end user of all goods and services produced in an economy.⁵⁵ Tarr defines 'consumer' as any person, natural or legal, to whom goods, services or credit are supplied or sought to be supplied by another in the course of a business carried on by him.⁵⁶ Schiffman and Kanut, learned authors in their definition of consumer have made a distinction between the personal consumer and the organizational consumer.⁵⁷ The personal consumer is the individual who buys goods and services for his own use or for the use of his household and in this respect, the goods or services bought must be consumed as end or estimate user. An organizational consumer on the other hand, refers to private organizations, who must buy products or services to be able to pursue the objectives of such organizations.

The foregoing however represents the definitions of the word 'consumer' as proffered by some law text writers. The word 'consumer' has also been defined by way of statutes. The Fair Trading Act 1973 (UK) defines a consumer as:

1. A person to whom goods are supplied or are sought to be supplied (whether by way of sale or otherwise) in the course of business carried on by the person supplying or seeking to supply them, or
2. A person to whom services are sought to be supplied in the course of a business carried on by the person supplying them and who does not receive or seek to receive the services in the course of a business carried on by him.⁵⁸

The Nigerian Consumer Protection Council Act defines a consumer as an individual, who purchases, uses, maintains or disposes of products or services.⁵⁹

⁵⁴ B.A Garner; *Black's Law Dictionary*, 8th Edition (St Paul Minnesota: West Publishing Co.

⁵⁵ 'Consumer Remedies' 1982, 60 Canadian Bar Review (No.4)p.549.

⁵⁶ Tarr; 'Consumer Protection and the Market Place', 5 *Otago Law Review*, p.397.

⁵⁷ L.G Schiffman, L.L.Kanut, *Consumer Behaviour*, Eaglewood Cliffs, Prentice-Hall Inc,1978 pp.4-8.

⁵⁸ S. 137(2) Fair Trading Act 1973 (UK).

⁵⁹ Section 32 of the Consumer Protection Council Act Cap C25, LFN 2004.

This definition removes the restrictions imposed by the English legislation by broadening the definition of the consumer to include producers/suppliers who are organizational consumers.

The definition has however, been criticized as an aberration to the extent, that such words as 'maintains and disposes' as used in it clearly purports that even after the purchase and usage of a product or a service, a person can still be described as a consumer.⁶⁰

The reference to individuals in the definition of a consumer is also noteworthy. It suggests that only natural persons can be consumers under the Consumer Protection Council Act. It is suggested that individuals should be interpreted to include partnerships and other unincorporated associations that may also engage in commercial transactions in the appropriate circumstances.⁶¹

The South African Consumer Protection Bill defines a consumer to mean:

- a. A person to whom goods or services are advertised, offered, supplied, performed or delivered in the ordinary course of business.
- b. A user of such goods or a recipient or beneficiary of such services; or
- c. The person who has entered into an agreement or transaction with a supplier but does not include a person in the supply chain for those goods or services who, in the ordinary course of business, markets those goods or services in the production of other goods or services, or in the marketing of any goods or services.⁶²

The above definition is also restrictive in that it sought to exclude persons who possess goods and services for business purposes. A good definition of consumer should therefore include in its coverage a person acting for business purposes. The English authorities have gone ahead to ascribe to consumer transactions three elements.

⁶⁰ See s. 189 (1) of the Consumer Credit Act 1974 (U.K) where individual was defined as including partnership and other unincorporated body of person not consisting entirely of bodies corporate

⁶¹S. 189(1) of the Consumer Credit Act 1974 (U.K) where individual was defined as including partnership and other unincorporated body of persons not consisting entirely of bodies corporate.

⁶²Section 1 South Africa Consumer Protection Bill 2007 2nd Draft 8th Sept 2006.

First; the consumer must be an individual who does not act in a business capacity. Second; the supplier of goods and services must act in a business capacity. Third, the goods or services must be intended for private and not business use.⁶³

This approach to the definition of consumer has however been criticized on two grounds,⁶⁴ namely; it is limited in application in providing for a consumer who contracts in the course of business with the effect that the consumer in the contemplation of the principle laid down in the case of *Donoghue vs. Stevenson*⁶⁵ is excluded. The requirement of contractual relationship presupposes that sanctity and privity of contract which limits protection for the consumers will become applicable. The implication is that only a contractual consumer can qualify as a consumer for purposes of protection. The approach would no doubt adversely affect possible claims of many end users that may not be in direct contractual relationship with the producers or suppliers of goods and services. In view of the foregoing, the term consumer is not confined to purchasers. Rather, it includes contractual consumers; ultimate users as well as any person who come into contact with a product or service in any way whatsoever.

4.02 The Concept of Rights

Right has been defined as something that is due to a person by a just claim, legal guarantee, or moral principle.⁶⁶ It also means a power, privilege, or immunity secured to a person by law, a legally enforceable claim that another will do or will not do a given act, a recognized and protected interest, the violation of which is a wrong.⁶⁷ Right has been construed in the judicial sense to mean a correlative to duty. This is because where there is no duty, there can be no right.⁶⁸ But there may be duties without rights. In order for a duty to create a right, it must be a duty to act or forbear.

For example it may consist of our duty to love our neighbour, but he has no right to our love.

⁶³ D.W Oughton; *Consumer Law: Text Cases and Materials*, 1991, Blackstone Press Ltd: London at p. 11.

⁶⁴ D.W. Oughton; *Ibid.*, F.N Monye at p.17.

⁶⁵ 1932 A.C 532.

⁶⁶ B.A Garner; *Black's Law Dictionary* 8th edition, 2004, St Paul Minnesota: West Publishing Co. Ltd, p7347.

⁶⁷ *Ibid* at p.7347.

⁶⁸ *Ibid*.

The subject of human right is as old as man and indeed its origin, scope and deeper meaning cannot be explained in isolation from the history of man. Human rights are natural rights and are rights conferred on men and women because they are human beings created by God in his own image.⁶⁹

They are inherent entitlements and arise from the very nature of man as a social animal and are recognized and protected in a civilized legal order.⁷⁰

4.03 The Meaning of Constitutional Rights

The word 'constitution' has been defined as the fundamental and organic law of a nation or state that establishes the institutions and apparatus of government, defines the scope of governmental sovereign powers and guarantees individual civil rights and civil liberties.⁷¹ Constitutional rights therefore, are those rights guaranteed by the Constitution. The constitutional guarantees of rights are supreme and cannot be overruled by the executive or the legislature unless the Constitution is amended, which again is not an easy task. They are rights antecedent to the political society itself.

Constitutional rights are a primary condition to a civilized existence. They are immutable to the extent of the non-immutability of the Constitution itself. These rights are premised on the existence of individual freedom for one's maximum development and welfare. They are enshrined in the Constitution for the protection of the Individual from arbitrary and oppressive exercise of government powers-be they legislative, executive or judicial. They cannot be infringed or repealed by simple legislation.⁷²

This places them on a pedestal over and above the ordinary laws of the land.⁷³ In fact, the Nigerian Constitution terms such rights as fundamental and their enforcement is within the exclusive jurisdiction of the High Courts.

⁶⁹Eze, O; *Human Rights in Africa: Selected Problems*, 1984, Lagos, Macmillian, p. 5; Gasiokwu, M.O.U; *Human Rights History, Ideology & Law*, 2003, Jos, Feb Educational Books. p. 2.

⁷⁰ O. Okpara; *Human Rights Law & Practice in Nigeria*, 2005, Enugu Chengle Limited, p. 1.

⁷¹ B.A Garner ; *Black's Law Dictionary*, 8th edition, 2004, St Paul Minnesota:West Publishing Co. Ltd, p 330.

⁷² *op. cit* at p330.

⁷³ *Ransome Kuti & Ors vs. A.G .Fed & Ors* (1985) 2 NWLR pt.6, p.211 at 246.

The courts in interpreting their provisions do adopt the liberal and broad approach that would uphold and ensure rather than defeat their evident purpose.⁷⁴

4.04 The Rights of Consumers vis-à-vis the Constitution

Consumers all over the world are accorded various rights. John F. Kennedy⁷⁵ in 1962 proposed four ideals for consumer protection law which he called rights: the rights to safe products, the right to demand information about a product or service, the right to a competitive marketplace and the right to get redress against a manufacturer or a distributor.

Consumer rights emerged after the second generation rights as a reaction to a post modern global world engulfed by scientific evolution. The *Consumer International* proposed eight consumer rights.⁷⁶ These include the right to safe products, the right to demand and receive information, the right to be heard the right to choose, the right to consumer education, the right to redress, the right to the satisfaction of basic needs and the right to a healthy environment. It is pertinent at this juncture to examine these rights more closely.

a. The Right to Safety

A consumer has the right to demand safe goods. He is entitled to protection from hazardous, unsafe and substandard goods.⁷⁷ This right entails that a manufacturer must ensure that their products are safe for use by the ultimate consumer. A manufacturer of goods therefore, owes a duty of care to ensure that the goods are safe and are free from harmful defects.⁷⁸ The consumers' right to safety is recognized when damages are awarded to a consumer who suffered harm as a result of the manufacturer's negligent act. A healthy nation, they say, is a wealthy nation. There is need to ensure that all products are safe for consumption.

⁷⁴ *Ohuka vs. The State* [1988]1NWLR 539 at pp.566-560, *Garba vs. Unimaid* (1986) 1NWLR 550 at 583 per Obaseki JSC.

⁷⁵ Famous American President 1917 -1963.

⁷⁶ Available at <<http://www.consumersinternational.org>> accessed on 13 August, 2014.

⁷⁷ Available at <<http://www.businessdictionary.com/definition/consumer-rights.htm>> accessed 13 August 2014.

⁷⁸ *Donoghue vs. Stevenson* op. cit at p. 562.

The relevant authorities should continue to insist that expiry dates of all consumer goods be put on the label and should reflect safety status. Most developed countries have adopted laws to reflect this view requiring ingredients labeling so as to eliminate any advertisement or wrong information that creates a wrong impression about the quality or safety of a product in order to protect this fundamental right of the consumer.

Consumers have the right of protection against industrial activities, goods and services, which may damage or destroy their property, injure or even kill them. However, consumers' ability to exercise the right to safety depends wholly on a full prior disclosure being made by operators of chemical, pesticides and allied industries, manufacturers of goods, products and services provider concerning the degree of safety of their industrial activities or reliability of goods, products or services.

Precautions that should be taken to avoid accidents, or to mitigate damage or injuries in the case of accidents, and who is to be held liable in the event of consumers having grievances concerning such activities, goods, products or services must be exhaustively communicated to the consumer.

b. The Right to be Informed

Every consumer has the right to complete information on the pricing, quality and ingredients of goods, products, and services, as well as the identity of manufacturers or producers. Consumers have the right to disclosure of information about the production, storage, transportation, use or release of hazardous substances that could potentially endanger human health or life.

c. The Right to Be Heard

Consumers have the right to be heard on issues, policies, plans, programmes and decisions that concern them. The scope of this right entitles consumers to redress of grievances concerning substandard, unsafe, unduly expensive goods and services, unfair claims which are not substantiated by tests and other unfair practices against them.

d. The Right to Choose

Consumers have the right to choose from a variety of quality goods and services available at competitive prices. Where a monopoly is the supplier or provider, consumers have the right to quality goods and services at reasonable prices. However, this right can be exercised only once consumers are able to clinch their freedom to receive or impact information or ideas on goods and services available in the market.

e. The Right to Consumer Education

The term *consumer education* refers to the process of exposing people to the knowledge about their rights and duties as well as skills needed by individuals, groups and institutions to be able to prioritize their needs minimize waste, maximize opportunities for purchasing and utilizing goods and services.⁷⁹ Consumer education is also about enabling citizens adapt to personal environmental, economic, social and technological changes and be able to take rational decisions and act efficiently in the marketplace.⁸⁰

A consumer has the right to make himself aware of consumer 'evils' in society.⁸¹ The greatest asset any consumer can have is education. This is because an educated consumer is a sure bulwark against the phenomena of consumer evils. There is the need for the consuming public to be properly educated on the menace and health hazards arising from the consumption or use of products with false claims. Consumers should be educated on the existing regulatory and protection agencies in the country.

Education engenders awareness and enlightenment. Every consumer has the right to be aware of basic consumer rights and responsibilities in order to be able to make an informed decision concerning choice of goods, services, and pricing thereof. The right entails submission to mandatory comparative testing ranking and evaluation of all consumer goods and products such as food and pharmaceuticals with the aim of publication of such findings for consumer education.

⁷⁹ E. Ekhide *op. cit* 78-80.

⁸⁰ P.E Okwuraiwe; 'Perspective on Consumer as Missing link in the Court of Consumer Protection'. Available at <<http://www.nigerianobsewvernews.com/4220220///features6-html>> accessed 14 August 2014.

⁸¹ I.M Chukwu ; 'Advertising Practice and Consumer Protection', *Consumer Journal* (2007) vol. 3 p. 36.

This may empower consumers into taking action against unsafe products and claims which are not substantiated by laboratory tests.

f. The Right to Clean and Sustainable Environment

The consumer has a right to live and work in an environment that does not threaten their health and life and which does not pose a danger to present and future generations.

Consumers and communities who live around industrial units and workers in such industries are entitled to information on such industries' toxic release inventors.

Furthermore, governments by way of legislation should ensure that industries take productive initiative to discharge their obligations to society, to share information on the products and processes and on potential threats to safety arising out of them.

g. The Right to the Satisfaction of Basic Needs

By this right, a consumer is entitled to enjoy the goods or services rendered to him or her. This implies that with respect to products, the goods must be fit for the purpose they were bought. Also, the product in issue should as much as possible correspond with the description given to a consumer or any description he is relying on. The scope of this right is reproduced under the Sale of Goods Act.⁸² Accordingly, a breach of any implied condition in a contract of sale entitles the consumer to repudiate the contract of sale, reject the goods supplied him, refuse to pay for them if he had not paid or recover his money if he has already paid for them.

However, a consumer may nevertheless consider a breach of any condition in a contract of sale as a breach of warranty. Accordingly, he has only the remedy of damages and cannot repudiate. However the Sale of Goods Act is restricted to contracts of sale and product liability as against liability for services.⁸³

In Nigeria, there is no gainsaying the fact that many manufacturers and advertisers have deceived consumers through unfair advertising; unfulfilled promises in sales promotion and exaggeration of product benefits.

⁸² The Sale of Goods Act 1893 Cap 164 of 1958.

⁸³ Ibid.

There is a strong link between consumer protection and human rights. Consumer protection law emerged in the 1970s in response to problems engendered by mass production and market failure. Human rights law recognizes that everyone is entitled to a social and international order in which his rights and freedoms can be fully realized. Enjoyment of human rights depends on production and distribution of scarce goods and services whose availability, quality and accessibility can be increased through international trade.

4.05 The Provisions of International Legal Instruments on the Rights of the Consumer

Consumer protection has been given more importance as a fundamental social value to compensate for loss of control over growing market integration. As trade has become increasingly international, the problem of hazardous goods and defective products is no longer merely a national concern and consumer protection rules have to be regulated at the international level.⁸⁴

The Universal Declaration of Human Rights provides that everyone has the right to a standard of living adequate for the health and well being of himself and his family, including food, clothing, housing, medical care and necessary social services. The UN Declaration of Human Rights affirms that development is fundamental human rights. Therefore, denial of any aspect of development through voluntary or involuntary actions by any economic agent is a violation of the Universal Declaration of Human Rights.⁸⁵

Also, the U.N. resolutions on the 'right to development' define development in terms of fulfillment of basic needs and human rights.⁸⁶ In 1966, the United Nations General Assembly adopted the International Convention on Economic Social and Cultural Rights (ICESCR) which is compulsory at the international level and has been in force since 1976. At the regional level, the Council of Europe has established two treaties; the Europe Convention on Human Rights (ECHR) in 1950 and the Europe Social Charter (ESC) in 1961, which can be seen as the social counterpart of the ECHR.

⁸⁴ S. Weather, *European Union Consumer Law Policy*, Chetttenham, UK and Northampton 2005, p.16.

⁸⁵ Peters Mann, 'Justice, Human Rights & Markets; *Los Angeles Law Review* Vol. 37,407 at p. 432.

⁸⁶ UDHR Art 28.

Some of the economic and social rights in the ICESCR address consumer protection issues. The right to an adequate standard of living in Article 11 (1) includes food, clothing housing and a continuous improvement in living conditions. Adequate food and housing also means safety, information and possible fair prices, which are achieved through consumer protection legislation. The right to physical and mental health in Article 12 ICESCR includes improvements in environmental and industrial hygiene and the prevention of diseases. The protection of individuals' safety from dangerous products is also an aim of consumer law.

On the 9th of April, the United Nation Guidelines for Consumer Protection were adopted at the 106th plenary meeting, 39th session.⁸⁷ The guidelines are of no legal effect but merely provide what could be called an internationally recognized set of basic objectives.⁸⁸ In the preamble, the guidelines provide that consumers should have the right of access to adequate information to enable them to make informed choices and availability of effective consumer redress. The UN Guidelines were expanded in 1999 to include a section on sustainable consumption as a new principle of consumer policy.⁸⁹

According to the general principle of sustainability, the Guidelines attempt to internationalize and internationally harmonize the level of consumer protection while recognizing the danger of misusing consumer protection policies as a justification to erect barriers to international trade and trade obligations.⁹⁰ The guidelines recommend numerous instruments to strengthen or install sustainable consumption in the Member States. The inclusion of the sustainable clause shows that there is more focus on the empowerment of the consumer such as the promotion of a clean and (sustainable) healthy environment.⁹¹ The Guidelines were aimed at giving a structure of basic objectives for the purpose of improvement upon the consumer legislation especially in developing countries.

⁸⁷ A/RES/39/248, April 1985, UN General Assembly, 'Consumer Protection'.

⁸⁸ Art. 13 UN-Charter.

⁸⁹ UN Decision 54/449, United Nations Guidelines for Consumer Protection, (87th Plenary Meeting 22 December 1999 General Assembly).

⁹⁰ United Nations Guidelines for Consumer Protection (as expanded in 1999), para. 2 and 10, Section H.

⁹¹ United Nations, Economic and Social Council 'Background Paper for the United Inter-Regional Expert Group Meeting on Consumer Protection and Sustainable Consumption. New Guidelines for the Global Consumer' January 28, 1998.

The UN recognized that consumer protection could no longer be construed strictly in domestic terms.⁹² Consumer rights are sufficiently important and have been unanimously accepted by UN member states as basic principles and guidelines which show the need for a stable high level protection. Art.38 provides that Union policies shall ensure a high level of consumer protection. The inclusion of consumer protection in the Charter and the Draft Constitution shows the commitment of the European Union to human values and not only economic market integration.⁹³

The international unanimous consensus on the Guidelines for consumer protection can be seen as general acceptance of universal rights and constitutes additional support for accepting consumer rights as human rights.⁹⁴ Human rights, and the reciprocal obligations of governments, do not end at national borders. The U.N human rights law recognizes that everyone is entitled to a social and international order in which the rights and freedoms can be fully realized. Enjoyment of human rights depends on production and distribution of scarce goods and services whose availability, quality and accessibility can be increased through international trade. In many cases, there exists no tradition in consumer policy with the exception of the general principle to preserve public health. The changing economic, social and political circumstances prompted the United Nations General Assembly to proclaim development as a human right. In line with this trend, consumer protection has been established as a constitutional right in some jurisdictions. We propose to examine the position those of jurisdictions.

4.06 Constitutional Provisions for the Protection of Consumer Rights in Some Selected Jurisdictions

Consumer protection has not yet become part of the Constitutions of many jurisdictions. In most countries' Constitutions, provisions are made which one way or the other relate to consumer right but nevertheless no specific mention of it is made.

⁹² 'Consumer International', available at <<http://www.consumerinternational.org/9>> accessed 14 August 2014.

⁹³G. De Burca; 'Beyond the Character: How Enlargement has Enlarged the Human Rights Policy for the European Union', *Fordhan International Law Journal*, 2004. 676-714.

⁹⁴A.Eide; A.Rosas, *Economic Social and Cultural Rights: Universal Challenge*, 2nd revised edition, the Hague: Kluwer, 2001, p.77.

Some of these Constitutions include the Constitutions of the Federal Republic of Nigeria 1999, The Constitution of the Republic of South Africa, 1996 and the Constitution of India.

(i) The Constitutions of the Federal Republic of Nigeria (CFRN) 1999

The socio-economic rights of citizens are provided under Chapter two of the Constitution. Chapter Four provides for "fundamental rights". The Chapter did not in any way use the word consumer but their provisions are such as will one way or the other affect the life and rights of the citizens, the bulk of whom are consumers. A close examination of the consumer's rights and the fundamental rights under chapter IV of the Constitution reveals some semblance between the two genres of rights.

The consumer's right to safety and health is closely related to right to life. Right to safety and health can be inferred from the Constitution as everyone is entitled to orders refraining institutions and companies including the State from doing anything that would violate or harm a citizen's health. It is pertinent to point out that the scope of the right to life under section 33 is limited and does not envisage the fact that one can lose his right to life by consuming adulterated drug or food products.

Therefore, the right to health is not within the contemplation of section 33. It is pertinent considering the influx of fake/adulterated products in our markets that this section of the Constitution be amended to encapsulate consumer's right to health and safety under the right to life or under a separate section. Also, the Constitution has provided that the state shall direct its policy towards ensuring that the health, safety and welfare of all persons in employment are safeguarded and not endangered or abused. There are adequate medical and health facilities for all persons.

The above constitutional provision is to the effect that the government of Nigeria is under an obligation to direct its policy towards ensuring the health, safety and welfare of all persons. The right to life is inextricably linked to the right to health, and the right to safe and healthy environment.

Section 39 (1) of the CFRN 1999 provides that 'every person shall be entitled to freedom of expression, including freedom to hold opinions and to receive and impart ideas and information without interferences'. Consumers' good health and safety are often threatened due to lack of information concerning the quality, safety and reliability of products, goods and services that they buy.

Two consumer rights are sub merged under this section, to wit, consumers' right to information and consumers' right to choice. It is regrettable that the term 'consumer' was not used in relation to this section. The Freedom of Information Act 2011 has taken cognizance of the precarious position of the Nigerian consumer and the central role of information in the exercise of these rights.

Section 36 (1) of CFR 1999 provides that in the determination of his civil rights and obligation, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartially.

Unfortunately, this section does not seem to make any mention of consumer redress. It is to be noted that a consumer may seek redress in other ways other than the court or tribunal.

Consumer Education may be said to be implicit in the right to basic education under section 18 of Chapter 2 of the CFRN 1999. It is however, regrettable that the draftsman did not include consumer literacy under Section 18. Section 18 provides that the Government shall direct its policy towards ensuring that there are equal and adequate education opportunities. It is to be noted that consumer protection is a joint responsibility of both the government and its citizens. Consumer literacy demands that the consumer be made aware of their basic rights and responsibilities in order to be able to make an informed decision concerning choice of goods, services and pricing thereof. Consumer literacy is also central and at the root of consumer protection. It is my humble view that it is a grave legislative oversight on the part of the draftsman not to have included it under section 18.

The inclusion of consumer rights in the Nigerian Constitution will no doubt enhance effective consumer protection. It is hoped that an amendment of the CFRN 1999 should include consumer protection rights under Chapter IV. The amendment will automatically uphold consumer rights as fundamental rights on the same pedestal as other fundamental rights. This is because consumers in Nigeria like in other developing countries are living under the high risk of hazardous, fake and adulterated products.

(ii) The Constitution of the Republic of South Africa, 1996

Section two of this Constitution merely provides that everyone has a right to life. Section 26 made provisions in relation to access to healthcare services, food, water and social security. Like the Nigerian Constitution. No specific mention was made in relation to the consumer. It is highly recommended that this be made in view of the endangering character of fake and substandard products which do confront the consumers. Section 16 (i) (b) of Act 108 of 1996, provides that 'Everyone has the right to freedom of expression which includes freedom to receive or impart information or ideas'. This provision is linked with the right of a consumer to be informed. The right to be heard is also implicit in the constitutional right to freedom of expression.

The right to choose is also protected under Section 16 (1) (b) of Act 108 of 1996 which has been referred to above. This is because a consumer can only make a good choice where he has access to adequate information and is at liberty to receive or express his opinion with respect to any consumer good. The right to redress is consistent with section 27 of Act 108 of 1996 which states that 'Everyone has the right to have access to healthcare services, sufficient food and water, including, if they are unable to support themselves and their dependants, appropriate social assistance'.

On the other hand, the consumer right to a healthy environment is consistent with section 24 of Act 108 of 1999 which confers on everyone the right to live and work in an environment that does not threaten their health and life, and which does not pose a danger to present and future generations. Again, the right to consumer education may be said to be implicit in the right to basic education provided under section 29 of Act 108 of 1996 which states that everyone has the right:

- a. To a basic education, including adult basic education; and
- b. To further education, which the state, through reasonable measures, must make progressively available and accessible. It is hoped that at the nearest opportunity, the South African Constitution be amended to incorporate the aforesaid rights of the consumer.

(iii) The Constitution of India Republic, 1949

The Constitution of India in Articles 38,39,42,43,46 and 47 provides that the State shall strive to secure a social order for the promotion of welfare of the people, it shall direct its policies in such a way that operation of economic system does not result in the concentration of wealth and means of production to the common detriment, it shall make provision for securing just and humane conditions of work and for maternity relief, it should endeavour to build an economic organization or to make suitable legislation to ensure a decent standard of life to all the workers who constitute the bulk of the consumers, it should promote educational and economic interests of schedule castes, scheduled tribes and other weaker sections and it shall also raise the level of nutrition and standard of living and to improve public health.

Article 46 of the India Constitution provides that the State shall endeavour to protect the economic interest of the weaker section of its population and also protect them from social injustice and all forms of exploitation which means all kinds of harassments and frauds in the marketplace.

The effect of non inclusion of consumer rights in the Constitutions of these countries is that breach of consumer right may not be considered as a constitutional breach. The correlative duties on the part of the producers, manufacturers of consumer products and services may also not form a basis for a constitutional action. It is hereby submitted that the non inclusion is not consistent with effective consumer protection.

4.07 Constitutional Consumer Law Models of Some Selected Countries

Some of the countries with specific consumer protection provisions in their Constitution include the Spanish Constitution of 1978, the Portuguese Constitution of 1982, the Polish Constitution and the Lithuanian Constitution.

i. The Spanish Constitution of 1978

Article 51 of the 1978 Spanish Constitution is an illustration of an acknowledgement of basic consumer rights. Chapter 3 of the Spanish Constitution made specific provisions concerning principles governing economic and social policy.

Art. 51(1) of the Spanish Constitution 1978 provides that “the public authorities shall guarantee the protection of consumers and users and shall by means of effective measures, safeguard their safety, health, and legitimate economic interests.

Article 51 (2) continues: “the public authorities shall promote the information and education of consumers and users, foster their organizations and hear them on those matters affecting their members” This provision relates to basic constitutional rights, such as education, information and health and recognizes the role of consumer organizations. The article no doubt protects the consumers’ right to safety, information; redress, literacy and the consumer’s right to be heard. Based upon the Constitution, a Law for the defence of consumers and users was published on 24th July, 1984.

ii. The Portuguese Constitution of 1982

Article 60 of 1982 Constitution declares consumer rights to be basic rights. Article 60 outlines constitutional rights to health, safety, protection of economic interest, fair advertising and the right of consumer associations to be heard. These constitutional provisions were the basis of the Consumer Protection Law of Portugal in 1981.

iii. The Constitution of the Republic of Poland, 1997

Article 76 provides thus: ‘Public authorities shall protect consumers, customers, hirers or lessees against activities threatening their health, privacy and safety, as well as against dishonest market practices. The scope of such protection shall be specified by Statute.’

This provision in the Polish Constitution integrates consumer protection. Consequent upon this, the State has to protect consumer interests and the constitutional court has the jurisdiction to test the compliance of laws with the principles of consumer protection. These constitutional provisions aimed at rendering consumer policy less vulnerable to short term economic considerations and unfair market practices.

iv. The Lithuanian Constitutions of 1992

Article 46 of this Constitution provides: 'Lithuanian economy shall be based on the right to private ownership and freedom of individual economic activity and initiative. The State shall support economic efforts and initiatives which are useful to the community. The State shall regulate economic activity so that it serves the general welfare of the people. The law shall prohibit monopoly of production and the market, and shall protect freedom of fair competition. The State shall defend the interests of the consumer'. The inclusion of consumer rights in these constitutions has however increased the protection of consumers.

5. Conclusion and Recommendations

In this paper, it is clear that the seller is required to ensure the basic rights of an individual buyer/consumer in every each sale of goods will not be infringed and violated by the seller which also includes business transaction. The contractual principle of *consensus ad idem* must be the connecting thread between the seller and the buyer in their dealings in ensuring that terms outside the contemplation of the parties are not smuggled into the contract in interpreting the intentions of the contractors. In the event of a seller or a buyer failing to properly streamline their undertakings; the paper reasons that it would be most unjust to impute an intention advantageously to one party at the detriment of the other party under the so-called implied terms of contract.

The paper applauds the position of that the Sale of Goods Act that the contractual parties of sale of goods may exclude implied warranties and conditions by having express agreement or by course of dealing between the contractual parties or by usage which also include business transaction on food and environmental safety, but avers that in a developing economy like Nigeria with high rate of illiteracy and poverty to engage the services of contract advisors, such rights of exclusion may remain an empty rhetoric existing in the dictionary of lawyers. In other words, the seller may exclude himself/herself from the implied warranties and conditions if the seller and the buyer/consumer having express agreement or by course of dealing between the seller and the buyer/consumer or by usage which also include business transaction on food and environmental safety in order to achieve business equilibrium and contractual sustainability.

A contract of sale of goods is very universal to every consumer. Almost, daily dealings involve a contract for sale of goods which also include business transaction. As a buyer, one would need a fundamental knowledge of the law on sale of goods because by having the knowledge, the consumer will increase the awareness on his or her rights.

Furthermore, this paper espoused the terms of a contract of sale of goods to include a condition and a warranty. A condition is a stipulation essential to main purpose of the contract the breach of condition gives the right to the injured party to repudiate the contract. As for warranty, a warranty is stipulation collateral to the main purpose of the contract, breach of warranty gives the right the injured party to claim for damages but not to a right to reject or refuse to accept the goods and treat the contract as repudiated.

In addition, the Act allows the injured party to treat a breach of condition as a breach of warranty, as the result of it, the injured party is entitled to claim for damages but not repudiate the contract. In *Associated Metal Smelters Ltd. vs. Tham Cheow Toh*,⁹⁵ where the Federal Court allowed the buyer (respondent) to treat breach of condition as breach of warranty as the result of it, the buyer entitled to claim for damages within the scope of the Sale of Goods Act.

Protectively, consumer rights have become fundamental in the wake of global technological and scientific developments which have occasioned negative incidence of adulteration and faking of goods. All forms of hazardous and substandard goods are daily dumped on the world's consumer population and this has threatened the right to life of the populace of the countries of the world.

In view of the foregoing, it has become necessary to entrench consumer rights in the Constitution of countries of the world so that manufacturers and providers of hazardous goods and services can face the same music as those who threaten and breach the rights of fellow citizens. Consumer rights as presently constituted are still in the domain of private rights leaving a consumer whose life has been threatened with hazardous goods with only those remedies available in the common law concepts of contract and torts.

⁹⁵ (1972) 1 MLJ 171.

The above scenario is far from the realities of the present times.

Most developed and developing countries such as the United States of America, South Africa and Nigeria have no express provisions for the protection of consumer rights in their Constitutions. However, a few Countries such as Spain, Portugal, Polish and Lithuania have made express provisions in their constitutional documents for the protection and enhancement of consumer rights. This is commendable. It is suggested that consumer rights should be interpreted as fundamental rights in the Constitution of Countries. When this is done, their enforcement will become speedier and more effective. Such a legal regime will serve as a strong deterrent to manufacturers and providers of services from the current practice of imposing all forms of hazardous and substandard goods and services on the hapless consumer.

The World Consumer Rights Day is a creation of the global community, intended to draw attention to inadequacies in service delivery and to demand value for money, while emphasizing that choice is a fundamental human right.

Choice is enhanced where there is effective competition - the necessary condition for efficiency and quality services. Governments have a responsibility to create an enabling environment for healthy competition. In Nigeria, effective competition through deregulation and privatization is the required solution to the nuisance posed by monopolistic entities such as the NNPC (in the petroleum downstream sub-sector) and the Nigerian Railway Corporation.

In the face of these numerous and compelling circumstances, it becomes imperative that government be involved via a regulatory policy to correct the imbalance that exist between the producer and the consumer. This is very necessary especially as the protection of the under privileged in power relations, like consumers and workers, helps to keep free enterprise acceptable to democratic majority. Furthermore, through the instrumentality of regulation, there is protection for honest enterprise against dishonest competitors by providing against fraud and deception, industrial espionage, sabotage or corruption etc.

The truth therefore is that the effectiveness of the free enterprise system itself has to be dependent on government regulatory role in just the same way the consumer needs government regulatory role for his protection.

Accordingly, if the traditional contractual principle of *consensus ad idem* in protecting the intentions of parties in commercial transactions is to be optimized, caution must be the watch word in the application of implied terms of contract to commercial transaction in a developing country as Nigeria.