

Is There a Paradigm Shift from Application of *Caveat Emptor* to *Caveat Venditor* in the Sale of Goods in Ghana? A Comparative Analysis of the Application of the Principle *Caveat Emptor*



Edmund Nelson Amasah¹ , Enoch Kwabena Amoah¹  & Joseph Bondzie Afrifa²

¹ Faculty of Law, Kwame Nkrumah University of Science and Technology, Kumasi, Ghana.

² Ghana School of Law, Makola, Accra, Ghana.

ABSTRACT

This study seeks to analyse, compare and determine the extent to which various legal jurisdictions have prioritized the protection of buyers in sale of goods contracts. A doctrinal legal research approach was adopted in carrying out the study. The study found that at the end of the 19th century, most legal systems are gradually making statutory attempts as well as judicial pronouncements to prioritize the application of the principle of *Caveat venditor* over the principle of *Caveat emptor*. The study, therefore, calls for an amendment of the Sale of Goods Act, 1962 (Act 137) to codify judicial decisions made on these concepts into statutory provisions to meet the requirements of legal validity and the exigencies of time. This would go a long way to boost consumer protection and largely, the socio-economic interests of buyers in Ghana.

Correspondence

Edmund Nelson Amasah

Email: edmundamasah@yahoo.co.uk

Publication History

Received 22nd February, 2022

Accepted 7th April, 2022

Published online 28th April, 2022

Keywords: *Sale of goods contract, lex mercatoria, Caveat emptor, Caveat venditor.*

© 2022 The Author(s). Published and Maintained by Noyam Publishers.

This is an open access article under the CC BY license (<http://creativecommons.org/licenses/by/4.0/>).

INTRODUCTION

Consumer and buyer protection in sale of goods contracts have become a prime focus in recent times. However, this direction in modern trade practice came to meet a time honoured practice of buyer beware principle known as *caveat emptor*. The principle of *Caveat Emptor* was of universal application given the fact that markets at the time were overtly and buyers had ample opportunity to examine and inspect goods they desired to purchase for quality and for whether they were fit for the purpose for which they were bought. Recent developments in sale of goods contracts where goods are packaged, sealed and are in the custody of the producer and or seller, and even sent to a buyer without the buyer having the opportunity to even see the goods at first hand, made it necessary to protect prospective buyers from buying undesirable or unfit goods. The modern approach to enforcing sale of goods contracts therefore recognizes the need to apply yet another principle of sale of goods contract known as *caveat venditor* which seeks to protect buyers in such contracts. Upholding the principle of *Caveat Emptor* only in sale of goods contracts invariably undermined the need to protect buyers from entering into a contract of sale of undesirable and unfit goods among others whilst

© 2022 The Author(s). Published and Maintained by Noyam Publishers.

This is an open access article under the CC BY license (<http://creativecommons.org/licenses/by/4.0/>).

upholding the principle of *caveat venditor* only in sale of goods contracts invariably undermined the right of sellers to enforce a valid sale of goods contracts among others. There however seems to be conflicts in how courts in varying legal systems consider enforcement of rights of buyers in sale of goods contracts when it comes to applying these two principles. From the notable development of *lex mercatoria* within the common law jurisdiction, there seems to be a gradual shift in the position of the law from shielding the seller towards an effective protection of the buyer.

Based on this background this study seeks to analyse, compare and determine the extent to which various legal jurisdictions have prioritized the protection of buyers in sale of goods contracts.

The study would through analysis, and comparisons determine the extent to which various legal jurisdictions have prioritized the protection of buyers to boost consumer protection and largely, socio-economic interests of buyers. The findings of the study would provide a lead on the existence of conflicts in how courts in various legal systems consider the enforcement of the rights of buyers. This is to enable the legislature to appreciate the need to effect amendments to the Sale of Goods Act, 1962 (Act 137). The amendment to be done will crystallize judicial decisions made on the concepts of *Caveat venditor* and *Caveat Emptor* into statutory provisions to meet the requirements of legal validity and the exigencies of time.

METHODOLOGY

Research methods have been defined as the theoretical and philosophical framework for carrying out research in addition to the processes and procedures employed for the study.¹ This study adopted the Doctrinal approach to legal research to arrive at its findings. Doctrinal legal research approach involves among others a careful reading and comparison of appellate opinions with the view to identifying ambiguities, exposing inconsistencies among cases and lines of cases, developing distinctions, reconciling holdings and otherwise exercising the characteristic skills of legal analysis.² This approach to legal research is premised on the idea that law is largely an autonomous discipline hence practitioners do not have to know any other field of learning to contribute to it.³ Therefore the law is regarded as a subject properly entrusted to persons trained in law and in nothing else.⁴ Doctrinal legal research also involves the use of study cases, experience as lawyers, common sense, and shared moral and political values of a society to evaluate the practicality and justice as distinct from the clarity and consistency of existing or proposed legal rules.⁵ The doctrinal ideology of law has however been attacked by various jurists many of which are in favour of a sociological approach to legal research.⁶ Holmes, for instance, argued that ‘law is a tool for achieving social ends so that to understand law requires an understanding of social conditions’.⁷ The ideology put forward by Holmes from deductions that can be made from his argument above is that ‘law is a deliberate instrument of social control so that one has

¹ W.C. Creswell., *Qualitative inquiry and research design; Choosing among five traditions* (Thousand Oaks, California:Sage Publications, 1998), 1; Enoch K. Amoah, “Justification for Implementing Victim-Offender Mediation in the Criminal Justice System of Ghana.” *E-Journal of Humanities, Arts and Social Sciences*, Vol. 1 Issue 5 (2020) : 125. Accessed February 4, 2022. <https://doi.org/10.38159/ehass.2020091>.

² Richard A. Posner, ‘The Present Situation in Legal Scholarship’ (1980) 90 *Yale Law Journal* 1113; Amoah, “Justification for Implementing Victim-Offender Mediation in the Criminal Justice System of Ghana,” 125.

³ Posner, “The Present Situation in Legal Scholarship,” 114; Amoah, “Justification for Implementing Victim-Offender Mediation in the Criminal Justice System of Ghana,” 125.

⁴ Richard A. Posner, “The Decline of Law as an Autonomous Discipline: 1962-1987” 100 *Harvard Law Review* (1987) 761, 762; Amoah, “Justification for Implementing Victim-Offender Mediation in the Criminal Justice System of Ghana,” 125.

⁵ Amoah, “Justification for Implementing Victim-Offender Mediation in the Criminal Justice System of Ghana,” 125.

⁶ Amoah, “Justification for Implementing Victim-Offender Mediation in the Criminal Justice System of Ghana,” 125.

⁷ Posner “The Decline of Law as an Autonomous Discipline: 1962-1987,” 762; Amoah, “Justification for Implementing Victim-Offender Mediation in the Criminal Justice System of Ghana,” 125.

to know something about society in order to be able to understand law, criticise it, and improve it'.⁸ Hence, doctrinal analysis was seen as insufficient to study and understand the law in terms of how it reverberates in society.⁹ Despite the attacks on the Doctrinal paradigm, Doctrinal legal research still remains a dominant approach to legal research compared with other approaches to legal scholarship.¹⁰

The Principle of *Caveat Emptor*

Caveat Emptor is a Latin expression which literally means 'let the buyer beware'.¹¹ It is a *mercatoria* principle which recognizes a right of a buyer to inspect goods he or she intends to buy failure to exercise such right, the seller would not be liable for any defects in the goods in the absence of a warranty. The principle of *Caveat Emptor* thus explains the relationship between a buyer and a seller relative to the apportionment of risk in the goods traded in when it comes to purchasing goods from a seller. A buyer therefore ought to know and should not be unaware of the conditions and nature of goods he intends to buy from any seller in a business transaction. The principle indeed, has been expanded to mean that caution and attention must be observed by all prudent men when making their contracts.

This principle has been followed for many years by the English courts in the context of business transactions. It was in the case of *Chandelor v. Lopus*,¹² in the 17th century, that the courts first gave recognition to the existence of a buyer's right to examine goods before purchasing same. The Court also established the obligations, liabilities and responsibilities of both parties (that is the buyer and seller) to a sale of contract. The case demonstrates the notion of warranty and the *Caveat Emptor* concept within the theories of a legal contract and its interpretation under the English common law. In the case reference, a seller who was the defendant owned a bezoar stones shop and had the knowledge of how these stones have magical healing properties. The seller sold what was thought to be a bezoar stone to the plaintiff for a hundred (100) pounds indicating that the stone was a bezoar stone. The plaintiff later found that the said bezoar stone had no magical properties and brought a suit against the defendant for the recovery of the purchase price of the stone. The court dismissed the suit and held *inter alia* that an express warranty was not given to the quality of bezoar stone. The court also found that there was no evidence of elements of fraud in the sale and that the vendor did not give it an express warranty hence risk in the goods must be borne by the buyer. The court also held that the mere fact that the seller said that the stone was a bezoar type did not mean the buyer has a right to a refund of his money when it is without warranty, hence no cause for action was accrued.

Historically, the phrase *Caveat Emptor* was first used in the year 1534 by an author by the name Fitzherbert in his literary work entitled "*Boke of Husbandrie*".¹³ Baker J.H.¹⁴ in a literary work reported that, Fitzherbert wrote in his "*Boke of Husbandrie*" in 1534 that if he was purchasing "*a horse ..., if he be tame and have been ridden upon, then caveat emptor*". Thus, the principle of *Caveat Emptor* had long been in existence as far back as the 16th century. The phrase was popularized like a widespread gospel by some jurists in America and some writers like Coke and Blackstone.¹⁵ A jurist also pointed out in the year 1804 that "*Caveat Emptor doctrine was meant to stimulate the care and consideration which all judicious parties have to observe whilst processing their contracts*"¹⁶. Indeed, in a United States of America's case of *Barnard v.*

⁸ Posner "The Decline of Law as an Autonomous Discipline: 1962-1987," 762.

⁹ Amoah, "Justification for Implementing Victim-Offender Mediation in the Criminal Justice System of Ghana," 125.

¹⁰ Amoah, "Justification for Implementing Victim-Offender Mediation in the Criminal Justice System of Ghana," 125.

¹¹ *Black Law Dictionary*, 9th edn. "*Caveat emptor*" by Bryan A. Garner.

¹² (1603) 79 ER 3, Exch.

¹³ J. H. Baker, *An Introduction to English Legal History* (London: Butterworth, 1979).

¹⁴ Baker, *An Introduction to English Legal History*.

¹⁵ Charles T. LeViness, *Caveat Emptor versus Caveat Venditor*, 7 Md. L. Rev. Vol. 7 Issue 3 [1943]: 182.

¹⁶ *Seixas and Seixas v. Woods* (1804) 2 Caine R. N. Y., 48, 54.

Kellogg¹⁷, the court recognised how the principle of *Caveat Emptor* has become universally accepted when it stated that “... the rule which requires buyers to see to their interest, has been accepted as a requirement for trade in the life of business transactions...”

In the words of the Court of Appeal in the case of **Wallis v. Russell**¹⁸,

“The legal meaning or interpretation of Caveat Emptor is that the buyer should be casual in his deals but must be fully responsible for all his undertakings. This includes things that the purchaser could do, exercise his judgement, make voluntary choices or decisions and the contract mandates him to do so or not to rely on the seller.”

Moreover, even before the case of **Wallis v. Russell (Supra)**, the English court in the case of **Ward v Hobbes**¹⁹ had had the opportunity to explain the scope of the *Caveat Emptor* principle in the following words;

“... though it was fraud for a seller to use false pretence to cover up or conceal defects in goods sold, the doctrine did not impose a strict liability that the seller’s duty was to disclose in detail all defects on the product to the buyer. Rather it imposed the duty of care, obligation, skill and judgement on the buyer any time he is buying a product.”²⁰

Application of the Principle of Caveat Emptor International Trade

The principle of *Caveat Emptor* gained notoriety in international commercial trade making the need to unify the application of the principle in the international spheres very necessary. The emergence of the global economy and the quest for consistency in the application of *Caveat Emptor* and its related commercial laws and rules were the main bases for the need to ensure uniformity in the application of the principle. Since globalization has the ability to create a common world market which facilitates international trade transactions hence, lawmakers within various jurisdictions have to reposition themselves as regards fashioning out laws which take cognisance of fundamental concepts underlying contracts. In globalized market economies, parties from different legal regimes call for uniform laws that could address specific issues that are extreme to business transactions.²¹ The objective of creating this international uniform law is to outdo legal regimes within state jurisdictions in order to maximize resource utilization to give way for a broad study in the area of sales of goods law by International Institute for the Unification of Private Law (“UNIDROIT”).²² The end result of that concerted efforts led to the promulgation of two laws viz *Uniform Law on the International Sale of Goods (hereinafter “ULIS”)* and *Uniform Law on the Formation of Contracts for the International Sale of Goods (hereinafter “ULF”)*. This further led to the promulgation of the *United Nations Convention on Contracts for the International Sale of Goods, 1980. (Hereinafter referred to as “CISG”)*. These laws were described as worldwide documents from a sales law perspective which were a success.²³

In his ground-breaking thesis, Ernst Rabel, author of *Das Recht des Warenkaufs*²⁴, comparatively evaluated sales laws with the objective of hypothesizing sale of goods rules within a global perspective. After an extensive analysis of the concept of ‘lack of conformity’ in sales of goods rules in different western

¹⁷ (1870) 77 U. S. 383, 388; See also *Barnard v. Kellogg* (1870)77 U. S. 383, 388

¹⁸ (1902) 2 IR 585; See also *Wallis v. Russell* (1902) 2 IR 585.

¹⁹ (1878) 4 AC 13.

²⁰ *Ward v. Hobbes (Supra)*

²¹ Villy De Luca, “The Conformity of the Goods to the Contract in International Sales,” *Pace International* 27, (2015):163.

²² De Luca, “The Conformity of the Goods to the Contract in International Sales,” 163.

²³ Bruno Zeller, *Cisg and the Unification of International Trade Law* (Milton Park, Abingdon, Oxon [UK]: Routledge-Cavendish, 2007), 94.

²⁴ Ernst Rabel, *Das Recht des Warenkaufs* Rabel, Band 1, (Unveränd Neudr. d. Ausg. v. 1936 u., 1957) (Germany: De Gruyter, 2015).

legal systems, Rabel found that there were various schools of thought on who is responsible when there is a defect in the delivery of a product. His discovery came out with the findings that, some legal systems looked at non-conformity from a perspective linked to the principle of *tale quale* (Roman law), which presumes that items were purchased on as it is basis²⁵. This presumption ensures that the responsibility of the product being found to be defective or lacking conformity at later date is allocated to the buyer. He also found that a more balanced rule has been developed from other legal systems which presumably indicates that a supplier assumes responsibility for non-conforming goods. At the back of this revelation, Rabel recommended that there should be a process to streamline and provide an appropriate interpretation and definition of non-conformity of goods to the contract.

Resulting from Rabel's work and recommendation were the laws known as the *uniform sales laws* which comprised the Uniform Law for the International Sale of Goods and Uniform Law on the Formation of Contracts for the International Sale of Goods (ULIS and ULF). These uniform sales laws later led to the promulgation of the United Nations Convention on Contracts for the International Sale of Goods (CISG) in 1980. Based on Rabel's recommendations, conformity of goods to a contract was agreed on and inserted in the uniform sales law and the CISG. The CISG provides the following rules:²⁶

- “(1) Goods delivered by the seller must be right in quantity, quality and as described in the contract, including required packaging and container stipulated in the contract.**
- (2) Except otherwise agreed between the buyer and the seller, the lack of conformity clause of goods in a contract can only be invoked if they:**
- (a) are not fit for its intended purposes and for which the same described goods would ordinarily have been used,**
 - (b) are not fit for any specific purpose, and not implied or the seller is not expressly informed before concluding the contract, except where, there is a proof that there was no reliance by the buyer on the skill and judgement of the seller or felt not necessary to rely on the seller's attributes;**
 - (c) do not have qualities of the sample given to the seller by the buyer as model;**
 - (d) are not well packaged and contained to give adequate protection and preservation of such products;**
- (3) The seller is in breach of sub-paragraphs 2(a) to 2(d) of the above paragraph for any latent defects of the goods if the buyer was not aware or knew that such defect exists when the contract was finally concluded;”**

***Caveat Emptor* Various Jurisdictions**

When Civil law was hoping to put in place some effective laws about warranties on trade transactions, Common law jurisdictions were still glued to the doctrine of *Caveat emptor*. Indeed, at the turn of the 17th century, *Caveat Emptor* gained a sense of urgency due to its significant impact on the concept of individuality and the relaxed attitude firmly in opposition to the directives and control of laws on quality by the clergy and government. There were administrative breakdowns which created countless abuse of quality control, which lead the whole structure to fall into a state of quagmire.

Indeed, Common and Civil laws operate basically on separate ideologies, and in the case of *Hoe v. Sanborn*,²⁷ it was held on the thinking that:

“*Caveat venditor* as a Civil law rule was adopted in reference to Articles that are general and are in ordinary use extensively in commerce within the country, whilst *Caveat Emptor* rule in Common law

²⁵ René Franz Henschel, *Conformity of Goods in International Sales* Governed by CISG Article 35; *Caveat Venditor, Caveat Emptor and Contract Law as Background Law and as a Competing set of Rules*, Nordic Journal of Commercial Law Issue 1 [2004]: 2. Accessed February 4, 2022. <<https://doi.org/10.5278/Ojs.ncl.v0i1.3064>>.

²⁶ Article 35 of the United Nations Convention on Contracts for the International Sale of Goods, 1980.

²⁷ (1860) 21 N.Y. 552.

originated in commercial age, among highly business-like people hoping to promote trade freedom. Though the advanced state of the business community wisely and best adapted common law rule, there are still a cluster of various cases that the Civil law regime could do to prevent multitude cases of fraud. Few are of the view that, it much better in justice delivery that the seller is held in all situational warranty regarding latent defects. But it is not possible to discriminate among various articles on subject of sales, a rule, Common law generally applies to all cases the maxim of caveat emptor.”

In the case of *M’Farland v. Newman*²⁸, Chief Justice Gibson of Pennsylvania had these words to say:

“The Buyer-seller relationships are not like the doctor-patient relations, or the lawyer-client one, the buyer-seller is not confidential. It is also the buyer’s duty to demand a clear warranty and if he decides to depend on the sphere of influence the seller has regarding his purchases, then he must blame himself for any lack of conformity that arises. If he decides to buy with the information gathered from the seller, the buyer should still demand a proper risk assurance; otherwise, it is assumed that he bought on his own. Justice Gibson also said that a simply done contract, exclusive of specified terms cannot be a fit for legal protection. Breach of trust by or to one other and falsehood should not be entertained by parties in sale transactions. The end result would be needless litigation which will drive everyone out of business.”

Therefore, the famous *mercatoria* concept “that a perfect price requires a perfect product” was overwhelmingly approved in England as well as in most parts of the US. Backed by sound civic policy debates, the principle was firmly approved that the supplier should not be liable for non-conformity or defects in transactions where fraudulent misrepresentation or express warranty are not present.²⁹ It was also held by Lord Mansfield that “*Sales made without warranty but for a sound price and can be situated as a ground for an assumpsit, but it must be placed in the case that the defendant knows of the unsoundness of the goods.*”³⁰

Since, to a large extent in these days, trades are being conducted involving goods which are not seen before the contract is concluded, the business community needs to protect the buyer who “...is compelled by conditions to do business based on the trust in the description of the vendor”.³¹ Various cases decided by the courts revived the mercantile tradition, which virtually imposed implied warranty on the quality of delivered goods by manufacturers and dealers on sale by the description which reflects a high quality similar to that same description sold in the market; Warranty of merchantability.”³²

Caveat Emptor in American Jurisprudence

The *Caveat Emptor* doctrine, though limited but simple, has been fairly acknowledged in American Jurisprudence. Therefore in the case of *Stuart v. Wilkins*,³³ a vendor sold a female horse with the guarantee that it was very sound, but the buyer later found out that there was a hidden defect of the windgall and the seller was held liable for that latent defect. The American legal system was firmly controlled by the establishment of the principle, throughout the 19th century. The US Supreme Court ruled in *Barnard v. Kellogg (supra) inter alia* that the principle of *Caveat Emptor* was a universally accepted rule which makes

²⁸ (1839) 9 Watts 55, SC; Friedrich Kessler, “The Protection of the Consumer Under Modern Sales Law,” 74 YALE L.J. (1964): 264.

²⁹ *M’Farland v. Newman* (1839) 9 Watts 55

³⁰ *M’Farland v. Newman (supra)*.

³¹ Henschel, *Conformity of Goods in International Sales*.

³² Friedrich. “*The Protection of the Consumer Under Modern Sales Law*,” 264.

³³ (1778) 1 Doug. 19, 99 Eng. Rep. 15.

a buyer responsible for his own needs and this was accepted as a requirement for business transactions.

The consumer, within a free market system has absolute control of production under the *caveat emptor*. He either approves or disapproves of buying the goods and services or rejecting them as they are offered. These acts of rejection by the consumer in a free market, open doors for a competition where the buyer decides which product fits his purpose. In a free market system, any time the consumer buys, then product competition sets in because he is the only one who knows what he wants and what could possibly satisfy him.

***Caveat Emptor* in the Jurisprudence of England**

The English followed and adopted the principle of “*caveat emptor*” into law for centuries. This principle has been part of the English language since 1523, which denotes “*let the buyer beware*”.³⁴ The principle was enacted when it was used in conjunction with the sale of a horse, which might have been galloped and tamed or might have been wild. It being wild was not to warn the merchant to beware but rather the buyer must be aware of *Caveat Emptor*.³⁵ The English Sale of Goods Act of 1893 statutory established the principle of *Caveat emptor*. The drafter of the Act was Sir Mackenzie Chalmers with the aim of reproducing an exact copy of the sale of goods bill that will fit the existing law at the time, leaving any possibility of the desired amendment to be presented by the legislature. The 1893 Sale of Goods Act, extended protection regarding implied terms of sale contracts of certain goods as well as those yet to be ascertained.

In 1979, there was a modification of the 1893 Act and the ensuing statute was the Sale of Goods Act, 1979. It is to be noted however that not many changes were effected and the *Caveat Emptor* principle remained applicable in England after the enactment of the 1979 Act. The Sale of Goods Act, 1979 provides that “*except as provided by this section and section 15 below and subject to any other enactment, there is no implied term about the quality and fitness for any particular purpose of goods supplied under a contract of sale.*”³⁶

The **Sale of Goods Act 1979** of England was amended to imply terms into sale of goods. However, the life force of the Act, in its native embodiment, was to come to a negotiable agreement between the procurer and the vendor. The implied terms in Sections 12 to 15 of the Sale of Goods Act have been enacted on all agreements in accordance with the circumstance of the sale of goods. As such, a procurer will attain his share of what was negotiated, without explicitly writing in the contract of sale.

In the case of *Ashington Piggeries Ltd v. Christopher Hill*³⁷, the subject matter of the transaction in issue, in this case, was the sale of animal food by description. Lord Wilberforce reiterates that he would not have a problem if a vendor should have a contract in goods of that description. This only holds when the vendor sources his orders in the order of the business and with the goods of that description if he has not before or has not accepted orders of such. This means that, the vendor could be seen as a professional, due to his expertise in the sale of the goods in question and the type of goods purchased made the sale of the goods a sale by description. Lord Diplock delivered a dissenting view and opined that, there is a major change in relation to protecting the right of the procurer which change going by the majority’s view is going beyond its boundaries. He further mentioned the use of “description” in section 13 of the Sale of Goods Act which affirmed his opinion that the sale of unascertained goods *per* the “description” is limited to what was agreed to in the contract envisioned by both parties to ascertain the nature of goods which were to be delivered.

At the end of the day, the test used in ascertaining the nature of goods to be delivered is whether the buyer could fairly and reasonably refuse to accept the physical goods offered to him on the ground that their

³⁴ *Spivey v. Adaptive Marketing, LLC* 660 F. Supp. 2d 940 (S.D. Ill. 2009).

³⁵ *Spivey v. Adaptive Marketing, LLC* (Supra).

³⁶ *Sec* 14

³⁷ [1972] AC 441, HL.

failure to relate with that part of what was said about them in the contract makes them goods of a different kind from those he had agreed to purchase.³⁸ In conclusion, proof of identity is vital with regards to section 13 of the Sale of Goods Act which Lord Diplock suggests. According to Lord Diplock, reliance is vital to both fitness and merchantable quality. In this case, the vendor must be capable to make or selecting goods which are equitably fit for the procurer's initiative together with the vendor's receipt of duty to act on since there is a rational reliance of the procurer on the vendor. Thus, under **section 14 of the Sales of Goods Act, 1979**, the buyer cannot complain of a defect when he had been told about it before entering into the contract. This was affirmed in the case of *Bartlett v. Sidney Marcus Ltd.*³⁹ In this case, the court held that the buyer could not complain about a defective clutch in a second-hand car which he had been told about when he was about entering the contract. Thus, defects drawn to the buyer's attention at the time of executing the contracts cannot be remedied.

Essentially, it is worth noting that the principle of let the buyer beware gleaned from the statutory provisions of Section 13 and 14 of the Sale of Goods Act falls within the ambit of implied conditions and warranties. The legal implication is therefore that, an express agreement by the buyer and seller would be negative or render the implied terms less effective.

Caveat Emptor in Civil Law Countries

Civil law from the Roman perspective largely protects the buyer from the risk of latent defects, if there are no fraudulent activities on the side of the vendor or if no express warranty was provided in the trade bid. The understanding of fraud from the perspective of Roman law, is the inability or failure to disclose, misrepresent or conceal known defects.⁴⁰ If there is a breach of these acts by the seller, the buyer would initiate legal action against the seller. There are two remedial provisions within civil law which deals with a non-fraudster seller who did not include an express warranty in a business transaction. Buyers of defective goods have the right within a reasonable time to rescind the contract or ask for abatement of the price. The requirement of the law for the sellers to openly disclose latent defects of their products and to give when requested, the stipulated warranty, widens the scope of the seller's responsibility regarding defective products and protection to the buyer on all hidden defects where warranty is absent.⁴¹

As Civil law continues to extend protection against substantial latent defects for the buyer, a workable concept of non-conformity was developed. In broad terms, it was a two-way test method for defect: a good is said to be defective if it cannot be put into ordinary usage or for the anticipated use by the parties.⁴² The Roman law, from the post classical days, holds the notion that a sale transaction is done when a good described or part in quantity belongs to the seller is involved.⁴³ It is obvious in principle that the buyer's protection to latent defects is getting limited in the face of both civil law and common law but the interpretation of the terms varies among some civil law countries.

German law does more in protecting the buyer than the French counterpart against latent defects. The German law gives the buyer a limited period to inspect and a leverage protection if his ignorance of defects was not due to gross negligence.⁴⁴ The German rule made an impact, which gave way to a modified rule: That a buyer loses his remedies when he expressively and without reservation receives non-conforming

³⁸ "Caveat Emptor Principle and Sales of Goods" All Answers Ltd., accessed March 19, 2022, <<https://www.lawteacher.net/free-law-essays/commercial-law/caveat-emptor-principle-and-sales-of-goods-commercial-law-essay.php?vref=1>>

³⁹ (1965) 1 WLR 1013.

⁴⁰ Kessler, "The Protection of the Consumer Under Modern Sales Law *Law*," 264.

⁴¹ H. F. Jolowicz, *Historical Introduction to Roman Law*, (Cambridge; Cambridge University Press, 1932):303-04.

⁴² Kessler, "The Protection of the Consumer Under Modern Sales Law *Law*," 264.

⁴³ Kessler, "The Protection of the Consumer Under Modern Sales Law," 264.

⁴⁴ Kessler, "The Protection of the Consumer Under Modern Sales Law," 264.

goods.⁴⁵The buyer's duty in sales under the German Law is to inspect the merchandise and inform the seller if there are defects of grave importance.⁴⁶

Broadly speaking, the present position is enabling contracting parties to customize sales contracts to suit their needs that extend the obligations of the seller, particularly, the quality which statutes or implied warranty do not cover. These individual sales laws are reflective of the functions and prerequisites in the basic structure.

Caveat Emptor in Ghana Considered

The Sale of Goods Act 1962, (Act 137) governs rules on *Caveat Emptor* in the sale of goods in Ghana. Section 13 of Act 137 provides that;

“Subject to the provision of this Act and any other enactment, there is no implied warranty or condition as to the quality or fitness for a particular purpose of goods supplied under a contract of sales.”

The Sale of Goods Act of Ghana, 1962, Act 137, to a large extent, mirrors the English legislation on Commercial law known as the Sale of Goods Act 1893. Some critics⁴⁷ have even gone so far to say that the Ghanaian Sale of Goods Act is a carbon copy of that of the English Sale of Goods Act of 1893.⁴⁸ Indeed, the Ghana Sale of Goods Act 1962 was to benefit from the seventy years' experience that the English lawyers have acquired in the operation of their great codifying statute of 1893. It is worrisome to know that Ghana has gone through an era and the law as it was before does not suit the current economic dispensation. This is because currently, the United Kingdom that Ghana copied from has itself evolved and made enormous legislative interventions to tilt towards the protection of the consumer. It is therefore strange that Ghana still upholds the old English system in its statute books. That notwithstanding and as it shall be seen later in this article, Ghana has by way of case laws sought to move away from the principle of *Caveat Emptor* to the principle of *Caveat Venditor*.⁴⁹ It is imperative to state however that the case law position on *Caveat Venditor* is in relation to domestic sales only and not international sales. Therefore, the Ghanaian position on *Caveat Venditor* relating to international sales is yet to be tested and pronounced on by its courts.

In applying the doctrine of *Caveat emptor*, the Ghanaian court seized the opportunity in the case of *Rockson v. Armah*⁵⁰ to espouse the meaning of the doctrine as captured in section 13 of Act 137. The case of *Rockson v. Armah (Supra)* affirmed the Latin principle of '*Caveat emptor*' and fully applied its effect to facts before it. The facts of this landmark case were that, the appellant owned a Mercedes Benz car which he sold to the respondent for Three thousand two hundred Cedis (¢3,200.00). The respondent made cash payments to the tune of Two thousand two hundred Cedis (¢2,200.00) and settled the balance of the purchase price with two post-dated cheques of Five hundred Ghana Cedis (¢500.00) each. When the car was delivered to the respondent, it showed the vehicle has been involved in an accident. There were serious defects in the clutch, starter systems and extensive damage to the mudguard and headlamp. After some initial hesitation, the appellant admitted to the accident, accepted responsibility for the defects and agreed to have them repaired. The appellant found a wayside mechanic who took in the car and completed the repairs within a day. The car was subsequently sprayed and delivered to the respondent, who accepted it without any complaints. However, after using the car for a period of about two (2) months, the respondent attempted

⁴⁵ Kessler, "The Protection of the Consumer Under Modern Sales Law," 264.

⁴⁶ German Commercial Code, promulgated on 2 January, 2002, 377-78.

⁴⁷ K. K. Dei-Anang, "*Caveat Venditor* Ghaniensis," Vol IV No. 2 UGLJ [1967]: 90-110.

(lamented that there was a mass transportation of articles from the English Sale of Goods Act without taking into consideration the socio-economic and political conditions of Ghana).

⁴⁸ It must be noted that the 1893 Act has currently been replaced with the English Sale of Goods Act 1979.

⁴⁹ *Sarpong v. Silver Star Auto Limited* [2014] 72 G.M.J 1 S.C.

⁵⁰ [1975] 2 GLR 116.

to repudiate the sale by stopping payment of his final post-dated cheque on grounds that he had discovered some latent defects in the car.

The issue for determination by the court was whether in the circumstances the respondent had the right to repudiate the contract. In the Circuit Court, the learned trial judge held that the respondent was not justified in repudiating the contract. The judges in their holding applied Lord Denning's decision in ***Bartlett v. Sidney Marcus Ltd.***⁵¹. In this case, Lord Denning held that,

“On a sale of a second-hand car, it is merchantable if it is in usable condition, even though not perfect. A buyer should realise that, when he buys a second-hand car, defects may appear sooner or later; and, in the absence of an express warranty, he has no redress.”

The court without mincing words laid down the principle that the seller of second-hand goods is under no obligation as to the quality and fitness of the goods to the buyer. This position puts the burden on the buyer to ensure that the goods he has contracted to buy are fit and of the highest quality for the purpose for which he desires them.

By implication, Section 13(1) of Act 137 is to the effect that there is no implied warranty or condition as to the quality and fitness of goods supplied by a seller. Should there be any defect in the goods so supplied by the seller, the buyer will not have the right to reject same or even sue for damages.

The Ghanaian courts had another opportunity in the case of ***Yirenkyi v Tormekpey***⁵² to further explain the effect of the principle as applied to the facts as was before it. The facts are that the plaintiff-respondent bought a second-hand Toyota truck for One hundred and fifty-seven thousand Cedis (¢157,000.00) from the defendant-appellant. The plaintiff-respondent was a businessman and the defendant-appellant, a motor vehicles dealer. Upon delivery, the truck was found not to be roadworthy in view of that the buyer had to spend Fifty-six thousand eight hundred and sixty Cedis (¢56,860.00) to repair the truck. This was done at the authorization of the seller. The seller promised to refund the cost of repairs to the buyer. However, despite persistent demands by the buyer, the seller refused to honour his promise as to the refund. The seller did admit to having received the purchase price but he denied giving the buyer any warranty. The seller further asserted that before the purchase of the vehicle, the buyer brought his own mechanics to examine the truck and denied having agreed to refund the cost of repairs. The buyer moved the court for summary judgment. The trial court held among others that the buyer was entitled to repudiate the contract, return the vehicle and claim the refund because the seller was in breach of the implied condition under the Sale of Goods Act, 1962 (Act 137), Section 13 (1) (b) which has the effect that the vehicle should have been reasonably fit for the purpose it was required.

The seller appealed against the decision and the Court of Appeal upheld the appeal. The court held that the trial judge was not entitled to conclude without evidence that there was a breach of warranty that the vehicle (a second-hand one) was reasonably fit for the purpose for which it was required, especially as the allegation of road unworthiness. The court asserted that the trial judge should have admonished himself that in buying a previously owned car, sooner or later it might develop defects, and he the buyer has no amends without an express warranty. Furthermore, the buyer should have properly scrutinized the car despite the fact that he bought it from a merchant in order to make sure that the car is in good shape for the road. Thus, by necessary implication, the court followed the decision of the court in ***Rockson v Armah*** (*supra*), since both applied the Common law principle of *Caveat emptor*.

However, in ***Continental Plastics Engineering Co. Ltd v IMC Industries Technik GMBH***⁵³, the court seemed to have drifted from the traditional principle of *Caveat Emptor* to *caveat venditor*. The court stated that *“The legal position can therefore be summed up as follows: there is implied conditions in the*

⁵¹ [1965] 2 All E.R. 753, C.A

⁵² [1987-88] 1 GLR 533.

⁵³ [2009] SCGLR 298, SC.

sale of used or brand-new goods which the seller is liable for if defects are found on them. In view of this, it's just common sense that when full disclosures or declaration are made to the procurer during a sale contract by the vendor, liability related to imperfections shifts to the buyer. Opportunities to examine goods are given to the buyer and in case the seller is not liable for a defect which could have been seen during the examination. But if the seller failed to disclose or declare latent defects which cannot be seen through examination to the buyer before concluding the contract, then the seller is liable and deemed in breach of a contract condition."⁵⁴ Thus, the Ghanaian courts are willing to apply the doctrine of *Caveat emptor*, albeit, with exceptions. It is significant to note here that in applying the *Caveat Emptor* in Ghana in the case of ***Rockson v. Armah (supra)***, the Ghanaian court relied heavily on the common law case of ***Bartlett v. Sidney Marcus Ltd***⁵⁵ much to the chagrin of Act 137. The court rarely made any reference to Act 137 in arriving at its decision on the principle of caveat emptor. It will suffice to state at this point that in England, the courts have many statutory interventions in the common law doctrine of Caveat Emptor which seek to now shift the burden on the seller and protect the consumer.

The Current View on the Law on *Caveat Emptor* Globally

As seen earlier, the principle of *Caveat Emptor* has been applied in sale of goods contracts since time immemorial however, many controversies surround its application and its resultant effects on consumers. It has been argued that this principle does not ensure effective protection of the consumer, a direction that has been called for ages.

Both domestic and international trade transactions have grappled with the application of this rule of *Caveat Emptor* in sale of goods contracts and its related consequences. This is so because stakeholders invited to apply the principle of *Caveat Emptor* in sale of goods contracts have been seen declining such invitation whilst gradually shifting to apply the rule of *Caveat Venditor* in favour of buyers in such contracts. The application of the rule of *Caveat Emptor* belittled the modern practice of enforcing the protection of consumer rights. The rule of *Caveat Emptor* predominantly had that attribute that the time because at that time, markets were overt and buyers had ample opportunity to examine and inspect goods they desired to purchase for quality and for whether they were fit for the purpose for which they were bought. Given the current practice of sale of goods where goods are packaged, sealed and are in the custody of the producer, and even sent to a buyer without the buyer having the opportunity to even see the goods at first hand, there is the need to protect a prospective buyer.

The modern trend in laws protecting consumers has increased responsibilities placed upon the seller, and the doctrine of *Caveat Venditor* (Latin for "Let the seller beware") has become more prevalent. Generally, there is a legal presumption that a seller makes certain warranties unless the buyer and the seller agree otherwise.⁵⁶ For a relationship balance to exist between the two parties (buyer and seller) in commercial transactions, where trust and goodwill will be a commitment of the parties in ensuring checks and balances, caveat vendor was also developed. In the case between ***Priest v Last***,⁵⁷ it was held that the normal use of a hot water bottle is to contain something hot, in strict terms, fitness for the purpose was missing in the course of using the bottle. This brings to bear the reliance on the sphere of influence, skill and judgement of the seller to achieve fitness.⁵⁸

⁵⁴ *Continental Plastics Engineering Co. Ltd v IMC Industries Technik GMBH* [2009] SCGLR 298, SC.

⁵⁵ [1965] 2 All E.R. 753, C.A.

⁵⁶ Enrique (Henry) Saldana, *Caveat Emptor (Let the Buyer Beware) vs. Caveat Venditor (Let the Seller Beware) When Buying Real Estate in Mexico* (2011).

⁵⁷ [1903] 2 KB 148.

⁵⁸ *Priest v Last* [1903] 2 KB 148.

The following are the key features of the doctrine of *Caveat venditor*;

- “The seller must have knowledge of implied conditions and warranties.
- The seller will be liable for loss on account of sale, if the goods do not come up to the standard required by law even though he has taken all possible care.
- All knowledge regarding goods for sale must be made available to the buyer by the seller to prevent a dispute.
- The sale of goods should be devoid of any fraudulent means by the seller.
- The seller bears the risk of defects which are not seen by a normal intelligent person.”⁵⁹

Indeed, a careful perusal of the “CISG, 1980” convention would reveal that the framers of that law had in full view the concept of *Caveat Venditor*. Article 35 of the “CISG 1980” in particular was premised from the fundamental basic duty and obligation a seller has, to supply the goods as stipulated within the contract.⁶⁰ This concept is universal and evidently, a public knowledge that vendors know the features, characteristics, quality and general functionality of their products than the buyer who pays for the items because it is within their domain and they have a significant influence on these items. This is the part the buyer has to receive as a bargain after making payment (*quid pro quo*). From this position, the sale of goods law has generally trended with the premise of the convention on *Caveat venditor* at the end of the 19th century.

Is Caveat Venditor, the New Wave?

The analysis of subsections of Article 35 of CISG gives a clear understanding of the convention within the scope of modern sales laws, that the seller is held accountable in cases of defective goods. Based on this assumption, and comparing modern and ancient legal regimes, writers of the CISG decided on the *Caveat venditor* principle to situate well the assumption of the seller bearing the risk of a defective good. It is worth mentioning that UNCITRAL had pursued a goal to achieving uniformity in international trade laws even though it is also the objective of CISG. This was further affirmed by the UN resolution that supported the commission to further harmonize and unify the international trade laws.⁶¹

It must be noted that Article 35(1) of CISG emphasizes on expressed content of the agreement in the determination of conformity obligation and compliance by the seller within the contract. From the understanding of the defectiveness of a good, goods are said to be defective only when the expected or anticipated characteristic features of the goods assumed by the parties at the time of concluding the contract were never so or a reality.⁶²

Both civil and common law jurisdictions have similar techniques in opening up a seller’s responsibilities on quality. These systems give an additional guard against fraud and concealment which edges the buyer collaterally, with a promised warranty over the seller.

Sample as a “silent symbol of warranty” was profound in the ***Bradford v. Manly***⁶³ case by the Massachusetts court which parties to the case understood perfectly. In expressing opinion, Chief Justice Parker, said “*Trade operations would be very embarrassed when samples are largely and frequently used in business transactions.*”⁶⁴ Mercantile traditions were revived by case laws with the view of achieving the intent

⁵⁹ Prachee Chelsea Taneja, “Doctrine of *Caveat Emptor* and *Caveat Venditor*”, Scribd Inc., accessed May 13, 2021, <https://www.scribd.com/doc/76646016/Doctrine-of-Caveat-Emptor-and-Caveat-Venditor>

⁶⁰ Henschel, *Conformity of Goods in International Sales*.

⁶¹ UN - General Assembly resolution 2205 (XXI) of 17 December 1966, Establishment of the United Nations Commission on International Trade Law

⁶² R. Hyland, “*Conformity of Goods to the Contract Under United Nations Sales Conventions and the Uniform Commercial Code*,” in *Einheitliches Kaufrecht und Nationals Obligationenrecht*, ed. Schlectriem, P. (Nomos, Baden-Baden, 1987) 319.

⁶³ (1816) 13 Mass.,139.

⁶⁴ ***Bradford v. Manly*** (1816) 13 Mass.,139.

and purposes of the parties involved, and this gave way to the imposition of implied warranty on producers, agronomists and suppliers who sell by description for the assurance of quality in their delivery of goods similar to goods bought from the market with the same description.⁶⁵ In as much as it is the responsibility of the seller to deliver on product quality sufficient to meet the purpose for which the transaction took place between him and the buyer, presupposes that fitness of purpose is implied or expressed into the agreement, but under civil law, the responsibility of the seller is based on the reliance of the buyer on skill and attributes of the seller.⁶⁶ The interpretation of fitness for a purpose is extensively shown in this case law.

Caveat Venditor in England

Under ss. 13-15 of the 1893 Act, the contracted terms in relation to quality and fitness in England, exemplify a significant step in the neglect of the original common law rule of *caveat emptor*. The regulation of the implied terms characterized the first step towards the death of the principle of *Caveat Emptor* in the Act and the ultimate consideration for the merchantability of the goods.

The protection of the implied terms in the Sale of Goods Act 1893 in relation to the contract was drawn-out to contracts for the sale of specific goods as well as unascertained goods. Despite the revolution, goods were simply required to be merchantable till 1973 when the Supply of Goods (Implied terms) Act made known a new concept of merchantable quality of goods. In 1987, a report published by the Law Commission contained some suggestive changes on implied terms and requirements for their breach. The issue of seller beware was further emphasized by the Sale and Supply of Goods Act 1994 which replaced the issue of merchantable quality with satisfactory quality. In 1999, European Directive on Consumer Guarantees was enacted. This directive put out measures which ensured the protection for the consumer. This has gradually given way to the disappearance of *Caveat Emptor* and making way for a new principle of *Caveat Venditor* that is directed towards a new consumer protection system.

In the case of *Stevenson v. Rogers*,⁶⁷ Rogers bought a second-hand fishing boat from Stevenson (a fisherman) at 600,000 British pounds and when Rogers became unhappy with the quality of the boat under section 14(2) of the Act, appeared with a claim for the breach of the Act. As a fisherman, Mr. Stevenson's trading in boats was an informal way to do business which would not have been regarded as being in breach of an implied term. Potter L.J in the Court of Appeal, specified the wording "course of a business", cited in the sale of goods Act under section 14 (2), which explains extensively the face value and should the vendor be in business if the fore mentioned section applies. In clear words, construing the 1893 Act and section 3 of the Act of 1979, L.J Potter reiterated, that the conditions needed for orderliness in commerce, or indeed any commerce, in the goods were removed.

Evidently, the requirements in sections 14 (2) and (3) of the Sale of Goods Acts, reveal that any business made on a contract of sale will be in breach of the Act. Furthermore, companies who are associated with, be it occasional in the sale of goods must carefully deliberate on it. This provision is subject to all businessmen involved in the Sale of Goods regardless of the sale of goods not being his core business. Currently, under the Sale of Goods Act 1979, the only remedies for the breach of an implied condition are rejection and damages. Also, the primary remedy for the consumer will be the right to have the goods substituted or fixed which has been obliged by the UK, from the EC Directive on Consumer Guarantees (Article 3 (3)) and for a second choice, there will be a reduction in the price or rejection of the contract (Article 3(5)).

One major legislative intervention in England is the **Sale and Supply of Goods to Consumers**

⁶⁵ Kessler, "The Protection of the Consumer Under Modern Sales Law," 264.

⁶⁶ 2 RAEL 167.

⁶⁷ [1999] Q.B. 1039.

Regulation.⁶⁸ It essentially provides that where guarantees are given to the consumer, they are legally binding on the seller. Regulation 15 of the law provides as “*the warranty takes effect at the time the goods are delivered as a contractual obligation owed by the guarantor under the conditions set out in the guarantee statement and the associated advertising*”

Other legislation confers enough powers on authorities to maintain safety standards in supplying products for use by consumers. Among such legislation is the **General Product Safety Regulations 2005 (SI 2005/1803)** which empowers the authorities to punish breaches of the safety standards that inure the detriment of consumers. Another legislative piece is **The Consumer Protection Act 1987**, seeking to protect the consumers thereby extending the principle of *Caveat Venditor*.

For the protection of consumers, the **Supply of Goods (Implied Terms) Act 1973**, has revised an injunction to warranty key protection for them. **The Unfair and Contract terms Act 1977** is another statute enacted to give more protection to the consumer thereby shifting the burden unto the seller.

Is there a Paradigm Shift in the Jurisprudence of Sale of Goods Contracts in Ghana from *Caveat Emptor* to *Caveat Venditor*?

Mills in a literary work⁶⁹ expressed his view on the Ghanaian position as being *Caveat Venditor*, thus:

“Opinions on the desirability of Section 13 may differ. However, the present writer believes that in the light of the prevailing economic conditions the buyer needs to be protected against unscrupulous sellers. Any unsolicited assistance that such seller may get from our courts can only help seal the doom of the unfortunate Ghanaian buyer”

The case of ***Sarpong v. Silver Star Auto Limited***⁷⁰ is a watershed moment and elucidates the Ghanaian position clearly on the doctrine of *Caveat Venditor* and how the courts have now moved to embrace this new pattern. The facts of this case were that the plaintiff/respondent/appellant company (hereinafter referred to as “the appellant”) is a firm of Legal Practitioners and Consultants. The company bought from the defendants in February 2007 a brand new C180 Mercedes Benz Salon car from the defendant/appellant/respondent (hereinafter called “the respondent”). The car was bought under a 2-year unlimited warranty. The head gasket cracked 5 months into acquiring the C- 180 Benz. It was agreed between the parties that the appellant should surrender the C- 180 Benz for another brand-new E-Class Benz. The E-Class Benz car in May 2008 broke down and after notice to the respondent; the car was towed away and repaired. In August of the same year, the appellant had to pay an amount of Seven hundred and forty-eight Ghana Cedis, and eighty-nine pesewas (GHC748.89) as part of the repair cost before the car was delivered to it. On December 1st of 2008, the Director of the appellant company whilst driving the car experienced a breakdown which led to all the oil being drained from the car. The respondent company after working on the vehicle declared the engine broken down beyond repair. Thus, the appellant sued for a replacement of the car.

This is the most recent case with respect to the test and on the law and legal implication of section 13 of the Ghana Sale of Goods Act. The Court in delivering its judgment through **Ansah JSC.** asserted that in Ghana, the liability of defective goods rests on the seller whether it is new or fairly used. The Court went on to say that this duty is an implied condition of the contract of sale. Furthermore, under section 13 of the sale of Goods Act of Ghana, the seller has the duty to deliver goods of the right quality and fitness, which is applied when a buyer complains of defective goods under Ghana law and is comparatively different in application to the English law jurisdiction and under which most of the cases relied on by both parties have been decided.

⁶⁸ 2002, SI 2002/3045.

⁶⁹ J.E.A. Mills, *Rockson v. Armah: A Case of Caveat Emptor, Caveat Venditor or Neither?* Vol. Xv UGLJ[1978-81]: 168-175.

⁷⁰ [2014] 72 G.M.J 1 S.C.

The court also draws a link between section 13(1) and section 49 of the Sale of Goods Act. The seller is under an implied condition that goods are free from defects not declared or known to the buyer before or at the time when the contract is made. And upon breach, the buyer is entitled to reject the goods and to refuse to pay, or as the case may be, to recover, the price. The court observed that goods merchantability is not needed when evaluating defects of goods under the provisions of the sales of goods act. The Ghanaian provision imposes a heavier duty of care on the seller. The duty imposed is the same for the seller of both second-hand goods and new goods. Ghanaian law approaches the sales of goods with *Caveat Venditor* gloves on rather than the *Caveat Emptor* approach. Hence, the court's position can be clearly put in the perspective of section 13, being a *Caveat Venditor* and not *caveat emptor*.

It was on this same line of reasoning that the case of *Continental Plastics Engineering Co. Ltd. v. IMC Industries-Technik GMBH* (*supra*) was decided. Thus, *Caveat venditor* was being embraced by the Ghanaian courts.

Recently, in *Andreas Bschor v Birim Wood Complex (Birim Timbers)*,⁷¹ the Supreme Court referred to the seminal cases of *Ashington Piggeries v Christopher Hill* (*supra*), *Jones v. Bright*⁷², and came to the conclusion that, a seller is said to be dealing in the course of business if he agrees to supply the goods when ordered. The law is to protect persons necessarily ignorant of the qualities of a commodity they purchase, and the sellers must furnish the best articles that can be supplied. Broadly, if one sells, he warrants it fit for that particular purpose. The Court speaking through Pwamang JSC. affirmed that, the purpose of the statutory condition of quality and fitness is to protect buyers when they rely on the skills and knowledge of business sellers. **Section 13 (1) (b) of Act 137 would therefore be broadly construed** to give effect to the purpose of the provision by including any sale where there is an element of regularity, that is where the seller accepted an order from the buyer to supply goods of that description.

The Present Position of the Law in Ghana

Adding to the complexity of Section 13 of Act 137 is the purported effort of the Court in both *Sarpong v. Silver Star Auto Limited and Andreas Bschor v. Birim Timbers* (*supra*) to change *Caveat Emptor* entrenched in section 13 to *Caveat Venditor*.

What now is the law?

From this exercise, it is the authors humble submission that the courts are toeing the line of *Caveat Venditor* when indeed the position of the law as remains in the statute is *Caveat Emptor*.

What then is the legal implication of section 13 in relation to the general rule? Are the Ghanaian courts bound to stick to the dictates of what the drafters of section 13 have put there or follow the position adopted by the interpreters of the law?

According to some jurists, Article 11 of the 1992 Constitution hierarchically provides for the sources of law in Ghana: it states that

“The laws of Ghana shall comprise

- (a) This constitution;*
- (b) Enactments made by or under the authority of the parliament;*
- (c) Any order, rules and regulations made by any person or authority under a power conferred by this constitution;*
- (d) The existing law and*
- (e) The common law”*

⁷¹ [2016] GHASC 68, SC.

⁷² (1829) 130 ER 1167.

Therefore, by implication, the decision in the case laws cannot override a statute; hence *Sarpong and Andreas Bschor* which are case laws cannot override Section 13. Thus, *Caveat Emptor* still prevails.

It should be pointed out that the legislative power of Ghana is vested in Parliament and same is exercised in accordance with the Constitution.⁷³ On this premise, one may infer that it is only parliament that can enact laws and amend same. It must be pointed out that the Supreme Court has held that any act of a court, that was contrary to a statute was, unless otherwise expressly or impliedly provided, a nullity. Thus, the courts had consistently insisted that it was their duty to observe and enforce statutes of the land. Consequently, the courts have been bound to hold that the courts' own law, the common law as defined in article 11 (2) of the 1992 Constitution, must give way to the statute.⁷⁴

CONCLUSION

From the foregoing discussions, it has been established that provisions of the Sale of Goods Act, 1962 (Act 137) specifically, Section 13, is inclined towards the legal principle of *caveat emptor*. However, the development of judicial interpretation on the subject has resulted in a gradual approach tilting towards the position of *Caveat Venditor*. This, therefore, calls for a legislative affirmation on the recent position of *Caveat Venditor* in protecting consumer rights.

LIST OF AUTHORITIES

Cases:

Andreas Bschor v. Birim Wood Complex (Birim Timbers) [2016] GHASC 68, SC.

Ashington Piggeries v. Christopher Hill (1829) 130 ER 1167.

Barnard v. Kellogg (1870) 77 U. S. 383, 388.

Bartlett v. Sidney Marcus Ltd. (1965) 1 WLR 1013.

Bradford v. Manly (1816) 13 Mass., 139.

Chandelor v. Lopus (1603) 79 ER 3, Exch

Continental Plastics Engineering Co. Ltd. v. IMC Industries-Technik GMBH

Hoe v. Sanborn (1860) 21 N.Y. 552.

Jones v. Bright (1829) 130 ER 1167.

M'Farland v. Newman (1839) 9 Watts 55, SC.

Priest v. Last [1903] 2 KB 148.

Republic v. High Court (Fast Track Division) Accra; Ex parte National Lottery Authority (Ghana Lotto Operators Association & Others Interested Parties) [2009] SCGLR 390 at 392.

Rockson v. Armah [1975] 2 GLR 116.

Sarpong v. Silver Star Auto Limited [2014] 72 G.M.J 1 S.C.

Seixas and Seixas v. Woods (1804) 2 Caine R. N. Y., 48, 54.

Spivey v. Adaptive Marketing, LLC 660 F. Supp. 2d 940 (S.D. Ill. 2009).

Stevenson v. Rogers [1999] Q.B. 1039.

Stuart v. Wilkins (1778) 1 Doug. 19, 99 Eng. Rep. 15.

Wallis v. Russell (1902) 2 IR 585.

Ward v Hobbes (1878) 4 AC 13.

Yirenkyi v Tormekpey [1987-88] 1 GLR 533.

⁷³ Article 93(2) of the 1992 Constitution of Ghana

⁷⁴ *Republic v. High Court (Fast Track Division) Accra; Ex parte National Lottery Authority (Ghana Lotto Operators Association & Others Interested Parties)* [2009] SCGLR 390 at 392.

Statutes:

The 1992 Constitution of the Republic of Ghana.

Sale of Goods Act, 1962 of Ghana (Act 137).

German Commercial Code, 2002.

International Legislations:

General Product Safety Regulations, 2005 (SI 2005/1803)

Sale and Supply of Goods to Consumers Regulation, 2002 (SI 2002/3045).

Supply of Goods (Implied Terms) Act, 1973.

English Sale of Goods Act, 1979.

The Consumer Protection Act, 1987 (CPA).

The Unfair and Contract terms Act, 1977 (UCTA)

Uniform Law on the Formation of Contracts for the International Sale of Goods, 1964 (The Hague, 1964)

United Nations Convention on Contracts for the International Sale of Goods, 1980 (CISG).

UN - General Assembly resolution 2205 (XXI) of 17 December 1966, Establishment of the United Nations Commission on International Trade Law.

BIBLIOGRAPHY

- All Answers Ltd., “*Caveat Emptor Principle and Sales of Goods.*” Accessed March 19, 2022, <https://www.lawteacher.net/free-law-essays/commercial-law/caveat-emptor-principle-and-sales-of-goods-commercial-law-essay.php?vref=1>
- Amoah, E. K. “Justification for Implementing Victim-Offender Mediation in the Criminal Justice System of Ghana.” *E-Journal of Humanities, Arts and Social Sciences (EHASS)*, Vol. 1 Issue 5 (2020): 118-130. Accessed February 4, 2022. <https://doi.org/10.38159/ehass.2020091>
- Baker, J. H. *An Introduction to English Legal History*. 2nd Edn., London: Butterworth, 1979.
- Creswell, W.C., *Qualitative inquiry and research design; Choosing among five traditions*. Thousand Oaks, California: Sage Publications, 1998.
- De Luca, Villy., *The Conformity of the Goods to the Contract in International Sales*, 27 *Pace Int’IL. Rev.* [2015] :163.
- Dei-Anang, K. K, “*Caveat Venditor Ghaniensis*,” Vol. IV No. 2 *UGLJ* [1967]: 90-110.
- Enrique (Henry) Saldana, *Caveat Emptor (Let the Buyer Beware) vs. Caveat Venditor (Let the Seller Beware) When Buying Real Estate in Mexico* (2011).
- Henschel, René Franz, *Conformity of Goods in International Sales Governed by CISG Article 35; Caveat Venditor, Caveat Emptor and Contract Law as Background Law and as a Competing set of Rules*, *Nordic Journal of Commercial Law Issue 1* [2004]: 1-21. Accessed February 4, 2022. <https://doi.org/10.5278/0js.ncl.v0i1.3064>
- Hyland, R., “*Conformity of Goods to the Contract Under United Nations Sales Conventions and the Uniform Commercial Code*,” in *Einheitliches Kaufrecht und Nationalen Obligationenrecht*, ed. Schlectriem, P., Nomos, Baden-Baden, 1987.
- Jolowicz, H. F., *Historical Introduction to Roman Law*, Cambridge; Cambridge University Press, 1932.
- Kessler, Friedrich, “The Protection of the Consumer Under Modern Sales Law,” 74 *YALE L.J.* (1964): 278-79.
- LeViness, Charles T. Charles T. LeViness, *Caveat Emptor versus Caveat Venditor*, 7 *Md. L. Rev.* Vol. 7 Issue 3 [1943]: 177-200.

- Mills, J.E.A, *Rockson v. Armah: A Case of Caveat Emptor, Caveat Venditor or Neither?* Vol. Xv UGLJ [1978-81]: 168-175.
- Posner, Richard A., 'The Decline of Law as an Autonomous Discipline: 1962-1987' 100 *Harvard Law Review* (1987): 761.
- Posner, Richard A., 'The Present Situation in Legal Scholarship' 90 *Yale Law Journal* (1980):1113-1130.
- Rabel, Ernst, *Das Recht des Warenkaufs* Rabel, Band 1, (Unveränd Neudr. d. Ausg. v. 1936 u., 1957), Germany: De Gruyter, 2015.
- Taneja, Prachee Chelsea, "Doctrine of *Caveat Emptor* and *Caveat Venditor*." Scribd Inc.. Accessed May 13, 2021. <https://www.scribd.com/doc/76646016/Doctrine-of-Caveat-Emptor-and-Caveat-Venditor>.
- Thomson Reuters, *Black Law Dictionary*, (9th edn., West Publishing Co, Minnesota, 2009), Bryan A. Garner (ed.) 252.
- Zeller, Bruno. *Cisg and the Unification of International Trade Law*. Milton Park, Abingdon, Oxon [UK] : Routledge-Cavendish, 2007.

ABOUT AUTHORS

Edmund Nelson Amasah Esq. is a Commercial Law lecturer at the Kwame Nkrumah University of Science and Technology Faculty of Law, Kumasi. He holds a Master of Laws degree from Cambridge University and is a Barrister and Solicitor of the Supreme Court of Ghana. He is an associate of Obeng-Manu Law Firm in Kumasi.

Enoch Kwabena Amoah Esq. is an Assistant Lecturer at the Faculty of Law of Kwame Nkrumah University of Science and Technology, Kumasi, Ghana. He holds a degree in BSc. Biochemistry, LLB, Master of Laws degree and is also a Barrister and Solicitor in the Republic of Ghana. He is an associate of Minkah-Premo & Co. legal firm in Kumasi, Ghana.

Joseph Bondzie Afrifa is a Professional Law course student at the Ghana School of Law, Makola, Accra. He holds a degree in Law (LLB) from the Kwame Nkrumah University of Science and Technology, Kumasi, Ghana.