

CONSUMER LAW AND PRACTICE IN CHINA: A CRITIQUE ON THE 20-YEAR EXPERIENCE AND THE RECENT AMENDMENT BILL

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I. Introduction

Recently an amendment bill (the Bill), the first in the past two decades, to China's core legislation on consumer protection, the Consumers Rights and Interests Protection Law (Consumer Protection Law),¹ was introduced to the Standing Committee of National People's Congress (NPC). While the Bill proposes some great changes to the Consumer Protection Law in response to China's substantially changed market and society, it leaves some important issues unaddressed. This paper, adopting an "economic law in context" approach, critically reviews the historical development and the status quo of China's consumer protection law and practice. It argues that further changes are required for better consumer law and practice in China.

II. An Overview of China's Consumer-Law Development

A Pre-Consumer Protection Law (1993)

In China, consumer protection law is considered a part of "economic law", a term popular since the "economic reform" initiated in the late 1970s. As a hybrid of public law and private law, "economic law" concerns

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1 Xiaofeizhe Quanyi Baohu Fa (消费者权益保护法) [Consumers' Rights and Interest Protection Law] (promulgated by Standing Comm. Nat'l People's Cong., 31 Oct 1983, effective Jan. 1, 1994) ST. Council GAZ., 6 Dec 1993, at 1160 (China).

governmental intervention in particular types of economic activities. Classic justifications for an “economic law” intervention include, *inter alia*, externality, free-ride, imbalance of bargaining power/information, etc.²

Prior to the Consumer Protection Law, China had already passed legislation³ with provisions indirectly concerning consumer protection. In the initial stage of the “open door and reform” policy, Chinese economy was still essentially a government-planned economy. Consumer protection was not a direct purpose of the legislation, but a side effect of government’s efforts to maintain economic order. First, consumers’ rights were protected to some extent as a consequence of the waves of government’s actions to tidy up the economy, such as crackdowns on fake goods. Then, government agencies’ regulation of private enterprises helped, in effect, the protection of consumers. In the early stage of China’s economic reform, setting up a private enterprise was deemed a privilege and government agencies implemented a variety of criteria controlling the establishment and operation of private enterprises. Some of the criteria concerned the “good character” of the applicant, the minimum standard of product quality, conditions of production, and requirements for product quality certification, which in consequence helped consumer protection. Third, the central government’s efforts to establish a national market also helped, in effect, the protection of consumers. Such efforts inevitably resulted in the reduction of market barriers set by local governments for the protection of local enterprises (as the main source of their revenue) rather than consumers.

China’s economic reform underwent a process of “government-planned economy to commodity economy and then to market-oriented economy”.

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- 2 See Liao Zhixiong (廖志雄), *Shichang Falu Zhidu Yanjiu* (市场准入法律制度研究) *A Study on the Legal System of Market Access Regulation*, 4 *ECONOMIC L. REV.* 241, 317 (2004).
- 3 E.g., the *Jiji Hetong Fa* (经济合同法) *Economic Contract Law* (promulgated by Nat’l People’s Cong., Dec. 13, 1981, effective July 1, 1982) *St. Council Gaz.*, 25 January 1982, at 864 (China), *ShangbiaoFa* (商标法) *Trademarks Law* (promulgated by the Standing Comm. Nat’l People’s Cong. 23 August 1982, effective Mar. 1, 1983) *St. Council Gaz.*, Sep. 30, 1982, at 611 (China), *Gongye Chanpin Zeren Tiaoli* (工业产品责任条例) [Regulations on Industrial Product Quality Liabilities] (promulgated by State Council, 5 April 1986, effective Jul. 1, 1986) *St. Council Gaz.*, 20 April, 1986, at 418 (China), *MinfaTongze* (民法通则) [General Principles of Civil Law] (promulgated by Nat’l People’s Cong. 12 April 1986, effective 1 January 1987) *St. Council Gaz.*, 20 May 1986, at 371 (China) (China), *BiaozhunhuaFa* (标准化法) [Standardisation Law] (promulgated by Standing Comm Nat’l People’s Cong. Dec. 29, 1988, effective 1 April, 1986) *ST. ST. COUNCIL GAZ.*, 10 January 1989, at 867 (China).

The so-called "commodity economy" prevailed during the 1980's and in this stage, the government struggled to push enterprises to produce as many as possible 'commodities' to meet people's demands. The government's focus was mainly the producers and production rather than consumer and consumption. This was reflected in most of the 'economic' legislation made in the 1980s.⁴ An exceptional statute at the time was the General Principle of Civil Law, which provides the basic legal framework required for a "market economy" of which Articles 122 and 57 are highly relevant to consumer protection. Article 122 provides that suppliers and manufacturers should be liable for property damages and personal injuries caused by defective products/services, which is essentially a statute version of the classic English case of *Donoghue v. Stevenson*.⁵ Article 57 provides that a deceptive conduct is void *ab initio*, which is largely an equivalent to a "fair trading" provision in other jurisdictions.⁶ These articles, however, did not go beyond the civil law notion of "equal relations" and issues concerning the imbalance of economic power/information between producers and consumers remained unanswered.

B The Consumer Protection Law (1993)

In 1992, "market economy" was officially recognised by the Chinese government. An amendment was made to China's Constitution so that the establishment of a "market economy" system becomes the destination of the economic reform. Since then, many pieces of legislation were passed for this target. The Consumer Protection Law, passed in 1993, is a milestone with respect to consumer protection in China. Unlike the previous legislation

where consumer protection was at most a side effect, consumer protection is the direct and main purpose of this Law. As the core consumer protection statute, the Law provides for the basic legal framework and fundamental principles for consumer protection. It also makes explicit the government's attitude and responsibilities in consumer protection.

The Law has a cardinal feature it adopts an "economic law" ideology of "substantive fairness", rather than the traditional civil law principles as its fundamental "spirit". It concerns the imbalance of economic power and information between consumers and suppliers/manufacturers; and

4 *Supra* note 3.

5 *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.) 564 (appeal taken from Scot.).

6 E.g., section 9 of the Fair Trading Act 1986 (N. Z.).

consequently a strict application of the traditional civil law principles based on “equal status of civil subjects” and “freedom of contract” will inevitably result in substantive unfairness, to the prejudice of consumers. Such concerns justify government intervention for “substantive fairness”.

The Consumer Protection Law, which admits government’s duty in consumer protection, aims to establish a comprehensive network in order to protect consumers effectively. Such a network comprises of legislative, judicial, administrative agencies and mass media. First, central government departments and local governments are delegated powers to make regulations or by-laws for the enforcement of the Law. To date, almost all provincial governments have put into force by-laws protecting consumers. Some central government departments too have promulgated and enforced regulations related to consumer protection.⁷ Special rules were made to regulate particular sectors where consumers are generally in a more vulnerable position.⁸ Second, courts at different levels give priority to hearing consumer protection cases and enforcing the judgments. Special courts are established in some cities for hearing consumer protection cases, where a summary procedure may be adopted for the convenience of consumers. Third, the Industry and Commerce Administration, as the key government department in charge of consumer protection affairs, was given a power to “coordinate” other administrative agencies in investigating and taking actions against consumer protection law violations. Lastly, mass media assumes a great role in consumer protection. Consumer-related laws, regulations, and cases are frequently reported. The rapid growth of Internet users turns new types of mass media such as the Weibo (a Chinese version of Twitter) and We chat into important channels in promoting consumer rights.

C Post-Consumer Protection Law

Subsequent to the Consumer Protection Law, other consumer-protection-related legislation was passed. The most relevant are the Products Quality Law (1993), Anti-Unfair Competition Law (1993), Advertisements Law (1994), Provisional Regulations on the Prevention of Excessive Profiting

7 E.g., QizhaXiaofeizheXingwei Chufa Banfa (欺诈消费者行为处罚办法) [Measures on Punishments for Deceptive Conducts on Consumers] (promulgated by the State Administration for Industry and Commerce, 15 March 1996, effective Mar. 15, 1996) St. Council Gaz., 25 April 1996, at 446 (China).

8 E.g., the sectors regarding provision of cosmetic, dry clean, tax, gas heaters and automobile goods/services.

(1995), Provisional Regulations on the Administration of Futures Trading (1999), Stipulations on Punishment on Price-Related Law Violations (1999), Anti-Monopoly Law (2007), and Food Safety Law (2009). Notably, consumer protection was expressly declared as one of the purposes of the Anti-Monopoly Law.⁹

To date, China has already established a comprehensive legal framework for the protection of consumer rights and interests, with the Consumer Protection Law as the core. There are now about 160 current pieces of legislation, including a wide range of statutes, regulations and by-laws, directly or indirectly dealing with consumer protection matters.¹⁰ China has also signed and ratified some important international treaties on consumer protection, such as the United Nations Guidelines for Consumer Protection (UNGCP) (1985), and the United Nations Multilaterally Equitable Principles and Rules for the Control of Restrictive Business Practices (1980).

III. Key Aspects of China's Consumer Protection Law

A Consumers' Rights

Part II of the Consumer Protection Law provides that consumers have nine clusters of rights. Five of them are basic consumer rights, including the rights to safety,¹¹ rights to truthful information,¹² rights to choice,¹³ rights to fair dealings,¹⁴ and rights to compensation.¹⁵ The rest of the four clusters are derivative rights, including the rights to association,¹⁶ rights to consumer education,¹⁷ rights to respect,¹⁸ and rights to be heard.¹⁹ Most of these

9 See art. 1 of the Fan LongduanFa (反垄断法) Anti-Monopoly Law (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective 1 August 2008) St. Council Gaz., Aug. 30, 2008, http://www.gov.cn/flfg/2007-08/30/content_732591.htm (China).

10 See Xinglong HU, Introduction of Consumer Law 15 (2nd ed. 2006).

11 *Supra* note 1, art. 7.

12 *Supra* note 1, art. 8.

13 *Supra* note 1, art. 9.

14 *Supra* note 1, art. 10.

15 *Supra* note 1, art. 11.

16 *Supra* note 1, art. 12.

17 *Supra* note 1, art. 13.

18 *Supra* note 1, art. 14.

19 *Supra* note 1, art. 15.

rights are not dissimilar in essence to consumer rights protected in many other jurisdictions.

B Obligations of “Operators”

As the corollary of consumers’ rights, Part III of the Consumer Protection Law provides that an “operator” has a wide range of obligations towards consumers. An operator includes any natural person, legal person and other organisations. An “operator” has the “positive” obligation to comply with consumer protection laws/regulations and consumer contracts,²⁰ to subject himself to consumers’ supervision,²¹ to ensure that consumers are free from personal injury and property damage,²² to provide consumers with true information,²³ to present the operator’s real identity,²⁴ to issue certificate of purchasing or service vouchers,²⁵ to guarantee the quality of goods/services supplied,²⁶ and to take responsibilities as to repair, replacement and return.²⁷ An operator also has the “passive” obligations not to unlawfully exclude liabilities to consumers by standard contracts,²⁸ and not to insult or defame consumers.²⁹

C Remedies

A consumer whose rights or interests as a consumer are infringed upon may settle the dispute with the operator, apply to Consumers Association for mediation, complain to relevant administrative authorities, apply for arbitration, or bring the case to court.³⁰ Most of these remedies are not mutually exclusive.

20 *Supra* note 1, art. 16.

21 *Supra* note 1, art. 17.

22 *Supra* note 1, art. 18.

23 *Supra* note 1, art. 19.

24 *Supra* note 1, art. 20.

25 *Supra* note 1, art. 21.

26 *Supra* note 1, art. 22.

27 *Supra* note 1, art. 23.

28 *Supra* note 1, art. 24.

29 *Supra* note 1, art. 25.

30 *Supra* note 1, art. 34.

D Unique Provisions

There are two unique provisions in the Consumer Protection Law. One is that a defrauded consumer is entitled to punitive damages with an amount equivalent to the purchase price, in addition to a full refund of the purchase price.³¹ Another is that a farmer purchasing or using “means of farming” in farming is treated as a consumer,³² even though the “means of farming” is not “ordinarily” for “the need of living consumption” or “personal, household or domestic use” and is generally consumed in the process of trade.

IV. Problems with the Status Quo of Consumer Protection Law and Practice in China

A The lack of a clear Legal Definition of “Consumer”

The Consumer Protection Law does not provide a definition or interpretation of “consumer”. Article 2 of the Law provides that “[w]here a consumer purchases or uses goods or accepts services for the need of living consumption, [his/her] rights and interests are protected by this Law”. Nothing in the Law interprets the meaning of “the need of living consumption”. Today, 20 years after, there is still no consensus as to whether “the need of living consumption” includes the circumstances where a person purchases a house or a car, or accepts medical treatments, education, brokerage or telecommunication services; and whether “consumer” includes a person who purchases goods knowing the goods are fake but merely for the purpose of claiming punitive damages.³³

Another unsettled issue is whether “consumer” is limited to a natural person. This is because article 2 provides that “a consumer (rather than a person) ... is protected by this Law”. Many academics argue that a consumer in China does not include a legal person or an organisation, because an organisation is presumed to be in an equal position to an operator.³⁴

31 *Supra* note 1, art. 49.

32 *Supra* note 1, art. 54.

33 *Supra* note 1, art. 49.

34 See E.g., Yin Yongqiang (尹永强), *WanshanWoguoXiaofeizheQuanyiBaohuFa de Sika* (完善我国消费者权益保护法的思考) [On Improving Consumer Protection Law in China] 4 *Economist J.* 34, 34 (2012).

By-laws or regulations made after the Law, however, commonly indicate that “consumer” includes a legal person or other organisation.³⁵

The lack of a clear legal definition of “consumer” results in uncertainty in consumer law enforcement. The situation is worse off because of the lack of *stare decisis* in China’s Civil Law system. Without any binding judicial interpretation of the concepts of “consumer” or “the need of living consumption”, Judges and administrative officials may only rely on their personal views of these concepts and thus determine materially similar cases differently. This results in uncertainty and hence contradicts the “rule of law” which requires “like cases should be treated alike”.

A problem in relation to, and as a consequence of, the lack of a clear legal definition of “consumer” is the inadequate protection for new or emerging types of consumption. For example, if you register an online-communication account with an Internet Service Provider (ISP), are you using the ISP’s service for “the need of living consumption” What if you also use that account for business communications Commonly, you may not register an account unless you accept the ISP’s disclaimer excluding its liability. Is such an exclusion of liability effective in law Generally, operators’ liability to consumers cannot be contracted out,³⁶ but is the user of that account a consumer.

B The Limited Role of Consumer Associations

Prima facie, consumer associations are statutory bodies³⁷ and are delegated a wide range of powers/functions in dealing with consumer-protection affairs, including provision of information, participation in supervision, suggestion to administrative agencies, investigation and mediation, submission of complained goods or services for appraisal, supporting consumers in litigations, and to expose and criticise consumer rights infringements through mass media.³⁸ Those powers/functions, however, are substantially restricted in practice, mainly for two reasons. First, consumer

35 E.g., art 2 of the *Guandongsheng Shishi Xiaofei zhe Quanyi Baohu Fa Banfa* (广东省实施消费者权益保护法实施办法) Measures on Implementation of Consumer Protection Law in Guangdong Province (promulgated by Standing Comm. People’s Cong. Guangdong Province, Aug. 30, 1999, effective Aug. 30, 1999) (Date needs to be provided here) http://www.law-lib.com/law/law_view.asp?id=34665.

36 *Supra* note 1, art. 24.

37 *Supra* note 1, art. 31.

38 *Supra* note 1, art. 32.

associations are not government agencies and all the powers given are limited to those of the nature of proposal, referral or suggestion. Consumer associations have no statutory power to enforce any law. It is true that governments at all levels are required to support consumer associations in exercising their functions and duties,³⁹ but nothing is said as to what will happen if a government fails to support. Second, a settle agreement as a result of a consumer association's mediation is not directly enforceable by courts. If a party refuses to fulfil his/her obligations provided in the settle agreement, the other party can only bring either a "contractual" case (regarding the agreement), or the original dispute (from the scratch), to courts. Consequently, it is not common for a consumer to go to a consumer association for settling disputes.

C Considerable Costs for a Consumer to Seek a Judicial Relief

Due to the vagueness of the concepts of "consumer" and "the need of living consumption", a person who thinks his/her rights or interests have been infringed upon may not be sure whether he/she is a consumer or not in the particular circumstance. He/she might consult lawyers, but different lawyers may give him/her totally different advices as to the possible outcome of the case. The uncertainty increases the costs for consumers to bring a case to courts. Fees/costs have to be paid before an outcome can be obtained from courts. Even if he/she wins the case, the damages awarded are still likely to be insufficient to cover his/her costs. Those costs include losses from the absence from work, legal fees paid to the courts and lawyers, fees incurred for the testing and valuation of the goods/services. It is not unlikely that those costs outweigh the damages awarded. Especially, as a general practice in China, legal fees paid to lawyers are generally not recoverable from the culpable party even if a litigant wins the case.

D Overlapping Roles/Functions of Administrative Agencies

The Industry and Commerce Administration, and other "relevant administrative agencies" have powers and duties to protect consumers.⁴⁰ They may revoke a consumer law violator's licences or impose a fine on a

³⁹ *Id.*

⁴⁰ *Supra* note 1, art. 28-29.

violator.⁴¹ China's consumer law enforcement by administrative agencies, *prima facie*, seems very effective. The real situation is, however, is far from the ideal. The prominent problem is with the overlapping functions and roles of the "relevant" administrative agencies. Consequently, when a consumer complains to one agency (say, the Industry and Commerce Administration) against a seller of fake medical products, this agency may ask the complainant to complain to other "relevant" agencies (say, the Administration of Food and Drugs Supervision). The government agencies may play a game of "ping pong" (table tennis) and entangle the entire matter in a bureaucratic mesh. In addition, there is no clear procedure for a consumer to follow in making a complaint. It is not clear which of those "relevant departments" a particular complaint should be made; and whether this department must record the case, start investigation and reach a decision within a time limit.

E The Gap Between Administrative Agencies and Courts

Another issue concerns the relationship between administrative protection and judicial relief. If a consumer complains to an administrative agency, the agency may after an investigation, punish the operator by revocation of license or imposition of a fine, but may not award damages to the complaint consumer. Unless the operator's violation is so severe that a criminal liability may be pursued, enforcement of the administrative punishments will be the end of an administrative protection procedure. A consumer can only go to the court for civil relief. Currently in practice the court in determining the amount of damages awarded to the consumer plaintiff does not take into account the fact that the defendant has already been punished by administrative agencies for the same or similar conducts. It is conceivable that a decisive factor in assessing damages is the actual loss of the plaintiff. The effect of courts' ignorance of the administrative punishments, however, is that the violators are very likely to continue their unlawful conducts until a consumer goes to the court. This is because the gains from violation of consumer law may outweigh the losses caused by the administrative punishments.

On the contrary, if a consumer goes to the court straight away, he/she may be awarded damages by the court. The rights and interests of the plaintiff

41 *Supra* note 1, art. 29. See also article 8 of the Xingzheng Chufa Fa (行政处罚法) [Administrative Punishment Law] (promulgated by Nat'l People's Cong., Mar. 17, 1996, effective Oct. 1, 1996) St. Council Gaz., Apr. 10, 1996, at 325 (China).

consumer are thus protected. It is not clear whether the court's judgment of such a civil case may be invoked by an administrative "relevant department" as the basis of administrative punishments, but the current practice is that no such actions are taken by administrative agencies unless a consumer makes a successful complaint against the same violator. The violator may continue his/her unlawful conducts because he/she is only actually liable to the plaintiff consumer who won the civil case and the damages awarded may be much less than the total gains from his/her violations (not every deceived consumer goes to courts for relief due to the costs, uncertainty and other factors).

F Arbitration as an Impractical Avenue for Relief

Arbitration is one of the avenues that aggrieved consumer may seek a relief. It is, however, impractical for a consumer to invoke this process. Under current Chinese law a binding arbitration clause or agreement is a prerequisite for bringing a dispute to arbitration.⁴² In China, there is no special arbitration tribunal/procedure for consumer disputes and consumers are not familiar with arbitration. It is quite uncommon in practice that an arbitration clause is included in a contract between a consumer and the operator. It is also very unlikely that an arbitration agreement could be reached between them after a dispute arises. It is extremely rare that a consumer-operator dispute is actually brought to arbitration.

G Problems with the Civil Procedure

Firstly, a *potential* consumer does not have a standing at court against a culpable operator. As a general rule of civil procedure in China, only those who have a "direct interest relation" with the case may act as a plaintiff.⁴³ A person may only bring a civil proceeding against a consumer law violator after he/she has actually purchased, used or accepted the goods/services provided, and has suffered a loss. It is impossible for a person to sue a consumer law violator for public *interest* unless that person has already been directly aggrieved by that violator.

42 See arti 4 of the ZhongcaiFa (仲裁法) [Arbitration Law] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 1994, effective Sep. 1, 1995) ST. COUNCIL GAZ., Sep. 20, 1994, at 867 (China).

43 See article 108 of the MinshiSusongFa (民事诉讼法) [Civil Procedure Law] (promulgated by Nat'l People's Cong., Apr. 9, 1991, effective Apr. 9, 1991) St. Council Gaz., May. 15, 1991, at 481 (China).

Secondly, the class action brought by a representative procedure as provided by the Civil Procedure Law⁴⁴ does not work in the real world. On one hand, courts in China are very reluctant to accept a class action for political and practical reasons. On the other hand, it is very difficult and costly for a particular consumer to coordinate a class action by a representative.

V. Recent Developments and Proposals for Reform

Partially in response to the problems and criticisms, an amendment bill to the Consumer Protection Law was recently introduced. The Bill proposes changes in five areas of existing consumer law for “strengthening consumer protection”, “coping with new situations in consumption”, and “making consumer protection law workable”.⁴⁵

A. New Detailed Rules on Consumers Rights and Interests

The Bill proposes better protection of consumers’ personal information. A business operator cannot collect, process, or use consumers’ information unless for specific, clear, legal and reasonable purposes and with informed consent from the individual concerned.⁴⁶ Nor can an operator send digital commercial information to a consumer without the consumer’s consent.⁴⁷

The Bill introduces stronger protection of consumers’ rights to return, replacement and repair. A consumer who purchases substandard quality of goods/services will be entitled to return within seven days, even if there is no specific provision of law or agreement on this.⁴⁸ The consumer may still cancel the contract after the seven days if the general requirements for cancelling a contract are satisfied; and the rights to repair/replacement exist whether those requirements are satisfied or not.⁴⁹

44 *Id.*, art.53 & 54.

45 Standing Committee of National People’s Congress, XiaofeizheQuanyiBaohuFaXiuzhengan (Caoan) TiaowenJiCaoanShuoming [An explanation to the Consumer Protection Amendment Bill (Draft) and the Clauses] (Standing Comm. Nat’l People’s Cong., Apr. 28, 2013, http://www.npc.gov.cn/npc/xinwen/lfgz/flca/2013-04/28/content_1793762.htm(China)). The following categorisation is largely based on this explanation.

46 See the Consumer Protection Amendment Bill (Draft), *Id.*, cl 2 & 10.

47 *Id.*, cl 20.

48 *Id.*, cl 6.

49 *Id.*

The Bill also introduces harsher punishments for commercial fraud. Where an operator has fraudulent conducts in supplying goods/services, in addition to a full refund, the defrauded consumer will be entitled to *punitive damages* as much as *twice* of the purchase price, with a minimum amount.⁵⁰ If an operator fraudulently supplies defective goods/services knowing the defects, which causes severe personal injury or death, criminal liability will be pursued in addition to civil damages.⁵¹

B Strengthening Obligations and Duties of Business Operators

First, the Bill imposes on operators a duty to issue a warning and to recall defective products.⁵² Second, the Bill shifts the burden of proof to operators, where a defect is raised by a consumer within six months, regarding the supply of durable consumer goods (such as vehicles, computers, televisions and refrigerators) and particular types of services (such as decoration of houses).⁵³ Third, the Bill imposes on advertisers a joint liability with suppliers where a misleading advertisement concerns about food, drugs or other goods/services related to human's health.⁵⁴

C New Rules on E-Commerce

The Bill introduces a "cooling down" period for "online shoppers". A consumer purchasing via the Internet, television, telephone, or mail order may return the goods/services within seven days from the date of receiving the goods/services and is entitled to a full refund of the purchase price.⁵⁵

50 *Id.*, cl 25.

51 *Ibid*

52 *Id.*, cl W3.

53 *Id.*, cl 5.

54 *Id.*, cl 17.

55 *Id.*, cl 9.