Nonconformity in Subject Matters for Sales : Turning of Fundamental Analyzing Instruments and Improvement of Specific Systems

PhD Thesis

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Abstract

The rise of seller's obligation to tender subject matters conforming to the contract indicates a fundamental shift in sales law, away from the classical notions of *defects in things* and *warranty liability for defects*. "Nonconformity with the contract" is a promising concept as it allows a "single-track" remedy system for breach of contract, rather than distinguishing special remedies for defects and general remedies for breach of contract. The fact that the special remedy regime has had difficulties in meeting the requirements of modern society has been a major factor in its decline, besides the confusing legal structure of the expression "warranty liability" it relied on.

In Chinese legislations and judicial practices, the reasonable exercise of the buyer's remedy rights in case of nonconformity and the reasonable time limitation on these buyer's remedies are two problems that need further clarification and examination. These two "reasonableness" issues are the focus of this study.

Regarding the reasonable exercise of remedy rights, I argue that the seller should be granted a right to cure the nonconformity in the subject matter he delivered, notably because of the need to maintain the inner coherency of the remedy system and to strike a balance of interests between the contracting parties. The right to cure should be constructed as a right to suspend any inconsistent or abusive remedy claims by the buyer, giving the seller a "last chance" to save the contract. Further, I suggest that the buyer's right to refuse nonconforming goods in Chinese law should not be interpreted as a right to reject nonconforming goods as in Anglo-American law, because China already has a functional equivalent to this right to reject, namely the right to require supplementary performance. Rather, what should be perfected is the buyer's right to refuse to take delivery, and the conditions for exercising this right should be basically the same regardless of whether the nonconformity is in quality or quantity. Finally, I argue that the buyers' right to price reduction in case of nonconformity should be interpreted as a right to require contract modification and that the buyer should not reduce the price unilaterally, because in Chinese positive law the conditions for exercising this right are not as strict as the conditions of contract termination. The introduction of a German-style price reduction into Chinese law might cause disorder within the remedy system as well as an

imbalance of the parties' interests, as it would give excessive protection to the buyer.

Regarding the determination of a reasonable period for the buyer to give notice of nonconformity, I first clarify the relationship among inspection period, notification period, and guarantee period for quality. The Chinese Contract Law (CCL) has merged the inspection period with the notification one, making the time for the buyer's notification overly short. I therefore recommend differentiating, by teleological reduction, the "inspection period" provided in CCL Article 158(1) from the one provided in CCL Article 157. On the other hand, as the agreed inspection period has functioned as the longest time limit for notification, it often conflicts with the guarantee period for quality, which can also affect the length of the longest time limit, causing confusing applications in judicial practice. I then propose various methods for interpreting the contract in order to address potential conflicts resulting from the problem of "double interference" with the time limit. As to determine a reasonable period for notification of nonconformity, I firstly introduce the experiences in German-speaking countries, which have been using a so-called "noble month" as a rough average period, and in U.S. law, which has been following certain policy rationales in determination. Finally, I propose that the policies aiming to protect the seller from being prejudiced by the buyer's failure to notify the nonconformity should be fundamental guidance, whereas a relatively "rigid" starting scope could be a secondary reference, taking into account both the predictability and the flexibility in the application of law.

Key words: Nonconformity with the contract; Warranty liability for defects; Right to cure the breach; Reasonable period for giving notice

Abbreviations

ADHGB	Common German Commercial Code of 1861 (Allgemeine Deutsche Handelsgesetzbuch)
ALI	American Law Institute
BGB	German Civil Code (Bürgerliches Gesetzbuch)
CAL	Chinese Auction Law (Auction Law of the People's Republic of China)
CCL	Chinese Contract Law (Contract Law of the People's Republic of China)
CECL	Chinese Economic Contract Law of 1981
CISG	the United Nations Convention on Contracts for the International Sale of Goods
EU Consumer Directive of 1999	Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees
FCC	French Civil Code
GPCL	General Principle of Civil Law of the People's Republic of China
HGB	German Commercial Code (Handelsgestzbuch)
JCC	Japanese Civil Code
JILSC	China's Supreme People's Court's Judicial Interpretation on the Law of Sales Contract
LBC	Liability for Breach of Contract
NCCUSL	National Conference of Commissioners on Uniform State Laws
NPCSC	China's Standing Committee of the National People's Congress
pCESL	the Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law
PECL	the Principles of European Contract Law
pPROL	Japan's Draft Proposals for Principles of Reforming Obligation Law
SGA 1893	the U.K.'s Sale of Goods Act (1893)
SGA 1979	the U.K.'s Sale of Goods Act (1979)

SPC	China's Supreme People's Court
UCC	the U.S.'s Uniform Commercial Code
ULF	Uniform Law on the Formation of Contracts for the International Sale of Goods
ULIS	Uniform Law on the International Sale of Goods
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT Principles 2004	UNIDROIT Principles of International Commercial Contracts 2004
UNIDROIT Principles 2010	UNIDROIT Principles of International Commercial Contracts 2010
USA	the U.S.'s Uniform Sales Act of 1906
WLD	Warranty Liability for Defects

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Chapter 1 Introduction

1.1 Research topic and background

In Chinese contract law, there are two key questions related to "reasonableness" that need further research. One concerns the reasonable exercise of the buyer's remedy rights in case of quality or quantity problems in subject matter for sales; the other concerns the reasonable time limitation on these buyer's remedies. Regarding the first one, there are disagreements on whether the seller can basically remove the nonconformity or deliver a fresh conforming tender before the buyer terminates the contract, requires price reduction, or claims damages, and on how the buyer can exercise the rights of refusing to take delivery and requiring price reduction. Regarding the second one, there are disagreements on whether the periods for inspection and for notification ought to be distinguished and on how to determine a reasonable length for the notification period. These questions ought to be considered from the perspectives of the balance of interests between the contracting parties and the inner coherency and consistency of the system.

When we approach this topic, it is crucial to keep in mind that contract law, especially the law of sales contracts, has experienced a process of extraordinary globalization in the past few decades. One important symbol of this process is the adoption of the United Nations Convention on Contracts for the International Sale of Goods (CISG)[①] in 80 countries and counting, including all important economic actors except the U.K..[②] This convention and a few other successful model rules, such as the UNIDROIT Principles of International Commercial Contracts (UNIDROIT Principles) and the Principles of European Contract Law (the PECL), have greatly stimulated the unification of cross-national laws (e.g., Z. Q. Chen, 2010a; Z. Q. Chen, 2010b; M. E, Xiang, 2010), and the revision and modernization of domestic contract laws, including the EU's Directive of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees (hereafter EU Consumer Directive of 1999),

① As to official text, see official website of the United Nations Commission on International Trade Law (UNCITRAL), http://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf.
② See http://www.uncitral.org/uncitral/zh/uncitral_texts/sale_goods/1980CISG_status.html.

Germany's modernization of its obligation law (Gesetz zur Modernisierung des Schuldrechts) in 2002 (Haas et al., 2002, pp. 2-4), the United States' amendment on the Article of Sales in the Uniform Commercial Code (UCC) in 2003, Japan's Proposal for Principles of Reforming Obligation Law (hereafter pPROL) drafted by the Japanese Civil Code (Law of Obligations) Reform Commission since 2009[①] and the Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law (pCESL) in 2011.[②] Another important legislative development is the unified Contract Law of the People's Republic of China in 1999 (hereafter CCL).

It has to be admitted that the rapid development of cross-national transactions has had a very internationalizing influence on the law of sales contract. Many national legal systems have generally come to share similar fundamental analysis instruments,[③] remedy systems[④] and time limitations on the buyer's remedies.[⑤] Accordingly, they have also come to share the same problems and uncertainties, notably regarding the reasonableness of the buyer's exercise of remedy rights, and of the time limitations within which the buyer should give notice of nonconformity.

Against this background, this dissertation will, by comparing the above-mentioned legislations, proposals and interpretations, try to identify possible solutions for both issues above and make some suggestions for the improvement of related Chinese rules. Throughout the analysis, this author will emphasize the importance of striking a balance of interests between the contract parties and maintaining coherency within the remedy system. Although the main purpose of this dissertation is to draw a roadmap to solve these "reasonableness" issues within Chinese law, the research may also be helpful for the modernization of Japanese obligation law, which is confronted to similar problems internationally.

I am confronted with a theoretic obstacle in Chinese contract law right from the start of

① The Japan's Reform Commission emphasizes that these draft proposals are not draft provisions to be promulgated as they are. A lot of polishing is expected before the proposals can become legal provisions. What the Reform Commission intended was to submit a set of policy proposals for drafting new provisions of the Law of Obligations. However, these proposals were drafted by a number of senior scholars specialized in civil law. The proposals can therefore more or less reflect the prevailing standpoint of major civil law scholars. See Japanese Civil Code (Law of Obligations) Reform Commission (2009a, p. i).

② As to full text, see http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0635:FIN:en:PDF. This proposal indicates that we may be expecting a Uniform European Sales Law, as an optional instrument for the EU's member states (Macqueen et al., 2012, pp. 65-70).

③ For example, the concept of *nonconformity with the contract* discussed in Chapter 3 of this dissertation.

④ For example, the U.K. has introduced remedies of requiring repair and replacement for consumers, according to Sale and Supply of Goods to Consumers Regulations in 2002 (Basedow, 2005, p. 487).

⑤ For example, the notice rule applying on nonconforming goods in U.S. law was inspired from the German Commercial Code about a century ago, and has further influenced the drafting of CISG Article 39. See Section 7.3 of this dissertation.

the analysis, namely the instability of fundamental analysis instruments. Important divergences between "unitary theory" and "relative independence theory" have significantly impacted the identity of fundamental legal instruments, such as liability for breach of contract, and the properness of certain legal concepts, such as warranty liability and defects. Therefore, the first part of this dissertation will review fundamental theories on this topic in China, aiming to supplement and perfect the unitary theory, and then clarify fundamental analysis instruments for further analysis.

1.2 Previous research in China

1.2.1 Previous research on fundamental analysis instruments

Academic research on "warranty liability for defects" began with the introduction of foreign theories (Liang, 1991), and has, for now, concentrated on whether warranty liability for defects had been merged into "liability for breach of contract". It seems that more and more researchers have been considering that warranty liability for defects cannot be independent from liability for breach (L. M. Wang, 2001; Han, 2007; X. J. Chen, 2003, pp. 276-277; Xie, 2011). After the enforcement of the CCL, Professor L. M. Wang (2001) argues that "there is no such system of warranty liability for defects that can be separated from inappropriate performance" (p. 25), Professor S. Y. Han (2007) also concludes that warranty liability for defects has been merged into liability for breach of contract, and therefore, the "double-track" remedy system has been replaced by a "single-track" remedy system (p. 170). This theory is usually been named "unitary theory" (Cui, 2006).

On the other hand, some other authors advocate the so-called "relative independence theory", according to which the independent warranty liability for defects still exists independently, but is merely merged into liability for breach of contract *in name* (e.g., Cui, 2006). These scholars argue that there are still substantial differences between warranty liability for defects and liability for breach of contract, in respect of both idea and function (e.g., Cui, 2006). Sometimes this theory is also called "distinction theory" (Y. J. Li, 2008, p. 333).

Generally speaking, the enforcement of and the case law related to the unified Chinese Contract law has convinced more and more scholars of the unitary theory, making it gradually

become the prevailing theory (Xie, 2011, p. 80), while leaving the relative independence theory as its major critique. Under these circumstances, this author considers it necessary to work for further consensus, in order to promote the identity and stability of fundamental analysis instruments. Thus, I will try to perfect the unitary theory by reviewing what the relative independence theory could contribute to.

1.2.2 Previous research on the reasonable exercise of remedies for nonconformity

First, there are only a few studies on the seller's right to cure nonconformity, which is an important device for striking a balance of interests between the contracting parties and promoting the reasonable exercise of remedies. Professor D. M. Shen published a thesis in 1995 on the right to cure in U.S. law, in which he introduced the content of and official comments on UCC §2-508. He pointed out that "there is no definition provided in the code [on the right to cure]. According to academic research, the cure refers to repairing, adjusting and replacing nonconforming goods, as well (in some cases) as paying a monetary allowance." (Shen, 1995, p. 19-21) He also argues that "strictly speaking, it [i.e., the right to cure] is not a right but a power" (Shen, 1995, p.19). This is one of the most insightful researches on the right to cure among Chinese scholars. After that, Professor S. Y. Han, who later becomes a famous proponent of the unitary theory, has introduced the system of cure into a draft proposal for the Chinese Civil Code. Professor Han drafted one provision on "breaching party's cure", based on the advanced experiences of international model rules (Liang, 2011, p.183). Since that, only a few scholars have concentrated on the seller's right to cure. Among them, the research of F. M. Jiao and Y. Lu (2009) deserves mentioning: they examined the right of the obligor to cure in the PICC and the PECL, and argue that the common idea behind the right to cure is basically coordination. They also raised the issue of the Chinese translation of the concept and argue that the term "*zhiyu*" is preferable to that of "*bujiu*" (pp. 66-68). To sum up, as to the research on the seller's right to cure, there has been some inspiring work; however, there is still a lack of consensus on the expression of this concept, not to mention the essential nature, constituent elements and legal effects of it. Moreover, no concern has been given to the inner coherency of the remedy system, especially considering that the CCL has introduced a right for the aggrieved party to require supplementary performance (a concept inspired by continental legal

systems). Proper suggestions cannot be made without considering the coherency between the buyer's right to require supplementary performance and the seller's right to cure.

Second, the realization of some of the buyer's remedy rights needs to be reviewed from the perspectives of the balance of the parties' interests and the inner coherency of the system. For example, there has been great dispute on the refusal to take delivery, the refusal to accept, and the returning of goods. H. Y. Xia and J. Fu (2008) argue that provisions on advance performance (CCL Art. 71), partial performance (CCL Art. 72), performance with exceeding quantity (CCL Art. 162) and performance with nonconformity in quality (CCL Art. 148) have all confirmed the buyer's right to refuse to accept nonconforming subject matters, whereas Han (2011b) argues that those four articles all relate to the buyer's right to refuse to take delivery (pp. 317-319). H. Wang (2009), however, considers that the rights in Articles 71 and 72 of the CCL are rights to suspend, of a different nature than the right that can lead to termination of contract in Article 148, and she advocates perfecting the system of the right to refuse goods by borrowing the experiences in Anglo-American law. Yet L. H. Chen and C. B. Liu (2004) make distinctions among the refusal to take delivery provided in Article 162, the refusal to accept provided in Article 148, and the returning of goods provided in Article 111 and, consider the refusal to accept as a termination of the contract in its nature. It can be observed that the nature of buyer's rights provided in Articles 71, 72, 148 and 162 and their relationship to each other are complicated and draw little consensus among scholars. It is urgent to analyze these problems from the perspective of the inner coherency of remedy system.

The buyer's right to price reduction is also among the most disputed issues. Regarding the structure of price reduction and its perfection, Professors Han (2008) and J. L. Du (2008) have separately made relatively thorough analyses, and both advocate the German-style price reduction, which basically allow the aggrieved party to unilaterally declare price reduction.[①] Professor J. Y. Cui (2012), on the other hand, emphasizes the importance for analysis with reference to the coherency of the remedy system, and argues that the status of price reduction should be considered regarding "whether or not it is a special way of compensating for losses" (p. 98). Actually, there is a need for a greater inner coherency in the system. Although

[①] For further discussion based on these opinions, see Z. L. Yang (2010).

according to the prevailing theory, price reduction can be exercised by unilateral declaration,[①] the essential justification of this structure has been largely neglected. The key device of German-style price reduction is to base the conditions to exercise the right of price reduction on the one to exercise the right of termination (except regarding minor defects). Without this key device, the introduction of German-style price reduction into Chinese contract law will probably cause disorder within the remedy system as well as an imbalance of the parties' interests, in the sense that it overprotects the aggrieved party. This author will examine different ways to realize price reduction and recommend reconsidering the prevailing theory.

1.2.3 Previous research on the time limitation on remedies for nonconformity

As to time limitation on the buyer's remedies, most scholars in China have concentrated their research on the legal nature of inspection period or notification period. At the beginning of the 1990s, Professor Liang (1991), based on observations of continental law countries' experiences, recommended that the nature of notification period should be considered as an extinction period (p. 29). Yet, judges of the Supreme Court have tended to interpret and enforce CCL Article 158 as a kind of special rule of prescription. They have stated that, "since special rules have priority over general rules, Article 158 of the CCL should have priority over Article 136 of the General Principles of Civil Law (GPCL)." (G. G. Li, 1999, p. 734) According to this standpoint, given that GPCL Article 136 is a general rule for prescription, CCL Article 158 is unquestionably a specific rule for such prescription. Some scholars have been known to basically agree (e.g., Y. Wang, 2001, pp. 109-117).

The consensus achieved is after the lapse of a certain period, the buyer's claim for remedies for nonconformity in quality or quantity should basically not be admitted by legal authorities. However, as to the relationship among inspection period, notification period, and guarantee period for quality and factors or standard for determining a reasonable period for giving notice, which judges are eager to address, only a few law practitioners have devoted themselves to do research,[②] and few analysis on policies served by the notice rule have been conducted.[③] Therefore, it is necessary, for proper application of Chinese law, to review the structure of the

① As to the prevailing theory, see Han (2008); Du (2008); Ma & Yu (2007, p. 690); Su (2011, p. 275).
② As to the exploration made by law practitioners, see Mao and Cai (2004), and Y. Q. Sun (2011).
③ Even the literature introducing expereices in foreign legal systems is rare. As to related studies, see L. H. Chen and Q. Li (2011), and J. G. Wang (2011).

notice rule in the CCL and to establish adequate instructions for determining a reasonable period for notification.

1.3 Research methods

1.3.1 Comparative legal analysis

Comparative legal analysis, in the most general sense, is comparing the spirit and approaches of various legal cultures, and revealing the characteristics of different legal systems, as well as their similarities; specifically, comparative legal study compares different methods for solving a given legal problem, to help understand and improve the domestic legal system (Ooki, 2006, p. 66). The analysis of comparative law employed in this dissertation focuses on functional comparison, rather than literal comparison of statutory provisions. I believe, moreover, that functional comparison of the legal concepts in different legal systems is the only way to reduce misunderstanding arising from literal translation. As mentioned above, the CISG has significantly influenced the drafting of the unified Chinese Contract law of 1999 as well as the modernization of the German obligation law of 2002, and is impacting, directly or indirectly, the reform of Japanese obligation law in recent years. Studies of nonconformity of the subject matter in contract law cannot be limited to the domestic area; comparative law study is necessary and irreplaceable.

The first civil code in China entered into force in 1929, and was abolished in most areas of China, except Taiwan, in 1949. Moreover, the direct study of traditional civil law theories had been interrupted for about thirty years, and had not revived until the 1980s. It is widely accepted that the General Principles of Civil Law of China (GPCL) in 1986 has followed the models of traditional civil codes, including the civil codes of European continental countries' and Japanese Civil Code. However, since the 1980s, Chinese contract law has been more and more heavily influenced by international uniform private laws (Liang, 1996, p. 13). It is generally recognized that a large amount of rules, especially rules related to sales contract in the CCL of 1999 was borrowed from the CISG and has close relationship with common law systems (e.g., Liang, 1996, pp. 13-15); as exemplified by the notice rule. In this account, it is plausible to say that the research of Chinese contract law cannot be competently made without

comparative study of both civil law and common law approaches. The previous research on time limitation was, however, essentially dominated by not only special legal expressions from traditional civil law, but also by the interpretational approaches from continental jurisprudence. However, it has been largely overlooked that requirement for notification in a reasonable period is much closer to rules in the CISG and the UCC. Therefore, it is necessary to emphasize the desirability of thorough comparative law study of different legal systems for the improvement of related rules in China.

1.3.2 Empirical analysis

Empirical analysis of law has been particularly highlighted during the past decade. J. J. Bai, for example, has proposed that empirical analysis should be applied more frequently in the study of law, as he expressed by advocating "a little less *I believe that*, a little more *I found that*" (Bai, 2008, p. 25). Recently, many Chinese scholars have discussed the application of empirical analysis in civil law research; and case study has been particularly emphasized (e.g., Han, 2012, p. 46). The subject of empirical study, however, ought to be the objective elements of judicial decisions, such as the types of nonconformities or the different understandings of a special legal concept in a series of given cases. By collecting, classifying and analyzing legal decisions available in the database of *Beida Fabao*, certain problems or phenomena in legal practice can be well demonstrated.

In the first chapter, this author employs this empirical method to analyze the usages of *warranty liability for defects*, aiming to explore the different understandings and applications in decisions using this legal concept. The result shows that, more than a half of the samples have considered warranty liability as a certain obligation of the seller to warrant the subject matter to satisfy some requirements on quality or quantity. This means that the understanding and application of warranty liability in legal practice deviates significantly from the prevailing definition in academic research, according to which warranty liability is some kind of remedies. In this chapter I will examine the cause of this phenomenon and discuss the definition of this legal concept.

1.3.3 “Norm-logical” analysis

One of the most important and oldest legal study methods is the so-called “norm-logical” analysis, which is actually a logico-semantic analysis of positive law (MacCormick & Weinberger, 1986, p. 45). “Norm-logical” analysis aims at clarifying the logic and literal content of positive norms. It is the most important method to construct interpretative theory. When applying this analysis, various interpretative methods would be employed, including semantic interpretation, historical interpretation and teleological interpretation. “Norm-logical” analysis will be employed in all chapters, not only on positive statutes, but also on judicial decisions. When applying this method, the following instructions ought to be mentioned.

First, contemporary logical-semantic analysis should not be dismissed as a *game of concepts*, which is unable to reflect the changes of morality and to meet the aims of society. Contemporary logical-semantic analysis ought to be connected with value judgment and evaluation of interests.[①] In other words, the “norm-logical” analysis should not be independent from social aims and basic values in human society. On the contrary, it ought to be, more or less, interpreted or implemented in consideration of these social aims and policies (Bodenheimer, 1967, p. 97).

Secondly, it is important for the interpreter who follows the traditional methods of legal interpretation to keep one basic standpoint, but not, for example, swing from an extremely subjective one to an excessively objective one when exploring legislative purposes. Failing to keep one basic standpoint could be fatal for the inner coherency of the remedy system.

1.4 The structure of this dissertation

1.4.1 Clarification of fundamental analysis instruments (Chapters 2 and 3)

The first part of this dissertation, consisting of Chapter 2 and Chapter 3, primarily aims to deal with the dispute of fundamental theories and dispel the confusion relating to fundamental instruments. As mentioned above, the main theoretical obstacle for dealing with those two

[①] The approach of incorporating value judgement and evaluation of interests into legal interpretations has formed, in Germany, the so-called Jurisprudence of Value Judgments (*Wertungsjurisprudenz*), which was advocated in particular by Karl Larenz, whose methodology of legal science is influential in China (Larenz, 1991, pp. 119-125). Jurisprudence of Value Judgments is considered as the dominant jurisprudence in today’s Germany (Grisé, Gelter, & Whitman, 2012, p. 113).

"reasonableness" issues is the instability of fundamental analysis instruments. Because of the opposition between the unitary theory and the relative independence theory, the fundamental concepts, that is to say liability for breach of contract and warranty liability for defects, lack stability and identity. It is necessary, at first, to review fundamental theories on this topic and clarify fundamental analysis instruments.

In Chapter 2, I try to demonstrate the problems existing in legal practice through an empirical analysis of judicial decisions. It turns out that the results of judicial decisions using warranty liability as some kind of obligation are much more than expected. It is clear that there is great divergence related to the usage of warranty liability. From the perspective of semantic interpretation and based on the historical development of related rules, it seems that the concept of warranty liability itself has a confusing structure. After reviewing the fall of special remedies for breach of warranty, I show, not only that the old special remedies that cannot adapt to the modern economy ought to be abandoned, but also that the expression of warranty liability itself is too ambiguous for proper application. I conclude in this chapter that the "liability for breach of contract" has indeed and generally a broad meaning in Chinese law and that this kind of "broad meaning" in legislation can hardly be "corrected" by interpretation. Although the unitary theory admittedly suffers from shortcomings, the relative independence theory would face even more problems and must therefore be abandoned.

In Chapter 3, I reconstruct fundamental instruments for analysis. The unitary theory, in the past, has merely concentrated on the analysis of remedies, while this dissertation will mainly focus on the issues of contractual obligations. Most scholars still tend to preserve the legal concept of *defects* as a key instrument for analyzing legal consequences for breach of contract, to refer to obligations of warranty against defects (e.g., L. M. Wang, 2003, p. 398; Cui, 2010, p. 386; Han, 2010, p. 389; Ma & Yu, 2007, p. 642), while I would like to argue that the concept of *nonconformity* is less ambiguous and better recognized worldwide, and that it could therefore be a promising replacement to *defects*. Furthermore, *obligation of warranty against defects* is not a satisfactory concept insofar as the special meaning of warranty cannot be well defined. In this chapter I will argue that the concept of the seller's obligation to tender conforming subject matters would be a preferable instrument for analysis. Based on this opinion, I attempt to redefine the concept of warranty liability for defects that remains in the Supreme People's

Court's Judicial Interpretation on the Law of Sales Contract (hereafter JILSC) in 2012.

1.4.2 Reform of rules on exercising remedies for nonconformity (Chapters 4 and 5)

1.4.2.1 Construction of the seller's right to cure

Chapter 4 deals with the introduction and clarification of the seller's right to cure. The remedy system for breach of contract in China does not prioritize the seller's supplementary performance. In other words, the buyer may choose any remedy he considers to be reasonable, whether supplementary performance, damages, or price reduction in case of nonconformity; there is no order of priority among them. However, a problem arises from this kind of design: once the breach occurs, is the buyer able to choose any remedy he considers as reasonable, disregarding the seller's requirement of cure or supplementary performance in good faith? The reason I address this question is the obvious imbalance of interests between the buyer and seller in the CCL. It should be noted that in both German law and U.S. law, the answers to the question above are negative, while in Chinese law the seller seems to be completely at the mercy of the buyer in case of breach of contract.

German law gives priority to supplementary performance, and the buyer must generally fix an additional period for that performance before pursuing other remedies. U.S. law, on the other hand, gives the seller a so-called "right to cure"; even if the buyer rejected the goods or justifiably revoked the acceptance, he must still accept the seller's effective cure and thereby prevent cancellation of the contract (though note that any cure must be made with timely notice and at the seller's expense). In Japan, the pPROL has not only adopted the obligee's right to require supplementary performance (追完請求権) (JCCRC, 2009b, p. 198), but also introduced the obligor's right to cure (追完権) (JCCRC, 2009b, p. 209)；both of them generally require the buyer to wait a reasonable time for potential supplementary performance or cure. In contrast, in Chinese law, there is neither a duty for the buyer to fix an additional period for supplementary performance nor one to accept a reasonable cure. The CCL only stipulates that supplementary performance is one of the possible remedies available to the buyer.[①] This makes it possible for the buyer to act opportunistically, for instance, by refusing

[①] This is somewhat different from the dominant views in Germany, which consider supplementary performance as a transformation of the initial performance (der modifizierte vertragliche Erfüllungspruch) (Heyers & Heuser, 2010, p. 3057).

the seller's bid to cure in order to keep his own performance, and the seller could do nothing but accuse the buyer of failing to mitigate his own loss (CCL Art. 119). Clearly this system may cause unfairness and imbalance of interests between the contracting parties.

Besides, without the introduction of devices like the seller's right to cure, there may be theoretical inconsistencies between the lax freedom of the buyer to choose remedies and the strict conditions for him to terminate the contract under the CCL. According to CCL Article 94, the buyer who received nonconforming subject matters may not terminate the contract unless the breach frustrated the purpose of contract. This strict standard reflects that the legislative purpose is generally encouraging the parties to save or maintain a contract. Such a purpose would be frustrated if there were no effective restriction on the buyer to choose remedies.

Therefore, I try to argue in Chapter 4 that the seller's the right to cure is not only important for the balance of interests between the contracting parties, but also beneficial for the coherency as to provisions of termination of contract and of notification of nonconformity. The nature, constituent elements and legal effects of this right will also be clarified here.

1.4.2.2 Reconstruction of the buyer's right to refusal to take delivery and to price reduction

Chapter 5 deals with the structure of several of the buyer's remedy rights. I try here to reconstruct these rights from the perspectives of the inner coherency of remedy system and the balance of interests between the contracting parties, addressing refusal to take delivery and price reduction respectively in the first and second section of this chapter.

In the first section of Chapter 5, I will firstly address whether the buyer's right to reject should be established, on a par with the buyer's right to require supplementary performance. By comparing the right of rejection in Anglo-American law and the right to require supplementary performance in German law, I will argue that the systemic functions of these two rights are equivalent. Accordingly, if, in a legal system, the right to require supplementary performance has been established as one of the main remedies for the buyer in case of nonconformity, and the right to terminate the contract has been recognized as the basic system for ending the contractual relationship, it would be neither necessary nor suitable to introduce the system of rejection, otherwise the overlap of systemic functions or legal effects would be inevitable, and confusions in practice might accordingly arise.

Based on these analyses, I will then reconstruct the interpretative theory for CCL Article 148. Next, I suggest that what ought to be carefully construed is the buyer's right of refusal to take delivery, and the determination of the conditions for this right deserves particular attention. Finally, I propose to establish a uniform condition for refusal to take delivery, whether the nonconformity is based on quality or quantity.

In the second section of Chapter 5, I address the exercise of price reduction. The basic problem under the CCL lies in knowing whether the buyer is entitled to *reduce the price by himself* or must *require the seller to reduce the price*. In this section, I firstly examine different ways to exercise price reduction in different legal systems. In German law, the right of price reduction allows the buyer to reduce the price by a declaration of his own, rather than having to require the seller to reduce it for him (BGB Art. 441). By contrast, in Anglo-American law, the price generally cannot be reduced by the buyer himself. Under the UCC, the buyer can only deduct the damages by notifying the seller of his intention according to UCC §2-717, but this cannot be confused with unilateral price reduction; Likewise, according to the special rules supplemented for consumer buyers in 2002 to the U.K.'s Sale of Goods Act (SGA) of 1979, the buyer is not allowed to reduce the price of the goods by himself, and must require the seller to reduce the purchase price for him. (SGA 1979 §48A)

I then explore the special characteristics of price reduction in German law. Firstly, though its function is to strike a balance between the contracting parties by reducing the purchase price to a level in accordance with the actual value of the delivered object, it is different from damage compensation in the sense that it is a remedy that is not based on fault. Secondly, its logic of unilateral price reduction is grounded on that of a partial termination of the contract, in the sense that the buyer may keep the nonconforming subject matter but free himself from one part of payment. Thirdly, the conditions for its exercise are based on the ones of termination (insignificant defects excepted) (Medicus & Lorenz, 2010b, pp. 58-59).

Next, I argue that unilateral price reduction can only be justified insofar as its logical foundation is partial termination and the conditions for its exercise are almost the same as those of termination. Both of these justifications can be found in German law, but do not exist in the CCL as well as the pPROL of Japan.[①] In this part, I further argue that if the buyer can reduce

[①] As to this proposal, it is argued that using "partial termination" to explain price reduction is no more than a metaphor, and is

the price unilaterally, without conditions similar to those of contract termination, the inner coherency of the remedy system as well as the balance of interests between the contracting parties would both be undermined.[①] Finally, I suggest that it is preferable to establish the right of price reduction as a right to require contract modification. This kind of approach may change the function of price reduction; however, it will still remain an effective method for contract liquidation.

1.4.3 Reform of rules on time limitation (Chapters 6 and 7)

In many countries there are strict time limitations on remedies of the buyer in case of nonconformity. In U.S. law, for example, according to UCC §2-607(3) (before the amendment of 2003), "if a tender has been accepted, the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy." This notice rule has very strict effects, for the buyer can no longer invoke the breach as a defense to refuse the payment as soon as he fails to give timely proper notice. Such kind of strict rule has been introduced into the CISG, and then was borrowed by Japan's pPROL. However, this kind of strict notice rule has been seriously criticized recently. It is said to be too harsh, because it can make the buyer lose all his remedies even though the seller was in fact in breach of contract (Reitz, 1988, p. 534). This is why an amendment to UCC §607(3) was proposed in 2003, stating that "the failure to give timely notice bars the buyer from a remedy only to the extent that the seller is prejudiced by the failure."

The CCL has also borrowed rules from the CISG, establishing a strict duty of notification for the buyer. CCL Article 158(1)-(2) states:

> "When an inspection period was prescribed, the buyer shall notify the seller of any nonconformity within such inspection period, otherwise the subject matter is presumed to be conforming to the contract.
>
> When there was no inspection period prescribed, the buyer shall notify the seller within a reasonable period, since he discovered or should have discovered the nonconformity, otherwise the subject matter is presumed to be conforming to the contract.

likely to cause worthless confusion to the application of fundamental nonperformance, which is a constituent element of termination (JCCRC, 2010, p. 60).

① As to opinions in favor of unilateral declaration, see, e.g., Han (2008, p. 15).

However, if the buyer fails to notify within 2 years since he received the delivery, the subject matter is presumed to be conforming to the contract. If there is a guarantee period for quality, the 2-year period will not apply."

Accordingly, there are two major problems concerning time limitation on buyer's remedies in case of nonconformity in Chinese law, the first one is that the period for inspection has merged with the period for notification, and creates an unfairly short limitation on the buyer. The second one is that there are no proper instructions for determining what a "reasonable period" for notification is, leading to great divergence in Chinese judical practice.

In Chapter 6 I deal with the first problem. Under German law, U.S. law and the CISG, the periods for inspecting the subject matter and for notifying the nonconformity are clearly distinguished; the requirement for inspection is promptness or with a reasonable opportunity, while the one for notification is promptness or within a reasonable time. Under the CCL, however, the inspection period merges with the notification period, and the agreed inspection period, as a combined period for both inspection and notification, has been given the effect of the longest time limit for giving notice. Therefore, the rules on inspection period in the CCL may have very harsh consequences. We should apply the so-called "teleological reduction" to CCL Article 157, so that the inspection period provided in this article can be distinguished from the one provided in CCL Article 158(1).

In China, guarantee periods for quality have different types and usually can only influence, but not equal the longest time limit for giving notice. Given the agreed inspection period (that merges with the notification period) and the guarantee period for quality both can determine or influence the longest time limit for giving notice, there exists a "double-interference with the time limit" problem. In order to avoid a conflicting application of the law, we should try to exclude one or the other interference by the application of various interpretive methods. The JILSC has entitled Chinese courts to intervene in the agreement on inspection period, but still has some disadvantages in this area.

Chapter 7 addresses the issue of determining a reasonable period for giving notice of nonconformity. Surrounding this issue, German-speaking countries have been using a so-called "noble month" as a rough average period when applying the notice rule under the CISG in the past few years, while the U.S. courts has been pursuing the guidance of policy rationales to

protect the seller from being prejudiced by the failure to notify the breach. The former has an advantage in the uniformity and predictability in the application of law, but it has been criticized for being too “rigid”; the latter may be more appropriate to fit the requirements of individual cases, but it does not contribute much to the uniformity of the application of law.

When establishing instructions for determining a reasonable period in Chinese law, it is necessary to take into account both the predictability and the flexibility of its legal application. I argue that policy rationales regarding the seller’s prejudice are suitable as fundamental guidance, while a relatively “fixed” scope could be a secondary reference. As to the content of policy rationales, there should be more than one policy rationale to support the notice rule. These policies include preserving opportunities for the seller to cure the breach, to collect useful evidence and to mitigate loss caused by the breach, as well as generally enhancing the effectiveness of commercial transactions. Most of them aim at protecting the seller from being substantially prejudiced by the buyer’s failure to notification. The JILSC has listed many factors for the courts to refer to when determining a reasonable period for notification; however, the contents of them need to be clarified.

Chapter 2 The Decline of Warranty Liability for Defects

The decline of warranty liability is one of the past several decades' most important developments in international sales law. The traditional function of warranty liability in civil law systems, to establish special remedies for latent defects, has fallen. In modern sales law the seller's warranty liability can be merged into the seller's obligation to tender conforming subject matters, the breach of which may give rise to various remedies for nonconformity. In this chapter, I firstly demonstrate the double usage of the expression "warranty liability for defects" (WLD) in Chinese judicial practice, a problem that has been largely overlooked in academic research, then review the decline of the special remedies established by warranty liability in major civil law systems. Finally, I will comment on the present dispute between the unitary and the relative independence theories in China. In doing so, I will notably argue that the relative independence theory is not preferable, not only because the special remedies established by warranty liability for defects cannot meet the requirement of transactions in modern society, but can also be attributed to the ambiguity of the joint concept "warranty liability".

2.1 Ambiguity of the legal concept of "warranty liability for defects"

The expression that Chinese judges and scholars have been using for the concept of "warranty liability for defects" (WLD) (in Chinese, *xiaci danbao zeren*) has been transplanted from its equivalent in Japanese law (*kashi tanpo sekinin*). However, the characters used in Japanese for this expression lead to a rather ambiguous meaning in Chinese. And indeed, it appears that over the course of the past decade, the term of WLD has been interpreted in two different ways in China: firstly as a contractual obligation on warranty against defects (in the sense of an *a priori obligation of warranty against defects*), and secondly as the legal consequences for the breach of that warranty (in the sense of an *a posteriori liability for breach*). The joining of concepts of "warranty" and "liability" in the WLD term has been sowing confusion in the application of Chinese contract law. If this situation continues to be

ignored, there might be ambiguities in legal findings that could jeopardize the authority of judicial decisions.

In this section I will first demonstrate, through the empirical analysis of judicial decisions made after the Chinese Contract Law (CCL) came into force, how WLD has been ambiguously applied. I will then re-examine the historical development of legal rules on warranty in traditional civil codes and see why the WLD expression was originally and properly used in the sense of an *a priori obligation of warranty* rather than *a posteriori liability for breach of that warranty*, and why WLD as a joint concept of "warranty" and "liability" is an unsatisfactory expression to refer to legal remedies.

2.1.1 Empirical analysis on the application of warranty liability for defects

2.1.1.1 Subjects and methods of empirical analysis

In China, academic research on the concept of "warranty liability for defects" (WLD) has focused on whether it had been merged into the one of "liability for breach of contract" (LBC) under the CCL (L. M. Wang, 2001; Han, 2007). In other words, is the special remedies regime for latent defects, which originated in Roman law and then spread to later civil law systems,[①] still relatively independent from the general remedies regime for breach of contract in the CCL? Currently, more and more scholars conclude that WLD is not independent from LBC (L. M. Wang, 2001; Han, 2007; X. J. Chen, 2003, pp. 276-277; Xie, 2011). Professor L. M. Wang (2001), for example, states that "there is no such system of warranty liability for defects which can be separated from inappropriate performance" (p. 25). Professor S. Y. Han (2007) also concludes that WLD has been merged into LBC and that, therefore, a "double-track" remedy system had been replaced by "single-track" one (p. 170). This kind of view is sometimes called "unitary theory" (Cui, 2006).

On the other hand, some other authors advocate the so-called "relative independence theory", according to which the independent WLD still exists independently, but is merely merged into LBC *in name* (e.g., Cui, 2006). These scholars argue that there are still substantial differences between WLD and LBC, in respect of both idea and function (e.g., Cui, 2006).

① As to the historical development of warranty liability since the Roman law, see Zimmermann (2005, pp. 82-89).

Sometimes this theory is also called "distinction theory" (Y. J. Li, 2008, p. 333).

Generally speaking, the enforcement of and case law related to the unified Chinese Contract law has convinced more and more scholars of the unitary theory, making it gradually become the prevailing theory (Xie, 2011, p. 80), while leaving the relative independence theory as its major critique.

The analysis of the application of WLD in as many judicial decisions as possible since the CCL came into force in 1999 is an irreplaceable step in the evaluation of different theories. Therefore, I will examine each case identified by the "xiaci danbao zeren" (warranty liability for defects) keyword in the *Beida Fabao* database,[①] one of the leading Chinese legal databases.

According to the debate between the preceding interpretative theories, it can be presumed that the divergence in legal practice should be at the level of contents and conditions of different remedies for defects. However, the results of the empirical analysis do not really verify that presumption. In practice, the WLD expression was rarely understood as an *a posteriori liability for breach of warranty*. On the contrary, it was often employed in the sense of an *a priori obligation of warranty*. For example, in the MinSan ZhongZi No. 217 decision (2010) of the Intermediate People's Court of Changde city, Hunan Province, the court found that the hiree "is obligated to make and fix the black marble washing platen in compliance with the requirement of college X and within the agreed time, he (the hiree) also bears a contractual obligation of 'warranty liability for defects' in the platen; college X bears the contractual obligation to take delivery and inspect the work, as well as pay the charge." In this finding, the court was clearly attempting to clarify the specific obligations of contracting parties in a contract for work. Whether from a semantic or systematic perspective, we cannot interpret the usage of the expression WLD here in the sense of an *a posteriori liability for breach of warranty*, for no defects had been confirmed by the court yet. On the contrary, it is much more plausible to interpret it as an *a priori obligation of warranty* on the quality of the hiree's work. Therefore, the court seemed to apply the term in the sense of an *a priori obligation* to bear warranty against defects in subject matters.

In a further example, the Intermediate People's Court of Kunming city, Yunnan province,

[①] See http://vip.chinalawinfo.com/index.asp.

stated in the Kun MinWu ZhongZi No.1 decision (2008): "the contract of a sale of raw materials is enforceable. X, the seller, not only has obligations to tender the subject matter in compliance with the contractual requirement on time and quantity, but also is bound to a warranty liability for defects in the quality of the subject matter tendered." The court then moved on to analyze whether the quality requirement ought to be determined according to the corporation's standard or to the national standard. In this case, the WLD expression cannot be understood in the sense of an *a posteriori liability for breach*, because when it occurred, it had not yet been decided whether the seller failed to satisfy the requirement of quality; on the other hand, that WLD was associated with contractual requirements on time and quantity. Therefore it is reasonable to interpret it as an *a priori obligation of warranty* on the quality of the subject matter.

Because the modern Chinese legal system has been only recently set up, emotions of distrust towards courts still pervade Chinese society. Thus, some scholars may tend to consider that any usage of WLD in the sense of an *a priori obligation of warranty* is merely a "mistake" made by an unprofessional judge. This view, however, is prejudiced. By thorough investigation, it can be discovered that there are too many cases in which WLD has been treated by the courts as an *a priori obligation of warranty* for it to be dismissed as an occasional "mistake".

Over the past decade, Professor J. J. Bai (2000) has proposed that empirical analysis should be emphasized in the study of law, and advocated "a little less *I believe that*, a little more *I found that*" (Bai, 2008). Recently, many private law scholars have discussed the method of empirical analysis in the study of civil law (e.g., Han, 2012). Given the ambiguity of the transplanted legal concept and possible prejudices against the professionalism of the Chinese judicial establishment, it is necessary to launch an empirical analysis to determine to what extent unprofessional "mistakes" really exist, and then decide whether the transplanted term in Chinese law should be reconsidered.

Therefore, I collected all cases with the "xiaci danbao zeren" (warranty liability for defects) as the keyword in the *Beida Fabao* database, and classified the usages of this legal term in those decisions. I will first introduce the specific methods adopted in the following analysis, as they are essential for the credibility of this study.

(1) Analysis of the logical relationship between defects and WLD

WLD can be understood as an *a posteriori liability for breach of warranty* only if the court has first confirmed unsatisfactory quality or quantity conditions in the subject matter; if this term is used before such problems were confirmed, and it is determined merely according to the nature of the contract or of legal rules. In that case, it would be reasonable to consider that the WLD term has been used in the sense of an *a priori obligation of warranty* rather than an *a posteriori liability for breach of that warranty*.

(2) Replacement of the WLD expression with either concept

Firstly, I will try to replace in each case the WLD expression with "a posteriori liability for breach of warranty", then determine whether the logic of the court's opinion can be maintained or not. If it can, then I will retain the a posteriori sense; if it can't, or the logic even becomes self-contradictory, then I will repeat the analysis by replacing the original term with *a priori obligation of warranty*. If this second replacement makes sense, then I will categorize the court's use of the WLD expression as that of an *a priori obligation*. If neither replacement makes, I will sort the case in a "not clear" category.

2.1.1.2 Process and results of empirical analysis

(1) Collection and selection of samples

From August 1 to 8, 2012, I searched for judicial decisions which used the WLD expression. The *Beida Fabao* database contained 241 judicial decisions with such a keyword. Given the rapid development of internet technology and the date at which the Chinese Contract Law came into force (October 1, 1999), I excluded seven samples made before 1999. The samples were therefore limited to cases between 2000 and 2012 (the cases in 2012 only include those made in the early part of this year).

Next, some other samples had to be excluded or treated specially: Firstly, nine cases were complete duplicates, and another seven lacked basic information and were therefore unusable. These 16 cases had to be excluded. Secondly, in 21 samples, the WLD expression was used in the comments or interpretations made by scholars following the decisions, but not in the decisions themselves; in 47 further samples this term was merely used by the plaintiff or the defendant, but not in the finding of the judicial decision. These cases could not reflect the usage of legal term in judicial decisions, and were therefore not suitable for our purposes.

Thirdly, there were some results possibly related to class actions. The contents of the decisions were almost the same, and the case numbers were also continuous. For the sake of representativeness, I have treated each such case series as a single result. I have also treated as a single result cases series which involved different instances with the higher ones merely quoted each other the lower ones on warranty liability. 36 of these case series results hence had to be excluded. Finally, there were 114 results left, 30 of which involved "defects in title", while 82 were related to "defects in quality or quantity"; however, two cases among theses 114 samples were difficult to fit in either of the two categories: One was a "shareholder's warranty liability for defects in capital contribution", the other was an "original obligor's warranty liability for defects in assumed obligation".[①] Usage in those two samples were rare and unclear; therefore, I decided to exclude these two cases and analyze instead the remaining 112 results.

Table 2.1

Distribution of Samples According to the Date of Judicial Decisions

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	Sum
Defects in Thing	0	1	2	3	3	8	6	6	8	21	9	12	3	82
Defects in Title	0	2	2	1	2	2	5	5	3	2	1	5	0	30
Sum	0	3	4	4	5	10	11	11	11	23	10	17	3	112

Table 2.1 shows that the amount of samples increased significantly since the year of 2005. Perhaps this is due to the gradual development of internet technology and therefore, should not necessarily be held to mean that the cases using "warranty liability for defects" have increased significantly since 2005; on the other hand, it may mean that the results of the empirical study particularly reflect the situation after the year of 2005.

Differing from the results in Table 2.1, the year in which a given case was held has almost no impact on the meaning of the legal concept used by the court. It is safe to assume that Table 2.2 and Table 2.3 below reflect the general distribution of usages of WLD in Chinese judicial

[①] As to the difficulty in distinguishing between defects in thing and defects in title, see Han (2011a).

practice.

There were too many sorts of defects and quality problems to categorize them properly. In the category of defects in thing, many involved defects in machinery, chemical or electronic products, and the like (amount to 45.7% in all 82 samples). A few samples involved seepage of water, cracks or hollowing in the wall or floor (amount to 21% in 82 samples). There are only three samples which involved disease or disability of livestock. It is interesting to point out that 41.7% of the samples related to leasing contract were about lease items which could not satisfy environmental standards, fire prevention standards, or business requirements.

As to the samples of defects in title, 56.7% involved disputes on ownership or secured rights; and about 20% (six samples) concerned failure of registration due to breach of mandatory rules or seal up of property.

(2) Data of empirical analysis

Sometimes the term of WLD was not used once in each sample. If the court used the term in one sample in one way, I just recorded one usage; but if it used it twice or even more times in one sample and each of those usages were different, I recorded each of them. For example, one court stated that:

> "under this contract, the seller bears *warranty liability for defect*, which means he is responsible for warranting there is neither defect in title, nor unsatisfactory physical conditions in the subject matter tendered. In this case, the subject matter of contract is a milk cow. However, the cow actually tendered by the seller has no uterus and cannot lactate, and therefore cannot satisfy the purpose of contract; the value of the cow is reduced as a result. The seller shall bear the *warranty liability for defects*".

It can be observed that here the usage of WLD refers not only to the seller's a priori obligation to warrant the good's quality in the light of the contractual purpose, but also to the a posteriori legal consequences he has to face for breaching that obligation. Therefore, in this case two different usages have to be distinguished and counted in.

Table 2.2

Usage of "Warranty Liability for Defects" in Samples of Defects in Thing

	Remedies	Obligations	Not clear	Sum of usages	Sum of samples
Sales contract	22	29	5	56	51
Auction contract	2	4	0	6	6
Leasing contract	3	9	1	13	12
Work contract	4	6	2	12	11
Travel contract	0	1	0	1	1
Goods in tort case	0	0	1	1	1
Sum	31	49	9	89	82

Table 2.3

Usage of "Warranty Liability for Defects" in Samples of Defects in Title

	Remedies	Obligations	Not clear	Sum of usages	Sum of samples
Sales contract	2	5	0	7	7
Contracts for assignment of obligee's right, transferring of equity, or using right on State-owned land	2	4	2	8	8
Auction contract	0	4	0	4	4
Leasing contract	3	2	0	5	5
Contract for financial leasing	0	1	0	1	1
Contract for transferring business	1	0	0	1	1
Contract for transferring technology	0	0	1	1	1
Others[①]	1	2	0	3	3
Sum	9	19	4	32	30

① Including contract for operating rural lands, contract for dissolution of partnership, and contract for a license of the copyright.

Given the limitations of the database[①] and the author's subjective factors in the process of analysis, the results cannot be fully accurate. However, by employing the methods mentioned in 2.1.1.1 on different dates, the error or deviation has been controlled as much as possible. The obtained results demonstrate that the WLD expression evidently has two usages in Chinese legal practice. In samples of defects in thing, 35.3% of the term's usages were in the 'a posteriori liability' sense, while 54.5% of usages were in the 'a priori obligation' sense. The samples of defects in title are more or less the same: 28.1% of usages were in the 'a posteriori liability' sense, while 59.4% were in the 'a priori obligation' sense. It can be concluded that these findings significantly contradict the general understanding in academic research on this subject, and that it is not just a few decisions that have "mistakenly" used WLD in the 'a priori obligation' sense. Rather, the term just tends to be interpreted in such a way. Therefore, it is necessary to explore the cause of the confusing application of this legal term.

2.1.2 The cause of double usage

Generally speaking, the usage of a legal concept is primarily influenced by relevant statutory provisions. However, there is no article laying down the WLD concept in the CCL. Other statutes do not mention it either, except Article 61 of Chinese Auction Law, which provides a WLD rule for auction contracts.

In addition, we must also consider instruction books and legal textbooks. As to the former, the most influential one among various instruction books published since the enforcement of the CCL is the *Interpretation and Application of Chinese Contract Law* written by judges of the economic tribunal of the Supreme People's Court in 1999. In this book, CCL Articles 153 and 155 have been described as provisions regarding the "seller's warranty liability for defects in quality" and the "legal consequences for breach of warranty liability for defects in quality" (G. G. Li, 1999, p. 707, 716). CCL Article 153 provides that "[t]he seller shall deliver the subject matter in conformity with the prescribed quality requirements. Where the seller has provided quality specifications for the subject matter, the subject matter delivered shall conform to the quality requirements set forth therein." CCL Article 155 provides that "[i]f the subject matter delivered by the seller fails to conform to the quality requirements, the buyer may hold the

[①] The decisions of around 3,000 courts in China were not all required to be disclosed on the Internet until November 27, 2013. See http://www.court.gov.cn/xwzx/sytp/201311/t20131127_189869.htm.

seller liable for breach of contract in accordance with Article 111 hereof." It is very clear that CCL Article 153 concerns the obligation of the seller to tender conforming subject matters, and we can see here that the *Interpretation and Application of Chinese Contract Law* paraphrased it as "seller's warranty liability for defects in quality"; CCL Article 155 concerns the liability for breach of contract, and has been paraphrased as "legal consequences for breach of warranty liability for defects in quality". The summary of these articles' contents indicates that judges of the Supreme People's Court considered the term WLD to stand for some kind of contractual obligation of warranty, but not as legal consequences for breach of that warranty.

In 2012, the second civil trial tribunal of the Supreme People's Court, whose predecessor was the economic tribunal, published an instruction book entitled *Interpretation and Application of Judicial Interpretation on the Law of Sales Contract (JILSC).* Article 33 of the JILSC states that "the preparation group of the JILSC believes that the seller's warranty liability for defects in quality is one of the primary obligations of the seller in the contractual relationship; therefore, it cannot be easily excluded by agreement of parties, statement of the seller, nor acknowledgement of the buyer." (Xi, 2012, p. 495) This interpretation clearly shows that even judges from the Supreme People's Court use the WLD term in the *a priori obligation* sense, which would explain why the majority of courts have followed this approach.

Moreover, although many textbooks use the term *obligation of warranty against defects* (xiaci danbao yiwu) to refer to one of the primary obligations of the seller in a sales contract (e.g., X. J. Chen, 2003, pp. 276-277; M. R. Guo, 2005, pp. 260-266), some textbooks confusingly use the term *xiaci danbao zeren.* For example, one textbook stated that "warranty liability for defects is the obligation of the seller to warrant the adequate quality of his subject matter, as well as the right on it," while at the same time it pointed out that WLD has been treated as LBC in China (W. G. Wang, 2012, p. 435). Thus, the double usage emerges. It can be presumed that the ambiguous treatment in certain textbooks may have exacerbated the confusing application of WLD in legal practice.

How could so many judges, including those of the Supreme People's Court, "mistakenly" use WLD in the sense of an *a priori obligation*? Are there any further reasons supporting this viewpoint? Broadening our horizon, we find that those "misunderstandings" do not spring from a careless confusion of concepts, but can be, more or less, explained by the special semantic

structure of the term. Chinese Guarantee Law has a similar fundamental notion called *guarantee liability* (baozheng zeren). Most scholars believe that "guarantee liability" does not stand for a liability for breach of obligation, but the obligation itself, and the term of "guarantee liability" is just a name established by usage (e.g., Cui, 2010, p. 184). In other words, the concept of "liability" and that of "guarantee" form a joint concept that is not to be understood as an *a posteriori liability for breach* but as an *a priori obligation of guarantee*. Similarly, the expression of *WLD* also represents a joint concept consisting of *warranty* and *liability.* The meaning of liability has adhered to and been absorbed by the meaning of warranty; hence, it becomes difficult to interpret liability separately. Therefore, *a priori obligation of warranty* is not only a possible meaning of the WLD expression, but also the semantically most plausible one.

In fact, some scholars have noticed the properness of using WLD to stand for an *a posteriori liability for breach* (e.g., as one special kind of LBC). L. X. He (2002) suggested the expression *liability for breach of contract for defects in quality* to replace *warranty liability for defects*, and D. F. Xu (2004) has also argued that "liability for defects" is more proper, because WLD is a confusing term, in consideration of the special meaning of "warranty" (p. 194). These reasonable opinions certainly deserve attention.

Given the element of "warranty", we may presume that many courts might have paid more attention on the special meaning of "warranty" and tend to refuse to interpret this term as "legal consequences for breach of warranty". The question we will turn to now is whether it is necessary to reconsider this usage in academic research. In the next part I will explore the historical development of warranty rules in civil laws and argue that the double usage problem comes from an improper translation in the process of legal transplantation.

2.1.3 The development of warranty rules and the creation of "warranty liability"

Chinese civil laws and legal theories have been heavily influenced by German civil law and Japanese civil law. And rules on warranty liability are particularly rooted in the tradition of continental law systems. To shed light on the double usage of WLD, we ought to examine the old German obligation law and Japanese law.

2.1.3.1 *Haftung* and *Gewährleistung* in the old BGB

In the old German obligation law, frequently used terms were "*Haftung für Sachmängel*" (Larenz, 1977, §41; Westermann, 1995, §459) and "*Sachmängelhaftung*" (Medicus, 1997, §74), and both of them can be translated to be "liability for defects in thing" or "liability for material defects". Professor R. Zimmermann (2005) has used the expression "liability for latent defects" to refer to special liability for defects in the old German law, and he considers it to be based on "statutory warranty" (pp. 82-88). According to this standpoint, it seems that "*Haftung für Sachmängel*" should be *a posteriori liability* for defects in thing.

However, if we examine the letter of the old BGB carefully, the conclusion is not that straightforward. Articles 433-458 of the old BGB laid down rules on the primary obligations of the seller and the buyer, including warranty against defects in title, but did not include warranty against defects in thing (Westermann, 1995, §433, §434). Warranty against defects in thing (*Gewährleistung wegen Mängel der Sache*) and related rules are stipulated in Articles 459-493 of the old BGB, side by side with the primary obligations of the seller (Westermann, 1995, p. 192). In Article 459, the term *haften* is used as following:

> "Der Verkäufer einer Sache *haftet* dem Käufer dafür, daβ sie zu der Zeit, zu welcher die Gefahr auf den Käufer übergeht, nicht mit Fehlern behaftet ist, die den Wert oder die Tauglichkeit zu dem gewöhnlichen oder dem nach dem Vertrage vorausgesetzten Gebrauch aufheben oder mindern. Eine unerhebliche Minderung des Wertes oder der Tauglichkeit kommt nicht in Betracht.
>
> Der Verkäufer *haftet* auch dafür, daβ die Sache zur Zeit des Überganges der Gefahr die zugesicherten Eigenschaften hat." (Westermann, 1995, §459)

C. H. Wang (1907), who reportedly wrote one of the earliest and high quality English translations of the old BGB, has translated Article 459 as such:

> "The seller of a thing *warrants* the purchaser that, at the time when the risk passes to the purchaser, it is free from defects which diminish or destroy its value or fitness for its ordinary use or the use presupposed in the contract. An insignificant diminution in value or fitness is not taken into consideration.
>
> The seller also *warrants* that, at the time the risk passes, the thing has the promised

qualities." (p. 100)

According to this translation, *haftet* means nothing else but *warrants*, and this provision can by no means refer to *a posteriori liability for breach*, but ought to be considered as an *a priori obligation of warranty*.

It makes more sense for the *haften* in Article 459 to be understood in an *a priori obligation* rather than *a posteriori liability* sense, because the legal consequences for breach of warranty provided in the old BGB are termination of contract and price reduction, neither of which ought to be considered as forms of a posteriori liability. Instead, these consequences should be conceptualized as rights of the buyer (*Rechte des Käufers*), as Karl Larenz (1977) did in his *Lehrbuch des Schuldrechts* (p. 45). On the other hand, *Haftung für Sachmägel* or *Sachmängelhaftung* should, in the spirit of Article 459, be understood as the *a priori warranty* against defects in thing,[①] as none of the *a posteriori* legal consequences for the breach of that *warranty* has been provided in this article.

Now I turn to examine related rules in another civil law system - Japanese civil law, which has more directly influenced Chinese civil law and its legal concepts.

2.1.3.2 Warranty liability in Japanese law

Regarding latent defects, Article 570 of the Japanese Civil Code (JCC) provides that: "If there is any latent defect in the subject matter of a sale, the provisions of Article 566 shall apply mutatis mutandis; provided, however, that this shall not apply in cases of compulsory auction." JCC Article 566 provides remedies for sales involving superficies or other rights. The content of Article 566(1) is:

> "In cases where the subject matter of a sale is encumbered with for the purpose of a superficies, an emphyteusis, an easement, a right of retention, or a pledge, if the buyer did not know the same and the purpose of the contract will frustrate on account thereof, the buyer may terminate the contract. If the contract cannot be terminated, the buyer may demand compensation for damages."[②]

[①] When translating the treatise of Medicus's obligation law into Chinese, Professors Du and Lu have used the term "liability for defects" (Medicus, 2007, p. 35).

[②] For all Japanese articles referred to in this dissertation, see Kamata et al. (2012).

Dr. Ume (1984) used the French expression *garantie des vices cachés* (*warranty on hidden or latent defects*) to describe *kashi tanpo* (*warranty against defects*) in Japanese law (p. 525). The texts of warranty liability rules in the Japanese Civil Code are considered to have been primarily influenced by the French Civil Code (FCC) (Shiomi, 2010, pp. 13-16). However, the relevant provision in the French Civil Code has significant differences. For example, Article 1641 of the FCC, the provision laying down the French warranty on latent defects, states that:

> "Le vendeur est tenu de la garantie à raison des défauts cachés de la chose vendue qui la rendent impropre à l'usage auquel on la destine, ou qui diminuent tellement cet usage que l'acheteur ne l'aurait pas acquise, ou n'en aurait donné qu'un moindre prix, s'il les avait connus." ①

Professor Georges Rouhette, who has been considered to have set the relationship between French and English law on the plane of ideas (Kasirer, 1999), aided by his assistant, has translated it as such:

> "A seller *is bound to a warranty* on account of the latent defects of the thing sold which render it unfit for the use for which it was intended, or which so impair that use that the buyer would not have acquired it, or would only have given a lesser price for it, had he known of them."②

The Japanese translation of this article, as provided by Japan's Ministry of Justice, is as follows:

> "売主は、売却された目的物が予定した用途に適さないような、又は買主がそれを知っていた場合には取得しなかったか、より低い価格しか与えなかったであろうほどにその用途を減ずるような隠れた欠陥を理由として、*担保責任を負う*。" (Nozawa, 2009b, p. 87)

On the one hand, this Japanese translation with official background uses the expression

① For all French text of French Civil Code referred to in this dissertation, see http://www.legifrance.gouv.fr/affichCode.do;jsessionid=71D56C8770A3482B47B6A5634B58BD45.tpdjo03v_1?cidTexte=LEGITEXT000006070721.

② See http://www.legifrance.gouv.fr/content/download/1950/13681/version/3/file/Code_22.pdf. 2013-3-7. All English translations of French Civil Code have come from this translated version by Professor Rouhette.

“担保責任を負う” (*bear the warranty liability*) to translate the expression “être tenu de la garantie” (*be bound to a warranty*) from the French code. It employs the joint concept of “tanpo sekinin” (warranty liability), the meaning of which is close to *a posteriori liability for breach of warranty*. On the other hand, it can be observed, from the comparison between FCC Article 1641 and JCC Articles 570 and 566, that that French article does not stipulate any remedies for breach, but merely classifies the cause and content of warranty, while the Japanese articles basically provide the remedies for latent defects; the sense of the seller’s warranty against defects needs to be *deducted* from the text of JCC Articles 570 and 566. This means the codes have different legislative logics. The Japanese articles, unlike the French one, describe a liability in the sense of an *a posteriori liability*.

It ought to be noted that in Japanese Civil Code the term *warranty liability* (*tanpo no sekinin*) is only explicitly stipulated in Article 572. This article provides that:

> “Even if there is special agreement aiming at excluding warranty liability in Article 560 and the preceding articles, insofar as there are certain facts that the seller knew and did not disclose, or certain rights set for himself or a third party, exclusion of such warranty liability shall not be effective.”

The joint concept of “warranty liability” has been created and put in use by this article in JCC. This rule is different from those of either French law or German law. Article 1627 of the FCC, as the comparable provision related to special agreement on limitation and exclusion of warranty of the seller, states that: “Les parties peuvent, par des conventions particulières, ajouter à cette obligation de droit ou en diminuer l’effet; elles peuvent même convenir que le vendeur ne sera soumis à aucune garantie.” Professor Rouhette and his assistant have translated it as: “The parties may, by particular agreements, add to this obligation of right or diminish its effect; they may even agree that the seller may not be subject to any warranty.” Clearly, in French law, what may be limited or excluded is the “warranty” as an “a priori obligation”, while the a posteriori legal consequences for breach have not been mentioned (although it is obvious that once the warranty has been disclaimed, all remedies would be affected). As to the old BGB, it states in Article 476 on this subject that “Eine Vereinbarung, durch welche die Verpflichtung des Verkäufers zur Gewährleistung wegen Mängel der Sache erlassen oder

beschränkt wird, ist nichtig, wenn der Verkäufer den Mangel arglistig verschweigt." (Westermann, 1995, §476) . This means that an agreement that limits or excludes the seller's "warranty obligations against defects in thing" (*Verpflichtung zur Gewährleistung wegen Mängel der Sache*) is void if the seller concealed the defects in bad faith. Obviously, this article does not mention a posteriori liability for breach, either. Thus, it can be concluded that the joint concept of "warranty liability" in JCC Article 472 does not come directly from either the FCC or the old BGB.

Since the term warranty liability, as a joint concept, has been firstly used in the JCC, it is necessary to ask how Japanese jurists have interpreted it. A literature review reveals that for many Japanese scholars, JCC Articles 560 to 571 should all be understood, in light of Article 572, as rules on "warranty liability" (e.g., Uchida, 2011, p. 123). Indeed, JCC Articles 561, 563 and 565-569 are normally discussed as rules on "warranty liability" (Kamata, 2012). For example, JCC Article 561 is paraphrased as the seller's warranty liability in case of transferring rights to others, JCC Article 563 as the seller's warranty liability where rights partially belonged to others, and JCC Article 565 as the seller's warranty liability in cases of shortage in quantity or partial loss of the subject (Kamata, 2012, p. 383). Since the contents of these rules are mainly related to remedies, the warranty liability might not be understood in the sense of an "a priori obligation of warranty", but is probably to be interpreted as an "a posteriori consequence for breach". And this is exactly what many Japanese literatures have shown.

According to an influential academic commentary on Japanese Civil Code, the "contents of warranty liability" include termination, price reduction, and damage compensation (Yunoki & Takagi, 1993, pp. 139-161). Debate over warranty liability for defects is precisely debate on the nature and application of legal remedies; "warranty liability" has been widely accepted to be a concept mainly referring to a posteriori consequences for breach (Yunoki & Takagi, 1993, pp. 139-161). Professor Oomura (2005) concludes that the contemporary debate is focusing on whether to include the "warranty liability" into the wider concept of contractual liability (keiyaku sekinin) for breach (p. 48).

After all, we can conclude that a joint concept of "warranty liability" has been firstly used in JCC Article 572 and is considered to be also related to the preceding articles. Given that the logic of the Japanese Civil Code is to directly provide remedies for defects, the sense of the

seller's warranty against defects has to be deducted from those remedies. Contrarily to German and French law, the Japanese warranty liability is basically only to be understood in the sense of a posteriori consequences for breach, including termination, price reduction, and damage compensation. However, termination and price reduction should be considered as remedies; calling them warranty liability is hardly suitable.

In the next subsection, I will examine that in early Chinese civil law, which has borrowed the joint concept "warranty liability" from Japan, in which sense such legal term has been interpreted.

2.1.3.3 Warranty liability for defects in Taiwan, China

The Civil Code of Taiwan, China (hereafter CCT) has in general been heavily influenced by both German and Japanese law. In Article 354 of the CCT, it states that:

> "The seller of a thing *warrants* that the thing sold is, at the time when the risk passes to the buyer according to the provisions of Article 373, free from any defect in quality which may impair or destroy its value, or its fitness for ordinary purposes, or its fitness for the purposes of the contract of sale. However, if the extent of the impairment is of no importance, such impairment cannot be deemed to be a defect.
>
> The seller also warrants that, at the time the risk passes, the thing has the promised qualities."

Then Article 355 of the CCT states that:

> "A seller is not responsible for such defect of quality in the thing sold as specified in the first paragraph of the preceding article, if the buyer knew of the defect at the time when the contract was made. If a defect of the kind specified in the first paragraph of the preceding article has remained unknown to the buyer in consequence of gross negligence, the seller is not responsible if he has not guaranteed that the thing is free from the defect, except in the case that he has intentionally concealed it."

Accordingly, CCT Article 359 provides that:

> "When there is a defect in the thing sold for which, according to the provisions of the five

preceding articles, the seller *is responsible for a warranty*, the buyer has the option to rescind the contract or to require a reduction of the price, but when it appears from the circumstances of the case, that a rescission of the contract would constitute an obvious unfairness of the transaction, the buyer is only entitled to a reduction of the price."

As we can see, remedies, including rescinding contract and price reduction, are provided for the buyer under two prerequisites. One is that a defect exists in the thing sold; the other is that, according to the provisions of Articles 354-358 of the CCT, the seller is responsible for a warranty. It is proper to interpret "being responsible for a warranty" as "being bound to a warranty".

If "being responsible for a warranty" had been interpreted as bearing the legal consequences for defects, the meaning of "warranty" would have been overlooked and the logic might be questionable; since this term would mean nothing but declaring the arising of legal consequences, it cannot function as one condition for the buyer to pursue termination or price reduction, and therefore the function of it, as one of the two prerequisites, would have failed. In fact, "being responsible for a warranty" should be interpreted as "warrant" only. The first condition -the existence of a defect- is not sufficient; there ought to be other elements, such as that the defect should exist no later than the time of transfer of risk from the seller to the buyer, and that the defect should not be negligible. These elements constitute the second condition, i.e., "being responsible for a warranty", which means the seller should warrant that no defects, other than those of no importance, existed at the time when the risk passed to the buyer.

Chinese civil law scholars from Taiwan have always used the joint concept *warranty liability* borrowed from Japan. Professor S. K. Shi (2000b, p. 22) has used the German expression of *Sachmängelhaftung* or *Gewährleistung wegen Sachmängel*, the French expression of *garantie contre les vices de la chose*, and the English expression of *warranty against defects of quality* to refer to *xiaci danbao zeren*. It is clear that, according to German, French, and English expressions, "warranty liability" means "warranty against defects".

However, the double usage clearly exists in the treatise of Y. B. Zheng, another famous scholar in China. He borrowed the prevailing theory in Japan at that time, which called for securing transaction orders based on contract with *consideration*, and maintaining the special

characteristic of those bilateral contracts (Zheng, 1986, pp. 29-31). In his *Special Obligation Law*, Zheng (1986) has mentioned that "the contents of warranty liability for defects in things" are, on the one hand, warranty against defects in value and, on the other hand, warranty against defects in utility (p. 41). This standpoint was different from opinions of the majority of Japanese scholars, who consider "the contents of warranty liability for defects" to be remedial rights of the buyer. However, Zheng (1986) also pointed out that the elements of "warranty liability for defects in things" include: (a) defects that existed at the time when the risk passed to the buyer, (b) the buyer was in good faith and had no gross negligence, and (c) the buyer had timely examined the subject matter. If these are elements that constitute "warranty liability for defects in things", then this "warranty liability" should be understood as legal remedies (pp. 41-56). This standpoint is advocated by many other Chinese scholars, like C. Z. Qiu (2006, p. 74), C. E. Lin (2007, p. 87), and becomes the prevailing theory in Taiwan, China; accordingly, the double usage of the "warranty liability" expression have also been inherited in China without thorough reconsideration (Qiu, 2006, pp. 70-74, 90-95; Lin, 2007, pp. 84-85, 93).

2.1.4 Conclusion of this section

"Warranty liability", as a joint legal concept, did not exist in the old BGB; its concepts of "Haftung" and "Gewährleistung" share the same meaning. The term of "warranty liability" has been firstly used in JCC Article 572 and is considered to be related to the preceding articles (JCC Arts. 560-571). Given that the legislative structure of Japanese Civil Code is directly providing remedies for defects and the rules laying down remedies are treated as rules on warranty liability, this term (warranty liability for defects) has been used in the sense of *a posteriori liability for breach of warranty*. After Chinese jurists borrowed this term from Japanese law, a confusing double usage of the term has spread in Chinese law and legal practice: warranty liability is interpreted on the one hand as a contractual obligation of warranty, and on the other hand as the legal consequence for the breach of this obligation. In fact, termination and price reduction are not suitable to be called liability. "Warranty liability" is more properly understood as certain obligation of "warranty". The legal consequences of breach of such obligation should be referred to as remedies for breach of warranty.

2.2 The decline of special remedies for latent defects

Contrarily to that of the double usage of warranty liability, the debate over whether special remedies for latent defects can be unified into general remedies for breach of contract has always been a hot topic. In Germany, Japan, as well as mainland China, the prevailing views are that, basically, special remedies for latent defects ought not to be independent, but can be unified into general remedies for breach of contract. In this section I will explore the reason of the decline of such special remedies, and describe the legislative movement in Germany, as well as in Japan. Finally, I will comment the dispute between the unitary theory and relative independence theory in China.

2.2.1 Special remedies established by warranty

2.2.1.1 Aedilitian remedies in Roman law

Roman law is the ultimate common legal tradition for many European legal systems (Zimmermann, 2001, pp. 1-2), and has therefore also provided the basis of many continental sales laws on the conformity of things for quite a long time (Zamir, 1991). The most famous legal device in this area is called “aedilitian remedies”. Already in Roman law, the seller had to bear liability for fraud or breach of express warranty: the former included “non-disclosure of known defects in the object”; the latter arose “[not only from] an actual promise, but also from any representation or even description of the object, provided they were not mere puff” (Zamir, 1991, p. 6). Zamir (1991) pointed out that “even a tacit representation could give rise to such liability” (p. 6).

Besides those foundations for liability, the Roman Aediles developed special remedies that applied to every severe defect “that precluded the possibility of using the property for its ordinary purpose, or which significantly impaired its usefulness (‘redhibitory’ defects)”, and the seller’s liability for such defects “was not conditioned upon his knowledge of the defect” (Zamir, 1991, p. 6). The aedilitian remedies in Roman law were considered as a “fair and balanced solution”, which aimed at dealing with problems concerning “certain individualized commodities which are (i) regularly sold on open markets, (ii) notoriously prone to suffer from defects which even vigilant purchasers were unable to discover on sight, and (iii) offered for

sale by persons who had a questionable reputation." (Zimmermann, 2005, p. 82) This kind of special liability did not allow the buyer to claim damages; on the other hand, it was based on neither the principle of fault nor the seller's assertions.

The aedilitian remedies made good sense for transactions of slaves or cattle on the open market, because latent quality defects in sales were often impossible for either party to "discover on the spot." (Reimann, 2009, p. 901) When such a defect later appeared, it was not easy to decide who was at fault, but interests between the seller and the buyer had to be balanced: since claims for a "nondefective substitute" or for repair were usually meaningless, the appropriate way was to permit the buyer to cancel the sale or to reduce the price (Reimann, 2009). At the same time, short limitation periods were considered to be necessary because usually it became quickly impossible to verify "whether the slave or cow had already been sick when delivered." (Reimann, 2009, p. 901)

2.2.1.2. Special remedies in the old German law

The Roman special remedies influenced the old BGB's approach of remedies for defects in thing. Firstly, as the aedilitian remedies covered only substantive defects (i.e., of quality) but not legal problems with the object sold (i.e, on its title), the old BGB also treated them totally differently (Reimann, 2009, p. 899). Articles 433-434 of the old BGB expressly stated that seller was obligated to transfer title and to deliver the object "free from rights" of third parties, otherwise there would be a "legal defect" (*Rechtsmangel*) governed by the general rules on breach of main obligations (*Grundpflichten*) (Westermann, 1995, §433, §434). On the other hand, the old BGB Articles 459-480 addressed defects in thing (*Sachmangel*) under a specific set of rules, namely, *Gewährleistung wegen Mängel der Sache*, but had no explicit provision on the "obligation of" the seller to transfer the object free from quality defects. Thus, the existence of such a quality defect could hardly be treated as a type of nonperformance under the old BGB rules.

Secondly, the old BGB's approach to defects in thing focused, like Roman law, on the sale of specified objects rather than unspecified ones. The remedies thus focused on "nonreplaceable" objects (Reimann, 2009).

Thirdly, these special remedies differed significantly from the general ones for

nonperformance. In case of a defect in thing, the buyer had only two options: return the object and recover his payment (*Wandelung*), or keep the object and reduce the price (*Minderung*) (Reimann, 2009). While the buyer had these rights regardless of the seller's fault, he had to exercise them within a relatively short period of time (six months to one year) (Westermann, 1995, §477). Damages were available only if the sold object missed a promised quality (*zugesicherte Eigenschaft*), or if the seller had fraudulently concealed a defect (*Arglist*) (Zimmerman, 2004). The old BGB Article 480 "went beyond Roman law, however, in that it did consider the sale of unspecified goods." (Reimann, 2009, p. 900) If such goods were defective, the buyer could also demand delivery of a nondefective replacement (Reimann, 2009, p. 900).

To sum up, according to the old BGB Article 462, the contractual obligations that arose from a sale of a thing were limited to (a) delivering the subject matter to the buyer, (b) transferring the ownership to the buyer, and (c) warranting the sold object free from rights of third parties against the buyer. It was not the seller's contractual obligation to deliver the subject matter free from defects in quality. However, it would be unfair for the buyer to bear the whole risk of accepting an object with defects that he could hardly discover or foresee at the time he engaged himself by the contract. Thus, a separate concept was created in the old BGB, i.e., warranty against defect in things, and special remedies and strict time limitations followed. In short, the function of such warranty was to establish strict liability (*Haftung ohne Verschulden*) and limited remedies - termination and price reduction.

2.2.1.3 Special remedies in Japanese law

Besides the old BGB, the special remedies approach has also been adopted in Japan through the concept of *kashi tanpo sekinin*, which translates as "warranty liability for defects" (WLD). However, the Japanese WLD rules are not transplanted from the old German law, but from French law, as we saw above. The concept of "kashi" merely refers to "latent defect", and the term *kashi tanpo sekinin* hence only covers those latent defects. Therefore, both of them are narrower than their counterparts in German law (Morita, 2002, pp. 198-199; Nozawa, 2009a, p. 19). Moreover, the special "warranty liability for defects" in Japan allow damage compensation in case the contract cannot be terminated (JCC Arts. 570 and 566).

As to the nature of the concept of "warranty liability for defects" (WLD), the prevailing theory in early Japanese law research is that it is a "statutory liability" (Nozawa, 2009a, p. 21). This theory was advocated by Kaoru Yunoki, Hiroshi Suekawa, and Sakae Wagatsuma (Yunoki & Takagi, 1993, p. 197). According to this theory, the Japanese WLD is based on the idea of equity, rather than contractual obligations; its aim is to strike a balance between the interests of the buyer and the seller in case there were latent defects which were not discovered by the buyer at delivery.

As I mentioned above, WLD may be not a rigorous term. It is generally understood as "being liable for breaching the warranty against defects" in academic research. While actually, it should be read as "being liable for the warranty against defects", which is equivalent to "warranty against defects" itself.

2.2.2 Reforms of rules on warranty against defects in Germany and Japan

2.2.2.1 Modernization of German obligation law and its historical background

During the development of Roman law, the additional remedies for latent defects had already been considered to be "redundant" (Zimmermann, 2005, p. 83). However, the old BGB continued to adopt this device. Some scholars argue that, despite their lack of consistency, the old aedilitian remedies survived in the 19th century codification of private law "thanks to a strange coalition: while the historic school in German legal scholarship followed Roman law as a model for the codification of private law, trade and industry supported short prescription periods which tend to shift the economic consequences of defects onto consumers for obvious economic reasons." (Basedow, 2005, p. 491)

Levin Goldschmidt (1829-1897), also known as the founding father of modern German scholarship in commercial law, was one of the most prominent German jurists who insisted on maintaining the aedilitian remedies, even regarding the sale of unascertained objects. He had once served as a judge in the Commercial Supreme Court (Zimmermann, 2005, p. 89). Goldschmidt argued that "the act of delivery restricts the seller's obligation to the particular object chosen by him; what has originally been the sale of unascertained goods is then turned into the sale of specific goods," justifying the application of the aedilitian remedies

(Zimmermann, 2005, p. 88). The legislators of the old BGB adopted this reasoning, and so both specific and unascertained objects fell into the scope of the application of warranty liability. The buyer's remedies were limited to termination and price reduction, except in case of fraud or special promises by the seller. It has to be noted that the seller was not generally granted a second chance to make a conforming tender. As Professor Zimmermann (2005) observed, "[t]he traditional thinking patterns largely prevailed" in the old German law, and "the sale of unascertained goods was still regarded as a deviation from norm that could be dealt with by way of special provisions modifying the general law", which was designed mainly for specific goods (pp. 88-89).

Why did the earlier German jurists decided to maintain Roman law by keeping those special remedies in the BGB of 1900? The answer can be inferred from the beliefs of them. For example, Judge Goldschmidt "considered merchants as potential or actual representatives of the Volk and viewed mercantile law as the ultimate product of an organic and historical development, relatively immune from alien contaminations."(Robilant, 2006, p. 526) This kind of idea was typical of the famous German Historical School. The Historical School was the dominant school toward the end of the 19th century (Pound, 1937, p. 564); it really began in the fore part of the nineteenth century under the influence of Friedrich Carl von Savigny, the most prominent jurist in the area of modern German private law. The historical jurists believed that "law is found, not made," and that "a principle of human action or of social action is found by human experience and is gradually developed into and expressed in a rule." (Pound, 1911, p. 599) Therefore, the Historical School denied that law was "a product of conscious or determinate human will", and "doubt[ed] the efficacy of legislation" (Pound, 1911, p. 599). The German historical jurists "sought the nature of right and of law in historical deduction from the Roman sources, from Germanic legal institutions, and from the juristic development based thereon." (Pound, 1911, p. 600) The historical school held onto "the doctrine of legislative futility" and denied any real function to legislator. As Professor Pound (1912, p. 494) deplored, "[t]hey have helped to clear away, but they have built nothing", because the "declaration of the dominant social organism by which a legal standard is created or imposed" may not establish itself in the legal system. In his eyes, "the historical school went too far in the opposite direction and attempted to exclude development and improvement of the law from

the field of conscious human effort." (Pound, 1911, p. 149)

In can be found that the historical school might have a beneficial influence in limiting institutional waste, but made little contributions in transforming the old Roman law into an efficient, modern system (Pound, 2004, p. 85). Therefore, it would not be surprising that, during the drafting of the old BGB, the so-called "redundant" aedilitian remedies could still be kept.

We must keep the background and reason of the survival of aedilitian remedies in mind when we encounter a defense of these remedies in the contemporary academic discourse.

It has been generally recognized that Germany has abandoned the aedilitian remedies during the 2002 reform of its obligation law (Haas et al., 2002, pp. 13-15). Article 433 of the new BGB lays down the basic contractual obligations in sales contracts: The seller of a thing is obliged to deliver the thing to the buyer and to transfer ownership of the thing to the buyer; the seller must procure the thing for the buyer free from defects in thing and defects in title. On the other hand, the buyer is obliged to pay the seller the agreed purchase price and to take delivery of the thing purchased. Regardless of whether the good at the time of dealing is ascertained or not, the seller is always bound to transfer a good free from defects in thing.

Under the new German obligation law, defects in thing have been defined with rather subjective criteria (Hente, 2005). BGB Article 434(1) provides that the object is free from defects in thing if, upon the passing of the risk, the object has the agreed quality; to the extent that the quality has not been agreed, the object is free of defects in thing if (a) it is suitable for the use intended under the contract, and (b) it is suitable for the customary use and its quality is usual in things of the same kind and the buyer may expect this quality in view of the type of the thing. Moreover, supply by the seller of a different thing or of a lesser amount of the thing is equivalent to a defect in thing.

Accordingly, defects in thing are considered as a breach of obligation in the new BGB, which may give rise to various remedies, including damage compensation. Article 437 specifically provides those remedies, presenting as rights of the buyer. According to this article, if the subject matter has defects, the buyer may, provided the requirements of the following provisions are met and unless otherwise specified, (a) demand supplementary performance under Article 439, (b) terminate the contract under Articles 440, 323 and 326(5), or reduce the

purchase price under Article 441, or (c) demand damages under Articles 440, 280, 281, 283 and 311a, or demand reimbursement of futile expenditure under Article 284.

Accompanying these reforms, the special prescription for defects in the old German sales law has also been changed. Although it is still not the same as the general prescription, the prescription period, which was considered to be harsh and unfair for the buyer, has been significantly extended under Article 437 of the new BGB.

2.2.2.2 Reform of Japanese obligation law

According to the so-called "contractual liability theory" that arose in the 1960s in Japan, the delivery of conforming subject matters is part of the consensus of intentions between contracting parties, and can therefore be interpreted as a contractual obligation of the seller (Shiomi, 2009, p. 85). Adherents of this theory include Hujio Oho, Zentarou Kitagawa, Kiyoshi Igarashi, Eiichi Hoshino, Sueto Yamashita, and Hisashi Tanikawa (Yunoki & Takagi, 1993, p. 268). Professor Shiomi (2010, pp. 2-3) argues that the research level that the contractual liability theory has achieved is the binding effect of contract, which relates to the well-known principle "promise ought to be kept" (pacta sunt servanda), and the determination of the contractual content. This theory is considered as relatively convincing to broad range of scholars (Uchida, 2011, p. 131), and has significantly influenced the draft of the pPROL (JCCRC, 2009b, p. 248).

It has to be noted that it is not just the term "*kashi tanpo sekinin*" (warranty liability for defects) that can be misleading, but also that of "*keiyaku sekinin*," which seems to refer basically to "liability for nonperformance of contract". However, it is not desirable to define all remedy measures from the perspective of liability. Some legal consequences, such as termination of contract, should not be considered as liability for nonperformance.

Influenced by the CISG and international model rules, the pPROL has proposed two approaches for reforming the core concept here. One is to follow the new German obligation law by redefining the concept of "defect" with subjective meaning; the other is to follow the CISG and some other international model rules by introducing a new concept of "nonconformity" (JCCRC, 2009b, pp. 17-18). It seems that the former has earned more support, as "nonconformity" and "conformity" have been considered to be difficult for Japanese

lawyers to understand. However, there is no substantial difference between these two approaches. According to pPROL §3.2.1.16, once a defect occurs, the aggrieved party is entitled to pursue various remedies that are provided by the pPROL for nonperformance of contract (JCCRC, 2010, pp. 71-72).

The foremost remedy for nonconformity clarified by the pPROL is the obligee's right to require supplementary performance (追完请求权) (pPROL, §3.1.1.57) (JCCRC, 2009b, p. 198). In the part of proposed sales law, pPROL §3.2.1.16, based on Article 570 of the JCC, provides in the first paragraph that, in case there are defects in the subject matter tendered to the buyer, the following remedies are admitted: (a) requiring the removal of defects (by, e.g., replacement or repair), (b) requiring price reduction, (c) terminating the contract, and (d) demanding damage compensation. The second paragraph states that the "existence of defects shall be determined at the time when the risk passes in accordance with §3.2.1.27." (JCCRC, 2010, pp. 71-72) Hence, the pPROL has generally recognized the buyer's right to require the tendering of subject matters that are free from defects. According to the interpretation of the pPROL, both termination of contract and damage compensation are subject to the general principles applicable to nonperformance of contract (JCCRC, 2010, p. 72).

Moreover, according to pPROL §3.2.1.D and §3.2.1.E, the original rules on one-year special period in JCC Articles 564 and 566(3) should be eliminated, applying the general prescription instead (JCCRC, 2010, pp. 64, 69). On the other hand, pPROL §3.2.1.18 establishes a duty to notify defects, based on a modification of JCC Articles 566(3) and 570. According to pPROL §3.2.1.18(1), the buyer shall notify the seller of the existence of defect within a reasonable time since he has been aware of defects when or after taking delivery of subject matter, however, in the case that the seller had bad faiths on the defects, the duty to notify shall not apply. According to pPROL §3.2.1.18(2), the buyer cannot pursue remedies on the grounds that there are defects if he did not notify the seller in compliance with the requirement provided in the preceding paragraph; however, if the failure of notification is beyond the control of the buyer, the duty to notify shall not apply (JCCRC, 2010, p. 86). The notice rule in the pPROL is similar to the one in the CISG, and even to the one in the UCC. In the third part of this dissertation I will deal with problems concerning notice rules, which have caused tremendous amount of debate in many legal systems.

The interpretation made by drafters of the pPROL states that "elements of each remedy ought to be in compliance with the general principle of liability for nonperformance, however, the elements cannot be inferred from the general principle exclusively, and therefore, specific stipulation is important" (JCCRC, 2010, p. 77). According to the specific provisions, the right to require supplementary performance, the right to require price reduction, the right of termination, and the right to demand damages have different elements and application scopes. For example, price reduction has no relationship with "legal excuse" and plays a special role for balance of interests. As to the Japanese law, it can be concluded that, on the one hand, the reforming of its obligation law is moving towards a uniform system of remedies for nonperformance, while on the other hand, the elements for each remedy will still differ from one to another.

2.2.3 Comment on the dispute between Chinese interpretative theories

2.2.3.1 The prevalence of the unitary theory

Debate over warranty liability for defects in thing arose as early as the drafting of the unified Chinese Contract Law (Liang, 1996, p. 13). Professors Wang and Yao (1995) argued that there were imperfections in the old German obligation law and that it was preferable to "abandon the concept of warranty liability for defects, and use that of liability for breach of contract as a replacement" (pp. 6-8). Following the enforcement trends of the CCL, more and more scholars have considered that there is no independent WLD concept coexisting with that of liability for breach of contract (e.g., L. M. Wang, 2001; Han, 2001).

Professor Han dedicates himself to the unitary theory. He argues that WLD has been merged into liability for breach of contract, and that the "single-track" remedy system has replaced the former "double-track" one (Han, 2007, p. 170). His argument is mainly based on his observation on international trends in the development of sales law and the historical development of Chinese contract law. As to the interpretation of the CCL, it is plausible to say the WLD has never been independent from liability for breach of contract. After all, the unitary theory has been advocated by more and more scholars, and is considered as "the prevailing theory" (Xie, 2011, p. 80).

2.2.3.2 Response to the relative independence theory

Professor Cui (2006) insists on the so-called "relative independence theory", according to which the WLD may have been merged into liability for breach of contract *in name*, but actually still survives independently. He argues that there are still substantial differences between WLD and liability for breach of contract, in respect of both idea and function.

(1) Symptom discovered by relatively independent theory: ambiguity of "liability"

The logic of the relatively independent theory is that "the snake can't swallow an elephant": liability for breach of contract is not broad enough to cover all contents of WLD. Professor Cui (2006) argues that liability for breach of contract should contain, and only contain, what can be qualified as liability, excluding remedies that cannot be considered as such. Therefore, price reduction and return of goods, the key remedies for defects, cannot be contained by the concept of liability for breach of contract; on the contrary, they can only be contained by the concept of WLD, the nature of which is remedy rather than liability. In other words, in his view, WLD is an "elephant", and liability for breach of contract is a "snake"; the latter cannot swallow the former.

Liability for breach of contract is indeed not the most suitable concept to refer to all remedies for breach of contract; for instance, it is not proper to describe the remedy of termination as a liability. However, I do not believe the relative independence theory can resolve these problems it has raised. In fact, scholars who advocated the relative independence theory do not seem to have ever discussed the historical development of the ambiguous usage of the concept of "liability for breach of contract".

Because of the Chinese civil war in the 1940s and the following international political situation, reconstruction of PRC's civil law and its theory in the 1980s was heavily influence by Soviet law. In the obligation law of the Soviet Union, there was a special category which could not be found in either German law or French law, called "liability provided by the Soviet Union's civil law". This category had been mentioned in many textbooks of the Soviet Union that served as reference to early Chinese researchers in the 1980s, and thereby influenced early Chinese legislation.

Legal liability has a narrow meaning in the civil law theory of the Soviet Union. It has been defined as the most serious sanction imposed by the state on those who broke the law.

None of the following elements should lack when defining something as liability in the Soviet sense: (a) it qualifies as "one of the forcible forms imposed on individuals to compel them to obey the law"; (b) it "applies only to those who broke the law"; (c) it "ought to be applied by state organ or social organ with legal authority and within the scope it has been authorized"; and (d) it goes "against the interests of the law breaker," making it an actual sanction (Gribanov & Korneev, 1984, p. 488). The most significant characteristic of civil law liability is its "property feature". Gribanov and Korneev (1984) believed that "to force the obligor to pay a debt, or to force the goods to be tendered" was not a form of liability in the Soviet sense but a "special form that forces the obligor to perform their obligation" (pp. 489-491). Smirnov et al. (1987) have further argued that "removing the defects detected after the work was completed" was not a form of liability in the Soviet sense, either (p. 395). In contrast, "compensation for the damages, including liquidated damages," as well as loss of deposit, are considered forms of civil law liabilities (Smirnov et al., 1987, p. 397). We can conclude that the Soviet civil law was characterized by (a) the construction of a system of legal liability in obligation law and (b) a restriction of the contents of this legal liability. Under this kind of system, it is clear that not all remedies can be covered by the concept of liability.

In China, Chapter 4 of the Economic Contract Law of 1981 had laid down provisions on the liability for breach of an economic contract, and so did the Law of Economic Contract involving Foreign Interest of 1985 and the Technology Contract Law of 1987. These laws were made obsolete when the CCL came into force in 1999. However, the General Principle of Civil Law of 1986 (GPCL) is still in force. The GPCL covers civil liability in its Chapter 6, with Article 106 as the general provision on this topic. GPCL Article 106(1) states that "citizens and legal persons who breach a contract or fail to perform other obligations shall bear civil liability." GPCL Article 111 further provides that "[i]f one party fails to perform its contractual obligations or its performance fails to satisfy the terms of the contract, the other party is entitled to demand performance or remedial measures, as well as claim compensation for its losses." We can hence observe that the rules of the GPCL involving breach of contract have the two following characteristics. First, the rules for breach have been designed and laid down as liabilities rather than remedies, which is similar to the Soviet approach. Second, demanding damage compensation, specific performance, or other remedial measures is conceptualized as

the aggrieved party's right, rather than the liability in the Soviet sense.

This kind of legal design has been changed in the CCL of 1999. CCL Article 107 states that "If one party fails to perform its obligations under a contract, or its performance fails to satisfy the terms of the contract, it shall bear the liabilities for breach of contract, such as to continue to perform its obligations, to take remedial measures, or to compensate for losses." In this chapter, there are also liquidated damages and deposit. We can infer from the system and the letter of provisions, that the CCL designed the rules on breach with "liability" rather than "remedy". Accordingly, a problem arises. On one hand, the concept of liability itself often suggests that the behavior leading to the breach is a misconduct that must be sanctioned by the state.[①] Therefore, the scope of liability cannot be broad. On the other hand, the CCL has abandoned the general *fault-based principle* of the Economic Contract Law of 1981, and introduced so-called *strict liability* in the area of obligation of result[②], not to mention including various remedies in the concept of "liability for breach of contract". Thus, great tension arises between the concept of liability as a State sanction for some sort of misconduct, and the structure of "liability", which is not necessarily based on fault and includes various remedies. As a result, we are confronted to a dilemma in defining "liability for breach of contract".

(2) Relative independence theory: a suitable prescription?

Relative independence theory has recognized the incoherency in the system of "liability for breach of contract" and has given a prescription for this symptom. There is indeed a problem of ambiguity with the concept of "liability for breach of contract". Future codification of Chinese private laws might benefit by replacing the "liability design" of breach rules with a "remedy design." For now, though, we have to make an appropriate choice between the unitary and relative independence theories.

We probably cannot avoid broadening the content of liability for breach of contract when constructing an interpretative theory for the CCL.[③] The term "liability" has been widely used

[①] Chinese Economic Contract Law provided liability for breach of contract in Article 29(1). Following that, it provided administrative liability and criminal liability, also in Article 29(1). This reflects the idea to treat liability for breach of contract as the same level of the both of these other liabilities.

[②] The theory distinguishing between "obligations of means" (*obligation de moyens*) and "obligations of result" (*obligation de résultat*) originated in French law (Morita, 2002, pp. 11-16). It can be generally agreed to sort sales of goods into the category of obligations of result. This kind of distinction of obligations has been noticed and introduced by Chinese scholars as well (Yin, 1995, pp. 303-307; G. X. Zhu, 2012, pp. 546-549).

[③] No matter the liability for breach of contract in Chinese Contract Law, or the liability for tort in Chinese Tort Law, the scope of liability has drifted quite far away from the one in traditional continental law. It is unclear whether in the future a uniform concept of liability for nonperformance of obligations can be established or not.

in many different contexts: in the broad sense it is used in the concepts of "guarantee liability" and "warranty liability", and also in that of "liability for breach of contract". As a matter of fact, liability is commonly understood as some burden borne by people with moral or legal duties. Under the CCL, specific performance and other remedy measures have been merged into the concept of liability for breach of contract. This kind of "broad sense" at the level of legislation can hardly be "corrected" at the level of interpretation. In fact, a flexible interpretation of the concept of "liability for breach of contract" should not be problematic, because it will not push the judge to punish the breaching party more seriously. Therefore, it should be tolerable to interpret "liability for breach of contract" from a functional perspective.

As G. X. Zhu argues, the provisions of Chapter 7 of the CCL represent the functional equivalents to "remedies for breach"; "liability for breach of contract" actually means that when one party fails to perform its obligation or its performance fails to satisfy the standard of agreement, "the aggrieved party is entitled to require specific performance, taking remedial measures, damage compensation, or liquidated damages."(G. X. Zhu, 2008, p. 396) This functional interpretation method could avoid many of the problems of the relative independence theory.

First, the relative independence theory also faces its own "ambiguity" problems. It is based on the "nonperformance theory", which considers WLD as special legal consequence for breach of contractual obligation, but not a special statute liability. But if the relative independence theory argues that the concept of "liability" stands for a kind of obligation that cannot include all types of remedies, how could it avoid the ambiguity that springs from the shared usage of the term "liability" in the two concepts of WLD (warranty liability for defects) and LBC (liability for breach of contract)? Its criticism of the ambiguity of the legal notion of "liability" makes it unavoidably fall into self-contradiction.

Second, WLD is itself ambiguous as a joint concept. As analyzed above, the juxtaposition of "liability" with "warranty" easily gives rise to confusion. The joint concept was understood in many judicial decisions as an *a priori obligation of warranty* rather than an *a posteriori liability for breach of that warranty*. The relative independence theory can hardly overcome this ambiguity.

Third, the relative independence theory jeopardizes the unity of the remedy system for

nonperformance or breach of contract. It does so by insisting that LBC and WLD are governed by two different ideas. This interpretation actually relies on the "statutory liability theory", which harms the unity of the CCL remedy system by attempting to revive Roman law's special remedies for latent defects (i.e. by attempting to revive a double-track remedy system).

In conclusion, the unitary theory may not be perfect, but remains preferable as a general interpretative theory. The relative independence theory has certainly pointed out some important problems, but fails to give a satisfying solution. Not only does it fail to solve the original problem, but it creates new ones in attempting to do so.

2.3 Conclusion of this chapter

Research on Chinese sales law in the past was dominated by a debate on comparative law, rarely supported by a thorough empirical analysis on the actual application of the CCL. This neglect of empirical data is a weak point of studies. It is a pity, because proper empirical analysis is a powerful tool for revealing problems in the application of legal rules, for example, the ambiguity of a legal concept like WLD.

In the first section of this chapter, I collected 112 decisions as samples to conduct such an empirical analysis on the practical application of the WLD concept in Chinese law. I discovered that there were much more decisions than expected that used WLD in the sense of an *a priori obligation of warranty* rather than an *a posteriori liability for breach of that obligation*. It appeared clearly from this analysis that some positions advocated in the theoretical dispute on WLD seemed far removed from the realities of its application. Next, I explored the cause of significant divergence in understanding of WLD. The direct reason appeared to be that many senior judges and scholars defined WLD as an *a priori obligation of warranty*. If we dig deeper, it can be found that these divergences are due to the confusing structure of the WLD concept: joining "warranty" and "liability" in the concept leads it to be interpreted as an *a priori obligation of warranty* on the one side and an *a posteriori liability for breach of that obligation* on the other. Then, I examined the historical development of WLD and found out that the joint concept has been firstly used in Japanese civil code. Given that the legislative logic of the Japanese Civil Code is to provide remedies for defects directly rather than to stipulate warranty against defects before providing remedies, the sense of the seller's

warranty against defects has to be deducted from those rules on remedies, and WLD in Japanese law can easily be interpreted as forms of legal remedies, rather than as the *a priori obligation of warranty* itself. This approach exacerbates the confusion on the concept of WLD.

The concept of WLD declined not only of its confusing structure, but also, more essentially, because the limited remedies established by it cannot satisfactorily remedy nonconforming unascertained subject matters in modern society. In the second section of this chapter I reviewed the modernization process of German obligation law and explained the academic proposals for the reform of Japanese obligation law. As to the former, I pointed out that the essential reason for which the special remedy established by warranty liability could survive in the old German law was the dominance of Historical School in Germany. The disadvantage of this School was that it lacked motivation to reform the old legal rules which might out of date. Nevertheless, after a hundred years, the German obligation law finally moved towards a unified remedy system for nonperformance of contractual obligation. As to the reform of Japanese obligation law, it turns out most Japanese scholars favor interpreting warranty liability as a contractual liability, while those drafting the pPROL have clearly called for a unified remedy system for all sorts of breach in their proposals, including defects in thing.

As to Chinese civil law, Chinese scholars have come to the consensus that there is no independent concept of WLD in the CCL. At the end of this chapter I argued that LBC has indeed been used in a broad sense in the CCL and that this legislative design cannot be "corrected" by any sort of scholarly interpretation. The relative independence theory cannot solve this problem, and will instead create other problems in its attempt to do so. In short, the interpretation of the unitary theory may not be perfect, but is preferable to the relative independence one for interpreting the positive rules under the CCL.

Chapter 3 The Rise of Seller's Obligation to Tender Conforming Subject Matters

In Chapter 2, I have demonstrated the divergence in the understanding and application of warranty liability for defects, recalled the historical development of warranty rules since Roman law and described the decline of warranty liability for defects in many civil law systems. In China, warranty liability for defects should be abandoned to be fundamental analysis instrument, not only because it cannot meet the requirement of modern economics, but also because of its confusion borne from joining the two concepts of "warranty" and "liability". In this chapter, I would like to introduce new instruments for analyzing situations where inadequate subject matters are sold, and attempt to construct an interpretative theory on the basis of those instruments.

The new analysis instruments are "conformity of the subject matter" and "nonconformity of the subject matter", which have become wide recognized in international conventions and model rules concerning sales contract. In this dissertation they will be used in the sense of conformity "with the contract", rather than with regulations, and only in the sense of nonconformity in the thing (i.e. material inadequacy), rather than in the title. Nonconformity of the subject matter in thing has no substantial difference with the notion of *"SachMangel"* in the new German law, but should not be confused with the notion of "defects in thing" in Japanese civil code or the one in the civil code of Taiwan, China. The introduction of nonconformity of the subject matter as a basic analyzing instrument in contract law is based on the following considerations. Firstly, this concept may avoid the confusion arising from the different definitions of the notion of "defects" in different civil law systems. Secondly, nonconformity of goods has already become a basic concept in the CISG and some influential model rules concerning contract for cross-national sales. Thirdly, and most importantly, the influence of these model rules actually led the drafters of the Chinese Contract Law (CCL) to design its provisions following the notion of "nonconformity of the subject matter". As a result, this concept has already seeped into a number of important provisions of the Chinese Contract

Law of 1999, while the more general and less precise notion of "defects" is only used in some less weighty provisions connected with pre-contract duties. For these reasons, it should be beneficial to interpret the CCL in the light of the notion of nonconformity of the subject matter.

In the following sections, I would like to first examine the development of conformity of the subject matter in international contract law and discuss its potential as an analyzing instrument for interpreting the CCL, then use it to construct the system of obligation to tender conforming subject matters in the CCL, and redefine rules on warranty liability for defects in the Judicial Interpretation on the Law of Sales Contract issued by the Supreme People's Court in 2012 (JILSC).

3.1 The rise and development of "conformity with the contract"

3.1.1 Worldwide concepts: nonconformity and conformity with the contract

To avoid different understandings of what defects in goods could constitute breach of contract, the CISG has created a uniform concept of "lack of conformity" with the contract, which includes not only differences in quality, but also differences in quantity and defects in packing (Schlechtriem & Schwenzer, 2005, p. 411). During the past several decades, more and more countries have introduced this concept: some of them, like China, directly adopted the new concept in its uniform contract law; some others, like Germany, used it to redefine its traditional concept when reforming its obligation law. Regarding the reform of Japanese obligation law, the prevailing view reflected in the pPROL is to redefine the traditional concept *kashi* (defects) in the Japanese civil code (JCCRC, 2009b, p. 17), while certain other scholars suggest using *keiyaku hutekigou* (nonconformity) to replace *kashi* (JCCRC, 2009b, pp. 17-18).

3.1.1.1 Lack of conformity in the CISG

Different legal systems have been using various legal concepts to settle problems of quality in the sale of goods. For example, U.S. law has been using concepts like "express warranty" (UCC §2-313), "warranty of merchantability" (UCC §2-314) and "warranty of fitness for a particular purpose" (UCC §2-315); French law differentiates "latent defects" (*vices cachés*) and "apparent defects" (*vices apparents*) (Honnold, 1999, pp. 252-253). The diversity of those

different concepts has been a complicating factor for international trade disputes. It is those divergences that stimulated the development of a uniform law for international sales. In 1964 a diplomatic conference of 28 States was held at the Hague and two conventions were agreed upon: the Uniform Law on the International Sale of Goods (ULIS) and the Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF), both of which went into force in 1972 (Honnold, 1999, pp. 5-6). Based on those two conventions, the CISG was approved in 1980 and finally came into force in 1988 (Kröll, Mistelis, & Viscasillas, 2011, pp. 4-5). It is this convention that introduced the notion of "nonconformity". The drafters of the CISG compared different concepts in many Western countries when dealing with the problems of quality in the sale of goods, and distilled a uniform concept from it: "lack of conformity". This concept differs from most domestic laws so that it does not burden itself with elusive distinctions, such as the Swiss legal distinction between the ordinary characteristics of goods (*Sacheigenschaft*) and a specific warranty that particular characteristics exist (*Zusicherung*), or the distinction between completely different goods (*aliud*) and merely non-conforming goods (*peius*), or again the distinction between latent defects (*vices cachés*) and apparent defects (*vices apparents*) (Schlechtriem & Schwenzer, 2005, pp. 411-412). The drafters believed that "such differences in interpretation will hinder unification of the law", because "there is a risk that each court will interpret [CISG] Article 35 in accordance with its own domestic legal classification." (Schlechtriem & Schwenzer, 2005, p. 412) The consequent creation of the concept of "nonconformity" is considered to be an "excellent illustration of the work of simplification" strived for by the CISG (Pham & Wautelet, 2001, p. 333).

Nonconformity in Article 35 of the CISG differs from its predecessor in Article 33 of the ULIS. Firstly, nonconformity does not affect the fulfillment of obligation of delivery, thus the buyer can only appeal to the general remedies for nonperformance of contract provided in Article 45, but not to remedies for late delivery. Secondly, nonconformity also includes immaterial discrepancies. Thirdly, nonconformity includes problems in quality, quantity, and packing, as well as situations with completely different goods (*aliud*) (Schlechtriem & Schwenzer, 2005, p. 411; Kröll, Mistelis, & Viscasillas, 2011, pp. 491-498). It should be noted that some French and Italian scholars have been worried about the loss of the special remedies

for *aliud* (i.e. equivalent to the remedies for a non-delivery).[①]

The CISG's concept of *nonconformity* differs from the *Mangel* of the old German Civil Code in the following respects. First, contrarily to the objective standard of Mangel, the nonconformity standard is constructed from a subjective perspective, the term itself shows close relationship with the requirement of the agreement, with objective standards only used as secondary factors. Second, this concept covers nonconformity not only in quality, but also in quantity and in packing (Schlechtriem & Schwenzer, 2005, p. 411). Last but not least, nonconformity leads to general remedies for nonperformance of contract, while Mangel was linked to a special remedy regime in the old German Civil Code.

3.1.1.2 Conforming goods in U.S. law

The U.S.'s Uniform Commercial Code (UCC) had developed a concept of contractual nonconformity before its internationalization by the CISG. UCC §2-106 provides a definition of conformity: "Goods or Conduct including any part of performance are conforming or conform to the contract when they are in accordance with the obligations under the contract". The 2003 official comment on UCC §2-508 compares cure within the agreed time for performance and the one after the expiration of agreed time for performance. It states that the conforming goods should be conforming to the contracted-for quality, quantity, assortment, and other similar obligations under the contract. But the seller's tender of conforming goods required to effect a cure may not conform to the contracted time for performance (ALI & NCCUSL, 2010, 134-135). This means the merely delay of performance without nonconformity in quality, quantity, and other similar conditions, can only be treated as "nonconforming conduct", but not "nonconforming goods". Nonconforming goods merely refer to lack of conformity in quality, quantity, and other similar natures of goods. For now, nonconformity has been an important and wide accepted term in American legal textbooks (e.g., Ayres & Klass, 2012, pp. 936-937).

3.1.1.3 Conformity of goods in European law

European private law has been on a path of progressive unification. Since the l980s, and

① As to the French opinion, see Pham (2001, p. 308). As to views of Italian observers, see Ferreri (2005, pp. 232-233).

particularly in the 1990s, large quantities of EU directives have played important roles in the unification of European private law, especially in the area of contract law (Müller-Graff, 2011, pp. 153-155). In 1999, the European Union promulgated a Directive on the Sale of Consumers Goods and Associated Guarantees (1999/44/EC), also known as the "Consumer Sales Directive". This directive borrowed some uniform legal concepts and rules from the CISG (Bonell, 2008, pp. 6-8), making "conformity with the contract" one of the directive's fundamental notions.[①] Article 2-1 of the Consumer Sales Directive states that: "The seller must deliver goods to the consumer which are in conformity with the contract of sale". Because Article 11-1 requires EU Member States to transpose the directive by means of laws, regulations, or administrative provisions which should come into force no later than January 1, 2002,[②] many European countries have as result launched a project to supplement or modernize their contract law. Germany took the opportunity to carry out the so-called "big solution" (die groβe Lösung), i.e. the reform of its whole obligation law. On January 1, 2002, the Act concerning the Modernization of Obligation Law (*Gesetz zur Modernisierung des Schuldrechts*) came into force, introducing a new German Civil Code (BGB) (Haas et al., 2002, pp. 2-4). Article 433 of the new BGB, which is said to be modeled after the CISG, requires the seller to deliver goods free from defects (Beckmann, 2008, p. 2). It seems that the concept of freedom from defects (*Mängelfreiheit*) has almost the same meaning as conformity of the goods. Moreover, German scholars believe that CISG Article 35, the core concept of which is "conformity of the goods", has inspired the liability for defects in thing (*Sachmängelhaftung*) to be based on general liabilities for breach of contract (Honsell, 2010, p. 385).

Although with some delay, the U.K. and France respectively transposed the rules of directive into the UK's Sale and Supply of Goods to Consumers Regulations in 2002[③] and the French Consumer Code (*Code de la Consommation*) in 2005.[④] It appears that following the impetus of the EU Consumer Sales Directive of 1999, the uniform concept of "conformity" and the rules for defining it have been in some measure accepted by the major European countries.

But although this directive partly harmonized laws on consumer sales, barriers to the "free movement of goods" inside the Europe Union still survived in other sale areas. This is why

① See Directive on the Sale of Consumers Goods and Associated Guarantees 1999/44/EC 25.5.1999, OJ L 171/14.
② See Directive on the Sale of Consumers Goods and Associated Guarantees 1999/44/EC 25.5.1999, OJ L 171/14.
③ See 2002/3045.s.52(1)of the SoGA.
④ There are also two amendments in French Civil Code (Miller, L., 2007, p. 397).

recently there has been a movement towards a more general unification of sales law. In October, 2011, the European Parliament and the Council of the European Union published a "Proposal for a Common European Sales Law" (pCESL), the scope of whose application would cover all business-to consumer transactions and contracts between traders where at least one of the parties is a micro, small, or medium-sized enterprises (SME), drawing upon Commission Recommendation 2003/361 of the 6th May of 2003.[①] This proposal continues to use "conformity" as its cornerstone. The title of Chapter 10 of the pCESL is "the seller's obligations", and its Article 91 states the following main obligations of the seller:

> "The seller of goods or the supplier of digital content (in this part referred to as 'the seller') must: (a) deliver the goods or supply the digital content; (b) transfer the ownership of the goods, including the tangible medium on which the digital content is supplied; (c) ensure that the goods or the digital content are in conformity with the contract; (d) ensure that the buyer has the right to use the digital content in accordance with the contract; and (e) deliver such documents representing or relating to the goods or documents relating to the digital content as may be required by the contract."[②]

It is clear from point (c) that the delivery of goods and digital content conform to the stipulations of the contract is one of the seller's primary duties. It can be imagined that the European sales law might be further harmonized in the direction that the pCESL has pointed to, and the notion of conformity is likely to be further accepted in many European countries.

3.1.2 Adoption of conformity of the subject matter under the CCL

In the preceding subsection I have shown that the conformity concept has been embraced in a number of countries. There are clues that the drafters of the CCL have also fallen under its charm. In fact, the influence is so evident that this concept could even be wielded as a useful analyzing instrument in the interpretation of the CCL, especially when comparing it internationally with other sales laws.

Firstly, it appears that many provisions in the CCL (1999) have been inspired by the CISG and the UCC. For instance, according to the Paraphrase on the Contract law of the People's

① There are debates over the scope of its application (Ortiz & Viscasillas, 2012, pp. 241-258).
② COM (2011) 635 final.

Republic of China (PRC), edited by the Legislative Affairs Commission of the Standing Committee of the National People's Congress (NPCSC), Article 153 of the CCL has been inspired from Article 35 of the CISG and Section 2-313 of the UCC (Hu, 2009, pp. 233-234). This Commission is a work department which was responsible for drafting the initial provisions of the CCL, therefore this comment may indeed reflect the actual drafting progress of CCL Article 153.

Secondly, the words employed in the text of provisions on requirement of quality of subject matters are quite close to CISG Article 35. Conformity can be translated as "*shihe*" or "*fuhe*" in Chinese, while nonconformity essentially corresponds to the "*bufu*" expression in CCL Articles 153-158; as a matter of fact, the "*bufu*" expression has been used by certain Chinese scholars to refer to the nonconformity in the CISG (W. Li, 2009, pp. 160-162).

Thirdly, the standards for determining whether a subject matter is adequate or not in the CCL are almost the same as the ones in the CISG. Both require the subject matter (a) to be in conformity with the agreement and specific instructions of the seller, (b) to meet their ordinary purpose or to be expected as the same kind of subject matter, in the absence of explicit agreement; (c) to be identical with the sample provided by the seller; and (d) to be contained or packed in a way that is sufficient to protect the subject matter, in the absence of explicit agreement (Mo, 1999, pp. 235-236). Some U.S. scholars who compared the CISG, the CCL and the UCC agree that conformity is an appropriate instrument for comparing the three regimes; It has been suggested that rules on the quality of goods under the CCL and under the CISG essentially share the same idea and expressions, although there are slight differences between the two regarding: (a) the unclear relationship among CCL Articles 153, 154, and 61, 62, and (b) the special treatment on latent defects in sample provided in CCL Article 169 (Giuliano, 2006, pp. 340-341; Mo, 1999, pp. 236-237).

3.1.3 Reconsideration of the notion of defects under Chinese law

3.1.3.1 Different meanings of defects in academic research

Many Chinese civil law scholars prefer to use "defects" rather than "nonconformity" in their studies in spite that the latter concept is used much more frequently in both the CCL and

the legal practice (e.g., L. M. Wang, 2003, p. 398; Cui, 2010, p. 386; Han, 2010, p. 389; Ma & Yu, 2007, p. 642). D. F. Xu (2006) stated that: "If the defects have been disclosed, the mere lack of a certain function in the product will not constitute defects; but if a functional defects has not been disclosed, it will definitely give rise to liability for defects", and that the common basis for liability for defects and liability for *culpa in contrahendo* could be reflected in "the relationship between defects and disclosure" (pp. 88-89). It is clear that, in the preceding literature, defects that should be disclosed in the process of contract conclusion and the one that leads to liability for defects must be differentiated at the level of both meaning and function, otherwise the logic is confusing: defects that has not been disclosed will not constitute defects. H. L. Wang (2005) argues that the concept of nonconformity in quality specified in CCL Article 111 could be considered as one of defects in quality, and "the concept of defects may also provide basis for the pre-contractual obligations and the collateral obligations" (pp. 72-73). Obviously, defects here do not only refer to the nonconformity in quality in CCL Article 111, but also play an important role for clarifying the pre-contract obligations and the collateral obligations. Therefore, defects have different meanings and functions in academic research and cannot be merely sorted into the instruments for analyzing breach of contract or the ones for determining the pre-contract obligations.

The different functions carried by defects have shown that it is a more general concept, which is often connected with an objective standard. If we go back to the initial meaning of defects in the traditional civil law systems, we can observe that most legislators initially employed objective rather than subjective standards to define the notion of "defects". A case in point is the old German obligation law.

The old BGB Article 459 firstly required the seller to warrant the buyer that at the time when the risk passed to the buyer, "it is free from defects which diminish or destroy its value or fitness for its ordinary use or the use presupposed in the contract. An insignificant diminution in value or fitness is not taken into consideration" (C. H. Wang, 1907, p. 100), then in the same provision it required the seller to warrant that, "at the time the risk passes, the thing has the promised qualities." (C. H. Wang, 1907, p. 100) The notion of "defects" was only defined in light of the "ordinary use or the use presupposed in the contract", but not primarily according to "the promise". Therefore, defects and breach of promise may be interpreted as different

systems, and the former should only be determined from the objective perspective.

Accompanying the rise of the performance theory (Erfüllungstheorie), the subjective standard for determining defects has been more emphasized (Westermann, 1995, p.199). When modernizing the old German obligation law, the new wine was put into the old bottle: as Medicus and Lorenz (2010b, §77 Rn. 77, 81, 85) point out, "Mangel" has been redefined with subjective meanings in the first rank (subjektive Fehlerbegriff). The new BGB Article 434 requires the thing sold free from defects as to quality when the risk passed, and the foremost standard to determine whether the thing is free from defects is "the agreed quality". In the absence of such agreement, the thing being free from defects as to quality can be determined in light of the following standards: (a) the use specified in the contract, and otherwise (b) the normal use and "its quality and condition is such as is usual in things of the same kind and can be expected by the buyer by virtue of its nature" (Tamm, 2006, pp. 52-53). It is obvious that the subjective meaning of defects has been given priority over the objective meaning and the new German law is moving towards the approach of the CISG and EU Consumer Sales Directive of 1999.

The academic researches that consider *nonconformity of the subject matter* provided in CCL Article 111 and Article 155 as *defects*, may be inspired from the approach of the redefinition of Mangel in the new German law. However, the reform of German obligation law reflects that the old German law at first did not define defects with the subject meaning in the first rank; on the contrary, the objective meaning had been put in the first rank since this concept was established. It is understandable that the German legislators preferred to redefine a traditional concept rather than to replace it with a new one from international conventions; on the other hand, it is not necessary for Chinese scholars to follow the German approach to interpret nonconformity as defects, unless the Chinese contract law is facing the same problem as the German law did. If we examine the provisions of the CCL carefully, it can be found that the law of sales contract was more influenced by the CISG, while the laws of contract for gift and contract for storage have borrowed some rules from traditional civil codes. As a result, on one hand, nonconformity has become the stone concept in the law of sales contract (CCL Arts. 153-155) and contract for work (CCL Art. 262), on the other hand, there are still rules with the concept "defects" in the law of contract for gift (CCL Art. 191), contract for storage (CCL Art.

370), and contract for trading-trust (CCL Art. 417).

Given the considerable weight of contract for sales, for works, and for lease, it is fair to say, the CCL has, from the beginning, basically refused to adopt the traditional notion of defects, but established similar notion and related rules with the CISG. The following questions should be: in what way the Chinese legislators have actually employed *defects* in the preceding four provisions? Are they actually the same as nonconformity?

3.1.3.2 Defects in Chinese positive law

In this subsection, each of these provisions that have employed the concept *defects* will be examined. The first provision that mentions "defects" relates to latent defects in sample for sales. CCL Article 169 provides in this respect that: "In a sale by sample, if the buyer was not aware of a latent defect in the sample, the subject matter delivered by the seller shall nevertheless comply with the normal quality standard for a like item, even though the subject matter delivered complies with the sample." No comparable provisions can be found in U.S. law, German law, the CISG,[①] or Japanese civil law. Latent defects in CCL Article 169 cannot be understood from the perspective of nonconformity with the agreement because these defects only concern samples in the pre-contractual negotiation phase. The subject matter tendered afterwards with the same kind of defects as the sample will be viewed as nonconforming only if the defects make them fail to meet the normal requirement for subject matter in the same kind, but they would not be considered as nonconforming merely because of the failure of being fit for a particular purpose of the buyer. In short, the latent defects in sample cannot be defined as nonconformity with the contract.

The second provision that mentions defects relates to gift contracts. According to the first sentence of CCL Article 191(1), the donor is not liable for any defects in the gift property if he did not contract for an obligation to the donee; CCL Article 191(2) then provides: "Where the donor intentionally omitted to inform the donee of the defects or warranted the absence of any defects, thereby causing loss to the donee, he shall be liable for damages." Yet CCL Article 191 would not make sense if "defect" was defined in a solely subjective sense of nonconformity to the contract, because no donor can be excused under CCL Article 191(2) if the defects refer to

① See A. M. Giuliano (2006); see also J. S. Mo (1999).

quality conditions that do not comply with the requirement agreed in the contract. On the contrary, it seems reasonable to define defects with an objective standard here. Firstly, most contracts for gift with no obligation on the donee would not specify the quality condition of the gift property and, the special requirement of the donee rarely occurs even if it is normal to find some unsatisfactory conditions in the gift property, comparing with the new item of the same kind. Secondly, since the donee gets a benefit from the contract without consideration, it is not unreasonable to consider that he should bear the burden of possible defects. Therefore, it is unnecessary to hold the donor to a general obligation to warrant the gift to meet normal quality standards for a like item, except if the parties expressly agree so. It is more reasonable to hold him instead of an obligation to inform the donee of any defects, as provided in Article 191(2). And this obligation to inform only makes sense in case defects are defined by an objective standard rather than a subjective one, because the contract will only rarely set a quality standard.

Another two provisions contained defects are Article 370 and Article 417. CCL Article 370 provides that if the deposit delivered by the depositor has defects or requires special safe keeping measures in light of its nature, the depositor shall inform the depository of the relevant situation. If the depositor failed to inform, the depository is not liable for damages. Likewise, according to CCL Article 417, if a trust item was defective, perishable or susceptible to deterioration at the time it was delivered to the trustee-trader, upon consent by the trustor, the trustee-trader may dispose of the item; where the trustee-trader is unable to contact the trustor in time, it may dispose of the trust item in a reasonable manner. These two provisions are related to contracts which rarely need to set subjective quality standards against the delivery of defective subject matter as long as they do not cause losses to the depositary or trustee-trader, which is why the provisions limit themselves to affirming the obligation to inform or the right to dispose. As we can see, these provisions would make no sense if the defects were defined from a subjective perspective of contractual agreement (no quality standards to conform to), which means they must be defined objectively, with regard to the instability of the subject matter.

In addition, there are a few rules that mention "defects" in the Chinese Auction Law (CAL). CAL Articles 18, 27, and 35 are related to the obligation of the trustor and auctioneer to

disclose the defects of the auctioned object, and CAL Article 61 mainly regards the obligations of the trustor and auctioneer to compensate for damages in case they breach such obligation to disclose. These rules are unique, compared with similar rules in German law and Japanese law, both of which generally impose no liability for defects on the auctioneer unless some exceptions.[①] In Chinese law, the trustor and auctioneer must disclose the defects which they have been aware of. The defects can only be defined from an objective perspective as there can be no detailed meeting of intention between the trustor or auctioneer and the many bidders, who may have different intentions. Defects in the subject matter for auction should be understood as lack of certain quality that can be normally expected by a rational third party; however, these defects are not necessarily inconsistent with the agreement, meaning that the seller should be held to no more than an obligation to inform.

To sum up, all the provisions that mention "defects" in the Chinese positive law are concerned mainly with the bargaining process and with contracts that do not normally set express quality standards on the subject matter. Accordingly, the obligation of the seller is usually limited to an obligation to inform of any defects, and this would only really make sense if "defects" were defined in an objective rather than subjective sense.

3.1.3.2 Different meanings of defects and the adoption of nonconformity

According to the two preceding subsections, we can distinguish between two different meanings of defects. One is the "defects" in the sense of nonconformity to the contract, a meaning featuring prominently in academic research. Another is the "defects" in the sense in which it is actually used in the Chinese positive law. As Table 3.1 shows, there are significant differences between them.

[①] See BGB Article 445 and JCC Article 570.

Table 3.1

Defects with complex meanings

	Defects as used to in academic research	**Defects as occurring in positive law**
Relevant Provisions	CCL Articles 153, 154, 155, 216, 244, 262, 62, 111, 148, and 158	CCL Articles 169,191,370,and 417; CAL Articles 18, 27, 35, and 61
Legal Effects	Remedies for breach of contract	Obligation to disclose
Standards for Determination	First, fail to satisfy the requirement of contractual agreement; Second, in the absence of contractual agreement, fail to satisfy the requirement of the purpose of contract, usage of transaction, national standard or industrial standard, and other standards provided by law.	Fail to satisfy the ordinary standard of the same kind item or normal expectation of a rational third party.

It is not proper to use defects in a too general sense, as this may lead to confusion in legal decisions due to lack of guidance on the positive rules. In order to bridge the gap between the two meanings of defects and to improve the interpretative theory, I would like to propose the concept of "nonconformity" as a basic analyzing instrument in study. Among the characteristics of this concept, we can count that: (a) it exists no later than the transfer of risk from the seller to the buyer; (b) it is judged mainly by a subjective standard, especially through the contractual agreement; (c) it is applied to both ascertained objects and unascertained objects; and (d) it is mainly related to remedies for breach of contract.

There are four aspects of distinction that can be observed between defects and nonconformity in positive law: (a) defects always exist in the bargaining process when no effective contract has yet been concluded, while nonconformity exists no earlier than the conclusion of contract; (b) defects exist only in ascertained objects, while nonconformity may exist in either ascertained objects or unascertained ones; (c) the standards for determining whether a defect exists mainly depend on objective factors, usually in terms of the ordinary purpose and normal expectation of a rational third party, while the standards for nonconformity mainly depend on the agreement itself, with objective standards coming into use only if the

contract does not specify subjective ones; and (d) the major legal consequence associated with "defects" is the duty to disclose, while in the case of nonconformity the consequence should be remedies for breach of contract.

3.2 The development of the obligation to tender conforming subject matters

After deciding on conformity and nonconformity as the basic concepts for analysis in this dissertation, the following section will focus on the rise of the obligation to tender conforming subject matters. Both foreign laws and Chinese law recognize that the seller should bear such an obligation.

3.2.1 The obligation to tender conforming subject matters in foreign legal systems

3.2.1.1 The obligation of conformity of goods in the CISG

CISG Article 35 explicitly states that conformity of goods is one of the seller's obligations. It means the seller must deliver goods in conformity with the contact. Breach of such an obligation would constitute "failure to perform", and the buyer could then pursue any of the remedies provided under CISG Article 45, including supplementary performance, avoidance of contract, price reduction, and damage compensation. However, there are generally conditions before the buyer to require these remedies, namely the serving of a notice of nonconformity and the exercise of the seller's right to cure (Sono, 2009, pp. 118-119). As to the standards of conformity, according to CISG Article 35(1), priority should be given to the requirement of the contractual agreement; in the absence of contractual requirements, subsidiary standards should be used to decide the standard of goods for sales. These standards are stipulated in Article 35(2), including:

> "(a) [being] fit for the purposes for which goods of the same description would ordinarily be used; (b) [being] fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgment; (c) possess[ing] the qualities of goods which the seller has held out to the buyer as a sample or model; and (d) [being] contained or packaged in the manner usual

for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods." (Schlechtriem & Schwenzer, 2005, pp. 416-426)

The great success of the CISG has made this kind of legislative technique gain in worldwide influence.[①]

3.2.1.2 The seller's obligation of conformity in European law

Since we have briefly discussed the content of conforming goods in U.S. law in subsection 3.1.1.2, I will now turn to the understanding of the notion in European law.

The EU Consumer Sales Directive of 1999 explicitly stipulates the requirement of conformity with the contract. Article 2(2) of this Directive states that:

"Consumer goods are presumed to be in conformity with the contract if they: (a) comply with the description given by the seller and possess the qualities of the goods which the seller has held out to the consumer as a sample or model; (b) are fit for any particular purpose for which the consumer requires them and which he made known to the seller at the time of conclusion of the contract and which the seller has accepted; (c) are fit for the purposes for which goods of the same type are normally used; (d) show the quality and performance which are normal in goods of the same type and which the consumer can reasonably expect, given the nature of the goods and taking into account any public statements on the specific characteristics of the goods made about them by the seller, the producer or his representative, particularly in advertising or on labelling."

However, the approach of "presumption" is confusing, and the relationship among these requirements needs to be clarified. For example, it is confusing to say: the consumer goods are *presumed to be* in conformity with the contract if they are *either* fit for any particular purpose for which the consumer requires them and which the seller should have known and has accepted, *or* fit for the purposes for which goods of the same type are normally used. On the contrary, the ordinary purpose should be used only if the preceding standards are not available and once it applies, the goods should *be*, but not *presumed to be* conforming with the contract.

As to the pCESL, Articles 99 to 102 of it explicitly stipulates the requirement of

① As to other legislations impacted by the CISG around the world, see Basedow (2005, p. 498).

conformity with contract. pCESL Article 99 (1) provides that, to conform with the contract, "the goods or digital content must: (a) be of the quantity, quality and description required by the contract; (b) be contained or packaged in the manner required by the contract; and (c) be supplied along with any accessories, installation instructions or other instructions required by the contract." If the contract does not stipulate any requirements of conformity for the goods, those requirements should be decided according to pCESL Articles 100-102. Article 100 lays down the "criteria for conformity of the goods and digital content":

> "The goods or digital content must: (a) be fit for any particular purpose made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for the buyer to rely, on the seller's skill and judgment; (b) be fit for the purposes for which goods or digital content of the same description would ordinarily be used; (c) possess the qualities of goods or digital content which the seller held out to the buyer as a sample or model; (d) be contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods; (e) be supplied along with such accessories, installation instructions or other instructions as the buyer may expect to receive; (f) possess the qualities and performance capabilities indicated in any pre-contractual statement which forms part of the contract terms by virtue of Article 69; and (g) possess such qualities and performance capabilities as the buyer may expect. When determining what the consumer may expect of the digital content regard is to be had to whether or not the digital content was supplied in exchange for the payment of a price."[①]

It can be observed that the standards for determining nonconformity of goods and digital contents provided in this article are more complex than the ones provided in the EU Consumer Sales Directive of 1999, largely due to the application scope of the pCESL has been extended to include digital content. It needs to be noted that one innovative design can be found in pCESL Article 99(2), which states: "in order to conform with the contract the goods or digital content must *also* meet the requirements of Articles 100, 101 and 102, save to the extent that the parties have agreed otherwise." Eidenmuller et al. (2012) criticize that this clause would

① COM (2011) 635 final.

bring trouble to the understanding and application of conformity rules.[①] This criticism makes sense, for the standards provided in pCESL Articles 100, 101 and 102 should only apply in the case that it lacks explicit requirement concerning the quantity, quality, manners for contain or package, installation instructions, and other similar conditions in the contract. If there are explicit contractual agreements, it is unnecessary and even confusing to apply pCESL Articles 100, 101 and 102 simultaneously.

Nevertheless, though the proposal is still in discussion and may not be adopted as such, it is plausible to say establishing rules on the obligation of conformity is the direction that pCESL is moving towards, and such obligation of conformity is likely to be more widely accepted in European law in the future.

3.2.1.3 The seller's main obligation of conforming tender in German law

Both the CISG and the EU Consumer Sales Directive of 1999 have significantly influenced the modernization of German obligation law. After the modernization, the "seller's main obligation of conforming tender" has been put on a par with the main obligations of title transfer (*Eigentumsverschaffung*) and of delivery (Brox & Walker, 2006, §2 Rn. 2-9). Meanwhile, the settlements for defects in thing and defects in title, which were separate in the past, have been merged together. It has been argued out: "Germany set forth corresponding provisions in the respect" of CISG Article 35 (Schlechtriem & Schwenzer, 2005, p. 412). Legislators of the new German obligation law have also mentioned that the conforming tender under BGB Article 433 was inspired from related rules in the CISG (Beckmann, 2008, p. 2). Freedom from defects (*Mängelfreiheit*) in BGB Article 434 is almost identical to "conformity with the contract" (*Vertragsmäßigkeit*) (Honsell, 2010, p. 385). It is plausible to say that both the new German law and its theory have accepted the idea and the approach to consider providing conforming tender as one of the seller's main contractual obligations. More accurately speaking, it is the remedies for breach of contractual obligation that has absorbed the special remedies for latent defects, while it is the "seller's main obligation to provide conforming tender" that has taken the replace of "statutory warranty" in the old German law (Westermann, 1995, §434, §459).

[①] They even considered these articles fell behind with the CISG, the EU Consumer Sales Directive of 1999, and even the Sale of Goods Act (1979) (Eidenmuller et al., 2012, p. 333).

3.2.2 The obligation to tender conforming subject matters in Chinese law

As I mentioned in section 3.1, the CCL has directly adopted the concept *conformity* and built a series of rules on determining conformity. In this part, I would like to clarify certain categories of obligation of conformity and discuss the methods to determine the content of this obligation.

3.2.2.1 The categories of obligation of conformity

In the CCL, the requirements of the obligation of conformity of goods can be inferred from: (1) the explicit requirement in contractual agreement (CCL Art. 153 sentence (1)); (2) the quality instruction, as well as the sample provided by the seller (CCL Art. 153 sentence (2), Art. 168), and (3) various supplementary standards, including national standard, industrial standard, ordinary standard, and other standards supported by the purpose of contract (CCL Art. 62 item (1)). The former two requirements can be understood as obligations arising from the consensus of contracting parties' intentions, while the last one including various standards should be considered as "implied contents" provided by the law of "gap filler" (White & Summers, 2010, p.146).

Agreed obligations of conformity of the subject matter include not only explicitly specified contents in the contract, but also other kinds of "agreements", such as quality instructions and samples provided by the seller. According to CCL Article 153, "The seller must deliver subject matters which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract". The NPCSC's Legislative Affairs Commission stated in the *Paraphrase on Chinese Contract Law* that:

> "Similar content has been stipulated in CISG Article 35…strictly speaking, the instructions on the goods' quality provided by the seller are also a kind of agreement on quality between contracting parties. It belongs to expressed agreement on subject matters for sales. It is helpful to refer to UCC §2-313…" (Hu, 1999, pp. 233-234)

Thus, according to this Commission, the legislation of these rules in the CCL has been inspired by the CISG and the UCC; instruction on quality is considered as a kind of agreement, similar with the expressed warranty of the UCC (ALI & NCCUSL, 2010, p. 1992).

On the other hand, when there is no explicit agreement and no accurate content can be interpreted from the contract, obligations as to the quality of the subject matter must be determined in light of supplementary standards provided by the law. The similar system is called implied warranty in U.S. law.[①] According to the *Paraphrase on Chinese Contract Law*, CCL Article 154 aims at:

> "solving the problem of determining quality requirements for subject matters if there is no explicit agreement on quality in the contract… In continental law systems, it is solved by warranty against defects, while in Anglo-American law it is addressed by implied warranty.….The CISG explicitly stipulates the seller's obligation on quality, which is similar with implied warranty system in Anglo-American law…This article (CCL Art. 154) is based on the reasonable content of those two systems, in particular referring to the implied warranty in Anglo-American law…" (Hu, 1999, pp. 233-235).

Although there was a mistake in the paraphrase concerning implied warranty, as this system exists only in U.S. law, but not in U.K. law, it has indeed pointed out that CCL Article 154 was created in light of related rules in those legal systems, especially the implied warranty in U.S. law. It should be admitted that, the approach of implied warranties is very close to the approach provided in CCL Article 64, in respect that both are supplementary standards provided by the law and both mainly refer to the objective standards, such as industrial standard.

3.2.2.2 The determination of the content of conformity obligation

CCL Articles 153, 154, 61, and 62 lay down a series of rules on the determination of the quality requirement. Firstly, quality should be determined according to the requirements of the contractual agreement, as well as the quality instructions or sample provided by the seller. Secondly, in the absence of explicit agreement on quality, the supplementary agreement concluded by contracting parties should be referred to (CCL Art. 61 sentence (1)). Thirdly, in case the contracting parties cannot reach a supplementary agreement, the quality requirement should be determined according to the related contractual provisions and usage of transaction

[①] As to the recent development of implied warranty, see Lord (2005).

(CCL Art. 61 sentence (2)). Finally, if the quality requirement cannot be determined by applying the above-mentioned standards, the national standard or industrial standard shall apply; in the absence of national and industrial standards, ordinary standard or special standard required by the purpose of the contract shall apply (CCL Art. 62 item (2)). Despite the need for clarification on some points, it is fair to say that the CCL system prioritizes the intention of the contracting parties, while establishing objective standards as a secondary reference. This approach conforms with the idea reflected in the CISG. Professor Mo (1999) compares the CCL and the CISG, and summarizes as following the substantial common factors between them: (a) both require the seller to deliver goods conforming with the contractual agreement; (b) both require the goods to be delivered in accordance with the special instructions provided by the seller; (c) both require the goods to meet the ordinary purpose or expected purpose of the same kind; and (d) both require the goods to be contained or packed in a way that can preserve and protect the goods (pp. 235-236).

Nevertheless, there are still several issues that should be addressed when applying those rules. The first problem is that when there is a dispute on the quality requirement, there is a potential conflict of application of rules, because the rules on determining the content of the contract provided in CCL Article 61 and the rules on interpreting the contract provided in CCL Article 125 can both govern the issue. According to CCL Article 125(1), the intention of the parties to the contract should be interpreted according to the literal content, the context and the purpose of contract, and in accordance with the usage of transaction and the principle of good faith. According to CCL Article 61, however, if a term, such as quality requirement, has not been expressed or was stated inexplicitly, unless supplementary agreement has been reached, the contents should be determined in accordance with the context of the contract or usage of transaction. Thus, the relationship between these two articles is unclear. CCL Article 125 provides for all sorts of interpretative methods for interpreting the mutual intention in a contract, while CCL Article 61 provides for a few methods to determine the content of contract. There are, in some measure, overlapping and conflicting requirements, which need to be clarified.

In my opinion, the determination of contractual content according to CCL Article 61 applies differently in the following two cases.

If the dispute is about ambiguous quality requirement in contractual provisions, CCL Article 61 provides means for determining the exact meaning in the absence of an explicit agreement. In such a case, except if the contracting parties reached a supplementary agreement, the determination of the contents of the contract are still part of the interpretation of the contract. The interpretation should be in light of the standards provided in CCL Article 125, i.e. literal content, system, the purpose of contract and usage of transaction, because it is unnecessary and even unreasonable to deprive of the application of these methods, especially the purpose of contract provided in CCL Article 125, as CCL Article 61 does by omission.

If the dispute is about whether there is any agreement on quality in the contract, the first step that should be taken is examining whether there are provisions contained requirement on quality. Advertisement or oral description during the process of bargain may usually be the focus of interpretation. If it is concluded that there is no agreement on quality, the first sentence of CCL Article 61 may apply, and supplementary agreements may be concluded by the contracting parties; if such agreement cannot be finalized or reached, the second sentence of CCL Article 61 applies, and the judge should fill the gap in light of relevant provisions and usage of transaction. If it fails, then the judge should move on to CCL Article 62, to apply supplementary standards. Anyway, in such a case, CCL Article 61 applies as a gap-filler, which should be triggered after the interpretation of the contract.

The second problem follows with the second case above, on the existence of an agreement on quality in the contract. When CCL Article 61 plays a role as gap filler, since Article 62 cannot be applied until Article 61 fails to solve this problem, accordingly, the purpose of contract cannot be employed under CCL Article 61, then how could the judge fill the gap while he cannot pursue the guidance of contractual purpose? Obviously, the legislator has not put enough priority on the purpose of contract. Putting the purpose of contract behind usage of transaction, national standard, and industrial standard (CCL Art. 61, Art. 62 item (1)) is questionable. The so-called "supplementing the agreement with relevant provision" to a large extent means supplementing the agreement in light of the purpose of the contract that has been reflected in relevant provisions, for relevant provisions cannot fill the gap on its own. Anyway, the purpose of a contract is an element that should be considered from the beginning of gap filling, and other standards need to be considered in light of it.

3.3 Redefining the function of warranties

The necessity to analyze the function of warranty lies in the existence of a few rules on warranty liability for defects in the CAL and the JILSC. In light of the modern law theory, warranty should not play a role in establishing special remedies for latent defect, but should be an instrument for determining the content of contractual obligations, especially in the case of sales of specific goods. As I will show below, warranty liability for defects has generated a new function to specify the supplementary obligation in a contract when there is no prescribed contractual requirement on quality. It mainly provides supplementary obligation based on the ordinary purpose of the contract. Warranty liability for defects, therefore, can be interpreted into the seller's main obligation to tender conforming subject matters.

3.3.1 The function of warranty in foreign legal systems

For the common law, despite there are some other opinions, the system of remedies is mainly considered to be based on the idea of redressing the consequences of breach (Farnsworth, 2004, p. 149). There never was a special liability for latent defects as in traditional civil law systems. The focus of academic research is the examination of the contracting parties' intention and, with the help of different instruments, the determination of the contents of obligations based on the contract.

3.3.1.1 The function of warranty in U.S. law

For U.S. law, warranty means the merchants have an obligation to tender goods conforming to a certain quality standard, unless they agreed to the contrary (Benfield & Hawkland, 1986, p. 213). The UCC has been using a pair of instruments: express warranties and implied warranties. The former basically refers to affirmations of fact or promises, descriptions of the goods, samples or models that have become part of the basis of the bargain (UCC §2-313); the latter includes a warranty of merchantability (UCC §2-314) and a warranty of fitness for particular purpose (UCC §2-315). Besides, an implied warranty of habitability has also been developed for lease contracts (Brower, 2011; Price & Pinkston, 2010).

Warranty of merchantability means: unless excluded or modified by contracting parties in accordance with UCC §2-316, "a warranty that the goods shall be merchantable is implied in a

contract for their sale if the seller is a merchant with respect to goods of that kind". UCC §2-314 (2) provides that the goods to be merchantable must satisfy the requirements, such as "in the case of fungible goods, [being] of fair average quality within the description", "[being] fit for the ordinary purposes for which such goods are used" and "[being] adequately contained, packaged, and labeled as the agreement may require".

As to warranty of fitness for particular purpose, it is provided that unless excluded or modified by contracting parties in accordance with UCC §2-316, "where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods," there would be an implied warranty that the goods shall be fit for such purpose.

Although implied warranties have a function to establish a bridge to strict products liability in the 1950s and early 1960s (Henderson & Twerski, 2008, p. 14; Vetri et al., 2003, p. 948), the most important function of it is, however, to provide obligations between contracting parties. Implied warranties have done so by clarifying and supplementing the duties on goods for sales, as well as on real property for lease. It allows the appropriate distribution of the responsibility for loss, and the appropriate protection of the interests of consumers and low-income tenants (Priest, 1981; Super, 2011).

3.3.1.2 The function of implied terms in English law

The concept of "warranty" in English contract law has a different meaning and function, comparing to the one in U.S. law. In English law, the development and application of warranty is related to discharge of contract. English jurists have divided contract terms into three different categories: *conditions*, *warranties* and *intermediate terms*. Breach of conditions may justify the aggrieved party to terminate the contract; on the other hand, breach of warranties would not, only allowing the aggrieved party to claim damages (Treitel, 2003, p. 789). Because *warranties* in English law have no special relations with the quality of goods, it is not suitable to compare *warranties* in English law with the ones in U.S. law (Beale, 2008, pp. 1421-1422). The comparable concept in English law should be implied terms and expressed terms. Among them, emphasis should be given to the implied terms provided in the Sale of Goods Act 1979 (SGA 1979), such as implied terms as to title (SGA 1979 §12), implied terms as to compliance

with description (SGA 1979 §13) and implied terms about quality and fitness for purpose (SGA 1979 §14). As to sale by sample (SGA 1979 §15), it may be either an express term or an implied one (Beale, 2008, pp. 1429-1450).

The function of implied terms in the SGA 1979 is to clarify and supplement the seller's duties. Professor Treitel (2003) divides them into three main groups: terms implied in fact, which are not expressly set out in the contract, but which the parties must have intended to include; implied terms in law, a way of specifying some of the duties mainly stated by statutes, justified by policy (for example, business efficacy); and implied terms by custom (pp. 201-214). The most important implied terms of goods for sales are provided in the SGA 1979, and of course, belong to implied terms in law.

Implied terms in English law are duties specified or "made implicitly" by the law or custom, based on the purpose of the contract and certain policies. Thus, even if a specific object is never free from defects, if the seller has induced the buyer to reasonably expect no defects, the seller would still be bound by this expectation he helped create. Otherwise, he should be liable for breach of contractual duties.

3.3.1.3 The function of guarantee in the new German law

In the new German obligation law, rules on special remedies for warranty have changed a lot. Although the warranty more or less still has the function of establishing stricter liability (than the general fault-based liability), it merely refers to specific guarantees provided by the seller. According to the first paragraph of BGB Article 276(1), there may be stricter liability if the law has so provided or if the seller guaranteed so. The most important cases are guarantee on quality (*Beschaffenheitsgarantie*) and guarantee on durability (*Haltbarkeitsgarantie*) provided in BGB Article 443. These guarantees may establish stricter liability in contracts for tendering goods (*Sachenbezogene Verträge*), such as contract for sales, lease, and work (Brox & Walker, 2006, pp. 211-212). However, the so-called "stricter" liabilities for nonconforming goods does not mean this liability is separated from the general remedy idea, but merely means the liability has been made stricter because the seller or a third party has so guaranteed. Therefore, the function of guarantee is actually to provide stricter obligations based on the seller or a third party's promise.

3.3.2 Redefinition of warranty liability in Chinese Law

The function of warranty to establish special liabilities in the old BGB never existed as such in the CCL. On the contrary, the "supplementary terms", such as those from CCL Article 62, are more or less similar with the implied warranties in the UCC and implied terms in the SGA 1979, both of which basically aim to specify the seller's duties in the case that the contractual terms are not explicit enough. In this part I would like to analyze how to interpret rules on warranty liability for defects in the Judicial Interpretation on the Law of Sales Contract issued by the Supreme People's Court in 2012 (JILSC).

The foremost task is to find out the purpose of those rules in the JILSC. Since special liability for latent defects has been merged into the general concept of liability for breach of contract, the focus of contract law research in many civil law systems seem to have shifted towards determining the exact content of each party's contractual obligations. In Japan, Professor Shiomi (2010) argues that the research made within the framework of the contractual liability theory chiefly concerns the binding effect of the contract and the determination of the content of contractual obligations; the former mainly arises from the principle of "promise ought to be kept" (*pacta sunt servanda*) (pp. 2-3). Likewise, in China, there is a problem about whether, in case of the purchase of specific object, the seller is liable for defects if he did not disclose the existence of defects he was aware of. If he should be liable, then to what extent? If the buyer bought a specific object with knowledge of the defects, is he still able to require remedies for them? These questions are left unanswered in present Chinese law and are mainly related to the determination of the content of contractual obligations. In my view, the JILSC has employed traditional rules of warranty liability in civil law countries, but the purpose of it is not to resurrect the special remedies regime, but to help clarify the content of obligations in a contract.

Given the viewpoint established above, we should redefine warranty liability for defects in the JILSC. The guidance of redefinition include: first of all, special meaning should be given to the concept "warranty". Ignoring the special meaning and function of this concept is not desirable and may lead to confusion in understanding. Secondly, the requirements of legal practice needs to be taken into close account, as the empirical study in the second chapter has shown that warranty liability for defects is often understood as the a priori obligation of

warranty itself and this kind of interpretation is indeed rather reasonable. The function of warranty liability to specify duties of the seller regarding the quality of the subject matter has obviously similarities with that of the concept of implied warranties in U.S. law. It may be a promising approach to redefine warranty liability for defects in the JILSC as a specific duty on subject matters. More specifically speaking:

First of all, the so-called warranty liability for defects in the JILSC should not be understood as an *a posteriori legal consequences for breach of warranty*. The term "liability" indeed has different meanings in different cases. Normally it means legal consequences arising from the breach of certain legal obligations (Liang, 2007, p. 83). However, as I have argued in Chapter 2, "warranty liability for defects" is a confusing concept; the proper way is to use it to refer to a priori obligations of warranty, while using the term "remedy for defects" to refer to the *a posteriori legal consequences for breach of that warranty*.

Secondly, special meaning should be given to "warranty". Not all duties based on the contract are suitable to be treated as *a priori warranty obligation*. Explicitly specified duties are not suitable to be considered as such a priori warranty obligations. According to CCL Article 153: "[t]he seller must deliver the subject matter which is of the quantity required by the agreement". It is clear that the legislators did not adopt the device of warranty here, and problems would arise if we called it a "warranty obligation", because the meaning of warranty cannot be explained in this context. On the contrary, it is the duties implied in or supplemented to the contractual agreement and, which are related to certain quality, quantity or other similar conditions, that can reflect the special function of warranty and help this concept make sense. Thus, the proper way is to limit the concept of warranty to the obligations implied in or supplemented to the contract, i.e. to situations when there was no explicit agreement initially.

Hence, I suggest the new definition of warranty liability for defects to be: in the absence of an explicit agreement to the contrary, the seller warrants the subject matter to be in conformity with the supplementary standards provided by the law.

According to JILSC Article 32, Even if the seller's warranty liability has been limited or excluded by contractual provisions, the seller's claim based on such limitation or exclusion shall not be admitted if he, intentionally or with gross negligence, fails to inform the buyer of such defects. This article is basically meant as a restriction on CAL Article 61, which provides

that where an auctioneer and trustor declare, prior to the auction, that they do not guarantee the genuineness or quality of the subject matter of auction, they need not bear the warranty liability.

A typical agreement aiming at excluding warranty liability may be as follows: "The good is sold as it is and the seller does not give any warranty on it". Although such kind of agreement can be enforceable, there must be some restrictions.[①] JILSC Article 32 provides one of them, according to which, the buyer may not act in bad faith, intentionally not disclosing the defects that he was aware of, nor is he permitted to act against the basic requirement of cautiousness, failing to disclose the defects because of gross negligence. If the seller broke these restrictions, in light of the principle of good faith and fairness, the special agreements regarding limitation or exclusion of warranty should not be valid. In my opinion, In JILSC Article 32, warranty liability should not be interpreted as special remedies, but should be interpreted as one device that helps determine the content of contractual obligations. In other words, limitation and exclusion on warranty liability should be interpreted as limitation and exclusion on implied contractual obligations. If the agreement aiming to limit or exclude warranty liability is void, the seller should have to perform in light of "warranty liability", i.e., implied contractual obligations implied by the law.

According to JILSC Article 33, even if the seller fails to disclose the defect under JILSC Article 32, insofar as the buyer has already known the defects and recognized the essence of them, he may not basically require the seller to bear warranty liability. Those defects are normally what can be easily discovered by the buyer. If it can be concluded that, in light of all circumstances in the case, the buyer has taken the defects into account and demanded a lower price, it is reasonable to treat the defects as accepted and there should be no ground for the buyer to require the seller to make a tender without such defects. In such a case, the buyer who later pursues remedies based on those defects should be considered as self-contradictory (widersprüchlich) (Looschelders, 2007, p. 57), and therefore should not be favored. Obviously, JILSC Article 33 also aims to address the determination of the content of contractual obligations, and warranty liability should not be interpreted as special remedies, but is suitable

[①] Among the most important there are rules on standard provisions governed by CCL Article 39, and on the consumer protection provided in Article 19 of Chinese Law related to Protection of Consumer Rights and Interests.

to consider as certain obligation in the absence of explicit agreement against defects. The rationale of this interpretation is: if there is a specific and explicit agreement against the defects, the buyer would have reason to expect that the defects to be removed after the conclusion of contract; accordingly, the mere fact that he had been aware of defects cannot justify the exclusion of the seller's warranty liability. [①]

All in all, rules on warranty liability in the JILSC are actually aiming at dealing with issues of determining the content of obligations in a contract. Limitation and exclusion on warranty liability should be interpreted as limitation and exclusion on implied contractual obligations. Redefining warranty liability as a special device related to contractual obligations may not only maintain the special function of warranty, but also satisfy the purpose of those rules on warranty liability in the JILSC.

3.4 Conclusion of this chapter

Nonconformity has become recognized worldwide as a basic analysis instrument in international sales law. The concept of "defects", on the other hand, does not qualify as a fundamental concept in Chinese Contract Law, as it has only been employed in the bargaining process. There are substantial differences between the concepts nonconformity and defects in Chinese positive law, and it is preferable to distinguish them and use nonconformity as fundamental concept when interpreting the CCL.

From the perspective of the prevailing unitary theory in China, the general remedies for breach of contract have absorbed the special remedies for defects, while the new instrument of the *seller's obligation to tender conforming subject matters* may replace the traditional one - warranty against defects. Warranty liability left in Chinese law should be redefined, to be an instrument for determining the content of obligations in a contract in the absence of explicit agreement as to defects. Under this new definition the unification of remedy system for breach of contract can be well maintained and the special purpose to determine the content of obligations in the JILSC can also been realized.

[①] Similar views has been advocated by some CISG specialist, according to whose standpoint, although the seller is not liable for lack of conformity if at the time of conclusion of the contract the buyer knew or could not have been unaware of such lack of conformity (CISG Art. 35), he is still liable for "contractually-agreed quality of the goods or their packing" (Schlechtriem & Schwenzer, 2005, pp. 427-428).

Chapter 4 Construction of the Seller's Right to Cure

In the preceding two chapters I have clarified fundamental instruments for analysis and argued that tendering conforming subject matters should be one of the seller's main obligations in Chinese law. In this and the following chapter I would like to discuss the improvement of specific remedy systems in case of a breach of such obligation. In this chapter I will focus on the seller's right to cure, and the analysis would be made in light of the ideas of striking a balance of interests between contracting parties and of maintaining the inner coherency of the remedy system.

Since the special remedy regime for latent defects has been merged into the general one for breach of contract, once the seller has breached its obligation to tender conforming subject matters, the buyer may, according to CCL Articles 111 and 107, pursue all sorts of remedies for breach. CCL Article 111 provides that the buyer may choose any remedy he considers as reasonable, among supplementary performance (repair, replacement, and remaking), damages, reduce price, and return of goods.

However, a problem arises from this kind of design: once the nonconformity arises, is the buyer able to choose any remedy he considers as reasonable, disregarding the seller's proposal to cure the nonconformity? The reason we address this question is that under the CCL there is neither a general duty of the buyer to fix an additional period for the seller's supplementary performance at first, nor one to accept a cure. Consequently, it is possible for the buyer to act opportunistically, refusing the seller's bid to cure to keep his own performance, and the only defense of the seller is to prove that the buyer failed to properly mitigate the loss (CCL Art. 119). It seems that the seller is basically at the mercy of the buyer if he breached the contract.

On the other hand, from the perspective of the coherency of remedy system, the lack of protection of the seller's interests in cure is not consistent with policies behind the rules on termination of contract and on notification of nonconformity. In the CCL, the standard for termination of contract in the case of nonconformity in quality is frustration of the purpose of the contract; such a strict standard indicates that the legislative policy is encouraging the breaching party to save the contract through cure. Likewise, CCL Article 158 requires the

buyer to inform the seller of any nonconformity within a reasonable period of time after he discovered or should have discovered it, otherwise he will be barred from any remedy under the contract law. Such a harsh consequence should also be based on policies aiming at protecting the seller's interests in cure and mitigating the related loss. These legislative policies or purposes would be frustrated if there were no effective restrictions on the buyer's choice of remedies.

In short, establishing a right to cure for the seller is not only important for a balance of interests between the contracting parties, but also necessary for the coherency of the remedy system. In the following sections, I will firstly introduce experiences in foreign legal systems, then show the necessity to establish a seller's right to cure in China, and finally discuss the nature, elements, and effects of this right in detail when constructing it.

4.1 The seller's right to cure or supplementary performance in foreign legal systems

Both German and U.S. law protect the interests of the seller in curing the breach. In the German legal system, it is usually the buyer's duty to fix an additional period for supplementary performance if he intends to pursue other remedies for a removable nonconformity. In the U.S., a device called the right to cure has been established to protect the seller who has tendered nonconforming goods but wishes to save the contract by timely replacement or repair; it is generally the buyer's duty to accept such cure. Furthermore, in the pPROL of Japan, the drafters have not only established the buyer's right to require supplementary performance (追完請求権), but also introduced the seller's right to cure (追完権); both of them basically require the buyer to wait a reasonable time for supplementary performance or cure.

4.1.1 The seller's "right to provide a second tender" in German law

After the modernization of German obligation law, the buyer who received a defective tender is entitled to require supplementary performance (*Nacherfüllungsanspruch*). Where some defects appear, it should first be determined whether those defects are removable

(*behebbar*) or irremovable (*unbehebbar*) in nature (Looschelders, 2007, Rn. 83). If the defects are removable, certain remedies of the buyer, including termination, price reduction, and damages in lieu of performance (*Schadensersatz statt der Leistung*) are only available after the fruitless (*ergebnislos*; *fruchtlos*) lapse of a proper period appointed by the buyer for the seller's supplementary performance (Medicus & Lorenz, 2010b, Rn. 123; Looschelders, 2007, Rn. 82). Although the priority of the seller's supplementary performance (*Vorrang der Nacherfüllung*) over other remedies is not explicitly expressed, it can be inferred from the provisions of BGB Articles 281 and 323 (Looschelders, 2007, Rn. 82). The first sentence of BGB Article 281(1) provides that where the obligor did not tender the due performance, or did not tender it as obligated (*nicht wie geschuldet*), and the proper period appointed by the obligee for supplementary performance elapsed fruitlessly, the obligee may, subject to BGB Article 280(1), demand damages in lieu of performance (Krüger, 2007, §281). As we can see, damages in lieu of performance can only be claimed if the obligor fails to seize his second chance to remove the defects. Likewise, BGB Article 323(1) provides that in a bilateral contract, where the obligor did not provide the due tender, or did not provide the tender in conformity with the contract, the obligee may, after the fruitless lapse of a proper period appointed by the obligee for supplementary performance, terminate the contract; the only exception to this rule is provided in BGB Article 323(2) (Dörner et al., 2002, §323). We can infer that, in principle, a sale contract cannot be terminated by the buyer in case of nonconformity until the seller fails to seize his second chance to remedy the defects. In this spirit, given price reduction is, according to BGB Article 441(1), applied in lieu of terminating the contract (*zurücktreten*), the exercise of price reduction basically is also conditional on the fruitless lapse of a proper period of time fixed for the seller's supplementary performance.

Professors Brox and Walker (2006, §4 Rn. 40) point out that the supplementary performance can be viewed as a right of the seller to provide a second tender (*Recht des Verkäufer zur zweiten Andienung*) in the sense of "last chance" (*letzte Chance*).[①] Such a right exists only in the case of removable defects, and its priority over other remedies has been confirmed by the new German obligation law. It has been argued that such a right is beneficial to the contracting parties' legal interests, as where defects appear, the primary concern of the

[①] As for relevant researches, see Ebert (2004).

parties is neither termination nor price reduction, but repair or replacement (Brox & Walker, 2006, §4 Rn. 40). In recent years, German scholars have discussed whether the buyer can remove the defects by himself and later require the seller to compensate for the cost; the problem is argued to be whether the interests of the seller to provide a second tender have been deprived of (Lorez, 2003; Oechsler, 2004; Herresthal & Riehm, 2005). Another issue that has been raised is whether, in the case of a replacement for a consumer, the seller is entitled to demand some charge for the buyer's consumption of a defective product (Fest, 2005; Gsell, 2006).

Although "the right to provide a second tender" in the new German law is meant to protect the seller's interests, it does so rather weakly. The buyer still has a right to choose (*Wahlrecht*) between repair and a fresh tender as remedies, and such a right is not based on rules of alternative obligation under BGB Article 262, but on so-called "elective competition" (*elektive Konkurrenz*). Therefore, the restriction provided in BGB Article 263(2) cannot apply, and the buyer can choose between different remedies more than once, subject merely to the principle of good faith (Brox & Walker, 2006, §4 Rn. 41; Medicus & Lorenz, 2010b, Rn. 125). The buyer's right to change remedies has also been more simply called the buyer's "right to alter" (*ius variandi*) (Krüger & Westermann, 2008, §439 Rn. 5).

Nevertheless, if the buyer's right to choose and change remedies has no substantial restriction, the right of the seller to provide a second tender is likely to be emptied of its meaning. Under the new German obligation law, the ways to protect the seller's interests include: (a) according to BGB Article 439(3), the right of the seller to refuse the remedy chosen by the buyer if its cost is excessive; (b) according to BGB Article 439(3), the potential limitation of the buyer's right to choose to a single remedy measure, depending on the value of subject matters without defects and the seriousness of the defects; (c) according to BGB Article 264, the transfer of the right to choose to the seller in case the buyer fails to choose remedies timely after the fruitless lapse of a period appointed by the seller; and (d) as mentioned above, the systematic governing of this issue by the principle of good faith (Schurhölz, 2005, pp. 31-34).

Actually, during the process of modernizing the German obligation law, it was proposed to entitle the seller a right to cure (*Nacherfüllungsrecht*). However, it was eventually rejected

by the legislators (Schurhölz, 2005, pp. 29-30). Disagreeing with this rejection, Professor Westermann argues that it is the seller who is in the best position to judge which is the proper measure for cure (Krüger & Westermann, 2008, §439 Rn. 1). Likewise, Professor Zimmermann (2005) comments this rejection by arguing that:

> "the solution adopted by the law is unconvincing in view of the fact that the seller's position can be affected very seriously by the choice made by the buyer whereas the buyer's position is safeguarded by the consideration that the seller would, in any event, only be able to choose a form of supplementary performance which completely removes the defect and thus satisfies the buyer's reasonable interests… it is usually the seller who can more easily assess the chances, and determine the effectiveness, of the different forms of supplementary performance." (p.100)

Despite the shortcomings of the seller's right to provide a second tender, the German law has finally established certain mechanism for protecting the reasonable interests of the seller, in respect of remedying the defects. By contrast, the seller's right to cure in the U.S. legal system has a stronger effect on protecting the seller's interests, and it has influenced related rules in international conventions and model rules.

4.1.2 The seller's right to cure in U.S. law

In U.S. law, UCC §2-508 provides for two types of cure: cure before the performance's due date and cure after it. UCC §2-508(1) provides that if some tender or delivery by the seller was rejected because of nonconformity and the time for performance has not yet expired, "the seller may seasonably notify the buyer of his intention to cure and may then within the contract time make a conforming delivery." UCC §2-508(2) then provides that where the buyer rejects a nonconforming tender which "the seller had reasonable grounds to believe would be acceptable with or without money allowance", the seller may have an additional reasonable time to "substitute a conforming tender" insofar as he seasonably notifies the buyer. (American Law Institute & National Conference of Commissioners on Uniform State Laws, 2010, p. 2189)

The first type of cure is quite reasonable: as long as the time for performance has not yet elapsed, there should normally be no obstacle for the seller to cure the defect, provided he gave

notice of his intention to do so. As to the second type of cure, there are two points that need some clarification. The first one concerns the so-called "reasonable grounds to believe" that the tender would be acceptable. According to the official comment of UCC §2-508, "such reasonable grounds can lie in prior course of dealing, course of performance or usage of trade as well as in the particular circumstances surrounding the making of the contract," (ALI & NCCUSL, 2010, p. 2190) Professors White and Summers (2009) argue that "presumably, in the absence of special circumstances, when the seller delivers goods which are not identical to those called for in the contract but which are the functional equivalent, the seller has reasonable cause to believe they will be acceptable." (p. 511) For example, a retailer of Sony receives goods from a manufacturer and "simply sells them off the shelf, the retailer too has reasonable cause to believe that the goods will be acceptable and is entitled to further reasonable time in which to cure." (White & Summers, 2009, p. 511) Furthermore, whether the seller has knowledge of defects is not an important factor in deciding whether he has a right to cure (White & Summers, 2009, pp. 511-512). The second issue is the determination of an "additional reasonable period". As the New Jersey Supreme Court held, this "depends on the surrounding circumstances, which include the change of position by and the amount of inconvenience to the buyer", as well as "the length of time needed by the buyer to correct the nonconformity and his ability to salvage the goods by resale to others." (White & Summers, 2009, p. 513)

Although the only form of cure the UCC provides for is replacement, in practice, the U.S. courts generally also permit repair as an effective form of cure (White & Summers, 2009, p. 514). Moreover, there have been some discussions on whether money allowances, generally used as a price reduction or price adjustment, can be an effective form of cure. For example, Professors White and Summers (2009) argue that: "price adjustments sufficient to recompense the buyer for deficiency in quantity or quality must certainly be the most common form of cure by business people." (p. 515) It seems that even though UCC §2-508 "does not recognize this behavior [price reduction] as a form of cure," business trade usages and legal practice both do (White & Summers, 2009, p. 515). Therefore, it could be considered that there are in fact three forms to cure nonconformity in U.S. law: retender conforming goods, repair, and money

adjustment with the support of trade usage.[①]

The system of the seller's right to cure under UCC §2-508 aims at restricting the buyer's right to reject goods under UCC §2-602 and to revoke acceptance of goods under UCC §2-608. These two rights are normally seen as an intermediary device for the buyer to cancel the contract (UCC §2-711(1)). By exercising the right to cure, the seller may prevent the cancellation of the contract. In other words, the function of the seller's right to cure is to protect him from losing the bargain, by providing him with another chance to remedy the nonconformity. There are strict conditions for the seller who wishes to exercise the right to cure, such as seasonableness and absence of unreasonable inconvenience to the buyer. Moreover, if the breach has given rise to a "shaken faith", the buyer may nevertheless refuse the seller's request to cure (White & Summers, 2010, pp. 443-444).

The seller's right to cure under U.S. law has a strong effect, imposing the buyer a duty to accept an effective cure. If the buyer wrongfully refuses to accept a cure which has satisfied the conditions of UCC §2-508, the consequences will be serious. It will "deprive the buyer of all remedies against the seller for breach arising from the contract," and the buyer will either be liable for the "price of the nonconforming goods" under UCC §2-709, or for the "contract-market differential as to conforming goods" under UCC §2-708 (1), or for "the difference between the resale price of those goods and the contract price" under UCC §2-706 "less the amount attributable to the nonconformity." (White & Summers, 2009, pp. 516-517)

In this subsection and the preceding one, it can be observed that both German and U.S. law give the seller some opportunity or right to provide a second tender or to remedy the nonconformity. If the cure or the second tender was wrongfully refused by the buyer, the buyer would normally be barred from other remedies based on the nonconformity.[②] Nevertheless, there are still some substantial differences between the U.S. and German systems: the former explicitly entitles the seller to cure while the latter only provides a comparatively weak "right to provide a second tender", which would be more appropriately considered as some legal protection due to an additional appointed period. Moreover, under U.S. law it is the seller who decides which form the cure should take, while in German law, it is the buyer that has the right

① These three ways to cure have also been mentioned in *Sales Law and the Contracting Process* written by Alan Schwartz and Robert E. Scott (Piché, 2003).

② As to further analysis on their effect, see subsection 4.3.4 of this chapter.

to choose the remedy for nonconformity. Nevertheless, both designs aim to strike a balance of interests between the seller and the buyer, and are therefore a valid source of inspiration for other legal systems.

4.1.3 The seller's right to cure in the CISG

The CISG, as an internationally recognized uniform sales law, establishes a system of cure in Articles 34, 37 and 48, which were borrowed directly from the UCC without any significant change (White & Summers, 2009, pp. 507-508). On the other hand, CISG Article 46 also provides that the buyer may require delivery of substitute goods or repair, and CISG Article 47 provides the seller with an additional, reasonable period of time for his supplementary performance. The design of these two latter articles is quite close to the system of supplementary performance under the new German obligation law. It is hence safe to say that the CISG has implemented both the seller's right to cure and the buyer's right to require supplementary performance. However, since the seller's right to cure constitutes, as mentioned above, in fact a stronger protection of the seller's interests than the additional period for supplementary performance, the effect of the seller's right to cure is likely to "cover" the effect of the supplementary performance device on this point. On the other side, there is a potential conflict between the seller's right to cure and the buyer's right to require supplementary performance if the form of cure chosen by the seller is different from the one required by the buyer; therefore, the CISG has to create a duty of communication for contracting parties to coordinate their response.

4.1.3.1 Types, elements, and effects of cure under the CISG

There are different types of cure under the CISG. Article 34 concerns the seller's duty to hand over documents relating to the goods. It provides that the seller must hand documents over at the time, place, and in the form required by the contract; if the seller has handed over documents before that time, he may, up to that time, cure any nonconformity in the documents, insofar as the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense. Meanwhile, the buyer's right to claim damages under the CISG is unaffected. CISG Article 37 concerns the cure of nonconformity of goods in the period before

the due date of the performance. It provides that if the seller has delivered goods before the date for delivery, "he may, up to that date, deliver any missing part or make up any deficiency in the quantity of the goods delivered, or deliver goods in replacement" of any nonconforming goods delivered, or remedy any nonconformity in the goods delivered, insofar as the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense. Like Article 34, the buyer retains any right to claim damages as provided for under the CISG.

It can be observed that the requirements that there be "no unreasonable inconvenience" and "no unreasonable expense" for the buyer are constituent elements of an effective cure before the delivery date. These two elements should be determined in light of all sorts of circumstances in individual case. A repair which would cost quite a long time or a replacement in a case where the buyer has installed the goods as a part of his production line would be good examples of cures which would cause unreasonable inconvenience or expense (Schlechtriem & Schwenzer, 2005, p. 444).

Although the seller's right to cure before the delivery date in the CISG is basically borrowed from U.S. law (see UCC §2-508), it is argued to have also been well accepted by continental countries (Schlechtriem & Schwenzer, 2005, pp. 440-441). Although the buyer has no general obligation to take delivery of goods tendered before the fixed date (CISG Art. 52(1)), if the buyer refused to take such a delivery, the position of the seller would not be worse; while if the buyer took such a delivery, the seller will still have the opportunity to cure any potential nonconformity of goods. After all, "the wording of Article 37 does not restrict the seller to one attempt," therefore, as long as the act of cure does not bring unreasonable inconvenience or unreasonable expense, it is possible for the seller to cure more than once (Schlechtriem & Schwenzer, 2005, pp. 443-444).

As to cure after the due date of performance, CISG Article 48(1) provides that, even after the date for delivery, the seller may, subject to Article 49, cure any failure to perform his obligations at his own expense, "if he can do so without unreasonable delay and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer." However, in the meanwhile, the buyer retains any right to claim damages provided for in the CISG. Clearly, the conditions for exercising an effective cure after the date for delivery are much stricter and more specific than the ones before the date

for delivery. The constituent elements of this cure include that it should be: (a) at the seller's own expense, (b) without unreasonable delay, (c) without causing the buyer unreasonable inconvenience, and (d) without causing the buyer uncertainty of reimbursement by the seller of expenses advanced by the buyer.

The effects of the seller's right to cure have been provided in CISG Article 48(2), according to which, if the seller has acquired a reasonable period for cure, the buyer may not, during that period of time, resort to any remedy that is inconsistent with performance by the seller. Thus, the seller's exercise of his right to cure actually suspends part of the remedies that the buyer can claim. For example, if the buyer demands delivery of substitute goods under Article 46(2), and the seller offers repair based on Article 48(1), since the seller has the right to choose how he will cure the breach, his choice of repair prevails over the buyer's choice of substitute goods; this approach also applies to the opposite case (Schlechtriem & Schwenzer, 2005, pp. 569-570). Accordingly, the prerequisite for the seller's right to cure to prevail over the buyer's choice of remedy is that the seller satisfies the strict constituent elements of cure provided under CISG Article 48.

If the buyer wrongfully refused the cure, the legal consequence would be the loss of all remedies, including price reduction. This has been clearly provided in CISG Article 50, which states: "if the seller remedies any failure to perform his obligations in accordance with article 37 or article 48 or if the buyer refuses to accept performance by the seller in accordance with those articles, the buyer may not reduce the price." Price reduction is a remedy aiming at striking a balance of interests between contracting parties. If this remedy cannot be permitted under the circumstances mentioned above, the buyer must perform his obligation to pay the whole price for the goods. Furthermore, the buyer should not be allowed to pursue the remedy of damages in lieu of performance; otherwise, the rules in Article 50 would be actually meaningless. In short, if the buyer has wrongfully refused an effective cure provided by the seller, he cannot require any remedy that aims to redress the consequences of the breach that could have been elimated by the cure.

One restriction related to the seller's right to cure - "subject to Article 49" - has induced a lasting debate over the relationship between the seller's right to cure and the buyer's right to avoid the contract. According to the letter of CISG Article 48(1), the buyer's right to avoid the

contract in the case of a fundamental breach has a priority over the seller's right to cure. In other words, if the buyer exercised his right of avoidance based on a fundamental breach of contract in accordance with CISG Article 49(1)(a), or the additional period fixed by the buyer in accordance with CISG Article 49(1)(b) has fruitlessly elapsed, the seller may not provide supplementary performance any more (Schlechtriem & Schwenzer, 2005, p. 567). Professor Müller-Chen argues that there exists a "largely international consensus" on this fundamental breach point, yet the following problem has drawn the attention of academic research: to what extent can the buyer's right of avoidance override the seller's right to cure (Schlechtriem & Schwenzer, 2005, p. 567)? The essence of the debate is whether the fact that the nonconformity can be successfully cured can exclude or suspend the fundamental nature of the breach of a contract (Schlechtriem & Schwenzer, 2005, p. 567).

It is necessary to point out that although the UNIDROIT Principles of International Commercial Contracts (UNIDROIT Principles) have kept consistence with the CISG in most areas,[①] they have adopted a different approach to deal with the relationship between the seller's right to cure and the buyer's right to avoidance. UNIDROIT Principles 2004 Article 7.1.4 provides in its second paragraph that the right to cure is not precluded by the buyer's notice of termination. According to the comment on this article:

> "If the aggrieved party has rightfully terminated the contract pursuant to Articles 7.3.1(1) and 7.3.2(1), the effects of termination are also suspended by an effective notice of cure. If the non-performance is cured, the notice of termination is inoperative. On the other hand, termination takes effect if the time for cure has expired and any fundamental non-performance has not been cured."[②]

This means the drafters of the UNIDROIT Principles disagreed with the solution provided in the CISG and made a proposal with the opposite effect – privileging the seller's right to cure over the buyer's right to terminate the contract in case of fundamental breach.

[①] As Professor M. J. Bonell (2002, p. 347) has argued, the UNIDROIT Principles and the CISG are not necessarily incompatible and indeed can even usefully support one another. They differ from the other merely in specific provisions.
[②] http://www.unidroit.org/english/principles/contracts/principles2004/integralversionprinciples2004-e.pdf. Note that this comment is not changed in UNIDROIT Principles 2010. See http://www.unidroit.org/english/principles/contracts/principles2010/integralversionprinciples2010-e.pdf.

4.1.3.2 Duty to communicate

As mentioned above, the CISG has not only introduced the seller's right to cure, but also adopted the buyer's right to require supplementary performance, and the principle of an additional period for such performance. Therefore, conflict may arise if the seller chooses one form to cure while the buyer requires the nonconformity to be removed in another. Thus, CISG Article 48(2)-(4) have established an obligation of communication, based on the principle of good faith, for both the seller and the buyer, aiming at addressing the potential conflict. CISG Article 48(2) provides that if the seller requires the buyer to make known whether he will accept supplementary performance or cure, and the buyer does not respond to that request within a reasonable time, then the seller may provide supplementary perform "within the time indicated in his request"; during that period of time, the buyer may not "resort to any remedy which is inconsistent with performance by the seller." CISG Article 48(3) then adds: "A notice by the seller that he will perform within a specified period of time is assumed to include a request, under the preceding paragraph, that the buyer make known his decision." The fourth paragraph of CISG Article 48 provides that a request or notice by the seller under paragraph (2) or (3) of Article 48 is not effective unless received by the buyer. These rules in Article 48 are very helpful in judicial practice, since the debate over the relationship between the seller's right to cure and the buyer's right to require supplementary performance is unlikely to cause serious problem if there is sufficient communication between the contracting parties (Schlechtriem & Schwenzer, 2005, p. 562).

4.1.4 The seller's right to cure in Japan's pPROL

In Japan's pPROL, a system called the obligee's right to require supplementary performance (追完请求権) has been proposed. According to the pPROL, in case of partial performance, the performing party is entitled to require repair, replacement, reconstruction, or other similar supplementary performance; the specific forms should be determined in light of the interpretation of the contract (JCCRC, 2009b, p. 199). Supplementary performance refers to additional performance which aims at completing the full performance (Uchida, 2005, p. 128). As to the nature of the right to require supplementary performance, the drafters of the pPROL consider that it is merely one form of the right to require performance in the case of "partial

performance", and therefore, must be in the same nature as the latter; accordingly, any legal ground that would exclude the right to require performance would also apply to the former (JCCRC, 2009b, pp. 200-201).

Meanwhile, the pPROL has also introduced the right to cure (追完権). According to pPROL §3.1.1.58(1), the conditions for the exercise of the right to cure include: (a) the notification by the obligor of the period and the content of cure which would be undertaken without unreasonable delay; (b) the reasonableness of the time of period and the content of performance, in light of the purpose of the contract; and (c) the absence of an unreasonable burden on the obligee as a result of the obligor's cure. pPROL §3.1.1.58(2) adds: "where a partial performance constitutes a fundamental breach, the obligor's right to cure has no prejudice to the obligee's right to terminate the contact." (JCCRC, 2009b, p. 209) According to the explanation of the pPROL, the establishment of the obligor's right to cure is based on the experiences of UCC §2-508, CISG Article 48(1), UNIDROIT Principles (2004) Article 7.1.4, and PECL Article 8:104; it seems that the drafters of the pPROL preferred to adopt the approach of the CISG, letting the buyer's right to termination prevail over the right to cure (JCCRC, 2009b, p. 211). However, a Japanese scholar, Matsui (2003), argues that, provided the elements of the right to cure have been properly established, the process of determining whether the buyer can terminate the contract should have taken the possibility of effective cure into account, and that therefore, it may be of no practical significance to deal with the conflict between the buyer's right to terminate and the seller's right to cure (p. 236).

pPROL §3.2.1.16 provides four remedy measures for the buyer in case of defects in delivery, including: (a) to require to tender the subject matter free from defects, (b) to require price reduction, (c) to terminate the contract, and (d) to require damage compensation (JCCRC, 2010, p. 71). pPROL §3.2.1.17 further deals with the relationship among those remedies, as well as the relationship between them and the seller's right to cure. pPROL §3.2.1.17(3) provides that when applying pPROL §3.2.1.16(1)(a), where it is possible both to substitute the tender and to repair, the buyer may, by his own intention, choose either of them; However, the seller may tender a substitute subject matter in lieu of the repair which has been required by the buyer, or repair the original subject matter in lieu of the replacement which has been required by the buyer (JCCRC, 2010, p. 76). It is obvious that although pPROL §3.2.1.17(3) has

permitted the buyer to choose remedies by his own intention, limitations have been imposed to protect the seller's interests: in certain circumstances the seller's actual tender of cure has a priority over the buyer's inconsistent requests.

All in all, during the process of modernizing their obligation law, Japanese jurists argue for introducing the system of the buyer's right to require supplementary performance and the one of the seller's right to cure, and attempt to deal with the potential conflict between them, by establishing certain devices to ensure the priority of the seller's choice. These proposals reflect that Japan's pPROL is striving to make a compromise between different systems and establish a harmonious remedy system able to strike a balance of interests between contracting parties.

4.2 The lack of and needs for interests-balance system in the CCL

4.2.1 The lack of interests-balance system in the CCL

"Balance of interests is one of the basic ideas and principles of law…both excessive and insufficient protection for the individual's interests conflict with the requirements of the modern society" (Gao, 2006, pp. 86-87). The idea of the balance of interests applies not only to the relationship in which one party has a weaker bargaining position than the other, such as labor or consumer contract, but also to the relationship between the aggrieved party and the breaching party. A Chinese scholar, Professor Qu, stated that: "balancing the interests of different individuals is a fundamental principle of legislation, as well as that of application of law… civil law would lose its way if interests-balancing was abandoned" (Qu, 2002, p. 38). Urges to balance the interests of different parties were particularly vocal during the drafting of the Chinese Labor Contract Law and the Chinese Tort Law. For instance, the drafters of the Labor Contract Law had a tendency to overprotect the interests of laborers. Although compared with commercial contract, there is a general recognition that the labor party has an unequal bargaining power and that there needs to be special protection against exploitation, such "special protection" should have restrictions and the "idea and purpose of labor law should be 'to promote equality through inequality'." (Feng, 2006, p. 25) During the drafting of the Chinese Tort Law, it has been pointed out that the populist emotions flowed out and the

protection of the aggrieved party has been partially emphasized (Zhao, 2010), while the protection of the freedom of individuals has been largely ignored. Similarly, there have been calls to pay more attention to the balance of interests between the infringer and the aggrieved party (Zhang, 2009). By contrast, in the context of the Chinese Contract Law, Chinese jurists seem to rarely question whether the interests of the breaching party and the aggrieved party have been well balanced, and whether the rights and duties of the breaching party have been properly designed.

During the development of Chinese contract law in the past several decades, the ground of liability for breach of contract has shifted from the principle of fault to the principle of the binding effect of contract itself, which gives rise to the concept of liability without fault (Han, 2011b, pp. 590-592). Accordingly, the idea of sanction and punishment on the breaching party should be removed. However, the present Chinese liability system in contract law does not pay enough attention on the balance of interests of the breaching party and the aggrieved party, and therefore excessively protects the latter. As mentioned above, there is neither a supplementary performance period for the seller, who tendered nonconforming subject matters, to provide a second tender nor a right for him to cure under the CCL; there are no instruments for balancing the interests of the parties in such a case except for the general principle of good faith.

In a word, Chinese contract law should have paid more attention to the balance of interests between contracting parties, but not focus on "punishing" the breaching party with all kind of means. Actually, the need for the protection of the seller's interests in case of nonconformity has already become clear in judicial practice.

4.2.2 The need for the system of cure in legal practice

In legal practice, when determining which remedy right of the buyer should be admitted, the courts have paid attention to the protection of seller's interests in cure in most cases, and sometimes instructed that the seller should be given a chance to repair before the buyer returned the goods.

In the decision of HuYiZhong MinSi (Shang) Zi No.84 (2005) involving a sale of cellphones, the seller X did not deny quality problems in 2302 cellphones, but he argued that these problems could be solved by repair, while the buyer Y argued that the percentage of

cellphones to be repaired was too high and therefore, these cellphones should be returned. The court found that:

> "In the 2302 cellphones that Y intends to return, there are 1407 that were unsold for various reasons. There is no ground to support return of goods based on the argument that quality problems have caused loss of commercial credibility. 608 cellphones of 735 have been repaired, and therefore the buyer should accept them; as to the 127 cellphones left and other 54 pieces returned to the seller, there is no evidence provided by the seller that they had been properly repaired, the demand of the buyer to return these goods thus can be admitted, the seller must return the purchase money accordingly; as to other 106 cellphones, they are still in the process of repairing or delivering to the seller, there is no ground for granting the return of them."[①]

In this case, the return of goods has been considered as partial termination of contract. In the decision above, the court imposed strict conditions on the exercise of returning goods: If the cellphones have been repaired or not been given a chance to repair, the remedy of return would not be granted to the buyer. It is only if the cellphones have not been adequately repaired in time that the buyer can be awarded the remedy of return. In this decision the judge has considered the interests of both parties and found that a second chance to repair should be the general condition of return. Inspiring from this instruction, we can conclude that the seller's prompt and effective repair or other forms of cure of breach may be a reasonable ground to suspend the buyer's remedy of return.

A similar standpoint has been adopted by the Chinese Supreme People's Court's Judicial Interpretation. In the Judicial Interpretation on the Law of Sales Contract (JILSC), Article 22 provides that where the buyer has notified the nonconformity in quality within the inspection period, quality guarantee period, or a reasonable period, if the seller fails to repair the subject matter as demanded or, due to an emergency the buyer repairs the subject matter by himself or through a third party, the courts shall grant the compensation for reasonable expenses by the seller to the buyer who has so claimed. We can observe that the condition of demanding compensation for reasonable expenses include: (a) notification by the buyer of the

[①] Unless otherwise stated, judicial decisions referred to in this dissertation all come from the database of *Beida Fabao*, see http://vip.chinalawinfo.com/index.asp..

nonconformity in quality within the inspection period, quality guarantee period, or reasonable period; and (b) failure by the seller to repair the subject matter as demanded or, impracticability for the buyer to deliver the goods to the seller for repair due to an emergency situation. It can be inferred that, conversely, in case the seller can repair the subject matter as demanded or there is no such emergency situation, the buyer may not repair the subject matter by himself or through a third party, otherwise he will be barred from requiring relevant expenses for repair. Obviously, the priority of seller's interests in cure is indirectly confirmed by the JILSC.

In legal practice, it is not satisfactory to entitle the buyer to choose any remedy he deems reasonable. It is unavoidable that some buyers will make arbitrary decisions, or that some buyers fail to choose a proper remedy due to their shortcomings of knowledge. Of course, if the buyer and the seller frequently communicate with each other in good faith to solve the problem, dispute may be avoided altogether. Unfortunately, this is not something on which we can rely in real life. Many suits have been brought due to the lack of communication in good faith, and the courts have little choice then but to balance the interests between contracting parties on a case-by-case basis, determining what constitutes a reasonable remedy. Judicial decisions and the SPC's judicial interpretation have shown that the seller's interests in cure need to be protected in one way or another.

4.2.3 The need for the system of cure to maintain the coherency of remedy system

The establishment of a system of cure is also necessary for the coherency with policies behind the rules on termination of contract and notification of nonconformity.

Firstly, the system of cure is necessary to maintain the coherency with policies behind the rules on termination in the case of nonconformity in quality. According to the fourth item of CCL Article 94, if one party delays its performance of obligation or breaches the contract in some other ways, thereby frustrating the purpose of the contract, the other party may terminate the contract. And according to the first sentence of CCL Article 148, where the quality of the subject matter tendered does not conform to the quality requirements, thereby frustrating the purpose of the contract, the buyer is entitled to terminate the contract. These two articles are the basis of the buyer's right to terminate the contract in the case of nonconformity in quality. Compared with the third item of Article 94, which provides that there is a right to termination

if one party has delayed the performance of its main obligation and also failed to perform within a reasonable period after a notice by the other party, it can be found that the CCL has not provided similar conditions for termination of contract in the case of nonconformity in quality or quantity. In other words, the only way for terminating the contract in the case of nonconformity in quality or quantity is the frustration of contractual purpose. Under these circumstances, the system of supplementary performance or cure should be indicated from a reasonable interpretation of the law. Since much nonconformity in quality or quantity can be cured by repair, replace, or other supplementary performance, the cure of the breach should be not only permitted, but also to some extent encouraged, for the sake of saving the contract.

In some cases, the buyer may intend to escape from a bad bargain, and therefore raise an improper claim, imposing a high cost on the breaching party. In such a case, it would be desirable to protect the seller's interest in cure. A system that enables the seller to refuse unreasonable requirements of the buyer and to tender instead a proper form of cure could protect the seller against bad faith and hardship.

Secondly, the system of cure is necessary for the coherency with the policies behind the rules on notification of nonconformity. In many legal systems the buyer has been required to notify the nonconformity of goods within a reasonable period of time after he discovered or should have discovered the breach, under penalty of losing all his remedies for nonconformity. Examples of this approach include BGB Article 377 and UCC §607(3). The notice period has been considered as a device to protect the interests of the seller (Canaris, 2006, p.437). In the view of some German courts, the justifications for the notice rule include promoting prompt settlements and encouraging supplementary performance (Boujong, Ebenroth, & Joost, 2001, p.478). Some U.S. scholars also point out that the foremost justification for the notice rule is to "enable the seller to make adjustments or replacements or to suggest opportunities for cure to the end of minimizing the buyer's loss and reducing the seller's own liability to the buyer." (White & Summers, 2009, p. 655) Clearly, the major ground for the notice rule is to facilitate supplementary performance or cure of breach.

CCL Article 158 has established a similar requirement for the notification of breach. If the buyer does not notify the seller within the agreed period, or if there is no agreed period and the buyer fails to notify within a reasonable period after he discovered or should have discovered

the nonconformity, the subject matter will be deemed to be conforming to the contract. This rule requires a similar justification. It is plausible to say that the main functions of the notice rule should be to promote the cure of the breach, to provide chances for investigations, and to mitigate the loss due to breach. And only with the help of notification, it is possible for the seller to timely cure the breach; difficulties for investigation and for cure, the loss arising from the breach will certainly increase with the time elapsing. Therefore, from the perspective of maintaining the coherency with the policies behind the notice rule, it is necessary to establish the system of cure.

4.3 Constructing a seller's right to cure in China

As the preceding sections have demonstrated, the seller's right to cure or provide a second tender is necessary to ensure balance of interests between contracting parties and the coherency with policies behind the rules on termination and on notification period. Yet among the various proposals for the replacement of the current General Principles of Civil Law of 1986 by a comprehensive Chinese Civil Code (e.g., X. Z. Sun, 2013; L. M. Wang, 2013), it seems few has explored the construction and implementation of an obligor's right to cure.

Professor Shen is one of the earliest scholars to pay attention to the seller's right to cure. He introduced and discussed the seller's right to cure in UCC §2-508 and its official comment as early as 1995. After recalling the background of it, he pointed out that although the rule for cure is provided for in the Article of sales (UCC §2-508), it can be extended by analogy to other kinds of contracts (Shen, 1995, p. 19-21). Professor Shen also argued that "strictly speaking, cure is not a right, but a power"; with reference to Hohfeld's view in *Fundamental Legal Concept*, he stated that "where there is no correlative duty, there should be no 'right', yet 'power' is different, for it refers to legal ability to do certain acts to alter legal relations" (Shen, 1995, p.19). Professor Shen's pioneering introduction and discussion of the seller's right to cure is a valuable source of inspiration, and I will comment it in the next section.

In one influential proposal for drafts of a Chinese Civil Code, directed by Professor Liang, Professor Han has drafted a provision on the "breaching party's cure", based on the experiences of the CISG and some international model rules (Liang, 2011, p. 183). This proposal has adopted a similar approach to the CISG, but different from the UNIDROIT

Principles, as it does not allow the cure of the breaching party to preclude the aggrieved party's exercise of its right of termination (Liang, 2011, p. 183).

In addition, Professor Jiao and Mr. Lu (2009) have examined the obligor's right to cure in the UNIDROIT Principles and the PECL, and argue that the foundation of rules on cure is the "idea of co-operation" (p. 66). This idea, they say, has been recognized by Article 5.1.3 of the UNIDROIT Principles 2004, which explicitly requires "co-operation between the parties", as well as PECL Article 1: 202, which establishes a "duty to co-operate" (Jiao & Lu, 2009, p. 66).

These proposals or studies are inspiring, but unfortunately they do not seem to thoroughly discuss the specific constituent elements and legal effects of cure. These are the issues I will address in the following subsections.

4.3.1 The nature of the "right" to cure

In the proposal drafted by Professor Han, the effect of the seller's proposal of a cure is to suspend the buyer's remedies that are inconsistent with the form of cure chosen by the seller. The question is whether the tender of a cure may constitute a right of the seller. And if it does, what kind of right could it be? More to the point, how should we construct the mechanism for protecting the seller's interests in cure?

As to the right to provide a second tender in German law, some scholars believe that, although it has been called a "right", it is not strictly speaking a right from a civil law perspective. In their opinion, if it were a right, it could be nothing else but a right to claim: a claim to the aggrieved party to accept the second tender; "however, evidently, the logic cannot stand if a breach of contract may consequently give rise to a right of the breaching party to claim the aggrieved party to take the delayed performance" (Du & Lu, 2012, pp.108-109.). In my view, it should be admitted that the so-called "right to provide a second tender" in German law is actually a metaphor of the effect of an additional supplementary period. The supplementary period aims to protect the seller's interests, not in terms of entitling the seller a right, but rather by imposing limitations on the exercise of the buyer's remedy rights. If it is called a right, it can only be understood as a "right" in a broad sense, i.e., certain "interests admitted and restricted by the law, plus the legal mechanism to protect them", but not a right in the narrow sense, which may enable one party, with the help of the power of political

organisms, to force another party to a certain conduct or to refrain from a certain conduct (Pound, 1984, pp. 42-43). The latter is the most common type of rights in civil law. For example, A requires B who illegally occupies A's property to vacate it, C prevents D from entering into C's house, and E requires F to fulfill its obligations as promised (Pound, 1984, p. 43).

On the other hand, the seller's right to cure in U.S. law has a much stronger effect. Once the seller exercises his right to cure the breach, the buyer has a duty to accept the cure. In other words, there was initially no duty for the buyer to accept anything; it is the cure provided by the seller that generates a new obligation for the buyer. Indeed, there is a sanction: if the buyer refuses or fails to accept an effective cure, he will be liable for breach of contract. Given the effect of the seller's right to cure is to generate a new obligation between contracting parties, this kind of "right" is, as Professor Shen argued, actually a power. However, his argument is based on the theory of Hohfeld, who has defined right in a narrow sense and basically limited it to the meaning of a claim right (Hohfeld, 1946, pp. 36-42). If we discuss the nature of this "power" in the continental civil legal systems, such kind of "power" would actually be defined as a formation right (*Gestaltungsrecht*): a right that enables the party who exercises it to create or change a legal relationship between him and another party by a unilateral declaration of his intention.

The CISG has adopted a different approach, based on the compromise between civil law and Anglo-American law. It has, on one hand, introduced the mechanism of the seller's right to cure and, on the other hand, established a general duty for the buyer to take delivery of the seller's tender. Therefore, even if the seller has initially provided nonconforming goods, the buyer is not generally entitled to refuse to take delivery. In other words, the seller's cure cannot *generate* the obligation to take delivery of the second tender, because an obligation to take such a delivery actually preexisted the cure (unless, of course, the buyer has some specific legal ground to refuse the tender).[①] Hence, the effect of cure in the CISG is not to generate a new relationship of obligation, but only to prioritize the seller's cure over the buyer's inconsistent claims. Such kind of right can still find its position in traditional civil law theory. Indeed, Professor Larenz has defined so-called "objection rights" (*Einwendungen*), which will enable

[①] The right to refuse to take delivery will be discussed in Chapter 5.

X to impact the effect of Y's right and to make Y, at least partially, be influenced by X's own right (Larenz & Wolf, 1997, p. 359). The most important type of the "objection rights" is the right to object against a claim (*Einrede*) (Larenz & Wolf, 1997, p. 360). This type of right has also been inherited by Chinese civil law, and the *Einrede* has become widely recognized as to impact the other party's right. The seller's cure in the CISG is the very example of an objection right, because it does not generate a new legal relationship, but merely impacts the other party's claim and suspends it.

Any legal system that intends to introduce the system of cure would face the following questions: what kind of effect should be given to cure? Which kind of right may it be categorized as? For China, which has inherited the traditional categories of rights from continental civil law systems, these are important questions for constructing and understanding a new system of cure.

As discussed in section 4.2, the CCL lacks a device that can satisfactorily handle situations of nonconformity of the subject matter while balancing the interests between the aggrieved party and the breaching party, as well as maintaining the coherency with the policies behind the rules on termination and notification of nonconformity. Therefore, we should construct a device adequately protective of the seller's interests in cure. As we saw in section 4.1, many German scholars seem to think it is the seller who is most suitable to decide which form to choose for supplementary performance; likewise, according to U.S. law, it is the seller that may decide the form of cure. Following these approaches, I suggest constructing a system of cure in which the specific form of cure can be decided by the seller.

In China, there is in general a duty of the buyer to take the delivery provided by the seller, and such an obligation still exists *vis-à-vis* the second tender, as long as there is no agreement or rules to the contrary. Therefore, the scope and function of cure in Chinese law will be limited to suspending claims of the buyer that are inconsistent with the seller's cure. In other words, the seller's right to cure in Chinese law would not be a right to claim the other party to accept the tender, but a right to suspend the other party's inconsistent remedy rights, which is indeed a type of objection rights.

4.3.2 Price reduction as a specific form of cure?

It is generally recognized that the specific forms of cure include repair and replacement. The question is whether price reduction should be also considered as a form of cure. From the perspective of commercial practice, the answer seems to be yes. This is exactly the view of some U.S. scholars, who believe that although it cannot be interpreted from a literal reading of the UCC, price allowance still can constitute an effective cure, if the usage of transaction requires it (e.g., Sebert, 1990).

It has to be noted that, in many areas, price reduction is indeed the only proper way to cure a breach. Take the trade of coal for instance, which in China represents a trade amount of about one billion tons per year. One important characteristic of coal trade is that the price is determined according to the quality of the coal tendered. Many contracts contain express provisions as to the promised quality and quantity of coal, but it happens regularly that the seller tenders nonconforming goods. It is impossible to require the seller to "repair" the nonconforming coal, and in most cases it is impracticable to replace it. Under these circumstances, both contracting parties may prefer to cut the price down. For example, in the decision of Xu Shang Chu Zi No. 0062 (2010) made by the Intermediate People's Court of Xuzhou City, Jiangsu Province, it has been found that the defendant offered two batches of coal, the calorific value per kilogram of which were 4905 kcal and 4912 kcal, far from the agreed 5400 kcal. The buyer has consequently suffered great losses. The defendant did not deny the quality problems, but repeatedly sent consultants and proposed to reduce the coal price to 675 RMB per ton. Meanwhile, the defendant tried to return part of the purchase money for each batch: 2 million RMB for the first and 2.09 million RMB for the second. However, the plaintiff and the defendant eventually failed to reach consensus on the settlement. In this case, although the buyer refused the price reduction, the seller actually had a chance to save his contract by cutting the price. This suggests that price reduction may be a proper way for settlement in certain circumstances.

However, as I will discuss in the second section of Chapter 5, price reduction is a kind of modification of the contract and should therefore be achieved by consensus between the contracting parties. It should not be imposed unilaterally by the seller as part of his right to cure. Even if the seller had successfully reduced the price in the preceding case, it would only

mean that the contracting parties have adjusted their contract and therefore changed their respective obligations. It is the modification of contract that has eliminated the breach, not the seller's proposal of price reduction *per se*. Although in some circumstances price reduction may be the only proper way for settling the problem of nonconformity, the seller's interests in such case should not be protected by the system of cure, but by the system of impracticability of performance. Thus, it is neither necessary nor suitable to consider price reduction, the nature of which is modification of contract, as a form of the seller's cure of nonconformity, which is decided according to the original contract.

4.3.3 Constituent elements of the right to cure

The first element of an effective cure is promptness, i.e., the time for the cure of the breach should not be of an unreasonable length. The earlier doctrine for determining what constituted an unreasonable delay focused on examining whether the time elapsed might prejudice the buyer, taking into account the type of goods, the ways to use goods, and other objective factors (Matsui, 2003, pp. 205-206). The current doctrine is influenced by CISG Article 47(1), in which the standards to determine promptness have tended to be more specific and clearer: if the seller cannot be expected to complete the cure within a reasonable period after he knew or should have known about the breach, then it can be considered that there is an unreasonable delay (Matsui, 2003, p. 206). As to the length of a reasonable period in this circumstance, it is proposed to follow the same criteria as those proposed for CISG Article 47. The factors that should be considered include:[①] Firstly, the length of the performance: generally speaking, the longer the period for preparing the performance, the longer the reasonable period for cure should be given. Secondly, the characteristics of the contract's subject matter: for instance, complex machinery or equipment that needs multiple accessories usually requires a longer period than goods that are easy to purchase on the open market, and so a longer period for cure may be reasonable for these complex goods. Thirdly, the nature of the transaction: for instance, if seasonal goods are involved, the reasonable period for cure may be relatively short. Fourthly, the influence of the breach: for instance, if the breach leads to serious problems for the buyer, the reasonable period for cure should be kept relatively short, to

[①] As to detailed discussion, see Matsui (2003, pp. 206-209).

prevent the interests of the buyer to be significantly harmed. Fifthly, the seller's acknowledgement of the interests of the buyer in a prompt delivery: some scholars believe that if the seller was aware of an interest of the buyer in a prompt delivery, the reasonable period for cure must be held to be shorter (Matsui, 2003, pp. 208-209)

The second element of the right to cure is "without unreasonable inconvenience", i.e., the cure should not cause unreasonable inconvenience to the buyer, such as disruption on production, or potential losses for the buyer's clients (Schlechtriem & Schwenzer, 2005, p. 566). Moreover, if the cure is very costly, the cost itself might be held to constitute an unreasonable inconvenience. Take the ICC Arbitration Court's decision No. 7531 in 1994 for instance, which involved a dispute between a Chinese seller and an Australian buyer.[①] The seller sold scaffold fittings to the buyer, who later claimed lack of conformity of the goods and declared the contract avoided. Subsequently, the buyer sold the goods and sued the seller for damages, because only part of the goods had been sold and at a lower price. The seller argued that according to CISG Article 48, he should be entitled to cure the breach, and that the buyer failed to provide him with such an opportunity. However, the arbitral tribunal found that:

> "the estimated costs of sorting out the bad fittings from the good would have amounted to more than one-third of the purchase price, and therefore [the tribunal] found a fundamental breach on the grounds that 'an important part' of the 80,000 scaffold fittings did not conform to the sample." (Koch, 1998, pp. 239-240)

As a result, the tribunal ruled in favor of the buyer's claim against the seller. In this case, the huge cost of cure, which amounted to more than one-third of the purchase price, has been considered as an unfavorable factor for an effective cure. This kind of cost may be considered as an example of unreasonable inconvenience.

The third element of the right to cure is "without unreasonable uncertainty for reimbursement". Of course, the cure should eventually be at the seller's expense, but it may be necessary for the buyer to pay some charges at first (e.g. for the return of the goods) and get reimbursed by the seller at a later date. There can be no effective cure if there is unreasonable uncertainty regarding the reimbursement of those charges. Therefore, the problem of

① http://cisgw3.law.pace.edu/cases/947531i1.html.

reimbursement may be an independent element to consider for the exercise of the right to cure (Matsui, 2003, p. 212). If the buyer has a reasonable doubt about whether the seller would pay him back, especially based on the credibility and the past behavior of the seller, it is fair to entitle the buyer a right to require the seller to provide guarantee or security (Schlechtriem & Schwenzer, 2005, p. 566). If the seller refuses to do so, the cure will not be effective and will be unable to suspend the buyer's claims.

The last element is that the right to cure should be exercised against an inconsistent claim of the buyer. It is a necessary element for constructing the cure as a right. If there is no inconsistent claim of the buyer, the repair or replacement should at most be considered as a supplementary performance by the seller, but not as his right. As discussed above, the right to cure impacts the exercise of the buyer's rights by suspending claims inconsistent with the seller's cure, but it cannot generate an obligation of the buyer to accept the cure, as such an obligation already preexists the exercise of the right to cure.

4.3.4 Legal effects of the right to cure

Firstly, the seller's right to cure may suspend the buyer's claim for supplementary performance that is inconsistent with the seller's chosen cure. For instance, if the elements for the right to cure are satisfied and the seller decides to tender new goods as cure, any claims of the buyer to repair the initial goods will be suspended, meaning they are momentarily unable to give rise to a duty for the seller to repair. A similar situation occurs in cases where the buyer required replacement of goods, when in fact the seller had already prepared well for their repair. Here, the seller's effective cure through repair suspends the buyer's claim for replacement.

Secondly, the seller's right to cure may suspend the buyer's claim for damages in lieu of performance. In a case involving nonconforming goods, there are several types of loss that may be suffered by the aggrieved party, such as a reduction of the value of goods, the loss attributed to the fact that the buyer cannot use them as expected, and the damages caused to the buyer's own body or other property. The right to cure can only suspend claims for damages "in lieu of performance". This is a newly identified type of damages which has taken the place of damages due to nonperformance (*Schadensersatz wegen Nichterfüllung*) under German law (Schermaier, 2007, §280-285, Rn. 101). This concept has also been adopted by Japan's pPROL

(JCCRC, 2009b, p. 257). Claims for damages in lieu of performance mainly occur in the following circumstances: (a) the agreed obligation is impossible to perform, and other kinds of performance are unreasonable to expect in light of the purpose of the contract; (b) the obligor has explicitly refused to perform its obligation, regardless of whether the performance is due or not; (c) where the obligor fails to perform, and still fails to perform even after a demand and the lapse of a proper period fixed by the obligee; and (d) the contract has been terminated (JCCRC, 2009b, pp. 257-258). According to the contractual liability theory in Japan, the damage compensation should not exceed the benefits that would have been gained by the buyer if the full performance had been completed (Shiomi, 2009, pp. 86-87).

If the buyer directly requires damages in lieu of performance, without giving the seller an opportunity to repair or replace, the seller may suspend the effect of the damages claim by tendering an effective cure. After the cure has been tendered, the buyer may claim damage compensation, based on the delay of performance (Uchida, 2005, p.128). Given there is generally some uncertainty on the amount of damages before the completion of the cure, the seller's right to cure can also have a function on suspending the buyer's claim for damages due to delay. However, if the nonconformity has caused extra losses, such as physical damages and losses related to other properties, the claim for damages of these extra losses would not be suspended by the seller's right to cure.

Thirdly, the right to cure may suspend the buyer's request of price reduction. In the next chapter, I will argue that the construction of price reduction in Chinese law should be reconsidered. In the Chinese legal system, damage compensation in the law of sales contract is based on strict liability, and therefore, the special function of price reduction assumed in other legal systems has been comparatively reduced. Under the CCL, the exercise of price reduction is not based on the condition of termination and there is no device to assure a balance of interests between the aggrieved party and the breaching party. As a result, if the buyer can reduce the price by himself, without giving the seller any chance to remedy the breach, it will be harsh on the latter. Therefore, under Chinese contract law, the buyer should require the seller to reduce the price, rather than reduce the price by a unilateral declaration of his own intention. The buyer's request of price reduction should actually be interpreted as an offer to adjust the contract, so that the buyer's offer of price reduction would be suspended by the seller's

tendering of an effective cure.

Fourthly, the relationship between the seller's right to cure and the buyer's right to termination should be specially discussed. In the process of drafting the CISG, the relationship between those two rights has caused great disputes. The focus of this dispute is on whether the buyer's right of termination prevails or not over the seller's right to cure, and the essence of the disagreement is whether or not the nonconformity of goods itself may constitute a fundamental breach that would allow the buyer to avoid the contract regardless of the seller's ability to tender of an effective cure (Matsui, 2003, p. 212). Professor J. Honnold (1999), who has participated the drafting process of the CISG, pointed out that: "There was widespread agreement that whether a breach is fundamental should be decided in light of the seller's offer to cure and that the buyer's right to avoid the contract should not nullify the seller's right to cure." (p. 320) On the other hand, he also admitted: "However, it was difficult to find language that would clearly express the proper relationship between avoidance and cure." (Honnold, 1999, p. 320) By contrast, In the commentary edited by Professors Schlechtreim and Schwenzer (2005), it has been stated that if there is a fundamental breach of contract under CISG Article 49(1)(a), "the seller cannot claim a supplementary period of time for subsequent performance by relying on Article 48(1). Apparently, there is largely international consensus on this point" (p. 567); however, the commenters also point out that a problem arose from the beginning regarding "to what extent the right to avoidance of the contract should override the right to remedy by subsequent performance", and that the particular fear was that "the seller's right to cure would become obsolete if the objective seriousness of the defect would already constitute a fundamental breach of contract that would lead to the buyer's having a right to avoid the contract." (Schlechtreim & Schwenzer, 2005, p. 567)

Although different views can be observed from Professor Honnold's commentary, and the commentary edited by Professors Schlechtreim and Schwenzer, both of them suggest that if a dispute indeed arises between the contracting parties, the major reason may be the lack of sufficient communication in good faith (Honnold, 1999, p. 321; Schlechtriem & Schwenzer, 2005, p. 568). As we saw in section 4.1.3, paragraphs 2 to 4 of CISG Article 48 have hence established a duty of communication for contracting parties, to avoid these potential disputes.

In my view, the basic function and legal purpose of the right to cure should be to limit

the buyer's opportunities to terminate the contract, and it is unreasonable to determine whether there is a fundamental breach without addressing the issue of cure. One of the most likely reasons for a buyer who argues there is a fundamental breach is that he did not acknowledge, or at least was not well aware of, the seller's plan to cure, when in fact the seller's right to cure could play an important role in the rescue of the contract. If the breach that the buyer has suffered was definitely and ultimately impossible or unnecessary to cure, then the seller would probably not be considered to have a right to cure, as his proposal of cure would be unlikely to satisfy the elements for an effective cure outlined above, especially the ones on "promptness" and "without unreasonable inconvenience". In other words, the proper construction of the elements of the right to cure may have solved the problem of potential conflict between cure and termination. If there is indeed a right to terminate based on fundamental breach due to nonconformity, there should be no chance for a right to cure to exist; conversely, if there is indeed a right to cure, the breach should not be considered as fundamental. Cure thereby gives a *good faith* seller a good opportunity to prevent a fundamental breach and thus the termination of the contract.

4.4 Conclusion of this chapter

After the breach of a contract, the seller still has a right to cure and can therefore suspend the claims of the buyer that are inconsistent with the seller's chosen form of cure. This kind of design may seem baffling at first: why should the seller be entitled to anything when it is he who breached the contract? Does this go against the spirit of contract law, which should be to compensate the aggrieved party? Yet these doubts actually arise from an insufficient awareness of the need for a balance of interests, and from the dominance of the understanding of liability as sanction on the breaching party.

Many foreign legal systems we saw in this chapter provide various remedies for the aggrieved party, without going so far as to totally disarm the breaching party. They grant the seller a last chance to mend the breach in order to ensure the reasonableness of the remedy system and to give *good faith* sellers an opportunity to save the contract. In the new German law, this last chance comes in the form of the seller's right to provide a second tender, which arises from the additional period normally fixed for supplementary performance; in U.S. law,

this last chances comes in the form of the seller's right to cure; in the CISG and Japan's pPROL, it comes in the form of both the period for supplementary performance and the right to cure. These devices all aim at ensuring the reasonable exercise of the buyer's remedy rights and striking a balance of interests between the contracting parties. In Chinese law, there are no such devices in the current law. Yet establishing a system of cure is necessary not only for protecting the seller's interests in legal practice, but also for the coherency of the legal system. Therefore, it is necessary to explore how to construct the seller's right to cure.

In this chapter, I have discussed in detail various aspects of the seller's right to cure. Firstly, the system for protecting the seller's interests in cure should be constructed as an objection right, which has the effect of suspending the buyer's inconsistent remedy claims. Secondly, the forms of cure include repair, replacement, but not price reduction. Thirdly, the elements of the right to cure include: promptness, absence of unreasonable inconvenience, absence of unreasonable uncertainty for reimbursement, and contradiction of the buyer's inconsistent claims. Finally, the effects of the right to cure include: the suspension of the buyer's inconsistent claim for supplementary performance and of his claim for damages in lieu of performance. As to the relationship between the seller's right to cure and the buyer's right of termination, I argued that there should be no real conflict as long as the elements of the right to cure have been properly established.

Chapter 5 Reconsideration and Reconstruction of the Buyer's Remedy Rights for Nonconformity

After discussing the introduction of the seller's right to cure, I would like to deal with the problems in the exercise of the buyer's remedy rights in case of nonconformity. Of course, we cannot discuss each and every remedy in this chapter, thus the focus will be given to those that have been considered most unsatisfactory from the perspectives of the balance of interests between contracting parties and the inner coherency of the remedy system. Therefore, I would like to discuss the buyer's right to refuse nonconforming goods in the first section, and the exercise of his right of price reduction in the second.

5.1 Reconstruction of the buyer's right to refuse nonconforming subject matters

In Anglo-American law, the foremost remedy for the buyer in case of nonconformity in goods for sales is the right to reject. Many Chinese scholars have taken note of this remedy and tried to interpret some rules under Chinese Contract Law (CCL) in the light of the structure of this right. For example, Xia and Fu (2008) consider that CCL rules concerning advance performance (CCL Art. 71), partial performance (CCL Art. 72), performance with exceeding quantity (CCL Art. 162), and performance with nonconformity in quality (CCL Art. 148) have all confirmed the buyer's right to reject goods in China. H. Wang (2009), however, argues that the rights in CCL Articles 71 and 72 are actually objection rights (*Einreden*), which are of a different nature than rejection rights, which can lead to termination of the contract. She further argues that the system of the buyer's right to refuse nonconforming goods in Chinese law should be perfected based on the experiences of Anglo-American law (p. 398). On the other side, the CCL has already established the buyer's right to require supplementary performance as the foremost remedy in case of nonconformity (CCL Arts. 107, 111). It is necessary and urgent to analyze, from the perspective of the inner coherency of the remedy system, whether the buyer's right to reject nonconforming goods should be established on a par with the buyer's

right to require supplementary performance, and if not, how we should understand and interpret rules on the buyer's right to refuse to accept nonconforming goods and the right to refuse to take their delivery in Chinese positive law.

In the following sections, I will first compare the buyer's right to reject nonconforming goods in Anglo-American law with the buyer's right to require supplementary performance in German law, and then suggest that it is not suitable to establish a system of rejection in China, because this right basically is the functional equivalent to the right to require supplementary performance. Next I attempt to provide new interpretation for CCL Article 148, the only article that explicitly provides for rules on refusal to accept nonconforming goods in quality. Finally, I argue in favor of the construction of a system based on a right to refusal to take delivery instead of one on the rejection, and the establishment of similar conditions for refusal to take delivery whether the nonconformity is in quality or quantity.

5.1.1 Rejection and request for supplementary performance in comparative law

5.1.1.1 The right of rejection in Anglo-American law

In the case of nonconformity in goods for sales, the widely recognized and advocated remedy of the buyer in Anglo-American law is the right to reject nonconforming goods. Professor Schlechtriem, a famous CISG specialist, points out that the impossibility to apply the right of rejection under the CISG is viewed as one of the reasons for which the U.K. refused to ratify the CISG, and for which the application of the CISG is often contractually excluded in the U.S. (Schlechtriem, 2006, p. 85). Professor Bridge (2007) argues, in favor of the remedy of rejection, that English sales law and the CISG are two bodies of law of different characters to international sales transactions of different types: "the CISG would be better suited to contracts for the sale of manufactured goods, whereas the Sale of Goods Act would be more suitable for commodity sales" (p. 17).[①] When the European Commission attempted to issue a directive to harmonize further consumer rights throughout the European Union, the law commission of the U.K. strongly argued in favor of maintaining a right of rejection for the buyer (Naidoo, 2011, pp. 807-812). Next, I would like to briefly introduce the effects and functions of right to reject

[①] See also Bridge (2007, p. 17). Schwenzer and Pascal Hachem (2009) respond to this view and point out that the CISG is very well suited to the necessities of modern trade, including commodity trade (pp. 477-478).

in U.K. law and U.S. law.

In the U.K., the Sale of Goods Act 1979 (SGA 1979) and the related case law have become main sources of sales law,[①] and the right of rejection is widely provided for in the third chapter of SGA 1979. For example, SGA 1979 §30 concerns rejection in the case of wrong quantity, and SGA 1979 §35A, which was implemented by the Sale and Supply of Goods Act 1994, relates to the right of partial rejection.[②] According to these rules, a valid rejection can only exist if there is "a clear notice that the goods are not accepted and at the risk of the vendor" (Bridge, 2010, §12-034).

SGA 1979 §§11(3), 11(4), 15A, and 15B lay down the prerequisites for the exercise of the right to reject in various cases. According to these provisions, the right to reject can only be exercised in case of breach of a condition, but not in case of breach of a warranty. In needs to be noted that under U.K. law, *conditions* and *warranties* are interpreted as two different sorts of contractual promises. A condition is a promise made by a party whereby any failure to perform by one party, "irrespective of the gravity of the event that has in fact resulted from the breach," would entitle the other party to treat the contract as discharged; a warranty, on the other hand, is an agreement with reference to the subject matter, but collateral to the main purpose of such contract, and the breach of it "gives rise to a claim for damages, but not a right to reject the goods and treat the contract as repudiated" (Beale, 2008, pp. 1421-1422). Hence, the right to reject under U.K. law is a device that has close connection with the discharge of a contract and has a restrictive standard of exercise; if the prerequisites for exercising this right are not met, the buyer may not pursue the remedy of discharge of contract, but can merely claim for damages (Bridge, 2010, §12-029).

As to the effect of rejection in English sales law, briefly speaking, once the buyer rejects the goods, the property will be revested in the seller (Beale, 2008, §43-321), and the risk and expense related to the goods also switch back to the seller's side "if they [did] not so already" (Beale, 2008, §43-321; Bridge, 2010, §12-067). The buyer becomes "an involuntary, or at least a gratuitous bailee", who is in principle no longer entitled to deal with the goods except by the express or implied authority of the seller, but owes a duty of care in relation to the goods

① This Act is based on the Sale of Goods Act 1893, and has been consolidated by existing statutes in the 1970s (Bridge, 2010, §1-004). It has been reformed by three amendments during the past decades, including: the Sale of Goods (Amendment) Act 1994, the Sale and Supply of Goods Act 1994, and the Sale of Goods (Amendment) Act 1995 (Beale, 2008, §43-001).

② All provisions of the Sale of Goods Act 1979 referred to in this dissertation come from the database of Westlaw.

(Bridge, 2010, §12-067). Accordingly, the buyer is not liable for ordinary negligence, but merely for deliberate injury to the goods or gross negligence (Bridge, 2010, §6-011). Furthermore, according to SGA 1979 §36, the buyer bears no duty to return the goods when he rejects them: "it is sufficient if he intimates to the seller that he refuses to accept them".

As to the right to rejection in U.S. law, the general principle established in UCC §2-601 is that the buyer may reject if the goods or the tender of delivery fail *in any respect* to conform to the contract. This is also called the "perfect tender" rule (White & Summers, 2010, p. 415). In fact, it has been considered that as early as in the Uniform Sales Law of 1906, the related rules dropped the doctrine of substantial performance, but was identical with the requirement of the perfect tender rule (Travalio, 1984, pp. 935-938). However, Professors White and Summers (2010) express doubt on the real importance of such doctrine of the perfect tender rule, arguing that there are many restrictions on this rule in the UCC and that "the Code changes and the courts' manipulation have so eroded the perfect tender rule that the law would be little changed if 2-601 gave the right to reject only upon 'substantial' non-conformity." (pp. 300-301) They have pointed out that "of the reported Code cases on rejection, few actually grant rejection on what could fairly be called an insubstantial nonconformity." (White & Summers, 2010, pp. 300-301) Given the argument raised in the literature on this topic, it seems that the conditions of rejection in the U.S. may not be as strict as suggested by the letter of the UCC.

In U.S. sales law, according to UCC §2-401(2), unless otherwise explicitly agreed, the title of goods passes to the buyer at the time and place at which the seller completes his performance "with reference to the physical delivery of the goods". As to the effect of rejection on the title of goods, according to UCC §2-401(4), "a rejection or other refusal by the buyer to receive or retain the goods, whether or not justified" may revest the title of goods in the seller. And as to the effect of rejection on the risk of the goods, UCC §2-510(1) provides that "where a tender or delivery of goods so fails to conform to the contract as to give a right of rejection the risk of their loss remains on the seller until cure or acceptance." It can be observed that the right of rejection under U.S. law may not only revest the title of goods in the seller but also make the risk stay on his side. Furthermore, according to UCC §2-711, if the buyer rightfully rejects the goods, he can cancel the contract and recover "so much of the price as has been paid" (ALI & NCCUSL, 2010, p. 2229). This means the right to rejection in U.S. law is

considered, as in the U.K., as an important step before discharge of the contract.

5.1.1.2 The right to require supplementary performance in German law

After the modernization of German obligation law, the foremost remedy for nonconformity provided in sales law came to be the buyer's right to require supplementary performance (*Nacherfüllungsanspruch*). Following the majority opinion of the drafters of the new BGB, the supplementary performance remedy has taken the place of the ones that used to be provided in the old BGB, namely termination and price reduction (Jacobs, 2003, p. 371). The new remedy is the logical result of the new rules in BGB Article 433, which provides in its paragraph (1), that the seller is obliged to provide the subject matter free from defects in thing, as well as defects in title (Jacobs, 2003, p.371). The right to require supplementary performance is not completely new, as it was already mentioned in the first paragraph of Article 480 of the old BGB: "The buyer of a thing designated only by species may demand, instead of termination or price reduction, that instead of the defective thing one free from defect be delivered to him." (Westermann, 1995, §480) Nevertheless, in the new BGB, this remedy has been extended to apply to unascertained sales (Jacobs, 2003, p. 373).

The forms of supplementary performance include repair and replacement; the former is also called removal of defects (*Beseitigung des Mängels*), and the latter is also known as delivery of a thing free from defects (*Lieferung einer mangelfreien Sache*) (Brox & Walker, 2006, §4 Rn. 41). The right to require supplementary performance is considered as a modification or development of the original right of demanding performance and is therefore not dependent on the fault of the seller (Medicus & Lorenz, 2010b, Rn. 121; Looschelders, 2007, Rn. 84, 85). It should be mentioned that the classification as modification is of considerable legal importance. For example, it means that the short prescription and some other special rules that aim to restrict the buyer's remedies will apply, such as those from BGB Articles 439(3), 442, 444-445, and HGB Article 377 (Looschelders, 2007, Rn. 85). According to BGB Article 439(3), if the expense for one form of supplementary performance is excessively high, the seller may refuse such performance. The claim of the buyer can in certain cases be restricted to an alternative form of supplementary performance, depending on the importance of the defect and on whether any other forms of supplementary performance that do

not substantially prejudice his interests are available. Furthermore, according to BGB Article 323(1), if the obligee was tendered nonconforming goods, he should normally first require supplementary performance from the obligor and fix an additional period for it, under penalty of losing access to other remedies, such as termination, damages in lieu of performance, or price reduction.

It has to be noted that in German law there are no general rules on the obligee's right to refuse to take delivery or right to reject nonconforming goods. According to BGB Article 266, the obligor has no right to tender partial performance. However, although the refusal to take partial performance in such a case may usually not constitute default of the obligee (Medicus & Lorenz, 2010a, §157), it is not recognized as a right. By contrast, there are some widely advocated limitations on the obligee's refusal to take delivery. If the obligor believes he should not bear more obligations or is unable to tender the full performance, the obligee should take the delivery (Medicus & Lorenz, 2010a, §162).

5.1.1.3 Comparison and inspiration

The right to reject goods and the right to require supplementary performance can be compared from the perspectives of conditions for exercise, legal effects, and systemic functions.

Concerning the conditions for exercise, we can observe that both the right to reject in Anglo-American law and the right to require supplementary performance in German law can be triggered by material nonconformities which impact the main purpose of the contract. A nonconformity which has no material impact on the main purpose of contract may not give rise to a right to reject in U.K. law, but may under U.S. law, and will normally be able to justify the buyer's right to require supplementary performance under German law. On the other hand, whether the nonconformity can be or is suitable to be removed is of no relevance for the right to reject in Anglo-American law, but is crucial for requiring supplementary performance in German law. In short, there are substantial differences concerning conditions for the exercise of these two remedies, and the conditions for rejection even differ from U.K. to U.S. law.

The Anglo-American right of rejection is also very different from the German right to require supplementary performance in its legal effects. The right to reject may revest the title of

goods in the seller and make the risk stay at the side of the seller, while the right to require supplementary performance merely imposes the seller an obligation to provide such performance. In fact, the effects of the right to rejection are close to that of the right of termination in civil laws regarding risk and the title of the goods. However, the exercise of the right to reject should not be considered as termination of contract itself, but merely as the "normal first step" to treat the contract as discharged or cancellation in Anglo-American law. Furthermore, the right to reject is a short-term right, which should be exercised in a prompt period.[①]

However, when comparing similar rules in different legal systems, it is only by comparing their systemic functions that their essential differences can be demonstrated. From the perspective of systemic functions, the right of rejection may achieve in Anglo-American law the same effects as the right to require supplementary performance in German law.

First, both of these rights are the principal channels by which the buyer can object on the nonconformity in quality or quantity. In Anglo-American law, rejection of goods refers to refuse to accept these goods, but not merely the refusal to take physical delivery of those goods. The major difference between taking delivery of the goods and accepting them is that taking delivery refers to taking physical control over the subject matter in fact, while acceptance indicates some kind of approval in law of the subject matter, without necessarily involving physical control.[②] Hence, when the buyer exercises the right to reject, he undoubtedly objects on the quality or quantity conditions of the subject matter. The buyer's right to require supplementary performance under German law also expresses the buyer's objection on the quality or quantity conditions of the subject matter, but by directly requiring the seller to repair, replace, or provide other supplementary performance. These two rights therefore have similar functions regarding the raising of objections on the goods in quality or quantity.

Second, the main objective of the German right to require supplementary performance and the Anglo-American right to reject is to induce the seller to mend nonconformities by providing supplementary performance or cure. In the U.K., the sales law does not provide any

① As to the similarity and divergence of the right to reject in U.K. law and the right to terminate the contract in civil laws, see MacQueen (2011, pp. 111-115), Naidoo (2011, pp. 808-812).

② Professor Bridge (2010) has made explicit distinction between acceptance and taking delivery: "For example, the buyer may fail to take delivery of the goods for some time, but nevertheless subsequently accept the goods. Or he may accept the goods (in the sense of signifying his approval of them after examination), but subsequently fail to take delivery of them." (§9-003).

such remedy as the right to require repair or replacement except in the case of consumer contracts.[①] This may be confusing for a civil law scholar: what is a buyer able to do if he or she wants a repair or replacement instead of a return of the goods? The English dealers do not seem bothered by this issue. As an English scholar points out, "the right to reject provides a useful bargaining tool. It means that sellers have an incentive to ensure effective and speedy repairs or risk losing the bargain altogether." (Naidoo, 2011, p. 808) In other words, when the buyer exercises the right to reject, the seller is under pressure to negotiate with the buyer about repair or replacement, otherwise the buyer could cancel the contract, making the seller lose all interests in the bargain and be liable for damages.[②] Even after the introduction of additional consumer protection in the SGA 1979, English scholars still argue that the right to reject is the most powerful weapon for protecting the buyer's interests, and is sufficient to play the same role as the right to require supplementary performance in Germany (Hood, 2008, p. 316). In German law, the function of the right to require supplementary performance is self-evident, as this right allows the buyer to directly require the seller to repair, replace, or take other measures to provide supplementary performance. Therefore, the function of right to reject in Anglo-American law and the one of right to require supplementary performance in German law just seem to be different roads to the same goal on this point.

Third, both of these rights provide a "buffer zone" against the discharge of contract. In Anglo-American law, the first step for treating the contract as discharged is usually rejection (the other approach is revocation of acceptance),[③] and during the period separating the exercise of the right to reject from the cancellation of the contract, the seller has an opportunity to save the contract by cure. Likewise, under German law, the right to require supplementary performance may also provide a "buffer zone" against termination of contract as, save in a few exceptions, the buyer may not terminate the contract if he did not firstly require supplementary performance and fix an additional period for this performance. During that period, the seller has a reasonable chance to save the contract by providing this performance. These two rights

① In fact, the incentive for the U.K. to introduce remedies of repair, replacement and price reduction for the consumers was the transposition of the EU Consumer Sales Directive of 1999 (Willett, Morgan-Taylor, & Naidoo, 2004, p. 94).
② It needs to be noted that, under U.K. law, repair is generally suggested to be a collateral contract (Hood, 2008, p. 316) or a separate transaction (Bridge, 2010, §12-033), and hence that the arrangement for repair does not necessarily exclude the buyer's right to reject. For example, if a seller refuses to inform the buyer the cause for repair, the buyer may still reject a repaired subject matter (Low, 2007, p. 536).
③ See e.g. UCC §2-510.

hence have similar functions in this respect.

Table 5.1

Comparison between the right to reject and the right to require supplementary performance

	Right of rejection in U.K. law	Right of rejection in U.S. law	Right to require supplementary performance in German law
Standard for the exercise	breach of conditions	breach in any respect (UCC); material breach (commentary)	removable defects
Legal effects	property revested in the seller; risk stays on the seller's side	property revested in the seller; risk stays on the seller's side	the seller has a duty to provide supplementary performance
Systemic functions	(a) induce the seller to replace or repair; (b) provide a "buffer zone" against discharge of contract	(a) induce the seller to cure by, e.g. replacement or repair, (b) provide a "buffer zone" against cancellation of contract	(a) promote the seller to remove defects by replacement or repair, (b) provide a "buffer zone" against termination

Table 5.1 above provides a general illustration on the comparison of the right to reject in U.K. law, the right to reject in U.S. law, and the right to require supplementary performance in German law in respect of conditions for exercise, legal effects, and systemic functions. In light of these comparisons, I would like to address the problem raised at the beginning of this section, namely, whether it is necessary to introduce in the Chinese legal system an Anglo-American style right to reject.

It can be observed that, compared with the right to require supplementary performance, the most significant characteristic of the right to reject does not lie in its conditions for exercise, but in its legal effects. If we introduced the right to reject into the Chinese legal system with its legal effects unchanged, the following issues would be worthy of attention. First, if the condition for exercising the right to reject is constructed to be any sort of nonconformity except insignificant ones, then, on one side, the legal effects would be harsh for the seller, on the other

side, the conditions for exercise and the systemic function of right to reject would largely overlap with the right to require supplementary performance. Specifically speaking, when there is a removable nonconformity, the buyer may either reject the goods, which will induce the seller to timely repair or replace, to save the contract, or require supplementary performance, which will also promote the seller to repair or replace, to save the contract. The only reason for which it would make sense to introduce the right to cure would be to provide a device for irremovable nonconformity, in which case the buyer's right to require supplementary performance cannot apply. Second, if the exercise of the right to reject is made conditional on a frustration of contractual purpose due to nonconformity, while the legal effects might not be unjust as such, the triggering conditions and the legal effects of the right to reject would be identical to that of the right to terminate the contract, unnecessarily duplicating it. Besides, if the contractual purpose has been frustrated, is there any meaning for the buyer to merely reject, but not terminate the contract? To sum up, given that the legal effects of the right to reject and the right to terminate are quite close, and that the functions of the right to reject can be largely covered by the one of the right to require supplementary performance, if, in a legal system, the right to require supplementary performance has been established as the foremost remedy for the buyer in case of nonconformity, and the right to terminate the contract has been recognized as the basic system for ending contractual relationship, then the introduction of a system of rejection would inevitably lead to a confusing overlap of systemic functions or legal effects. For this reason, it does not appear necessary to introduce the right to reject in Chinese law.

It needs to be noted that the CISG, as an international sales law that has made considerable compromise between civil law and Anglo-American law, did not adopt both the right to require supplementary performance and the one to reject, but chose to solely establish a system for requiring supplementary performance. On one hand, taking delivery has been confirmed as one of the buyer's main obligations (CISG Art. 60) and refusal to take delivery can be admitted in a very limited scope. On the other hand, the right to refuse to accept (reject) nonconforming goods has been excluded from the remedy rights of the buyer.

5.1.2 Clarification of the refusal to accept in CCL Article 148

In the preceding subsection I argued that it was not necessary to introduce an

Anglo-American right to reject to perfect the present Chinese legal system. Nevertheless, there is one question that remains to be addressed: how should we interpret Article 148 of the CCL, which explicitly provides a rule concerning refusal to accept nonconforming goods? According to CCL Article 148:

> "Where the purpose of the contract is frustrated due to failure of the subject matter to meet the quality requirements, the buyer may refuse to accept the subject matter or terminate the contract. If the buyer refuses to accept the subject matter or terminates the contract, the risk of damage to or loss of the subject matter is borne by the seller."

Whether from the perspectives of the letter of law, comparative law, or legislative purpose, *refusal to accept* in this article can hardly be interpreted as meaning *refusal to take physical delivery*.

First, the phrase "refuse to accept the subject matter" in CCL Article 148 is obviously different from the phrase "refusal to take delivery" in CCL Article 162. Interpreted from the perspective of the letter of the law, it is proper to make distinctions, rather than to treat them simply as the same concept.

Second, the CCL's drafting history also suggests that *acceptance* in CCL Article 148 should not be understood as taking physical delivery. According to *Paraphrase on Contract Law of the People's Republic of China (PRC)*, which is edited by the Legislative Affairs Commission of the NPCSC, the idea of CCL Article 148 was borrowed from the experiences of the UCC and acceptance refers to the buyer's certain approval of the subject matter (Hu, 1999, p. 229). The comparable provision is UCC §2-510, the first paragraph of which provides: "Where a tender or delivery of goods so fails to conform to the contract as to give a right of rejection the risk of their loss remains on the seller until cure or acceptance." (ALI & NCCUSL, 2010, p. 2192) This rule mainly deals with the distribution of the risk of loss, and is precisely the parent provision of CCL Article 148. Therefore, acceptance in CCL Article 148 should refer to a certain approval of the condition of goods.

Third, it appears the main legislative purpose of CCL Article 148 was to address the issue of risk allocation in case of nonconformity in quality. If refusal to accept the subject matter in this provision was understood as a refusal to take physical delivery, then its role, as a specific

rule concerning distribution of risk of loss will be unnecessary to play, because if the buyer refuses to take physical delivery, the possession of goods is still on the seller's side, which means the risk of loss has never been transferred to the buyer. In other words, the special rule of CCL Article 148 would be redundant with general rules on risk allocation if the phrase "refusal to accept the subject matter" were defined as refusal to take delivery.

Hence, whether it be from the perspective of the letter of the law, from that of comparative law, or from that of the legislative purpose, the phrase "refusal to accept the subject matter" in CCL Article 148 should not be interpreted as refusal to take delivery. Instead, the function of it should be to express the buyer's objection on the condition of goods in quality or quantity. Next, I would like to analyze the conditions and legal effects of refusal to accept in CCL Article 148.

Regarding the conditions of exercise of this refusal, it should be noted that the right to refuse to accept (reject) has not been constructed with as strict conditions in Anglo-American law as in CCL Article 148. In the U.K., any nonconformity to the contract that is material or not slight may justify the buyer's right to reject (SGA 1979 §30). In the U.S., the UCC provides the so-called "perfect tender rule", which entitles the buyer to reject if there is any nonconformity in the goods, even though the literature suggests the standard for the exercise of the right to reject is in practice dependent upon a material breach. However, according to CCL Article 148, it seems that it is only in case of nonconformity of goods in quality that frustrates the purpose of the contract that the buyer is able to refuse to accept. The following questions hence arise: Why is the buyer not permitted to refuse to accept the subject matter when there is some normal nonconformity with the contract in it? If the concept of acceptance is indeed connected with some kind of approval on the condition of the subject matter, does the strict standard for refusal to accept not contradict the requirement in the contract itself?

In my view, given that the concept of "acceptance" should be understood as certain approval of the performance, then as long as the performance is nonconforming to the contract in any aspect that cannot be ignored, the buyer should be able to refuse to approve it. Interpreting frustration of contractual purpose as a necessary condition for refusal to accept is too high a threshold. As a matter of fact, the main purpose of CCL Article 148 is to address the issue of risk allocation between the buyer and seller; establishing a strict standard for refusal to

accept is not the main purpose. Therefore, it is possible to consider frustration of contractual purpose as only a sufficient condition for refusal to accept, rather than a necessary one. In other words, the buyer may certainly refuse to accept the subject matter with a nonconformity so serious as to frustrate the contractual purpose, but there could also be other nonconformities that justify such a refusal. I suggest that any nonconformity that cannot be ignored in light of the agreement and contractual purpose may entitle the buyer to object and consequently refuse to accept. The rationale for this interpretation would be the principle of *pacta sunt servanda*: since there is a requirement for quality in the agreement concluded by contracting parties, any nonconformity with the contract should be deemed unacceptable to the buyer, in the name of the binding force of the agreement.

The next issue is to determine what legal effects the refusal to accept should be given. Under Anglo-American law, the legal effects of rejection include the revesting of the property in the seller and the transfer of the risk of loss to the seller. As discussed above, since both the systems of requiring supplementary performance and termination have been established in Chinese law, it is neither necessary nor suitable to introduce such a right to rejection. Although the concept of refusal to accept in Article 148 should be interpreted similarly with Anglo-American rejection in the sense that both of them stand for an objection on the performance without necessarily refusing to take physical delivery, the legal effects of rejection in Anglo-American law should not be transplanted into Chinese law. In my view, only a termination of contract should be able to revest the property in the seller on Chinese law; the legal effects of refusal to accept should therefore be limited. Normally, refusal to accept has no special meaning but expressing objection on the performance, however, in case that nonconformity in quality has constituted a fundamental breach, refusal to accept may exceptionally lead to transferring the risk to the seller without physically returning the subject matter to him. Specifically speaking, in case the nonconformity has frustrated the contractual purpose, as long as the subject matter is still under the buyer's control, the risk of loss normally does not automatically transfer back to the seller. However, if the buyer expresses his *refusal to accept* in such a case, even if the subject matter has not been returned to the seller, the risk may transfer by itself. According to this interpretation, the original notion of acceptance and the legislative purpose of CCL Article 148 will be well maintained.

In summary, only if we (a) interpret the phrase *refusal to accept* in CCL Article 148 as refusal to approve, but not refusal to take physical delivery, (b) interpret frustration of contractual purpose as a sufficient rather than necessary condition, and (c) restrict the legal effects of refusal to accept to a special rule related to transfer risk, can the logic, legislative purpose, and special systemic function of CCL Article 148 be maintained.

5.1.3 Discussion of the buyer's refusal to take delivery

Since CCL Article 148 has not specified conditions for the exercise of the refusal to take delivery, the question left unanswered is what the conditions for refusal to take delivery of goods with nonconformity in quality would be. In Chinese law, taking delivery has been recognized as the buyer's duty. The system of the buyer's refusal to take delivery has been basically established through CCL Articles 71, 72 and 162. CCL Article 72 provides that the obligee may refuse partial performance, unless such performance does not prejudice his or her interests. According to this article, insofar as the partial performance prejudices his or her interests, the buyer would be given an option: either take delivery of partial performance and then require supplementary performance, or refuse to take delivery and wait for full performance (Hu, 1999, p. 121). The condition for refusal to take delivery provided in Article 72 is agreeable in principle. However, there are no explicit conditions of refusal to take delivery in case of nonconformity in quality, leaving a legal loophole.

In judicial practice, the conditions of refusal to take delivery are essential when the courts decide whether it is the default of the obligee or the delay of the obligor, or determine the time of the transfer of risk, or calculate the liquidated damages due to delay in performance. Hence, it is urgent to thoroughly analyze the conditions for the exercise of the buyer's refusal to take delivery in case of nonconformity in quality. In the next two parts, I would like to introduce several cases involving such a refusal in case of nonconformity in quality and make suggestions for the construction of conditions for this remedy.[①]

[①] As to performance before the fixed date provided in CCL Article 71, there are also some issues needed clarification. For example, according to CCL Article 71, the buyer is in principle entitled to refuse performance in advance, and the interests in the period for preparing performance are not considered at the obligor's side. Nevertheless, since the topic of this dissertation is nonconformity in respect of quality or quantity, but not performance in advance, I have to discuss this issue in other place.

5.1.3.1 Problems in legal practice

Among the six cases below,[①] cases A1 to A3 relate to sales of real property; each of them involved quality problems without relevance to the main structure of building, and each plaintiff in these three cases claimed for liquidated damages on the ground of the seller's delay in performance. Cases B1 to B3 concern sales of movable property; each of them involved a normal quality problem which did not significantly impact the utility of goods, yet each plaintiff was granted refusal to take delivery.

Case A1: The DongZhongFa MinYiZhongZi No.139 (2013) decision involved a dispute between a real estate corporation A, located in Dongguan City, and a buyer B. The court found that although A received a certification concerning the completion of the building from the administration on Nov. 30, 2010, there were still some quality problems in it, such as substandard installation of windows or doors, damaged cement productions, and cracks in the wall. The court found that: "considering there are quite a few parts that need fixing, and that some of the quality defects may impact the normal life of the property users, it is reasonable for the buyer to refuse to take over this building." As we can see, the court confirmed here the reasonableness of the buyer's refusal to take over (take delivery) on the ground that the quality problems in the building might impact the buyer's living. The court consequently allowed the liquidated damages to be calculated as agreed in the contract.

Case A2: The Xiang MinChuZi No.339 (2013) decision concerned a dispute between a real property corporation C and a buyer D. After receiving the notification of tender, D went to examine the department and discovered seepage and some cracks in the wall, as well as in the floor. Therefore, D refused to move in and demanded C to fix these problems. Afterwards, D required C to pay liquidated damages, calculated on the basis of 0.03% of the down payment per day. The court held that the parties had agreed in their contract that quality problems beyond the main structure of building did not affect the process of hand-out, and according to the contract should be fixed by the seller after the delivery. The scope of the problems included:

[①] Unless otherwise stated, judicial decisions referred to in this dissertation all come from the database of *Beida Fabao*, see http://vip.chinalawinfo.com/index.asp..

seepage, cracks and hollows in wall and floor, as well as loose face bricks. The court found that:

> "The flat has indeed some quality defects, such as seepage and cracks. However, according to the contract, these quality defects should be addressed by repair after the buyer notifies the seller, but may not justify the buyer's refusal to take over. As to the influence of the defects on utility, the buyer may demand damage compensation…which should equal the actual loss… the plaintiff may require expense for renting department of the same kind nearby."

The court confirmed the effect of the agreement which provided the standard for the buyer to refuse to take over and, accordingly did not uphold the buyer's claim for liquidated damages.

Case A3: The HuErZhong MinEr(Min)ZhongZi No. 1695 (2009) decision is one of a series of decisions concerning disputes between a real property corporation E, located in Shanghai, and its buyers. When inspecting the flats, E's buyers discovered all sorts of quality problems, such as holes in the floor, broken lights, seepage, cracks, and blocking of bathtub. These buyers refused to take over and required the seller to fix these problems; meanwhile, they also demanded liquidated damages, calculated on the basis of 0.03% of the down payment per day. In the decision mentioned above, the court found that:

> "The quality problems claimed by the buyer…do not belong to what may justify the buyer's right to refuse to take over. However, E has already promised to fix these problems and thereby postponed the date for delivery. This is a new agreement which confirms that the delivery has not been completed. Therefore, the delay in performance is confirmed."

The court, consequently, allowed the claim of the buyer for liquidated damages.

Case B1: In the case of ZheJia ShangZhongZi No.331 (2010), a furniture company A, located in Haining city, ordered sofa cloth from a company B, located in Hangzhou city. The court found that "neither on the sample, nor on the products for trial, were there any wheel-shaped stripes", yet the integration report confirmed that the 11000 meters of cloth

ordered by A on March 3rd, 2009 had wheel-shaped stripes. B did not deny the existence of those wheel-shaped stripes, but argued that they were tolerable under today's technology standards and therefore did not constitute nonconformity in quality. The court held that:

> "The cloth tendered by B has wheel-shaped stripes and is therefore nonconforming to the contract. According to CCL Article 148, A may refuse to take delivery. On the other hand, the court noticed that A had accepted some sofa cloth with wheel-shaped stripes. Nevertheless, that will not preclude the A's right to refuse to take delivery of the last 11000 meters of cloth."

In this case, although CCL Article 148 was referred to as the foundation of the buyer's refusal to take delivery, it is disputable whether the cloth tendered has frustrated the contractual purpose.

Case B2: In the case of ZheHang ShangZhongZi No.97 (2010), the plaintiff Dai ordered several air conditioners from a company C, located in Zhejiang. Regarding whether Dai might refuse to take delivery of an air conditioner, the court held that the COP_R (coefficient of performance of refrigeration) of the air conditioner first tendered by C was 3.0, while the COP_R of the air conditioner retendered was 2.8. Although the contract did not provide specific requirement on the COP_R, since the first tender was 3.0 and the buyer did not object on that, it should be considered that the agreed COP_R was 3.0. When C replaced the air conditioner, the COP_R should not have fallen below that standard. Consequently, the air conditioner replaced did not protect Dai's interests, but, on the contrary, harmed her interests in consumption. Therefore, Dai should be entitled to refuse to take delivery.

Case B3: In the case of HuYiZhong MinSi(Shang) ZhongZi No.148 (2004), the plaintiff Dong ordered a red Ferrari, the price of which was 2.99 million RMB, from the defendant D, an automobile company located in Shanghai city. Dong had been informed from D that there was a small defect on the surface of the car, which was at that time the only red Ferrari transported to D. Nevertheless, the plaintiff required the car to be tendered in an "absolutely perfect" condition. Before transporting another car from Tianjin, the defendant required the

plaintiff to provide a written statement, promising to accept any car that might have a small defect. The plaintiff refused to provide such a statement. The district court and the appeal court both held that Dong, as a consumer, had ordered a car valued 2.99 million RMB; the high value of the car made the requirement for a perfect tender reasonable. In this decision, the seller's delay in performance was therefore found to constitute a breach.

Analysis: In case A1, although the completion of the building had been confirmed by the administration, there were still quality problems in the department involved. The court was of the view that these problems would have an impact on the residential purpose of the contract, and therefore found that it was reasonable for the buyer to refuse to take over. In case A2, although similar quality problems existed, there was an agreement on the conditions for the buyer to refuse to take over, according to which the buyer might not refuse if the quality problems did not impact the main structure of the building. Since the seepage and cracks were exactly contained in the list of those problems that should be fixed after the delivery, the court denied the buyer's right to refuse to take over. In case A3, there were also similar quality problems that did not impact the main structure of the building, and there was no agreement as to the condition for the buyer to refuse to take over as in case A2. Nevertheless, the court went directly to the conclusion that those quality problems did not provide justifications for the buyer's right to refuse to take over. It can be inferred from case A3 that even if there was no specific agreement, a strict standard was imposed to the buyer who intended to refuse to take over a real property with nonconformity in quality.

We can observe that there are divergences concerning the conditions for the buyer to refuse to take over a real property with quality problems. One court employed the standard of impact on normal residential purpose, one imposed a stricter requirement (impact on the main structure of the building) based on the contractual agreement, and the last one imposed a similar strict requirement on the buyer with no clear ground. Not all of them referred to CCL Article 148.

By contrast, in cases B1-B3, related to movable properties, the courts all confirmed the right of the buyer to refuse to take delivery. As seen from the facts revealed in judicial decisions, the quality problems in cases B1-B3 were unlikely to frustrate those contractual

purposes. In case B1, although the wheel-shaped stripes might reduce the quality of the sofas, but the reduction of value was not significant and did not preclude the buyer to use the cloth on a sofa. In case B2, even if the reduction of the COP_R of the air conditioner constituted a nonconformity, the divergence was slight and the impact on normal use was very limited. As to case B3, a high-priced sports car would definitely call for high quality both inside and outside, therefore, a small defect on the surface would constitute a nonconformity. However, even the most delicate work and maintenance by mankind can hardly ensure an "absolutely perfect" condition. Even though a defect on the surface of a Ferrari cannot be overlooked, there seems no reason to consider it to be unacceptable and to definitely frustrate the contractual purpose. As we can see, the court upheld the right of the buyer to refuse to take delivery in all these three cases on movable properties, even though none of the nonconformities seem so severe as to frustrate the contractual purpose.

Evidently, the views on the buyer's right to refuse to take delivery differ depending on the type of sales. In the sales of real property, the courts tend to make the buyer take over first and then pursue other remedies, while in the case of movable property, there seems to be no obstacle for a buyer to refuse to take delivery as long as a material nonconformity occurs. The reasons for this divergence possibly include the following. Firstly, the buyer's exercise of his right to refuse to take delivery is more efficient and reasonable in the case of movable goods than in the case of real property. This is because for movable properties, the nonconformities can normally be removed by replacement, and the repair is often practical only if the goods have been returned to the seller, while for real properties it is normally difficult to replace and the work of repair must be undertaken at the place where the property is located. Secondly, the cooperation of the buyer in taking delivery is more important in real property sales, in order to protect the seller's interests in timely performance. The reason for this is that for movable properties, even if the buyer has wrongfully refused the goods, the seller can still perform his obligations by escrow; while in the case of real property, there is no room for the seller to do so. Finally, in recent cases involving sales of real property, the liquidated damages that are calculated on the basis of certain percentage of the down payment per day has usually been agreed on in contracts. Under these circumstances, if the buyer may refuse to take over on ground of any minor quality problems, the liquidated damages could be much higher than the

actual loss suffered by the buyer. In judicial decisions that were reluctant to confirm the buyer's right to refusal to take over a real property, it is possible that consideration had been given to this factor.

5.1.3.2 Foundation and principles of the buyer's refusal to take delivery

Before discussing the foundation and principle of the buyer's right to refuse to take delivery, we have to recall the buyer's duty to take delivery. Professors Medicus and Lorenz (2010a) conclude that under German law the obligee's failure to take delivery has effects on three legal aspects: (a) on the mitigation of liability (*Haftungsmilderungen*), i.e. the obligor will not be liable for general negligence, but only for gross negligence and willful default, (b) transfer of risk from the obligor to the obligee, and (c) repayment of extra charge suffered by the obligor (pp. 247-249). Professors Brox and Walker (2010) argue that the obligee may also be responsible for delay in performance, insofar as the relationship of obligation requires him to take delivery, such as the case provided in BGB Article 433(2) (p. 306). In Japan[①] and China,[②] there are no significant divergences in the legal effects of the buyer's failure to take delivery.

Despite some disputes over the nature of the taking of delivery,[③] most civil law scholars believe that the ground for the requirement of taking delivery is the need for cooperation between contracting parties (Medicus & Lorenz, 2010, p. 244; Shi, 2000a, p. 425). Thus, the justification of buyer's right to refuse to take delivery lies in the suspension of the duty to cooperate. The essential problem is: in what kind of circumstances will the buyer not be bound by such a duty?

In my view, since the buyer has been entitled to require supplementary performance in the case of nonconformity, and taking delivery has been established as a general duty of the buyer, if the nonconformity can be suitably removed by supplementary performance, it is not necessary to entitle the buyer to refuse to take delivery, otherwise, the economic loss may

① Professor Uchida (2005) concludes that the effects of the obligee's failure to take delivery should be: (a) the obligor will not be liable for nonperformance in the period of the delay; (b) the obligee's *Einrede* to not perform the contract will be excluded; (c) the duty of care will be mitigated when tendering specific goods; (d) the extra charge will be burdened by the obligee; and (e) the risk transfers to the obligee (pp. 89-90).
② See, e.g., Shi (2000a, pp. 437-442).
③ As to different effects of default of the obligee based on statue liability theory, nonperformance theory or compromised theory, see Han (2011b, p.433); see also J. Ma (1998).

worsen and the system of requiring supplementary performance may be shelved. However, it is possible that in certain circumstances a nonconformity discovered at the time of delivery cannot be suitably removed by supplementary performance. For example, in the case of a nonconforming air conditioner as in case B2 above, forcing the buyer to take delivery makes it possible for the seller to fix the air conditioner on the spot and immediately put it into operation. If the buyer had pursued supplementary performance, the air conditioner would have had to be removed and fixed again, which is obviously inconvenient. Likewise, a flat with doors and windows that are not well fixed may not have nonconformities in its main structure, but should also be cured immediately, because the safety and privacy of the buyer cannot be well protected in such a flat. Hence, it is plausible to say that the buyer will not be bound by the duty to cooperate in taking delivery, if the nonconformity can be removed at the time of delivery and that failure to do so will evidently impact the buyer's interests in consumption or transaction, given the specific circumstances and purpose of the contract.

The CCL provides for rules on refusal to take partial performance, and therefore confirmed the right to refuse to take delivery of nonconforming goods in quantity (Hu, 1999, p. 121). According to CCL Article 72:

> "An obligee may refuse the obligor's partial performance, except where such partial performance does not harm the obligee's interests.
> Any additional expense incurred due to the obligor's partial performance shall be borne by the obligor."

In light of this rule, in a case where the tendered goods are nonconforming in terms of quantity, the buyer could either take this partial delivery and require the seller to provide supplementary performance, or refuse to take it and suspend his payment until the seller provides a conforming tender by full delivery. This approach is agreeable if there are restrictions on its interpretation, notably regarding the part of CCL Article 72 that prevents refusal to take delviery if the partial performance does not harm the obligee's (here, the buyer's) interests. Specifically speaking, if the "harm to the obligee's interests" was interpreted in a broad sense, taking into account even the most minor prejudice then the exception would never apply and the buyer would always be entitled to refuse partial performance as any partial

performance may impact the interests of the obligee in some way, e.g. by causing additional cost for taking another delivery and inconvenience for impossibility of control the full performance in a certain period. This is why "harm to the obligee's interests" should be interpreted in a narrow sense prohibiting the buyer's refusal in cases where it would be unreasonable or contradicting the principle of good faith. Furthermore, the application of this article should be subject to the usage of trade. If refusal to take delivery is unreasonable in light of specific usage of transaction, the right to refuse cannot be justified.

Next, I would like to clarify some fundamental principles for constructing conditions for refusal to take delivery in case of nonconformity in quality.

The first principle is that things of the same nature should be addressed in the same way. In the absence of legal justifications, any nonconformity will constitute a failure of full performance, whether the nonconformity is in quantity or quality. These two types of nonconformity do not differ on this point. In foreign legal systems mentioned above, quality problems and lack of quantity have generally been basically dealt with in the same way. In Chinese law, there is no reason to treat them differently, either.

The second principle is about maintaining the coherency of the remedy system. As I have argued above, a legal system which has recognized the buyer's right to require supplementary performance as a basic remedy for nonconformity of goods should not introduce an Anglo-American style system of rejection. The construction of buyer's right to refuse to take delivery of nonconforming goods should also be subject to the coherency of remedy system established in the CCL.

The third principle can be called as "suiting the remedy to the case". In legal practice, some courts tend to raise the standard of the buyer's right to refuse to take over nonconforming subject matters, concerned with the heavy burden the seller might be faced with due to the contractual agreed liquidated damages. However, the condition of refusal to take delivery should not be determined in light of the possible consequences of liquidated damages. It is the rules on liquidated damages that should be left to apply if the agreement on liquidated damages causes unjust hardship to the seller. As to the conditions for exercising the right to refuse to take delivery, they should be decided according to specific rules on this matter.

5.1.3.3 Conditions and legal effects of the refusal to take delivery

I have discussed the condition of refusal to take delivery of subject matters with a lack of quantity. In this subsection I would like to discuss the condition of refusal to take delivery of goods with quality problems, in light of the foundation and principles clarified in the preceding part. Generally speaking, in case the subject matter tendered by the seller does not conform with the contract, the buyer may refuse to take delivery if this nonconformity prejudices his interests in consumption or transaction and can be removed immediately, unless the agreement or the usage of transaction provides otherwise. The following points regarding the conditions for refusal deserve our attention.

First, the standard of exercising the right to refuse to take delivery should not be as high as that for the right to terminate the contract (i.e. only nonconformities frustrating the purpose of the contract), nor should be as low as that of a "perfect tender rule" as introduced in UCC (i.e., theoretically, any nonconformity). Following the principles established above, the condition of refusal to take delivery of subject matters with quality problems should be at the same level of the one with a lack of quantity. If the seller wished to raise the standard for the exercise of this right of refusal, he or she would have to negotiate with the buyer and make another arrangement in the contract, just as the seller in case A2 did. There are reasons to think that the cost for negotiating for such an arrangement should be borne by the seller, but not the buyer. One reason is that it is the seller who is best placed to control the gravity of the nonconformity and to reduce related transaction costs. Indeed, economic research has suggested that "the vendor is the lowest-cost insurer against non-performance," provided he has some control over the probability of externally caused nonperformance (Goetz & Scott, 1977, p. 583). The seller can reduce the probability and extent of nonconformity by enhancing efficiency of management. If the seller fails to ensure the quality of subject matters, then he has to negotiate to raise the standard for the buyer to refuse to take delivery, to avoid further loss. Thus, the low standard of the buyer's refusal to take delivery may induce the seller to enhance the efficiency of management, to avoid the cost for negotiating for a high standard for the buyer to exercise his right to refusal. In short, we could promote economic efficiency if we designed the right to refusal in a way that lets the transaction cost be borne by the seller.

Second, the buyer's right to refuse to take delivery should only be exercised at the time of

delivery. If the buyer has physically taken delivery of the goods, the only way left for him to remedy nonconformity is to require supplementary performance. The buyer may simply return the goods and notify the seller of the nonconformity, without having to make a choice among different measures of supplementary performance. The seller should then be held to provide a reasonable supplementary performance. This approach of interpretation is necessary for the coherency of remedy system.

Third, the legal effects of the refusal to take delivery should be limited. We can agree with Professor Han (2011b) to consider it as a right to suspend (p. 318). This would mean that the legal effects of the right to refuse to take delivery would include: (a) the suspension of buyer's duty to take delivery; (b) a delay in the seller's performance (i.e. the delay resulting from the refusal is considered as a delay in the seller's performance, which may lead to the triggering of liquidated damages).

5.1.4 Conclusion of this section

Regarding the buyer's right to refuse to take delivery of and to refuse to accept nonconforming subject matters, it seems that the legislation of the CCL is unclear and that there is still much academic research to be done. This section argued that it would not be suitable to introduce an Anglo-American style right to reject in Chinese law, because it would overlap with the systemic function of the buyer's right to require supplementary performance. Instead, it is the right to refuse to take delivery that should be further developed.

The buyer's right to refuse to take delivery of nonconforming goods is an independent remedy that should be carefully examined and constructed. CCL Article 72 provides the conditions for a refusal of partial performance, but its content should be clarified and some restrictions should be added when interpreting it. As to the nonconformity in quality, I have argued that a right to refuse to take delivery arises, save agreement or usage of transaction to the contrary, as soon as there is a nonconformity in quality that may prejudice the buyer's interests in consumption or transaction and can be removed immediately. The legal effects of buyer's refusal to take delivery should be held to be a suspension of the buyer's performance and a delay in the seller's. Moreover, the exercise of this right should be limited to the time of delivery; after the delivery, the buyer should only be allowed to pursue supplementary

performance.

In the next section, I would like to discuss another disputable remedy for nonconformity – price reduction, trying to reconstruct the way to exercise it in Chinese law.

5.2 Reconsideration of the exercise of price reduction

5.2.1 Divergence between legal practice and legal theories regarding the exercise of price reduction

The relevant provision for the remedy of price reduction in case of nonconformity is CCL Article 111:

> "Where a performance does not meet the prescribed quality requirements, the breaching party shall be liable for breach in accordance with the contract. Where the liabilities for breach were not prescribed or clearly prescribed, and cannot be determined in accordance with Article 61 hereof, the aggrieved party may, by reasonable election in light of the nature of the subject matter and the degree of loss, require the other party to assume liabilities for breach by way of repair, replacement, remaking, acceptance of returned goods, or reduction in price or remuneration, etc."

As we can see, in case of a nonconformity in quality, CCL Article 111 allows the buyer to require a price reduction as a reasonable remedy to it, provided there is no explicit agreement on specific measures of remedy. Price reduction has been thoroughly researched, and some studies have established a characteristic theoretic system (e.g., Han, 2008). The most common view at present is that price reduction can be realized by a unilateral declaration of the aggrieved party's intention; in other words, the right of price reduction is a pure formation right (*einfaches Gestaltungsrecht*) (Han, 2008; Du, 2008; Cui, 2012; G. X. Zhu, 2012, p. 615). Formation rights are rights to unilaterally create legal relationship and therefore have by nature a feature of "dominance" (Schwab, 2006, p. 143). A pure formation right does not even need the intervention of the authorities to have force at law (Medicus, 2006, p. 40); it is sufficient for the party exercising the right to notify the other party of its intention to produce a legal effect. As I will introduce below, the prevailing view in China is that the buyer can unilaterally reduce

the price in case of nonconformity by a simple notification to the seller, without needing to reach an agreement with him, or needing to resort to courts or arbitrators. It is obvious that this kind of interpretation has a significant influence on the autonomy of private parties and the balance of interests between them. Therefore, the way to exercise this right needs to be carefully examined and discussed.

The latest opinion in Chinese judicial practice on this matter is reflected in the Supreme People's Court's Judicial Interpretation on the Law of Sales Contract (hereafter JILSC), which was issued in 2012. JILSC Article 44 provides that the buyer may "require the seller to reduce the contractual price". Clearly, according the letter of Article 44, the buyer is not allowed to reduce the price by a unilateral declaration, but should require the seller to reduce the price for him.

Even if we considered that the text in Article 44 could be interpreted in a different way, the Explanation of the JILSC, edited by judges of the Supreme People's Court, undoubtedly defends a claim-based approach rather than a declaration-based one:

> "where contracting parties reach a consensus, the reduction of price can be realized by according to their agreement, and the effect of reduction arises as soon as the consensus is achieved; where they have different opinions, no matter whether price reduction is considered as a right of claim or as a right of formation, the reduction cannot be realized merely by declaration of one party's intention. It must, on contrary, be realized through the court or an arbitration institution." (Xi, 2012, p. 378)

Evidently, the Explanation of the JILSC has emphasized the importance of the consensus of the contracting parties and the leading role of legal authorities. Although the Explanation of JILSC does not have the same authority as the Judicial Interpretation itself, it would be the foremost reference when lower courts have problems in applying the JILSC. Thus, we can expect that many courts would require contracting parties to agree on price reduction in future related cases.

During the investigation of judicial decisions related to CCL Article 111, I did not find any case involving disputes on unilateral declaration of price reduction. Rather, I found that in quite a few cases it was actually the court that had actively promoted the price reduction. These

decisions were made before the issue of the JILSC, and therefore could reflect the opinions of lower courts in early judicial practice, which were in accordance with the claim right approach rather than the formation rights one. These views in judicial practice (the Explanation of JILSC and those early decisions) indicate that there is a divergence between legal practice and legal theories, according to which the right to price reduction should be realized by the buyer's own declaration. A first question then arises: is the formation right theory helpful for the application of the rules on price reduction in Chinese legal practice? Given that the formation right theory in China was basically inspired from German legal theory, and that the conditions for exercising the right of price reduction under German law is built upon the one for terminating contract, then the second question is: is there really any basis for adopting the formation right theory as an interpretative theory as to the Chinese positive law?

To answer these questions, I would like to first re-examine the understandings and definitions of price reduction in both German and Anglo-American law, and then, in light of this comparative legal study, question the logic of the prevailing theory in China, from the perspective of promoting the balance of interests between contracting parties as well as the inner coherency of the remedy system. Finally I would like to argue that price reduction under the CCL should be realized as a form of contract modification.

5.2.2 The prevailing interpretive theory on the exercise of price reduction

According to the dominant view in Chinese academia, price reduction is different from damage compensation and can be exercised by a unilateral declaration of one party's intention. In the mainland China, Professor Han has firstly discussed in detail the structure of price reduction and argued that price reduction should be divided into two stages: the process of price reduction and the result of price reduction. He considers that the consequence of the result of price reduction indicates the seller's liability for breach of contract, which has been stipulated in CCL Article 111. He adds that:

> "The right of price reduction itself is not the right to claim, but the previous step (i.e. the process of price reduction). The right of price reduction is the tool or instrument for realizing the interests in price reduction……it is the prerequisite of the claim, but not the claim itself." (Han, 2008, p. 20)

This view, however, is confronted with some criticisms.[①] Professor Han (2008) also argues that: "compared with partial termination, it is preferable to construe price reduction on the idea of contract modification." (p. 21) Moreover, he suggests that the seller's right to cure should have a priority over the buyer's claim for price reduction (Han, 2008, p. 24).

Professor J. L. Du has done research from the perspective of perfecting the present system of price reduction in China. He argues that price reduction should be designed as a right of formation, but not a right of claim; that price reduction should also be applied in case of defects in title; that the price reduced should be determined proportionally according to the value the subject matter actually has as compared to the value it should have; and that the time for determination should be the one of the formation of the contract, but not the one of tendering delivery (Du, 2008). It needs to note that the elements and effects of price reduction discussed in his article should be considered as suggestions for lawmaking, but not as interpretation of the Chinese positive law.

Professors Ma and Yu (2007) also consider the right of price reduction as a right of formation (p. 690), and so does Professor H. P. Su (2011). Professor Su argues that in the case that one party has tendered nonconforming subject matter and the non-breach party has therefore suffered loss, "if the non-breach party is willing to take over the defective subject matter and demand price reduction, then it should be considered that the non-breach party has unilaterally modified the content of contract, and that it has made adjustment in light of the situation of performance." (p. 275)[②] The standpoint of G. X. Zhu (2012) is more or less the same: "Price reduction is actually a right that may change legal relationship or legal statues by one party's declaration of his intention." (p. 615)

Professor Cui (2006) suggested, in one place, that "observed from the perspective of compensating for the buyer's loss, it is acceptable to consider price reduction as a kind of damage compensation in most cases", whereas in another place he stated that:

> "It needs to be noted that the price reduction is realized on the ground of striking a balance between the value and the quality of the subject matter, and is therefore not subject to the rules of mitigation and of contributory negligence. Accordingly, it can be admitted together

① As to criticism opinion, see Cui (2012, pp. 96-98); as to one different opinion, see Du (2008, p. 51).
② It needs to be noted that Professor Su (2011) also considers that the breaching party's right to cure should have priority over the non-breach party's right to reduce the price (p. 276).

with liquidated damages, even if the agreement of liquidated damages basically aims at compensating for the loss." (p. 38)

In my opinion, if the price reduction can by itself compensate for the loss and be considered as a kind of damage compensation, then it is not proper to admit it together with the enforcement of liquidated damages that also aims at compensating for loss; on the other hand, if the price reduction is based on the idea of striking a balance between the value and the quality of the subject matter, then its nature should not be considered as a kind of damage compensation. Therefore, there seems to be some contradictions in the opinions of Professor Cui. Nevertheless, regarding the exercise of the right of price reduction, he explicitly agrees with the prevailing view: "The right of price reduction is not a right of claim, but a right of formation, and accordingly, not governed by the rule of limitation on action" (Cui et al., 2010, p. 198).

Although some scholars have not explicitly expressed their opinions over this issue, it is plausible to conclude that the formation right theory dominates Chinese scholarship on price reduction. Nevertheless, it needs to be reminded that the formation right theory is basically transposed from German law. However, there does not seem to have been any thorough analysis in China of the logic and structure of the right to price reduction in German law; accordingly, the differences between Chinese contract law and German obligation law seem to have been largely overlooked. In the next subsections, I would like to examine the special function and condition of price reduction in German law, and point out that this kind of function and condition cannot be found in the CCL. I conclude that the lack of such factors in the Chinese positive law is fatal for the logic of formation right theory of price reduction.

5.2.3 Function of and attitudes towards price reduction in comparative law

5.2.3.1 The logic of price reduction as a right of formation in German law

After the reform of German obligation law, BGB Article 441(1) provides that the buyer may, in lieu of termination, reduce the price by his declaration to the seller, regardless of the exception provided in the second sentence of BGB Article 323(5). This provision can be applied, *mutatis mutandis*, to other bilateral contracts which require delivery of subject matters.

According to this provision, the right of price reduction can be exercised by the buyer's declaration (*Erklärung*) to the seller. In Germany, few people questioned the structure of the right of price reduction (*Minderungsrecht*) as a right of formation (e.g., Brox & Walker, 2006, §4 Rn. 73; Medicus & Lorenz, 2010b, §78 Rn. 167). According to BGB Article 441(3), the price reduced should be equal to the difference between the value the subject matter should have (*Soll-Wert*) and the value it actually has (*Ist-Wert*), in other words, the difference between the value of an object with no defects and the value of one with a defect (Medicus & Lorenz, 2010b, §78 Rn. 164). The prevailing view on price reduction currently held by most Chinese scholars, i.e. the formation right theory, originates in these rules in German legal system.

However, the nature of price reduction as a "replacement of the remedy of termination" deserves more attention, as it has rarely been emphasized in the Chinese literature on this subject. BGB Article 441(1) states that: "price reduction is applied in lieu of termination (*anstelle des Rücktritts*)". Such a definition ultimately determines the conditions for the exercise of price reduction and justifies the formation right approach in German law.

Professors Dieter Medicus and Stephan Lorenz (2010b, §78 Rn. 166) point out that the rationale of the right of price reduction lies in the rules on termination, such as BGB Articles 437 nos.2, 323 and 326(5).[①] Regarding termination, the first paragraph of BGB Article 323 explicitly provides that where there is a bilateral contract, and the obligor did not tender the due performance or has provided a nonconforming tender, if the obligee has appointed a proper period for the obligor's tender or supplementary performance and this period has elapsed fruitlessly, the obligee may terminate the contract. The second paragraph then provides for the cases that do not require an appointed period. According to these provisions, the right of termination is normally subject to the appointment by the obligee of a proper period, during which the obligor is allowed to "cure" the nonconformity. A similar condition applies to the right of price reduction. The right of price reduction does not arise at the same time with the right to supplementary performance; on the contrary, it basically arises after the fruitless lapse of a proper period for supplementary performance (Brox & Walker, 2006, §4 Rn. 70). This should give the breaching party a reasonable opportunity to "cure" before the price is reduced. Unless the defects are minor, the conditions for exercising the right of price reduction are thus

① As to the similarity of the conditions of price reduction and termination, see also Looschelders (2007, §5 Rn. 117).

the same as the one for exercising the right to terminate the contract. This is, in my opinion, the crux of the matter when it comes to the logic of the formation right approach.

First, during the period for supplementary performance, the seller's interests in "cure" have been given a priority. Whether the supplementary performance can be fulfilled is basically controlled by the seller. If the period has fruitlessly elapsed, it should be deemed that the seller did not take the opportunity to fulfill his performance. In that case the buyer has very few choice except termination, price reduction, and damage compensation. Thus, if the buyer unilaterally reduces the price in lieu of termination, the balance of interests between contracting parties will not be negatively impacted. Second, in case the period for supplementary performance has fruitlessly elapsed, the buyer already has a unilateral right to terminate the contract (except if the defect is minor). If the buyer unilaterally reduces the price, the logic of this right can stand insofar as the price reduction is constructed as a remedy in lieu of termination. In short, only if the condition for exercising price reduction is based on the one for termination can the formation right approach keep its logic and not impact the balance of interests between contracting parties.

Next, I would like to discuss the difference between price reduction and a similar remedy in German law – damages in lieu of performance (*statt der Leistung*) – in order to reveal the special function of price reduction. The right to damages in lieu of performance basically arises at the same time as the right to terminate and to reduce the price. This type of damages is established by the new German obligation law and takes the place of its predecessor, damages due to nonperformance (*Schadensersatz wegen Nichterfüllung*) (Schermaier, 2007, §280-285, Rn. 101). There are two specific forms of damages in lieu of performance. One is the so-called "small compensation", which allows the obligee to keep the delivery and demand the difference in value (*Wertdifferenz*); the other is the so-called "big compensation", which means the obligee will return the delivery and demand the whole value (Medicus & Lorenz, 2010b, §78 Rn. 180). No matter which form of damages the obligee claims for, according to BGB Articles 276 and 280, the requirement of the obligor's fault (*Vertretenmüssen*) has to be fulfilled (Medicus & Lorenz, 2010a, §31 Rn. 356 ff). In other words, the obligor may defeat the obligee's claim for damages by successfully proving a lack of fault on his part. By contrast, there is no such requirement for price reduction. That is to say that if the obligee pursues price

reduction, the obligor cannot escape the consequences of price reduction by proving the absence of fault. This allows price reduction to protect the buyer's interests when damage compensation is unavailable. From this perspective, price reduction, as a useful remedy for defective subject matters, has an irreplaceable function in German legal system.

However, if damage compensation in the field of sales law was not based on the principle of fault and the conditions for exercising price reduction were not based on the one for termination, would it still be necessary, or even suitable, to construe price reduction as a formation right? We cannot give an affirmative answer by merely referring to German legal theory. At this point, it would be helpful to introduce the understanding of reducing the price in Anglo-American law, which does not rely on fault for establishing liability for nonconformity in sales law.

5.2.3.2 The understanding of reducing the price in Anglo-American law

The concept of price reduction is said to be unfamiliar to both the U.K. and the U.S. (Bridge, 2010, §12-093; Piché, 2003, p. 519). In the U.K., if a breach in quality is treated as breach of a warranty, which means the buyer would not reject the goods, then the primary remedy provided to the buyer would be damage compensation, and the foremost standard for determination of damages would be the diminution of the value of goods (Beale, 2008, §43-443). That is to say, the difference between (a) the value of the goods if they had complied with the undertaking, measured at the time and place of delivery, and (b) the actual value of the goods in their actual condition, at the same time and place of delivery; this kind of calculation is known as a "*prima facie*" measure (Beale, 2008, §43-443; Bridge, 2010, §17-051). As to consumer sales, the U.K. has, following the instruction of the EU Consumer Directive of 1999, introduced the remedy of price reduction for consumer buyers. However, according to SGA 1979 §48C, price reduction cannot be exercised by the buyer's declaration of his intention. On the contrary, it states: "(1) If section 48A above applies, the buyer may (a) require the seller to reduce the purchase price of the goods in question to the buyer by an appropriate amount". It is clear that the buyer cannot reduce the price unilaterally, but should instead require the seller to reduce the price. A British scholar points out that given the existence of the "*prima facie*" measure in damage compensation, it seems unlikely that the remedy of price reduction will be

of much value in U.K. law unless either the ruling price for the goods bought has dropped between sale and delivery, or the buyer has difficulty in proving damages (Bridge, 2010, §12-096).

U.S. law never introduced a remedy of price reduction for the buyer. Furthermore, Professor Albert H. Kritzer (1989), a famous disseminator of the CISG (Moser, 2012; DiMatteo, 2011), believes that there is no direct equivalent to price reduction in the UCC (p. 375). It seems that the closest counterpart is the remedy provided in Section 2-717 of the UCC, which allows the buyer to deduct all or part of his damages resulting from any breach of the contract from any part of the price still due; however, this remedy should be considered as the right to set off, but not confused with the right of price reduction (Piché, 2003, p. 557).

Under U.S. law, it is damage compensation that generally takes the place of price reduction. According to UCC §2-714 (1), where the buyer has accepted the goods and given notification in accordance with UCC §2-607(3), "he may recover as damages for any nonconformity of tender the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable". The most commonly applied formula for damages here is, as UCC §2-714(2) provides, to compensate the buyer the difference at the time of acceptance between "the value of the goods accepted and the value they would have had if they had been as warranted." (White & Summers, 2010, p. 516) However, when the buyer made a bad bargain, he may not get as much recovery by pursuing the manner provided in UCC §2-714(2) as by pursing §2-713 and §2-712 (White & Summers, 2009, p. 601).

The reason that damage compensation in Anglo-American law can basically replace price reduction is not only because the formulas are similar, but also because the manner in which liability for damages is established. In Anglo-American law, it is not necessary to prove fault on part of the seller when establishing the seller's liability for damages due to nonconforming goods (Watanabe, 2011, p. 941). Given these factors, price reduction appears rather unattractive to Anglo-American jurists (Farnsworth, 2004, pp. 204-207).

5.2.3.3 The compromise made by CISG Article 50

According to CISG Article 50, if the goods tendered by the seller do not conform with the

contract, then whether or not the price has already been paid, "the buyer may reduce the price in the same proportion as the value that the goods actually delivered had at the time of the delivery bears to the value that conforming goods would have had at that time". Price reduction has been recognized by many commentators as an independent remedy, originating from the system of "*actio quanti minoris*" in Roman law (Schlechtriem & Schwenzer, 2005, p. 596; Honnold & Flechtner, 2009, p. 309). Although some CISG specialists, like Professors Schlechtriem and Müller-Chen, believe that price reduction should be construed neither as damages nor as partial avoidance of the contract, but rather as adjustment of the contract, the UNCITRAL's Secretariat's Commentary takes a different standpoint, according to which price reduction has a similar effect to a partial avoidance of the contract (Schlechtriem & Schwenzer, 2005, p. 597). Some other scholars, like Bergsten and Miller, also believe that reduction of price can be justified "if it is seen as a partial avoidance of the contract" (Bergsten & Miller, 1979, p. 274).

Most provisions of the CISG are the result of a compromise between Anglo-American law and civil law, and Article 50 is a prime example thereof. Compared to earlier versions of the CISG, the time when the price should be calculated has changed from the time a contract is concluded, which is the same as in the BGB, to the one of delivery, which is close to the one when determining damage compensation in Anglo-American law (Honnold & Flechtner, 2009, p. 452). Moreover, the term "declare" used in earlier versions of Article 50 has also been deleted, to prevent special weight being placed onto it (Honnold & Flechtner, 2009, p. 452). By comparing some influential commentaries on the CISG, we can find significantly different views between German and U.S. scholars.

German scholars interpret the exercise of price reduction under the CISG as follows. First, price reduction is understood as a unilateral right of the buyer and can be exercised by a declaration that does not have to satisfy any formal requirements, while this declaration must be clear but need not be specific. Second, the right of price reduction is taken to be subject to "the resolutory condition of the offer of subsequent performance", and cannot be exercised "as long as a time period fixed by the buyer for the seller's supplementary performance is still running" (Schlechtriem & Schwenzer, 2005, pp. 598-599). Those constructions make up a German-style approach: on the one hand, price reduction can be realized by unilateral

declaration of the buyer, and therefore can be understood as a right of formation; on the other hand, the seller's supplementary performance or cure has a priority over the buyer's right to reduce the price, and this can be viewed as a transformation of basing the conditions of price reduction on the ones of termination.

The U.S. commentators, in contrast, focus on the relationship between price reduction and damage compensation and question the value of price reduction. Professors John O. Honnold and Harry M. Flechtner thoroughly examined in their commentary the main function of price reduction, that is to say to act as an instrument for balance of interests between the parties when the buyer cannot be compensated by damages, particularly when the seller is not liable for nonconformity. They argue that the scope of Article 50 is in fact quite narrow (Honnold & Flechtner, 2009, p. 447), and that the "genesis" of the price reduction device can only be appreciated from a historical perspective, i.e. "as a vestige of an important tool designed to cope with a traditional civil law doctrine (eroded but not abandoned) that a seller is liable for 'damages' caused by defective goods only when he is guilty of fault or fraud." (Honnold & Flechtner, 2009, p. 449) It appears that these U.S. scholars have correctly recognized the original justification of price reduction in Roman law and the fact that the CISG has adopted a unitary contractual approach and rejected the idea that the liability for damages should be conditioned on fault. Accordingly, from their point of view, the special mechanism of price reduction could be considered redundant, and there would be "little reason to retain this venerable legal tool" (Honnold & Flechtner, 2009, p. 449).

The different interpretations on CISG Article 50 reflect a divergence between German and Anglo-American law, and indicate that the function and conditions of exercise of price reduction can be construed in different ways. In my view, whether price reduction should be retained as an independent remedy for nonconformity depends mostly upon whether the liability for damages in sales law is based on fault; whether the right of price reduction can be construed as a right of formation depends mostly upon whether price reduction can be understood as partial termination and whether its conditions can be based on the ones of termination.

The issues we now have to address are: how is price reduction provided for and applied in Chinese law? Is there any ground for constructing a German-style price reduction in China? In

the next subsection, I would like to examine the historical development and the present situation of application of price reduction in Chinese law.

5.2.4 The historical development and present situation of price reduction in China

5.2.4.1 The historical development of price reduction

Rules related to price reduction can be traced back to as early as the Chinese Economic Contract Law of 1981 (expired, hereafter CECL). CECL Article 39 (Article 34 after amendment in 1993) provided for the liability of the contractor in contract for constructions:

> "If, due to the inferior quality of survey and design work or because survey and design documents are not submitted in time, the work period is prolonged and losses are caused thereby, the survey and design unit shall continue to complete the designs and shall reduce or forfeit its survey and design fees and shall even make compensation for the losses."

CECL Article 40 (Article 35 after amendment in 1993) provided for the liability of the contractor in contract for hired work. If the quality or quantity of work delivered to the ordering party does not conform to the prescriptions in the contract, it shall, without charge, undertake to make repairs or supplement the quantity or, in light of the circumstances, reduce remuneration. Chinese scholars argue that "reducing survey and design fees" and "reducing remuneration" are the earlier provisions related to the liability of price reduction in China (e.g., Han, 2008, p. 18).

Article 35 of the Regulation on Contracts for Sales of Industrial Products and Minerals in 1984 (expired) provided that if the products supplied by the supplier did not comply with the contract in terms of description, type, quality, and other similar characteristics, then in case the ordering party agreed to use the products, the price should be determined in light of their quality, and in case where the ordering party could not use those products, the supplier would be liable for their repair, replacement, or return. Similarly, Article 11 of the Regulations on Contracts for Work in 1985 (expired) provided that if the contractor used the materials provided by the ordering party, the contractor should select materials in accordance with the contract and accept the examination from the ordering party; if the contractor concealed defects in the materials or used materials in a way that did not comply with the contract and the quality

of work had therefore been impacted, then the ordering party would be entitled to require a remake, repair, price reduction, or return of goods. Besides, according to Article 11 of the Supreme People's Court's Judicial Interpretation on Disputes regarding Contracts for Construction Projects, which came into force in 2005, if the quality of construction project fails to comply with the agreement due to the fault of the contractor, and the contractor has refused to repair or reconstruct, the developer may require a price reduction.

We can observe that the CECL originally provided price reduction only for the ordering party who agreed to use the nonconforming work, but not for the buyer who received a nonconforming object. The Judicial Interpretation concerning Disputes regarding Contract for Construction confirms the remedy of price reduction for the developer who receives a nonconforming construction; as to the exercise of price reduction, it provides that the aggrieved party may require the breaching party to reduce the price, but cannot reduce the price by himself.

Regarding contract for sales, it is the Regulations on Contracts for Sales of Industrial Products and Minerals in 1984 that first gave the buyer who agreed to use nonconforming subject matter the right to require price reduction. To exercise the right of price reduction, the buyer had to require the seller to reduce the price, but could not reduce it by himself.

In 1999, price reduction became a general remedy stipulated in the general part of the CCL, and its special rules for sales contracts (CCL Art. 155) and for contract for hired work (CCL Art. 262) have no material differences with the general rule. None of these rules allows the aggrieved party to reduce the price by himself; on the contrary, it has been clearly stated that it is the breaching party that should reduce the price.

The following question is: how is price reduction normally exercised in judicial practice, and in which way has the function of it been realized?

5.2.4.2 The realization of price reduction in Chinese judicial practice

In January 2013, I investigated judicial decisions on price reduction in the database of *Beida Fabao*.[①] A search with the keyword "reduction of price or remuneration" yielded 117 relevant results, while one with the keyword "determining the price in light of the quality"

[①] http://vip.chinalawinfo.com/index.asp..

found 70. In the former case, the decisions basically related to CCL Article 111, while in the latter case most of the decisions were related to the provisions concerning price reduction in private agreements. Among these decisions I could find no drastic disputes concerning the remedy of price reduction; on the contrary, price reduction rarely seems to have been the focus of arguments.

In decisions which involved disputes concerning price reduction, quite a few involved the intervention of the court. In the decision of HuYiZhong MinEr (Min) ZhongZi No.2093 (2011), regarding the decoration of a counter in a department store, Corporation A demanded termination of contract, return of already paid remuneration, and liquidated damages for a nonconforming decoration project, while Corporation B counterclaimed for the unpaid remuneration and demanded liquidated damages for A's delay in payment. The district court confirmed the existence of quality problems, but found that, according to CCL Article 111 and in light of the specific circumstances of this case, it was reasonable to reduce the remuneration at a certain proportion of the original sum:

> "Given that the decoration is specially made for the counter, and a high standard has been required for such a counter in the department store, in light of the actual quality of decoration project, the remuneration should be reduced by 40,000 yuan."

In this case, it needs to be noted that neither the plaintiff nor the defendant had demanded a reduction of price, it was the court that actively intervened and reduced the price by a certain amount, based on CCL Article 111.

A similar situation occurred in the decision of WuZhong MinSiZhongZi No.322 (2010). In this case, the intermediate court of Urumqi confirmed quality problems in an apartment and found that, according to CCL Articles 107 and 111, the contractor should be liable for the breach:

> "Given that [the contractor] did not fulfill his obligation to fix the problem, and that the ordering party has reconstructed the roof by himself, there is no chance for the contractor to repair or reconstruct. Thus, the contractor should be liable for breach by way of price reduction…The court find that the remuneration for the project should be reduced to a half."

In this case, the court reduced the remuneration in light of the specific circumstances, despite neither of the parties having raised such a claim. This is another example related to active intervention of the court, in terms of price reduction.

In the decision of ShanMinEr ChuZi No.496 (2006), the court of Shanjia county, Zhejiang Province, found that the furniture made by Corporation A for Hotel B was not conforming with the contract, and therefore A was held liable for the breach. Nevertheless, those pieces of furniture were specially made in accordance with the requirements of Hotel B, notably in terms of standard, color, and form. Given that the furniture could still be used and that Hotel B had already used them for nearly two years, the court did not admit the claim of Hotel B for a full return. The court found that:

> "According to CCL Article 111, given the specific circumstances of this case, it is proper to determine the price in light of the quality. …The court has made an interpretation on this point, but Hotel B still insists on its claim and fails to reasonably choose a remedy for liability for breach. Thus, the court find against the counterclaim of Hotel B."

In this decision, the court firstly made an interpretation regarding Hotel B's choice of remedies and pointed out that the most reasonable remedy for Hotel B was price reduction. As Hotel B refused to change its claim, the court, unlike the preceding two, did not directly intervene in the legal relationship between contracting parties, but respected the autonomy of the litigating parties and finally overruled the unreasonable claim.

During the examination of various cases in the database, I have not found any in which price reduction is realized by declaration of one party's intention. In contrast, price reduction is often promoted by the court. And the approach of the court's intervention appears quite close to that suggested in CCL Article 54, and that in CCL Article 114.

According to CCL Article 54, if the contract was concluded on the basis of a substantial misunderstanding, or the contract was grossly unfair at the time of its conclusion, either of the parties may require the court or an arbitral tribunal to modify or revoke the contract; if one party induced the other party to enter into a contract against his true intention by fraud or duress, or by taking advantage of the other party's hardship, the aggrieved party is entitled to require the court or an arbitral tribunal to modify or revoke the contract. It can be observed that

in the cases where the contract is unfair or one contracting party's true intention has been interfered with by the other party's improper behavior, the aggrieved party or either party may require modification or revocation of contract with the help of the court or arbitral tribunal. On the other side, if one contracting party wants to modify the contract without the intervention of the court or arbitral tribunal, it is necessary for it to reach an agreement with the other party. In other words, even in case of significant unfairness, the aggrieved party may not unilaterally modify the contract, but should demand the intervention of legal authorities.

Similarly, the interference of a court or an arbitral tribunal is also necessary if one party intends to adjust the amount of liquidated damages. According to CCL Article 114(2), where the amount of liquidated damages excessively exceeds the loss resulting from the breach, a party may require the court or an arbitral tribunal to reduce the amount as appropriate. It can also be observed that the adjustment of liquidated damages should be determined by the court or arbitral tribunal. If either party intends to reduce the amount of liquidated damages as appropriate without the intervention of the court or an arbitral tribunal, this party cannot do so by unilateral declaration – it must find an agreement with the other party.

5.2.4.3 Inspiration from preceding examination

The historical development of price reduction in China demonstrates that this remedy was firstly applied in the area of contract for hired work, especially for construction projects, and then applied to sales contract. The idea of price reduction is to strike a balance of interests between contracting parties when the aggrieved party agreed to use a nonconforming subject matter. The system and idea of price reduction is by now rooted in Chinese legal practice and therefore cannot be simply treated as a copy of German rules. According to provisions concerning price reduction in earlier legislations, the aggrieved party should require the breaching party to reduce the price, but might not reduce the price by unilateral declaration of his intention.

It needs to be noted that, under the CECL, damage compensation was based on the fault (Han, 2011b, pp. 590-591), and therefore might, price reduction, as a special remedy which did not require fault, have an independent function in Chinese law as the one in German law. However, under the CCL of 1999, which has taken the place of the former CECL and other

specific contract laws, the principle of damage compensation in sales law has moved from fault-based liability to strict liability. Given the change of the law, the aggrieved party may now recover damages more easily. Therefore, the special function of price reduction has been removed, or at least eroded.

During the investigation of judicial decisions, I found that the intervention of the court has a significant weight in cases involving price reduction. This situation suggests that the approach of applying price reduction is in practice close to the application of contract modification under CCL Article 54 and adjustment of liquidated damages under CCL Article 114. The similarity of approaches adopted by these rules indicates the coherency of legal policy, which may treat all sorts of adjustment of the original agreement as special remedies that normally invite the intervention of judicial authorities if the parties cannot reach a separate agreement. Therefore, it is reasonable to question the soundness of the prevailing theory in Chinese scholarship on price reduction, which suggests the aggrieved party should be able to unilaterally reduce the price by declaration of its intention.

5.2.5 Response to the formation right theory and proposal for a new approach

5.2.5.1 Comment on the formation right theory

The prevailing theory is questionable in respect of legal policy and of the coherency of the remedy system.

First of all, if the right of price reduction in case of nonconformity is to be exercised by a unilateral declaration of the aggrieved party, then the conditions for triggering price reduction need to be based on the conditions of termination. In other words, price reduction should then only be exercised in circumstances where the right of termination could also be exercised, despite immaterial divergence in case of minor nonconformities.

It can be observed from comparative legal study that price reduction in German law is treated as a kind of replacement for termination, and the conditions for exercising this right are almost the same as the one for termination (with just a single exception provided in BGB Art. 441(1)). It makes sense to construe price reduction as a formation right under such circumstances, as the interests of the breaching party have been in some measure protected by

the high threshold for application. Indeed, since a formation right will force the counterparty to bear negative legal consequences without consideration of its intention, it must be protected by the law from the abuse of the other party's right (Medicus, 2006, p. 42). In the German legal system, as discussed in section 5.2.3, it is only if the seller did not seize the opportunity to provide supplementary performance that the buyer can unilaterally reduce the price. In such a case, the interests of the seller has already been considered and protected through an additional period fixed for supplementary performance and, therefore, unilateral price reduction will not unfairly impact the balance of interests.

However, price reduction has been constructed in a different way in Chinese contract law. According to CCL Article 111, if the liabilities for breach were not explicitly prescribed, and cannot be determined in accordance with CCL Article 61, the aggrieved party may, by reasonable selection in light of the nature of the subject matter and the degree of loss, require the other party to repair, replace, remake, accept the returned goods, or reduce the price or remuneration, etc. Obviously, there is no hierarchy among these remedies, no requirement to "exhaust prior remedies" before using the harsher ones. Under these circumstances, if price reduction were exercised as a formation right, the aggrieved party would be allowed to reduce the price as soon as it received a nonconforming tender. And the effect of price reduction would arise as soon as the declaration of intention arrives at the counter party. The breaching party has no balancing instruments available, and is therefore powerless before the change in the contractual relationship. Thus, on one hand, the breaching party has been deprived of an opportunity to cure, which amounts to a perhaps excessively harsh penalty, and, on the other hand, the buyer may be tempted to act opportunistically, for instance to compel the counterparty into making a further concession.

Professor Han (2008) argues that giving priority to the breaching party's right to cure should be the precondition to constructing price reduction as a right of formation. It has to be admitted that such a priority could to a large extent mitigate the negative consequences arising from the formation right approach. As a matter of fact, the approach of the priority of the right to cure is similar to the one of "exhaustion of prior remedies". As I have pointed out in the comparative legal study, the priority of cure was suggested by German scholars when interpreting CISG Article 50. Such an interpretation would not have been detrimental to the

application of the CISG, as the Convention has established rules regarding the seller's right to cure. In contrast, there is no seller's right to cure in Chinese positive law, and there is no way to "create" it by interpretation. Under the CCL, in the case of the nonconformity of subject matter, it is the buyer that can "reasonably choose" remedies among different measures. The seller has no instrument to balance its interests with the buyer, and will inevitably bear a heavy burden if it intends to prove the unreasonableness of buyer's selection of remedies. Although I agree that it is reasonable for the seller to be granted a right to cure, such system should be introduced by explicit legislation (see Chapter 4). It cannot be naturally interpreted out of the current dispositions of Chinese positive law. Given these considerations, and especially the lack of a right to cure, the formation right approach must be considered unsuitable for the Chinese legal system.

Some scholars may argue that it could be inferred from the legal requirement for the buyer to make a "reasonable choice" among remedies for nonconformity that there is some kind of hierarchy among these remedy measures. It is agreeable that when the buyer makes a choice among different remedy measures, the sequence of these measures cannot be totally denied. In particular, repair, replacement, and remaking should have priority over return of the subject matter. However, the limitation of interpretation is: when the buyer chooses to return the subject matter in case of a nonconformity that is not serious in nature, the court may take into account the seller's interests in cure when interpreting the "reasonableness" of the buyer's choice, and then consider the buyer's choice to be unreasonable, as it did in the decision of Shan MinEr ChuZi No.496 (2006). However, this reasoning cannot go as far as to establish a rigid hierarchy among every single remedy right. In other words, this interpretative theory can merely deal with grossly unfair situations when the seller chooses return of goods because of some insignificant nonconformity. It can hardly establish a strict "priority rank" for *price reduction* vis-à-vis most other remedies. We can indeed easily imagine that the court would find a return of the goods unreasonable if the nonconformity does not frustrate the purpose of contract. However, if in the same case the buyer pursued price reduction, it would not be so easy for the court to deny the reasonableness of the buyer's choice, because price reduction does not seem as harsh to the seller as termination.

Moreover, it has been suggested that price reduction should be built upon the concept of

modification of contract (e.g., Han, 2008, p. 21). In my opinion, this argument would conflict with the logic of the formation right approach because it will bring more incoherencies to the system. According to CCL Article 8(1), contracts are legally binding on the parties; the parties shall perform their respective duties in accordance with the agreement and may not unilaterally modify or terminate the contract. According to CCL Article 77(1), a contract may be modified if the parties reach a consensus through consultation. Under the CCL, only in two cases does modification not need consensus of contracting parties. One is modification under CCL Article 54; the other is adjustment of liquidated damages under CCL Article 114. In either case, the modification of contract can be realized only with the intervention of a court or an arbitral tribunal. The modification cannot occur by unilateral declaration of one party's intention. Evidently, if price reduction were interpreted as a kind of contract modification, it should not be exercised by unilateral declaration of one contracual party, as this would run counter to the idea and principle of contract modification, undermining the consistency of legislative policy and the coherency of the legal system.

If price reduction were construed as a standalone device dependent upon the consensus of contract parties, it would be easier to maintain the balance of interests between the parties and the logic of the remedy system. Based on the above analysis of decisions in China, it can be observed that the courts tend to prevent unilateral price reductions, preferring to intervene between themselves to determine the amount of the reduction. This approach is consistent with the interpretation of price reduction as a form of contract modification. Next, I would like to compare different approaches for interpreting price reduction.

5.2.5.2 New approaches for interpreting price reduction

There are three possible approaches to construct the device of price reduction:

The first one is to adopt German-style price reduction. This approach will treat price reduction as a partial termination. This means the conditions for exercising the right of price reduction would be based on the ones for termination of the contract.

The second one is to merge the device of price reduction into that of damage compensation. This approach can be adopted if the liability for damages in sales law is not based on fault. Price reduction can then be constructed as a kind of formula for determining

damages. Under this approach, when the seller is not liable for nonconformity, the imbalance of interests between the parties should be addressed through other devices, such as that of unjust enrichment.

The third one is to reconstruct price reduction as a kind of contract adjustment. This would mean that, on one hand, the remedy of price reduction is independent from that of damage compensation and, on the other hand, the justification for price reduction is not partial termination, but contract adjustment. Under this approach, price reduction should not be exercised through unilateral declaration of one party's intention, but through consensus. The buyer would then be able to require the seller to make an offer on price reduction or to accept such offer raised by the buyer.

From the standpoint of making proposals for legislative reform, each of the above approaches has their own pros and cons. If, as I argued in Chapter 4, the seller's right to cure can be successfully introduced into a future "Chinese Civil Code", the formation right approach may be an option, although not necessarily. For interpreting the positive Chinese law, I would like to advocate the third approach, that of interpreting the exercise of price reduction as a form of contract adjustment.

First and foremost, the contract adjustment approach is the most consistent one with the present positive law. It maintains both the special function of price reduction in Chinese law and the coherency of the remedy system. As I discussed above, the first approach – the formation rights approach – cannot be interpreted into the current positive law, because Chinese law does not make the exercise of price dependent upon the "exhaustion of prior remedies" or the "priority of the right to cure". Since these key justifications for the formation right approach cannot be interpreted into the positive law, this approach must be vulnerable. The second approach – merging price reduction with damage compensation – would be attractive were it not for the fact that present positive law provides for price reduction independently from damage compensation. If we totally abandoned price reduction as an independent remedy, we would lose a convenient device for interests balance in cases where the seller escapes damage compensation for nonconformity. The third approach – contract adjustment – is preferable because, on the one hand, it recognizes the price reduction as an independent remedy coexisting with damage compensation and, on the other hand,

constructing price reduction as a contract modification, as opposed to a partial termination, may prevent imbalance of interests and incoherencies in remedy system.

Second, the contract adjustment approach may promote certainty in judicial practice and be suitable to the reality of commercial transactions. I have shown that price reduction has not caused serious dispute in present judicial practice and as they say, "if it ain't broke, don't fix it". If the current flexibility of the price reduction device allows it to operate so smoothly, there seems to be little reason to impose stricter conditions and a more rigid process on it. Besides, in most cases, it is the seller who is in the best position to know the price of the nonconforming goods, as the seller is likely to be better informed on the value of the goods. Therefore, it is usually more commercially practicable for the buyer to require the seller to reduce the price for him rather than to reduce the price by himself. As to the specific process of exercising price reduction, the buyer should be entitled to require the seller to make an offer to reduce the price, if the seller provides an appropriate offer of reduction, then the dispute would be settled by an agreement of the contracting parties. Otherwise, the intervention of a court or an arbitral institution would be necessary.

5.2.6 Conclusion of this section

According to the prevailing view in China, price reduction can be exercised by unilateral declaration of the aggrieved party. This point of view, which has been borrowed from the dominant German law theory, has neglected great differences between the Chinese and German legal systems. Contrarily to what is the case in German law, damage compensation is not based on fault under the Chinese law on sales contract, meaning that the special function of price reduction is limited. Meanwhile, Chinese law also differs from German law in that the exercise of price reduction is not based on the strict conditions of the right to termination. Since there are no requirements in Chinese law to exhaust prior remedies or to give priority to a hypothetical seller's right to cure, an interpretation of the right to price reduction as a formation right would lead to an imbalance in the interests of the parties, and should therefore be abandoned. To make price reduction more acceptable in legal practice, it is necessary to make it depend on the agreement of contracting parties or the leading role of judicial authorities. It is preferable to interpret the right to price reduction in Chinese law as a right to *require* price

reduction from the seller, i.e. a right to require a modification of the contract. This approach will better maintain the balance of interests between contracting parties, address the reality of commercial transactions, and preserve the coherency of the remedy system.

Chapter 6 Relationship among the Inspection Period, Notification Period, and Guarantee Period for Quality

If the buyer intends to pursue remedies for nonconformity in quality or quantity, he must notify the seller of such nonconformity within a contractual agreed inspection period, or, in the absence of such agreed period, within a reasonable period after he discovered or should have discovered the nonconformity; otherwise the subject matter will be deemed as conforming to the contract. This is the so-called "notice rule", provided in Articles 157 and 158 of the Chinese Contract Law (CCL). The current mainstream academic research on this rule is concentrated on the legal consequences of the fruitless lapse of those periods, and the debate focuses on whether those periods should be considered as a special prescription or extinction period (*Ausschlussfristen*).[①] However, the duty to inspect the subject matter and to notify any nonconformity should be special device concerned with commercial transactions. They do not aim at generally promoting the stability of legal relationship, which is the main purpose of prescription. Accordingly, it may not be suitable to define the notification period in the CCL as a special prescription in the sense of BGB Article 438, or of an extinction period in the sense of JCC Article 566(3).[②]

On the other hand, there are other related issues as to the application of the notice rule that have been examined only by a few judicial practitioners (e.g., Mao & Cai, 2004, p. 31; Sun, 2011, p. 82), and even less legal scholars.[③] One of the most important issues is the relationship among the inspection period, the notification period, and the guarantee period for quality. Some researchers basically consider that the characteristics of these three periods are essentially the same, namely, all of them are one period for complaint of nonconformity in the subject matter (Mao & Cai, 2004, pp. 31-35), some others concur, finding it unnecessary to distinguish between the inspection period and the notification period (e.g., Y. Li, 2011, p. 117).

[①] As to the view in favor of extinction period, see Liang (1991, p. 29); as to the standpoint in favor of special prescription, see Y. Wang (2001, p. 109).
[②] The debate in China has been influenced by the debate over the nature of the right to demand damages and to terminate the contract provided in Article 566 of Japanese Civil Code (Shiomi, 2010, p. 91).
[③] In recent years there have been a few articles introducing related experiences in foreign legal systems (Chen & Li, 2011, p. 96; J. G. Wang, 2011, p. 52).

The current researches are unsatisfactory. Generally speaking, first, the design of combining the inspection period and the notification period as one period under the CCL is rather rare from a comparative legal perspective. If the notification period is merged into the inspection period, an unjust consequence might be imposed on the buyer. Second, the guarantee period for quality under Article 158 of the CCL is different from the contractual guarantee period in the CISG, even though the latter has heavily influenced the drafting of the former. If the guarantee period for quality, which normally aims at protecting consumers and end users, is simply treated as the longest period for giving notice, it could also cause confusions and unjust consequences.

In the Supreme People's Judicial Interpretation on the Law of Sales Contract of 2012 (hereafter JILSC), there are as many as 6 articles that dealt with the problems in the areas of inspection period and notification period. However, neither of the preceding problems mentioned above has been settled. For improving the system of conformity of the subject matter, it is necessary to examine: (a) the consequences caused by the CCL's combination design of the inspection period and the notification period, and (b) the legal effects of the agreed inspection period and of the guarantee period for quality. In this chapter, I will first conduct a comparative legal study to demonstrate the distinction between the inspection period and the notification period in foreign legal systems, and then point out the combination design of those two periods under the CCL. Next, I will analyze the legal effects of the agreed inspection period and of the guarantee period for quality and describe the problem of "double interference" with the time limit for giving notice. Finally I would like to provide new solutions to address the harsh consequences due to the combination design, and the conflicting application problems due to "double interference" issue.

6.1 Distinction between inspection period and notification period in foreign legal systems

In many foreign legal systems, the period for inspection and the one for notification cannot be, in principle, combined as one period, and the requirements for them can be different.

6.1.1 Inspection after delivery and notification after appearance of defects in German law

The duty to inspect the subject matter and to notify of defects cannot be found in Articles 434, 435 and 438 of the BGB, which merely stipulate the prescription for actions (Lettl, 2011, p. 266). These duties only exist in the case of commercial sales. According to Article 377(1) of the German Commercial Code (HGB), if the sale is bilateral mercantile, the buyer shall inspect the subject matter promptly (*unverzüglich*) after the seller tendered delivery, in light of the practicability in the ordinary course of business, and notify the seller promptly as soon as the defect appears. According to Article 377(2) and (3), if the buyer fails to notify the seller of the defect promptly, the subject matter will be deemed to be approved (*genehmigt*) (Boujong, Ebenroth, & Joost, 2001, p. 474). These rules, as Professor Canaris (2006) has emphasized, aim to protect the seller (p. 437). If the buyer delays in giving notice, the legal effect is a fiction of approval (*Genehmigungsfiktion*), and the buyer will lose all remedies based on defects, including requiring supplementary performance, termination of contract, price reduction, and refund of fees provided in BGB Article 478(2) (Canaris, 2006, p. 448).

The duty to inspect and to notify established in HGB Article 377 can, from the courts' view, promote rapid settlement and the stability of legal relationship, protect the seller from repeatedly complaining about the defects, and promote the seller's supplementary performance. Hence, this system is considered to be specifically beneficial in enhancing the efficiency in commercial transactions (Boujong et al., 2001, p. 478), and therefore differs from the rules on prescription under BGB Article 438. In my view, it is HGB Article 377, but not BGB Article 438, that is the comparable rule with CCL Articles 157 and 158.

Under German commercial law, although the time requirements for inspection and for notification are both "promptness", they are not combined as one general phase. The inspection period is followed with the seller's tender of delivery, while the notification period starts to run as soon as the defects appear. This distinction may be of little value when the defects can be easily discovered when inspecting, but if the defects are latent and cannot be discovered until a considerable period elapses, such a distinction becomes very important, because in such a case, the notification is required only after the latent defect appears (HGB Art. 377(2)). This kind of

design demonstrates that the period for inspection and the one for notification should be, in principle, distinctive and separated. In judicial practice, the judges usually consider the time for inspection and the one for notification separately (Boujong et al., 2001, §377 Rn. 73).

6.1.2 Inspection before acceptance and notification after it in U.S. law

The rule concerning the notice of breach applied in the majority of the United States is stipulated in Section 2-607(3)(a) UCC, according to which once a tender has been accepted, the buyer must notify the seller of the breach within a reasonable time after he discovered or should have discovered such a breach, otherwise he will be barred from all remedies (ALI & NCCUSL, 2010, p. 2204). Compared with HGB Article 377, there are two characteristics of the UCC's notice rule. First, the scope of its application is not limited to *defects*, but has expanded to *any breach*, although in the case of delay in performance, the recent trend reflected in judicial practice is that the seller's actual knowledge constitutes a sufficient ground to exclude the buyer's duty to notify (White & Summers, pp. 654-655). Second, the time requirement for notification is *within a reasonable time*, but not *promptness*, and its connection with good faith is emphasized in the official comment on Section 2-607 of the UCC, according to which, the purpose of the notice rule is to defeat bad faith in commercial transactions, but not to exclude the remedies of a good faith consumer (ALI & NCCUSL, 2010, p. 2205).

It is important to note the content and function of acceptance of goods in the UCC. Generally speaking, acceptance of goods under the UCC may not only justify the seller's right to demand price (ALI & NCCUSL, 2010, p. 2204), but also indicate, after having a reasonable opportunity to inspect the goods, a confirmation that the goods do conform with contractual requirements or, in the case of nonconformity, a confirmation that the buyer will retain the goods despite the nonconformity (UCC §2-606(1)) (ALI & NCCUSL, 2010, p. 2203). Hence, the acceptance of goods does not mean taking the physical delivery of goods, but indicates certain approval of the conditions of such goods. Before the acceptance, there should be a reasonable opportunity for the buyer to inspect; after the acceptance, there should be a reasonable time for him to give notice. Evidently, inspection and notification are generally divided into two stages, instead of combined as one phase.

6.1.3 Distinction between examination and notification periods under the CISG

During the drafting of the CISG, the notice rule became one of the most disputable issues and was fiercely debated between developing countries and industrialized countries (Schwenzer, 2007, pp. 107-109). The requirement for giving notice was changed from original "promptness" to "within a reasonable time" (Schwenzer, 2007, p. 109). According to the first paragraph of CISG Article 39, the buyer shall notify the seller of any nonconformity after he has discovered or should have discovered such nonconformity and shall specify the nature of it, otherwise all remedies relied on such nonconformity cannot be admitted. Moreover, a new article -Article 44- was created: if the buyer has a reasonable excuse for his failure to give the required notice, he may reduce the price in accordance or claim damages, except for loss of profit. It has been argued that the notice rule under the CISG is closer to those legal systems in which there is a duty to give notice within a reasonable period (Schwenzer, 2007, p. 109).

Differing from the requirement for giving notice under CISG Article 39, Article 38 of the CISG requires the examination to be undertaken within *as short a period as is practicable in the circumstances* (CISG Art. 38(1)); however, "if the contract involves carriage of the goods, examination may be deferred until after the goods have arrived at their destination" (CISG Art. 38(2)). Articles 38 and 39 of the CISG have separated the time period for examination and for notification, making them with different starting points and time requirements. As the CISG Advisory Council (2004) stated in the second opinion:

> "[U]nless the lack of conformity was evident without examination of the goods, the total amount of time available to give notice after delivery of the goods consists of two separate periods, the period for examination of the goods under Article 38 and the period for giving notice under Article 39. The Convention requires these two periods to be distinguished and kept separate, even when the facts of the case would permit them to be combined into a single period for giving notice."

The view that the period for examination and the one for notification should be distinguished and separated under the CISG has also been supported by judicial practice. In a prominent decision made by the German Supreme Court in 1999, which involved nonconformity in a grinding device used for paper-making, the court assumed three weeks was

sufficient for examination; after the three weeks, there were four additional weeks for the buyer to decide to and actually give notice.[①] In other words, the buyer had three weeks to accomplish the examination and four weeks to give notice. In this case, the judge regarded four weeks to give notice as "regelmässig", namely, "regular" or "normal" (Schwenzer, 2007, p. 103; Boujong et al., 2001, p. 494).

6.2 The combination design in the CCL and its consequences

6.2.1 The merger between the notification period and the inspection one in the CCL

The legislation in China differs from those introduced in the preceding section. According to CCL Article 157, the buyer shall inspect the subject matter within a contractual agreed inspection period; if there lacks such an agreed inspection period, he shall inspect promptly. This article establishes a duty for the buyer to inspect the subject matter and confirms promptness as the general requirement for inspection. On the other hand, the first sentence of Article 158(1) stipulates that if the contracting parties have agreed on an inspection period, the buyer shall also notify the seller of any nonconformity in quality or quantity within such inspection period. This provision then expands the duties that the buyer needs to fulfill within the agreed inspection period from "inspection" to "inspection and notification". The first sentence of Article 158(2), however, provides that in the absence of an agreed inspection period, the buyer shall notify the seller of any nonconformity within a reasonable period after he discovered or should have discovered it. Therefore, according to Article 158(2), the general requirement for notification is not promptness, but rather a period with a reasonable length.

Consequently, a contradictory situation arises: on the one hand, the CCL generally requires inspection to be undertaken promptly (CCL Art. 157) and notification should also be accomplished within an agreed inspection period (sentence 1 of CCL Art. 158(1)). Therefore, if the contracting parties have followed the instruction of Article 157 and agreed on a short period for inspection, the buyer may discover later that he must notify of the nonconformity immediately after he discovered it, otherwise he might fail to meet the requirement of notifying

[①] As to the detail of this case, see http://cisgw3.law.pace.edu/cases/950308g3.html#ctoc.

within that agreed inspection period. On the other hand, the second sentence of Article 158(1) provides that the notification should be given *within a reasonable period of time* after the buyer discovered or should have discovered the nonconformity in the absence of an agreed inspection period. Hence, the fact that the buyer has to notify immediately after he discovered the nonconformity if they agreed on an inspection period is obviously inconsistent with the general time requirement on notification. It is unconvincing to impose different requirements on the time for notification in light of whether or not there is an agreed inspection period, particularly considering that the agreed inspection period may only be intended to affect the buyer's behavior of inspection, but not notification.

In the next part, I would like to introduce a case that can reflect the unjust consequence arising from the combination design.

6.2.2 Consequences of the combination design

In the decision of LiuShiMin ErZhongZi No. 106 (2010),[①] the facts of the case are of the following: the contracting parties have agreed on an inspection period of 7 days in a sale of steel pipe. Between August 16th and 19th 2008, the seller delivered several types of steel pipes to the buyer. On October 8th 2008, the buyer notified the seller of inner cracks in one type of the steel pipes. On December 30th 2008, the contracting parties reached an agreement, in which the seller admitted the problem in the material quality and agreed to accept the return of unused steel pipes. On February 20th 2009, the buyer informed the seller of inner cracks in another type of steel pipes, and 3 days later, an employee of the seller confirmed the cracks by examining related pipes at the scene.

The first instance court found that, according to the contractual agreement, any nonconformity in "appearance, types, categories, material quality, weight etc." should be notified within 7 days after the delivery, thus, "7 days after delivery" should be the agreed inspection period in this case. According to Articles 157 and 158 of the CCL, given the complaint of quality was not raised until October 8th 2008, by when it had already exceeded the time limit, the steel pipes tendered by the seller should be deemed to be conforming with the contract, and therefore, the seller was not in breach of contract. As to the agreement achieved

[①] Cases and judicial decisions referred to in this chapter were found in the database of *Beida Fabao*, See http://vip.chinalawinfo.com/index.asp.

between contracting parties regarding the return of unused pipes, because there was no breach at all, the freight cost arising from the return of goods should be borne by the buyer.

The buyer appealed to the second instance court and argued that the contracting parties only made consensus on inspection period for ostensible quality, but not for cracks within the pipes, therefore, the complaint raised did not exceed the "reasonable period" that is provided in Article 158(2) of the CCL. In other words, the buyer argued that the agreed 7 days period was related to quality conditions that could be observed from the exterior. The second instance court did not decide whether the complaint raised on October 8th 2008 was within a reasonable period, but found that since the cracks belonged to the material quality problems and the complaint about this problem raised in February 2009 was 6 months after the delivery, it should be considered that the complaint had exceeded the time limit. Finally, the second instance court dismissed the appeal and confirmed the findings of the first instance court.

I would like to argue that this decision should be reconsidered. In as short as 7 days after taking delivery, it might be practicable to conduct a thorough examination on types, weights, and other nonconformities in appearance, but is hardly reasonable for discovering inner cracks in various types of steel pipes. In other words, a 7-day inspection period should not, from a commercial practicability's perspective, be considered as fair and appropriate. Even if it might be considered as being sufficient for a reasonable opportunity to inspect, it was still unreasonable for giving notice, as the behavior of notification had been compressed to a highly short phase, i.e., *immediately* after the discovery of nonconformity, with no time to consider and seek consultation at all. Moreover, after the buyer notified the seller of the first nonconformity on October 8th 2008, the seller did not insist on the effect of the 7-day time limit, but reached an agreement with the buyer in December 2008, to accept the return of the unused pipes. In other words, the seller had confirmed the nonconformity and was cooperative with the settlement of the dispute. Considering this fact, in light of the principle of good faith, it is unreasonable to support the seller's argument concerning the buyer's delay in notification made on October 8th 2008. However, the courts of two instances ignored both the commercial practicability related to 7 days and the reasonable time required for notification, and failed to response to the contradicting behavior exhibited by the seller, which was arguably against the principle of good faith. On the contrary, relying merely on the disputable agreed inspection

period and the letter of the law, the courts denied all remedies of the buyer for nonconformity. In summary, what we can discover is a harsh unjust consequence borne by the buyer who had no significant fault other than insignificant delay (at least for the first notification) in notification, and an unjust enrichment gained by the seller who was even prepared to redress the nonconformities.

After the inspection period merges with the notification period, even if the contracting parties have a fair agreement on the time limit for inspection in light of the commercial practicability, the buyer may discover later that, during the period which he merely intends to complete the behavior of inspection, he must also undertake notification, and a slight hesitation in giving notice would bar all remedies under the CCL. On the other hand, a seller who tendered an unsatisfactory subject matter may receive a "double protection" from the CCL and escape any liability arising from the nonconformity as long as he bargained for a short inspection period. In a word, the combination design in Articles 157 and 158 of the CCL may lead to the following consequences: set an unexpected "trap" for the buyer, and grant unjust enrichment to the seller.

6.3 A single agreed time limit under the CISG

The harsh consequence caused by merging the notification period into the inspection period can also be examined from another aspect, which is, the inspection period functions as the longest time limit, and therefore conflicts with the guarantee period for quality. In this section and the next one, I would like to introduce the guarantee period in the CISG and the CCL, and argue the conflict between guarantee period for quality and agreed inspection period in the CCL.

CISG Article 39 provides that the buyer will lose his rights to rely on nonconformity of the goods if he does not give notice to the seller specifying the nature of the nonconformity within a reasonable time after he has discovered or ought to have discovered it. To restrict the possible length of a reasonable period, it is provided that in any event the buyer loses the right to rely on nonconformity if he does not give notice "at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless this time limit is inconsistent with a contractual period of guarantee" (CISG Art. 39). The two-year period is

the longest time limit, which is absolute and therefore will not be suspended or interrupted (Schlechtriem & Schwenzer, 2005, p. 471). However, this time limit will not apply if it is inconsistent with "a contractual period of guarantee". More precisely, the time limit may be shortened or extended by an agreed contractual period of guarantee (Schlechtriem & Schwenzer, 2005, p. 471). As to the content of an agreed contractual period of guarantee, it is not necessarily connected with a guarantee for the maintenance of the subject matter's quality or a similar condition. From a functional perspective, insofar as the intention of the contracting parties include using this period to restrict the time limit, then such a period should be regarded as a "contractual period of guarantee". For example, the contracting parties agreed that only when the buyer gave notice of nonconformity within 90 days after taking the delivery, then the seller would be liable for such alleged nonconformity. In this situation, the 90-day period should be regarded as a contractual period of guarantee, and function as the longest time limit (Schlechtriem & Schwenzer, 2005, pp. 471-472). It needs to be noted that this 90-day guarantee period merely refers to "guarantee of being responsible for" any nonconformity in the subject matter, but not necessarily to a guarantee concerning the maintenance of the subject matter's quality. On the contrary, the maintenance of the quality may be either longer or shorter than 90 days.

The inspection period, according to Article 38 of the CISG, should be a period "as short as possible" in light of specific circumstances. As to "agreed inspection period", the CISG does not address this issue, because a breach of such agreed inspection period, if not leading to a delay in giving notice, will not bring about any consequence to either of contracting parties (CISG Advisory Council, 2004; Flechtner, 2008). In contrast, if the notice is given after a contractual period of guarantee, the notice will therefore exceed the time limit and consequently all of the buyer's remedies will be precluded. Hence, it is the contractual period of guarantee under the CISG that may take the place of the two-year time limit and have a significant impact on the legal relationship of contracting parties.

Under the CISG, since the agreed contractual period is clearly provided as a replacement of the two-year time limit, it will normally not be very short and consequently prevent the application of the reasonable period rule. According to Professors Schlechtriem and Schwenzer's (2005) commentary on the CISG, even if there is an agreed contractual period of

guarantee, the buyer should still give notice of nonconformity within a reasonable period after he knew or ought to be aware of such nonconformity; in the absence of a contrary agreement, Article 39(1) should be presumed to apply (p. 472). For example, if the seller guaranteed in a contract that only if the buyer gives notice of nonconformity within one year after the delivery, will the seller be responsible. This does not mean that in case the buyer discovered a lack of conformity 7 days after delivery, he could wait until the end of the contractual period of guarantee to give notice of nonconformity. On the contrary, in the absence of a contrary agreement, the duty to give notice within a reasonable period should still bind the buyer in the case of commercial transactions.[①]

6.4 The "double interference" with the time limit in the CCL and its consequences

Under the CCL, given the agreed inspection period merges with the notification period and is usually very short, it can prevent the application of the reasonable period rule. Furthermore, as it can function as the time limit, there will be conflict between it and the guarantee period for quality, which can also affect the time limit for notification. I call the problem of the latter as "double interference" with the time limit. In this section I would like to show the confusing applications in judicial practice due to this problem.

6.4.1 The first "interference": agreed inspection period

In Chinese judicial practice, the agreed inspection periods are normally rather short. In some cases, the agreed inspection periods are at the same time of tendering delivery or within 24 hours after delivery;[②] in some cases, the agreed inspection periods range from two to five days;[③] One of the most common types of agreed inspection period is one-week period.[④]

① The situation is different for consumer sales, see §6.5 of this chapter.

② For example, in Hu Yizhong Minsi (Shang) Zhongzi No.1709 (2010) decision, the first intermediate court of Shanghai city confirmed the agreement as to "inspect and accept at the time of taking delivery" to be enforceable, even to the latent quality problems; in Hu Erzhong Minsi (Shang) Zhongzi No. 301 (2007) decision, the second intermediate court of Shanghai city confirmed the agreement as to "inspect and accept on the spot" to be effective, even to the quality conditions inside of the subject matter.

③ For example, the intermediate court of Guangzhou city confirmed 5 days printed on the delivery bill as the agreed inspection period for bobbin in Sui Zhongfa Miner Zhongzi No. 795 (2006) decision, and confirmed 3 days as the agreed inspection period for cloth in Sui Zhongfa Miner Zhongzi No.2194 (2009) decision.

④ For example, in Nan Shi Miner Zhongzi No.190 (2011) decision, 7 days applied to chemical fertilizer; in Shen Zhongfa Miner Zhongzi No. 206 (2011) decision, 7 days admitted to silicone rubber; in Zhe Jiashang Zhongzi No. 427 (2009) decision,

Certainly, there are also a few cases involved inspection periods of longer than one month.[①]

I discover that an agreed inspection period of no more than one week is rather normal in Chinese judicial practice, and many of those cases related to industrial materials. These short periods lack sufficient reasons for being enforceable for two reasons. First, various nonconformities cannot be discovered within one week. Second, the quality of many industrial materials is normally uneasy to change, and thus it is inappropriate to confirm such short inspection period even considering the need of preserving evidence. Furthermore, given the notification period is merged into the inspection period, such a short agreed inspection period will not allow enough time for notification.

As a matter of fact, the problem is more extensive. As discussed in the preceding part, the two-year time limit under the CISG is used to restrict the length of a reasonable period, but an agreed contractual period of guarantee will have priority over the two-year period. In the CCL, the agreed inspection period generally means the buyer will also have to give notice within such a period, and thus it actually plays a role as the contractual period of guarantee in the CISG, to be the longest time limit. Accordingly, the agreed inspection period should be considered as an absolute period and will not be suspended or interrupted.

6.4.2 The second "interference": guarantee period for quality

According to the second sentence of Article 158(2) of the CCL, if the buyer fails to notify the seller of any nonconformity within a reasonable period or fails to notify within two years after he received the subject matter, the quality and quantity of the subject matter is deemed to be conforming to the contract. However, if there is a guarantee period for quality, it will prioritize the time limit of the two-year. An evidential difference between CISG Article 39 and CCL Article 158 is that the latter uses "guarantee period for quality" rather than "contractual period of guarantee" (Kröll, et al., 2011, p. 594). Thus, the meaning has clearly changed: the "guarantee period for quality" does not refer to the longest guarantee period any more, but refer to the guarantee periods that are normally provided by various government departments in

7 days for kirsite; in Fo Zhongfa Miner Zhongzi No. 220 (2005) decision, 7 days for laminating glue and methylbenzene; in Zhe Yong Shang Zhongzi No.331 (2009) decision, 7 days for numerical control machine; and in Yong Yin Shang Chuzi No.127 (2011) decision, notification after 25 days was considered to be too long, as the agreed period for stainless steel materials was 7 days.

① For example, 30 days was admitted for wool yarn in Hu Yizhong Minsi (Shang) Zhongzi No. 782 (2005) decision; and two-month period for water pump was admitted in Yi Zhong Min Zhongzi No. 5023 (2009) decision.

China, aiming at protecting consumers or end users[①] from inferior products. Furthermore, the guarantee period is not identical to "the longest period", but can only *interfere with* the time limit.

The typical guarantee periods for quality are the consumption of food,[②] medicine,[③] and durable consumer products.[④] These periods are associated to the safe or effective periods for consumption, but do not establish a duty for the buyer to "notify within such a period". Under these circumstances, it is necessary to ask when the buyer should give notice, before the last day of the consumption period or may within a reasonable period even after the last day of the consumption.

When commenting on related rules in the CISG, the prevailing opinion is that if a guarantee is merely related to "specific features of the goods or their fitness for an ordinary or a particular purpose for a certain period of time, and the giving of notice is not regulated in more detail," the buyer should be entitled to give notice even after the end of the guarantee period (e.g., Schlechtriem & Schwenzer, 2005, p. 472; Honnold & Flechtner, 2009, p. 374). In other words, the guarantee period, which is related to the maintenance of certain features of the goods, does not usually include such consensus of contracting parties: the notice must be given before the lapse of the guarantee period. Hence, an agreement that contains a one-year utilization for a piece of goods does not mean that the buyer may not give notice within a reasonable period after the end of the utilization period, but merely means that the quality of the goods is still under guarantee even on the last day of the utilization period (Schlechtriem & Schwenzer, 2005, p. 472). It can be easily understood: the time limit should be longer than the period for utilization; otherwise the quality problems occurred on the last day of utilization cannot be remedied.

Although the guarantee period for quality cannot be treated as the time limit, it may interfere with the latter. More precisely, it may extend or shorten the time limit. For example, if the consumption of one subject matter is one year, the buyer may give notice within a

① Among them, there are farmers using farming machinery products. See Provisions on Liability for Repair, Replacement and Return of Farming Machinery Products issued in March 1998 and amended in March 2010.
② See Article 99 of Food Safety Law of the People's Republic of China.
③ See Article 49 of Drug Administration Law of the People's Republic of China.
④ The related rules can be traced back to regulations on "san bao" (repair, replacement and return) related to certain domestic household electric products in the 1980s and the latest one is Provisions on Liability for Repair, Replacement and Return of Private Car issued in December 2012.

reasonable period after this one year if the nonconformity does not appear until the end of the consumption; nevertheless, a notice given too late after the end of this year can hardly be considered as reasonable; if the consumption of one subject matter is three years, the time limit for giving notice will undoubtedly be extended to more than three years, in which case the inference of such guarantee period is more evident and significant (Schlechtriem & Schwenzer, 2005, p. 472).

However, as analyzed in the preceding part, the contractual period of guarantee in the CISG, which is mainly agreed by contracting parties, has been replaced by an agreed inspection period in the CCL, which merges with the notification period. Consequently, there are two time periods that can determine or interfere with the time limit for giving notice; if there is no clear coordinating arrangement related to the relationship between them, the conflict will be inevitable. As I will show in the next part, the "double interference" problem has caused serious problems in judicial practice.

6.4.3 Chaos arising from the "double interference" with the time limit

The following cases are typical ones collected from the database of *Beida FaBao*, which can indicate the chaos due to the "double interference" with time limit.

Case A: In the decision of Tianshang ChuZi No.426 (2011), the People's court of Tianning district, Changzhou city found that in the contract for a sale of central air conditioners, the supplier had guaranteed to keep maintenance of the whole machine for one year, the compressor for three years; meanwhile the contracting parties had agreed that the buyer should inspect and accept the air conditioners within 7 days after the installment. The court found that:

> "The contract has provided an agreed time requirement for inspection and acceptance. The buyer did not prove his complaint about quality problems was raised to the seller within this agreed period, and the air conditions have been used until the present day since the installment…therefore, the claim based on nonconformities of air conditioners should not be admitted."

In this case, although the contract has provided a rather long maintenance period, the court,

after clarifying the agreed inspection period, refused to give consideration on the maintenance period, but directly enforced the agreement related to inspection period and denied the buyer's claim.

Case B: In Chao Min ChuZi No.18074 (2007) decision, the People's court of Chaoyang district, Beijing city found that:

> "The contracting parties have agreed that the buyer should inspect and accept after taking delivery, the maintenance period is one year, and the buyer may require replacement within three months when there are serious quality problems. However, the contracting parties did not explicitly specify whether those periods are agreed inspection periods or guarantee periods for quality … In such a case, in light of the law, the buyer should notify the seller within a reasonable period since he discovered or should have discovered any nonconformity."

In this case, although there was maintenance periods provided in the contract, the court refused to regard them as agreed inspection period, but, on the contrary, decided to apply Article 158 of the CCL to determine a reasonable period.

Case C: In the decision of ErZhong Min ZhongZi No.18994 (2011), different from case A and case B, the first instance court (the People's court of Dongcheng district, Beijing city) found that although the buyer had inspected and accepted the categories, quantities, and types of the subject matter, the contract of sale had already provided that guarantee period for quality of meter-reading system and radio receiver was three years……therefore, the guarantee period for quality was three years. The second instance court (the second intermediate court of Beijing city) agreed with the finding of the first instance court and found that it was acceptable if the buyer complained about the quality within the three-year guarantee period. In other words, the courts held that the three-year guarantee period was equivalent to the period for inspection and notification.

Case D: In Kun Min Si ZhongZi No.588 (2010) decision, the intermediate court of

Kunming city found that, referring to the second paragraph of CCL Article 158, there was no explicit agreement on the inspection period in the two documents of the contract, but the guarantee period for quality had been clearly provided to be one year. The court decreed that given the petitioner's complaint about the problems in quality had exceeded the guarantee period for quality, and "he failed to prove that any other complaint was made to the appellee within such one year period……Hence, the claim of the petitioner cannot be supported". In this case, the court considered the guarantee period for quality to play a similar role as the agreed inspection period, and consequently, the complaint about the quality problems should be made within such a period.

It can be observed that, from these cases introduced above, the courts' decisions concerning the relationship between inspection period and guarantee period for quality are not coherent at all. In case A, the court ruled that the inspection period differed from either the maintenance period or the guarantee period for quality, and the latter two would not impact the application of the former one. In case B, the court did not directly pursue the guarantee period for quality, but instead pursued the rule of determining a reasonable period. In case C, even if there was an explicit agreement concerning the inspection period, the court still applied the guarantee period for quality, and gave the latter priority over the agreed inspection period. In case D, in the absence of an explicit agreed inspection period, the court used the guarantee period to determine the period for inspection and notification. The divergence reflected in the preceding cases is whether the guarantee period for quality takes priority over the agreed inspection period or should be used as a supplementary reference in the absence of an explicit agreed inspection period. Evidently, there is a significant inconsistency regarding this issue in judicial practice.

6.5 Solutions for the combination design and the "double interference" problem

The combination design and "double interference" problem are not only inconsistent with the experiences in foreign laws, but also cause unjust consequences in Chinese judicial practice. To deal with these problems, it is necessary to suggest and compare different solutions.

6.5.1 Solutions for the combination design

Plan A is through the so-called "teleological reduction",[①] to distinguish the inspection period under CCL Article 157 from the one under CCL Article 158(1). Specifically speaking, an agreed inspection period in judicial practice that only takes into account the practicability of inspection should be admitted as an inspection period under CCL Article 157 and can only affect the buyer's behavior of inspection; the one that considers not only the practicability of inspection, but also the time needed for the buyer to make decision and to give notice should be admitted as an inspection period provided in CCL Article 158 and can bind the buyer's behaviors of both inspection and notification. If the buyer can successfully prove that the agreed inspection period in the contract did not consider the time for giving notice, but merely considered the normal time for accomplishing inspection, then this period cannot be given the effect based on Article 158(1), and thus it can merely be considered as the period for restricting the behavior of inspection. In such case, delaying in inspection, if not leading to delay in giving notice, will not preclude the buyer from all remedies; the judges should, according to the reasonable period rule, determine a reasonable period for the buyer to give notice.

Plan B was raised by the JILSC. The first paragraph of Article 18 of the JILSC distinguishes latent defects from apparent defects, and provides that if an agreed inspection period is too short for the buyer to accomplish a thorough inspection, in light of the nature of the subject matter and the usage of transaction, it should be decided as a period merely concerning the complaint about apparent defects. The court should further determine a period for giving notice of latent defects in light of the reasonable period rule (Xi, 2012, p. 325).

This author argues for Plan A rather than Plan B. First, Plan B does not distinguish the period for inspection from the one for giving notice, probably because the inconsistency on the requirement for giving notice between CCL Article 158(1) and Article 158(2) is overlooked. Under the approach of Plan B, the courts will continue to ignore that the requirement reflected in Article 157 -promptness- should not be applied to a period that contains both inspection and notification, otherwise the time for giving notice cannot reach a reasonable length, and thus, hardly comply with the principle established in Article 158(2). Second, Plan B is based on an

[①] The justification of *teleological reduction* should be found in the order of justice; one of the basic principles is to different things there should be different solutions, and the source of the necessity to do so is: the nature of things should have an effect with priority (Larenz, 2003, p. 268).

unconvincing ground, i.e., the time for giving notice of apparent defects is different from the one of latent defects. According to Plan B, an excessively short agreed inspection period should be decided as a period for giving notice of apparent defects. It means, within a very short period of time, the buyer must not only accomplish the inspection of apparent conditions of the subject matter, but also decide to and actually give notice of the apparent defects. The problem is that even if the short time period is sufficient for examining apparent conditions of the subject matter, it is neither reasonable nor necessary to require the buyer to give notice within such a period. It can be easily imagined that, for instance, in a transaction of industrial materials, it may be practicable for the buyer to examine the style, color, and exterior designs within a short period, but the buyer may wish to further inspect the interior conditions of the subject matter and give notice of nonconformity after a thorough inspection and investigation, and it is acceptable insofar as the buyer notifies within a reasonable period. So, why must he first give notice of the apparent defects? There is no ground to consider the time for giving notice of latent defects to be a reasonable length, while the time for giving notice of apparent defects an excessively short one. In other words, it is plausible to treat the time for inspecting latent defects and the one for inspecting apparent defects differently, but there is no basis to establish such a difference when deciding the time for giving notice. On the contrary, the approach of Plan A correctly recognizes the importance of keeping the notice period generally separated from the inspection period and differentiated the consequences for delay in inspection and delay in notification; therefore, it should be the preferable approach.

6.5.2 Solutions for the “double interference” problem

In the first place, we should clarify some circumstances without *real* “double interference” problem.

In China, the “san bao” periods are widely applied for consumer products, which allow the consumers to, in light of related regulations, require the seller to *repair*, *replace*, or *return* goods in certain time. These periods are not the outcomes of private agreements, but provided by various government departments based on the policy of consumer protection. There should be no “double interference” problem in such case as the duty to timely inspect and to give notice should be inapplicable.

Specifically speaking, although Articles 157 and 158 of the CCL have not excluded consumer sales from their governing issues, from the perspectives of legislative purpose and comparative law, the duty to timely inspect and to give notice should not be used against tardy consumers with no bad faith. First, CCL Article 157 was mainly established based on Chinese commercial trade usages[①] and international commercial law, such as the CISG and the UCC. Under the CISG, Article 2 explicitly provides that it cannot be applied to the sales of goods "bought for personal, family or household use"; under the UCC, even if the requirement for giving notice can be applied to consumer sales, the official comment of UCC §2-607 clearly states that the purpose of the notice rule is not to preclude the remedies of a good faith consumer (ALI & NCCUSL, 2010, p. 2205), and the U.S. scholars and courts generally hold a friendly standpoint towards aggrieved consumers (White & Summers, 1988, p. 482). Given CCL Articles 157 and 158 were largely influenced by related legislations in those legal systems and made no special arrangement for consumer sales, it is rather questionable to directly apply these rules to consumers.

Second, if the buyer is a middleman and the guarantee period for quality printed on the package of goods is destined for end users, then there is no consensus of intentions between this buyer and the original seller as following: the buyer should notify any nonconformity within this guarantee period for quality. In other words, this kind of guarantee periods for quality normally does not interfere with the notice period of the middleman buyer.

In the case that contracting parties are both commercial dealers, if a guarantee period for quality and an agreed inspection period both exist, then the "double interference" problem will occur and there will be a need for solutions to determine which time period should have a priority.

Plan C is corresponds to Plan A. If the agreed inspection period did not consider the time needed for giving notice, it should not be regarded as the inspection period under Article 158(1) of the CCL, and consequently, cannot bind the buyer's notification. If the agreed inspection period has indeed considered the time for giving notice (e.g., a few months), then it should be regarded as the inspection period under Article 158(1), and therefore can bind the buyer's

① In the process of drafting this article, the main references include related rules in the international commercial laws and the Regulation on Contracts for Sales of Industrial Products and Minerals in 1984 (expired) (Hu, 1999, pp. 238-241).

notification. In such case, if there is a guarantee period for quality (e.g., one year), then the "double interference" problem will occur. According to the agreed inspection period, the buyer should in any events notify the seller within such agreed inspection period (e.g., a few months), otherwise his remedies will be precluded, while according to the guarantee period for quality, as long as the nonconformity appears within the guarantee period for quality, the buyer will be remedied insofar as he gives notice within a reasonable period after the sign of nonconformity occurs. Under this situation, the only way to address the problem of "double interference" is to refer to the interpretation of the contract and to explore the real intentions of the contracting parties in individual case. For example, in the case of commercial sales, if the guarantee period for quality is added under the influence of the "san bao" regulations provided by government departments, and the contracting parties have particularly agreed on a specific period for inspection and notification, which has indeed considered the time needed for the buyer to give notice, then it seems the effect of the agreed period should be prioritized over the former, since it has exactly reflected the negotiating outcome of the contracting parties and the arrangement of their interests.

Plan D corresponds to Plan B. According to the interpretation of the JILSC, in the case that an agreed inspection period is shorter than the guarantee period for quality, as long as the inspection period has expired, it should be deemed that the seller has tendered conforming subject matter, and the buyer then does not have any remedies based on nonconformity, but if it is still within the guarantee period for quality, the buyer still has a right to require the seller to deal with quality problems as promised. In the view of the JILSC, it seems there is no conflict between the agreed inspection period and the guarantee period for quality, and therefore they can coexist without any problem (Xi, 2012, p. 332).

I do not agree with Plan D, for its logic is questionable. The duty of the seller to deal with quality problems in the guarantee period for quality does not come from a service contract which has an independent consideration, but, on the contrary, arises from the seller's duty to tender conforming goods. The reason that the seller should deal with the quality problems is that the quality of the subject matter fails to comply with the quality requirement of contract, and therefore the seller should be liable for failing to fulfill his duty to tender conforming goods. Hence, it is contradictory as, on one hand, it deprives the buyer of all remedies based on

nonconformity, while on the other hand, it entitles the buyer to require the seller to deal with quality problems within guarantee period for quality. I have argued that if the agreement did not include the consensus that the buyer should notify within the agreed inspection period, it would be unreasonable to require the buyer to do so, and this kind of inspection period should not bind the behavior of buyer's notification, and therefore no "double interference" exists. If the inspection period has indeed considered the time for giving notice, then the "double interference" problem cannot be denied; in such a situation, pursuing various interpretative methods should be the only possible way to eliminate one of the "double interference".

6.6 Conclusion of this chapter

Under German Law, U.S. Law and the CISG, the period for inspection of goods and the period for notification of nonconformity are clearly distinguished. The time requirement for inspection are "promptness" or "with a reasonable opportunity", while the one for notification are "promptness" or "within a reasonable time". Contractual period of guarantee under the CISG is applied to replace the time limit of two-years for notification. Under the CCL, however, the inspection period merges with the notification period, and as a contractual period, has the same function as the time limit for giving notice. Therefore, the inspection period provided in the CCL is very harsh on the buyer. *Teleological reduction* should be applied to the inspection period provided in CCL Article 158(1), so that it can be differentiated from the one in Article 157.

As to the guarantee period for quality, this kind of period in China has different types and normally can only interfere with, but not equal the time limit for giving notice. When dealing with the "double interference" with the time limit problem, we must interpret the contract in light of various interpretative methods, to exclude one of the "double interference". The JILSC entitles the court to intervene in the agreement of inspection period, but the solutions it provided still have some disadvantages due to the lack of recognition of the necessity to divide the inspection period and the notification period.

Chapter 7 The Road to a "Reasonable Period" for Notification

The determination of what constitutes a reasonable period for notification of nonconformity has always been a difficult problem, in the absence of an agreed inspection period.[①] Some courts believe that the reasonable notification period should end at the time when the buyer begins to use the subject matter,[②] or takes the delivery of them;[③] some courts directly adopt the time limit of two years provided by the law;[④] some others again have determined the reasonable period on a case-to-case basis, often concluding on a few months' time.[⑤] It can be said that the judicial decisions are greatly divided in this respect. There have been some studies that have reviewed the experiences of foreign legal systems in the application of similar rules.[⑥] However, there is still a lack of thorough studies on the proper method for determining a reasonable period for notification.[⑦] In 2012, the Supreme People's Court has issued an Judicial Interpretation on the Law of Sales Contract (hereafter JILSC) and listed many factors for the courts to refer to when determining a reasonable period for notification. Unfortunately, the justifications for the notice rule are still unexplored, and the content of these listed factors should also be clarified.

Finding suitable criteria for determining a reasonable period has also been a difficult problem in international law. Jurists and judges from European countries and the United States

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① CCL Article 158(2) provides that: "Where no inspection period is agreed, the buyer shall notify the seller within a reasonable period since the buyer discovered or should have discovered the quantity or quality nonconformity. If the buyer fails to notify within a reasonable period or fails to notify within 2 years since he received the subject matter, the quantity or quality of the subject matter is deemed to conform to the contract, except that if there is a guarantee period for quality in respect of the subject matter, the guarantee period applies and prevails over such two year period."

② For example, the intermediate court of Kunming city found that, in KunMinSan Zhongzi No. 371(2007) decision, the original quality problem in house should be complained of before the buyer moved into it. All cases and judicial decisions in this dissertation are found in the database of *Beida Fabao*, see http://vip.chinalawinfo.com/index.asp..

③ As to apparent quality problems, some courts tend to consider that these problems should be raised at the time of taking delivery. For example, in Sui Zhongfa Miner Zhongzi No. 876 (2005) decision, the court denied the plaintiff's demand on the ground that he failed to complain about the lack of maple leaf pattern on the surface of printed box at the time of taking delivery.

④ For example, in WuZhong Minyi Zhongzi No. 974 (2010) decision, the intermediate court of Urumqi city considered two years as reasonable for the buyer to give notice, on the ground that such a period was "sufficient" for the buyer to inspect.

⑤ For example, in Erzhong Min Zhongzi No.12821 (2009) decision, the second intermediate court of Beijing city found that three months should be the reasonable period for giving notice of nonconformity in rolling machines.

⑥ See, e.g., L. H. Chen & Q. Li, On the Application and Interpretation of Article 39 (1) of the CISG in Germany, Journal of Suzhou University, 2011 (5); J. G. Wang, Study on the Notice of Nonconformity Goods under the Draft Common Frame of Reference and Its References to China, 2011(5). In the first literature, many German decisions have been examined, however, since those decisions were basically made before 1998, the development of the "noble month" approach in the past decade has been largely overlooked.

⑦ As to the need for solutions for such a problem, see Y. Q. Sun (2011).

have struggled for many years to find an appropriate approach for determining such a reasonable time for notification. As a result, there have been diverging national applications of the article of the U.N.'s CISG that provides a reasonable notification period (CISG Art. 39). In German-speaking countries, a so-called "noble month" (Grosszügiger Monat) has been used as a rough average period in the past few years for determining a reasonable period, while the U.S. lawyers have been pursuing the policy rationales to protect the seller from being prejudiced by the failure of notification of breach when applying UCC §2-607(3)(a) and CISG Article 39. The former approach has an advantage of a certain uniformity and predictability in the application of law, but it has been criticized for being too "rigid", while the latter may be more appropriate to fit requirements of individual case, at the expense of uniformity. Since the drafting of the rule on determining a reasonable period in the CCL was inspired from similar rules in foreign legal systems, especially from CISG Article 39,[①] it is helpful to introduce those experiences for improving the related interpretative theory in China.[②]

7.1 The rise of the "noble month" approach

The "noble month" approach consists in using one month as a rough average period for giving notice when applying CISG Article 39, which can be extended or shortened in light of specific circumstances in individual case. This approach developed from Germany's judicial practice, and therefore has close relationship with the notice rule and its application in Germany. In the following subsections, I would like to briefly introduce the notice rule in German law and its influences on international conventions, and then describe the rise of "noble month" approach when applying CISG Article 39.

[①] CISG Article 39 provides: "(1) The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it. (2) In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless this time limit is inconsistent with a contractual period of guarantee." All texts of the CISG referred to in this dissertation are taken from the official website of UNCITRAL, see http://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf.

[②] This is not only inspirable for the application of CCL Article 158, but also useful for the application of CISG Article 39 in China. I found rare decisions applied CISG Article 39 had carefully examined related precedent decisions or made thorough analysis on determining a reasonable period.

7.1.1 The strict requirement under German law and its impact on international laws

7.1.1.1 The strict requirement for giving notice under German law

Article 377 of German Commercial Code (HGB) provides for the buyer's duty to inspect the subject matter and to notify of defects. According to HGB Article 377(1), if the sale is bilateral mercantile, the buyer shall inspect the subject matter promptly (*unverzüglich*) in light of the practicability in the ordinary course of business and notify the seller promptly as soon as the defect appears (Boujong et al., 2001, p. 474). It can be observed that German commercial law establishes strict requirement for giving notice - *Promptness*, which, according to BGB Article 121, means without culpable delay (*ohne schuldhaftes Zögern*). To determine whether there is a culpable delay, both subjective and objective factors should be considered: the subjective one mainly refers to whether the behavior of the buyer complies with the requirement of a respectable businessman; the objective one refers to whether it is practicable in light of the ordinary business course (Boujong et al., 2001, p. 494). For a substantial period of time, the German courts have imposed strict standard on the time for giving notice of defects: in many occasions as short as three to five days. Some scholars advocate that the period for both inspection and notification should not be longer than 14 days altogether, and this opinion is known as "Magnus-doctrine".[①]

Article 377 of the HGB originated in Article 347 of the Common German Commercial Code of 1861 (ADHGB), the rule of which only applied in the case of transportation transactions, regardless of whether the buyer was businessman or not. The legislative purposes of ADHGB Article 347 included: (a) enabling the seller to adopt proper measures to collect evidence related to defects (ADHGB Art. 348 Abs. 2); (b) enabling the seller to confirm whether the alleged defects existed from the beginning or occurred in the process of transportation, as in the case of the latter it was the buyer who should bear the risk of loss (ADHGB Art. 345 Abs. 1); (c) in the case of agent or intermediate trade, protecting the seller by allowing him to demand damages against his own supplier; (d) enabling the seller to preserve and use the salvage of defective goods; and (e) protecting the seller from doubtful or

[①] Because it has been highly advocated by Professor Magunus (Andersen, 2012, p. 192).

repeated complaint about defects (*Mangelrügen*) when the price fluctuated and the buyer might try to escape from this bargain (Boujong et al., 2001, p. 477). Likewise, in light of the judicial decisions of the German Supreme Court (BGH), Article 377 in the present German Commercial Code (HGB) also aims at protecting the seller's interests in confirming what time the defects occurred and being free from repeated complaint about defects, and promoting settlement and the stability of legal relationship (Boujong et al., 2001, pp. 477-478). According to recent literatures, the functions of this rule also include promoting the seller to tender subsequent conforming goods and to mitigate the loss (Boujong et al., 2001, pp. 477-478).

As to the distinction between the notice rule established by Article 377 of the HGB and the special prescription provided in Article 438 of the BGB, it should be understood from the following aspects. Frist, the former only applies in the case of commercial transaction, while the latter applies to both civil and commercial cases. Second, the former has various functions (as mentioned in the preceding paragraph), while the latter is basically designed to promote the stability of legal relationship. Third, from the legal effect's perspective, the notice rule has a harsh consequence called "fiction of approval" (*Genehmigungsfiktion*), which means the subject matter would be deemed to be approved by the buyer, and the buyer would lose all remedies for defects; in contrast, the special prescription only has a weak effect, which merely gives rise to a defense that the seller may or may not choose to raise.[①] Hence, it can be concluded that the scopes of the application of these two systems do not coincide, and the functions and legal effects are significantly different. Although the special prescription has been reformed (even if not thoroughly) during the modernization of German obligation law,[②] the strict requirement on giving notice of defects continues to apply in German judicial practice.

7.1.1.2 The impact of the German-style rule on the ULIS

The notice rule in German law impacted the preparation of the Uniform Law on the International Sale of Goods (ULIS)[③] in the 1950s and 1960s. As Professor Schwenzer (2007)

① Even if the buyer has fulfilled his duty to inspect and to notify of the defects, the special prescription still applies.

② Medicus (2007) argues that it is the general prescription that should be applied in the case of defects in thing, however, the modernization was not thorough and consequently it is still a rather short prescription that applies to the remedies for defects (p. 51). See also Zimmermann (2005, pp. 133-135).

③ The ULIS and ULF (Uniform Law on the Formation of Contracts for the International Sale of Goods) were both finalized in in 1964 and came into force in 1972, and both were the main references of the CISG (Honnold, 1999, pp. 4-10).

has pointed out, ULIS Articles 38 and 39 were heavily influenced by those legal systems whose domestic sales laws "stipulated rather rigid notice requirements, especially German law" (p. 107). Consequently, Article 39 of the ULIS also required the buyer to "promptly" notify the seller of lack of conformity of the goods after he discovered or should have discovered it (Schlechtriem & Schwenzer, 2005, p. 460). As to the meaning of the term "promptness", it was defined as "within as short a period as possible in the circumstances" under ULIS Article 11. This requirement is rather close to "without culpable delay" in German law (see the first paragraph of §7.1.1.1).

However, the ULIS was not widely accepted, but was implemented by only a few states, among which there were "very strict notice requirements under their domestic sales laws, such as Germany and Italy" (Schwenzer, 2007, pp. 107-108). Moreover, Cases applying rules of the ULIS were also primarily concerned with sales contracts of parties having their places of business in Germany, Italy, and the Netherlands (Schwenzer, 2007, p. 108). Accordingly, the notice rule under the ULIS was often interpreted "in very much the same way as their domestic counterparts" and "promptness" often meant a period not longer than three to five working days (Schwenzer, 2007, p. 108).

7.1.1.3 The adjustment of the time requirement for notification under the CISG

The ULIS was mainly drafted by European scholars and reflected the legal culture of the Western Europe.[①] In 1966 the United Nations decided to establish an organization with worldwide participation and sponsorship to promote "the progressive harmonization and unification of the law of international trade", and that the result was the UNCITRAL (Honnold & Flechtner, 2009, p. 6). Based on the ULIS and ULF, this organization finished the draft of the CISG, which was finalized in 1980 by representatives of 62 states and 8 international organizations (Honnold & Flechtner, 2009, pp. 5-10). The CISG came into force in 1988, and has been approved or succeeded by 80 states until April 2014.[②]

During the drafting of the CISG, the German-style notice rule had become not so popular. On the one hand, some legal systems do not adopt similar notice rule, for example, English law

① Among 28 countries that participated in the Hague conference, 19 belong to the Western European (Honnold & Flechtner, 2009, p. 9).
② See http://www.uncitral.org/uncitral/zh/uncitral_texts/sale_goods/1980CISG_status.html.

only requires the buyer to give notice if he wishes to avoid the contract, on the other hand, even in those legal systems with established rules concerning period for inspection and notification, the time of such periods are quite different, for example, in the UCC and Dutch law it is required that notice should be given within a reasonable period (Schwenzer, 2007, p. 105). Only a few states provide that the notice must be given within a specific period, such as 8 days in Italian law.[①] Moreover, the drafted notice rule was opposed by many developing countries. Representatives from these countries argued that a strict notice requirement and the harsh consequence -losing of all remedies- were unacceptable, because their countries had to import "most manufactured and complex goods" and the nonconformities might become apparent "only long after delivery to unsophisticated buyers." (Brussel, 1993, pp. 63-65) These representatives were also concerned that "their developing infrastructures would dramatically delay their ability to respond" and therefore be seriously punished (Ryan, 1995, pp. 110-111).

After a long debate, the strict requirement on the inspection and notification were decided to be abandoned (Schwenzer, 2007, p. 108), the time requirement for giving notice changed from "promptness" to "within a reasonable time" and an exception of this rule was added in Article 40 -the requirement for giving notice would not apply in the case that the seller was aware of or should have been aware of the defect, but did not disclose it. Moreover, Article 44, a new article that was unknown to any other legal system was introduced. According to this article, the buyer who failed to give timely notice may still reduce the price or claim damages, except for loss of profit, if he has a reasonable excuse for his failure to conform to the requirements of CISG Article 39 (Ryan, 1995, pp. 111-112).[②] Professor Schwenzer (2007) argues that Articles 38 and 39, observed together with CISG Article 44, "may be fairly characterized as being closer to those legal systems that provide for a duty to give notice within a reasonable time in their domestic laws" rather than "to those that do not stipulate any notice requirement at all, or to those with very strict notice periods." (p. 109)

[①] According to Article 1495 (1) of Italian Civil Code, the buyer shall notify the seller of defects within 8 days after he discovered defects, otherwise all warranty rights are excluded (G. Z. Chen, 2010, p. 270; A. L. Fei et al., 2004, pp. 361-362).
[②] However, someone examined decisions made before 2006, which had been translated into English, and pointed out that in a few decisions which applied CISG Article 44, rare undeveloped countries had been successfully protected by pursuing this rule (Birch Ⅲ, 2006, pp. 4-15).

7.1.2 The development of the "noble month" approach in the application of the CISG

Accompanying the adjustment of time requirement for notification in the CISG, German courts have gradually become more generous when deciding a reasonable period for the buyer to give notice. Compared with the previous standards, such as two weeks or even several days, a new "starting point" has generated and begins to earn international influence.

The German Supreme Court (BGH) referred to the one-month period in the well-known *mussels-case* in 1995. In this case, the buyer gave notice six weeks after the nonconformity of the goods should have been discovered. This was considered to be too late, while the BGH reasoned that the generous average of one month was acceptable.[①] In 1999, the BGH explicitly ruled in favor of a four-week period starting at the time the buyer knew or ought to have known the nonconformity of the goods. The facts of the case were as follows: On April 7th, 1993, the buyer purchased a grinding device and attached it to a paper-making machine; the devise was then able to operate on April 17th. On April 25th, the grinding device broke down and on the next day it suffered a total failure. At first, the buyer did not take action in regard to the device itself. However, on May 17th, the buyer received complaint about rust in the paper which was produced during the time the device had been in use. Ten days later (May 27th), the buyer commissioned an expert to determine the cause of the rust and on June 11th, he received a report from the expert that concluded the rust was due to the grinding device. Three days later (June 14th), the buyer notified the seller of the nonconformity.[②] Compared with the rigid notice requirements at the beginning of the 1990s, the standpoint of the court became more generous. The BGH held that the notice was given in due time, although more than two months had passed after the delivery. The BGH found that at the time of the failure of the device the buyer ought to have been aware of the latent defect. At that time, the period for examination under CISG Article 38 started to run. The court calculated the amount of time available for examination by assuming that the buyer should have had one week to decide whether to select and commission an expert; two weeks for the expert to prepare his report were deemed adequate. Thus, the BGH arrived at a three-week period for examination. At this point, the

① See http://cisgw3.law.pace.edu/cases/950308g3.html#ctoc; see also Schwenzer (2007, p. 112).
② See http://cisgw3.law.pace.edu/cases/991103g1.html.

period for giving notice under CISG Article 39 started to run. As the court assumed a four-week period for giving notice, which was added to the three weeks for examination, the buyer's notice was still before the expiration of the total seven-week examination and notification period. By actually giving notice three days after getting the report concerning the cause of nonconformity, the buyer was still able to compensate for the delay in examination.[①] In this case, the court described the four-week period for giving notice as "regelmässig," which means "regular" or "normal." (Schwenzer, 2007, p. 113; Boujong et al., 2001, p. 494) Professor Peter Schlechtriem (1999) has commented this case, saying that this decision was a welcome development "at least in the case of complex and complicated goods, compared with the original German decisions".

This kind of ruling quickly drew attention. the Swiss Supreme Court then followed by expressly upholding a finding of the Court in Luzern State which allowed the buyer one week for examination followed by one month to give notice in the case of a defective second-hand textile cleaning machine (Schwenzer, 2007, p. 114). At the Conference of "25 Years United Nations Convention on Contracts for the International Sale of Goods (CISG)", which was held in March 2005, the reporter on CISG Article 39 concluded that the analysis of case law regarding the notice period showed "a cautious convergence in the direction of the 'noble month'."(Girsberger, 2005, p. 247) Meanwhile, the concept of "noble month" was introduced to English academic circle in 1997 (Andersen, 2012, p. 185). It needs to be noted that one noble month is rather generous in German-speaking countries, given earlier decisions made in this area normally granted no more than two weeks for the buyer to give notice; this rule of thumb reflects the endeavor these legal authorities made to adapt the unified application of the CISG notice rule. However, whether around one month is reasonable should still be answered in light of the specific circumstances in individual case.

In academic circle, the standard of one "noble month" is advocated by Professor Schwenzer, who is also a member of the CISG Advisory Council[②] and an influential CISG specialist in German-speaking countries. She said that the "noble month" approach was still

① See http://cisgw3.law.pace.edu/cases/991103g1.html; see also Schwenzer (2007, pp. 112-113).

② The CISG Advisory Council is an unofficial organization founded by scholars in 2001. The founding fathers include some famous specialists in the area of contract law and comparative law, such as Professor E. Allan Farnsworth and Professor Peter Schlechtriem. The members of it come from different countries, including the U.K., France, Germany, Japan, China, and the U.S.. The opinions released by it have been referred to in some U.S. decisions. Someone even suggested that the CISG Advisory Council had "come of age". (Karton & Germiny, 2009. p. 448).

opposed by both those who advocated stricter standard and those who demanded more flexible requirement, but it "might become acceptable in the long run" (Schwenzer, 2007, p. 123). Andersen (2012) studied in 2012 the cases from Germany concerning the application of CISG Article 39 and discovered that although the BGH had not always explicitly used one "noble month" as a standard, the decisions of the BGH was not inconsistent with it, and the lower courts seemed more willing to use one "noble month" as a "benchmark"; more importantly, since 2005 there had been no reported instances of very short original "Germanic-style timeframes" in operation under CISG Article 39 (p. 196). Girsberger (2005) even argues that the "noble month" theory may have had a good start in Germany and Switzerland and have influenced many courts outside these jurisdictions; although there are strong oppositions, this standard may "serve as a starting or vantage point, upon which certain groups of situations should be distinguished, would increase legal security" (p. 247). All in all, the "noble month" approach has become an influential standard in German-speaking countries and even influenced jurisdictions outside this area. It is worthy to pay attention to this approach when constructing an interpretative theory on the determination of a reasonable period in China.

7.2 The development of the policy rationales concerning "prejudice"

The approach of policy rationales concerning "prejudice" means the justifications of the notice rule should be policies aiming to protect the seller from suffering prejudice arising from the buyer's failure to give proper notice; meanwhile, determining a reasonable period for giving notice should also be guided by these policy rationales. This approach originally developed from the U.S. judicial practice and was then argued to be applicable when addressing the determination of a reasonable period under CISG Article 39. In this section I would like to first introduce the development of the notice rule in U.S. law and then explore the proposed policy rationales behind it.

7.2.1 The present U.S. notice rule and its policy rationales

7.2.1.1 The present notice rule and its predecessor in U.S. law

The notice rule applied in the majority of the U.S. is stipulated in UCC §2-607(3)(a),

which states that if a tender has been accepted, "the buyer must notify the seller of breach within a reasonable time after he discovers or should have discovered any breach, or be barred from any remedy" (ALI & NCCUSL, 2010, p. 2204). This rule was inherited from Section 49 of the Uniform Sales Act (hereafter USA), which was drafted by Professor Samuel Williston in 1906. The latter was introduced to address the issue of the effect of acceptance of goods. USA §49 states that:

> "In the absence of expressed or implied agreement of the parties, acceptance of the goods by the buyer shall not discharge the seller from liability in damages or other legal remedy for breach of any promise or warranty in the contract. However, if after acceptance of the goods, the buyer fails to give notice to the seller of any breach within a reasonable time after he knows or ought to know, the seller will not be liable anymore." (Williston, 1909, §484)

Jerry Phillips (1972) argues that neither the notice rule in the UCC nor the one in the USA belong to the general requirement of the Common Law, and that there was no comparable rule in the U.K.'s Sale of Goods Act of 1893 (pp. 461-462). Professor Williston (1909) mentioned that the latter part of USA §49 had imposed on the buyer's rights a "qualification", "which is justified by business practice and by some decisions, as well as by the law on the Continent of Europe" (pp. 846-847). John Reitz (1988) has further pointed out that, when drafting USA §49, Professor Williston "in part [drew] his inspiration" from Article 377 of the German Commercial Code (HGB) (pp. 534-536).

Compared with HGB Article 377, the notice rule in the USA (as well as the UCC afterward) had significant differences, the most important one of which was the time requirement for giving notice became "within a reasonable time", instead of "promptness". The official comment of UCC §2-607 in particular emphasizes the connection of the notice rule with good faith in commercial practice and states that the purpose of this rule is not to preclude remedies of a retail consumer who is in good faith, but to defeat bad faith in commercial transactions (ALI & NCCUSL, 2010, p. 2205).

7.2.1.2 The early rationale for the notice rule: addressing the effect of acceptance

When Professor Williston introduced the rule of notification of breach, he connected it with another system -acceptance of goods. He analyzed that, under U.S. law, there were great disputes related to the buyer's right to demand damages after he accepted a nonconforming tender. The problem was: "if one party who has a right to rescind the contract and nevertheless allows the party in default to continue with the contract and accepts the defective performance", did that mean the performance had been "received as full satisfaction of all obligations?" (Williston, 1909, p. 847) Professor Williston (1909) tended to give a negative answer, arguing: "when insufficient performance is received by the buyer he should not be debarred from recovering damages because of the insufficiency, unless he has agreed to accept what has been offered him as full satisfaction of all his rights", and the mere fact that he had taken the goods should not indicate such assent (p. 847). However, at that time, views towards this issue were greatly divided. Although many decisions were close to the standpoint of Professor Williston's, some jurisdictions turned to the opposite side: For example, in New York, it had been held that "taking title to the goods indicated an assent to accept the goods in full satisfaction of the seller's obligations as to the quality of the goods" and this doctrine had been followed by some other jurisdictions (Williston, 1909, pp. 851-853). Under these circumstances, what did it mean if the buyer held the goods without any objection for a considerable period of time? Professor Williston (1909) argued that this kind of behavior might guarantee such presumption: "the goods are exactly what the contract requires or the buyer is satisfied with them despite the nonconformity to the contract." (p. 852) Indeed, in many decisions the importance of giving timely notice had been emphasized at that time. As the Supreme Court of Maine stated, the fact of acceptance, as a matter of evidence, might "have great weight on the question of satisfactory or sufficient performance", first, it might "raise considerable presumption that the article delivered actually corresponded with the agreement", and then it might be some evidence of wavier of any defect despite the tender did not "so correspond" (Williston, 1909, p. 852). Furthermore, this court argued, if the goods had been accepted without objection within a reasonable time after the delivery, the evidence of waiver might be considered "conclusive" in the absence of proper explanation (Williston, 1909, p. 852).

It can be observed that, in early 20th century, there was great divergence in U.S. law with

regards to the legal effects of acceptance of goods: Some believed acceptance of goods itself might indicate that the buyer had approved the quality condition of the tender and that consequently, the buyer might not demand damages based on quality problems; the opposite standpoint was that receiving the goods might not indicate such kind of approval, and that the buyer's remedies for defect would not be precluded unless there were agreement to the contrary. During the lasting debate between these two views, the focus had been moved to how to determine whether the buyer had agreed to accept the tender as sufficient performance. Under these circumstances, whether the buyer had complained about quality problems became a considerably important factor. Professor Williston, on the one hand, tended to agree that the mere fact of receiving the goods did not mean the buyer had accepted the goods as full performance, while on the other hand, argued that if the buyer did not notify the seller of the defect within a reasonable time, then it would constitute a strong evidence of wavier of any defects. This standpoint of compromise tells us that Professor Williston, as well as the early U.S. sales law, did not draw a clear distinction between "taking physical delivery" and "acceptance" of goods; consequently, the approach of presuming "acceptance of goods" to be accepting goods as full performance was not totally abandoned, but merely adjusted, by postponing the harsh consequence of it to *after the lapse of a reasonable period of time*.

In the second edition of Williston's Treaties on Sales Law, Professor Williston clearly stated his intent to introduce the notice rule to strike a balance between contracting parties. He believed that it was necessary to establish a system that might enhance the certainty of application and avoid possible hardships in front of contracting parties: "the hardship on the buyer of holding that acceptance of the title necessarily deprives him of the seller's obligations", and "the hardship on the seller of allowing a buyer at any time within the period of the Statute of Limitations to assert that the goods are or were defective though no objection was made when they were received" (Williston, 1924, p. 1259). Given these considerations, a rule related to notification of breach has been added into the law, to use as important evidence to decide whether the goods are in full satisfaction. However, this device has been made "an absolute condition" and only if the buyer followed the requirement of it, might his rights be preserved (Williston, 1924, p. 1259). Professor Williston has demonstrated reasonableness on his design, but he might not expect a lasting debate over this device in the next few decades

(Reitz, 1988, p. 534).

The second Article of the UCC was adopted in the majority of the U.S. in the 1950s and 1960s and has achieved accomplishment that has not been made by the Uniform Sales Act (White & Summers, 1988, pp. 3-5). Nevertheless, under the UCC the notice rule is basically preserved with little change and the effects of acceptance are still "strong": it may justify the seller's right to require payment and indicate the goods are in conformity with the contract or the buyer will retain the goods despite the nonconformity (ALI & NCCUSL, 2010, p. 2203). Therefore, the reasons that Professor Williston raised to support the notice rule does not disappear. Some scholars still believe that the necessity of the notice rule under the UCC still lies in the strong effects of the acceptance of goods (Squillante & Fonseca, 1974, pp. 300-301).

7.2.2 The rise of policy rationales concerning "prejudice" and the amendment of UCC Article 2

An interesting thing was, when making supplement to *Williston on Sales* in 1995, Professor John Fonseca (1995) added one thesis entitled "UCC §2-607(3)(a): Reasonable Notice of Breach as a Question of Law" and clearly changed the traditional standpoint of Professor Williston, who considered a reasonable period as a matter of fact (pp. 514-531).[①] In this supplemented thesis, it has been argued that in successful litigation strategy the importance of policies behind the notice rule should not be neglected, and that those policies should include: (a) enabling the seller to investigate the alleged breach; (b) enabling the seller to finalize the sale of goods; (c) enabling the seller to cure the alleged breach; and (d) promoting dispute settlement through negotiations (Fonseca, 1995, pp. 514-515). Most of the policies were related to the purposes of protecting the seller's various interests, and had significant weight in decision making (Fonseca, 1995, pp. 515-531).

Actually, since the 1970s, more and more U.S. scholars have learned to address the notice rule from policy guidance's perspective (Hammond, 1985, p. 525; Henning & Lawrence, 2009, p. 573).[②] The policies summarized by Professors White and Summers are widely referred to in the academic circle, as well as in judicial practices (e.g., Faegre & Benson, 1995, p. 514; Reitz,

① As to Williston's view, see Williston (1948, pp. 39-40).

② The U.S. courts had already insisted on such an approach. For example, the Fourth, Fifth, and Eighth federal circuit courts of appeal held that a determination of whether notice was reasonably made under UCC §2-607(3) should be guided by the policies behind this provision (Rapp, 2004, pp. 401-402).

1988, pp. 582-583). At first, they concluded three policies: the first and the most important one is to enable the seller to adjust, replace, and take other measures to remedy the breach and therefore to mitigate the loss and his liability, the second one is to provide an opportunity to enable the seller to arm himself to negotiate and to prepare for the litigation, the last and not so important reason is to give the seller some "mind balm" that can be obtained from the Statute of Limitations (White & Summers, 1988, pp. 480-481). However, the last rationale has caused serious criticism, as most scholars believe that the notice rule need not play a role similar with limitations on action; in addition, Professors White and Summers seemed to have overlooked the value of good faith (Reitz, 1988, pp. 540-542). In a later literature of these two scholars, a new policy has been added to meet the requirement in transactions - cutting off the "doubtful tardy claim" from the buyer (White & Summers, 2009, p. 656).

The U.S. scholars began to note that the foundation of Williston's reason for introducing the device of notice was connected to a questionable "presumption", namely, once the buyer retained the goods for a certain period without complaint, it could be presumed that the goods were conforming to the contract or the buyer intended to accept the goods actually tendered instead of conforming one. This presumption is not convincing in many cases, especially in those the buyer had not paid the entire price; as to the buyer who has not yet discovered the breach, this presumption is particularly "implausible" (Reitz, 1988, p. 540). Even though the acceptance of goods has been given a strong effect, the protection on the seller's interests through the notice rule should have reasonable grounds: the seller should at least show that it is possible for him to suffer prejudice due to the buyer's delay in giving notice. Reitz (1988) carefully examined each type of "prejudice" and concluded that each type, such as enabling the seller to cure or to investigate and collect useful evidence, could not justify all sorts of cases in various circumstances; on the contrary, the notice rule should normally be justified by several policies together, and the scope of its application should not be as wide as the one of the limitation rules (pp. 547-548).

In my view, when Professor Williston, in part inspiring from related rules in German Commercial Code and its legal practices, introduced the notice rule into the Uniform Sales Act, he was prepared to address a special issue under U.S. law: to reconcile different views towards the legal effects of acceptance of goods. This problem arises because U.S. law did not establish

explicit distinction between acceptance and taking delivery of goods. Professor Michael Bridge has demonstrated the difference between taking delivery and acceptance of goods in U.K. law. He argues that the SGA 1979 has basically drawn a distinction between them, and that although this distinction might not be "precisely delineated", it undoubtedly exists in fact:

> "For example, the buyer may fail to take delivery of the goods for some time, but nevertheless subsequently accept the goods. Or he may accept the goods (in the sense of signifying his approval of them after examination), but subsequently fail to take delivery of them." (Bridge et al., 2010, §9-003)

Since in early U.S. law there was no such distinction between taking physical delivery and acceptance of goods, Professor Williston tried to introduce a device to deal with the divergence regarding the legal effects of acceptance. He, as mentioned above, on the one hand, did not deny the strong effect of acceptance of goods, while on the other hand postponed the occurrence of this effect to a time after a reasonable period elapses after delivery. Therefore, notification becomes a key factor for the buyer to demand remedies. The approach Professor Williston adopted is to make the notification within a reasonable time a necessary condition for the buyer's remedy. Accordingly, the failure of notice will bar the buyer from all remedies based on nonconformity. However, as the Supreme Court of Maine has stated, either the fact of acceptance or the one of the buyer's silence within a reasonable period might merely act as an "evidence" that has "great weight on the question of satisfactory or sufficient performance" (Williston, 1909, p. 852). In other words, these facts can only function in the process of the evaluation of evidences, to prevent the buyer from successfully proving the existence of breach, and the legal effects of the buyer's failure to give notice should be no more than the one of disadvantageous evidence, but not "absolutely" bar the buyer from all remedies. Since Professor Williston adopted the latter approach, a problem arose: given the notice rule has a rather harsh consequence and may seriously punish the buyer, the justifications of it could no longer be based on what the acceptance of goods or the buyer's silence within a considerable period can *prove*, but should on policy rationales that can support the absolute deprivation of all buyer's remedy rights. After a long dispute over this strict notice rule, the U.S. courts had gradually clarified a few policies, and the standpoint to restrict the harsh consequences of the

notice rule has earned the support of the majority, leading to an amendment to UCC §2-607(3)(a).

In 2003, the second Article of the UCC was amended and the new Section 2-607(3)(a) provides that, if a tender has been accepted, the buyer must give notice to the seller within a reasonable time after he discovers or should have discovered any breach, however, the failure to give notice under the preceding requirement will only bar the remedies of the buyer to the extent that the seller has suffered prejudiced arising from the buyer's failure (ALI & NCCUSL, 2010, p. 151). This amendment has reflected the endeavor of the U.S. lawyers and scholars to strike a new balance between the buyer and the seller, by easing the consequences of the buyer's failure to give notice (Miller, F., 2009, p. 143). Although how this new article can be adopted in the U.S. is still unclear,[①] given the considerable influence and success of the UCC, it is safe to say that the policy rationales concerning prejudice will be more important in U.S. judicial practice.

According to the amendment of the UCC, policy rationales concerning prejudice do not have a direct influence on the determination of the length of a reasonable period, but mainly influence the consequences of the buyer's failure to give notice. However, since these rationales are indeed the justifications of the notice rule, it is also proper to refer to them when determining a reasonable time for giving notice. Under U.S. law, a period longer than four months is usually considered as unreasonable; in some cases even three weeks, fifty days, or two months cannot be considered as reasonable, either (Fonseca, 1995, pp. 501-531). As to the food, the period for giving notice is sometimes decided to be as short as possible: in the case *A.C. Carpenter, Inc. v. Boyer Potato Chips*, the buyer sent a letter to the seller complaining of the nonconformity eight days after he received the delivery, and the seller received the letter four days later, the hearing office held that the notice was not timely as "twelve days was too long for parties dealing in perishables" (White & Summers, 2009, p. 656).[②] However, as to cases involving consumers, more than four months can sometimes be considered as acceptable (White & Summers, 2009, p. 657). It is fair to say, the determination of a reasonable period

① For example, a report from Texas considers this amendment to UCC §2-607(3)(a) as "both substantial and questionable", however, no thorough analysis was provided in this report (Henderson, 2009, pp. 256-257). As a matter of fact, the resistance met by the proposed Article 2 of the UCC is mainly because this proposal aims at enhancing the protection of consumers and reducing the one for the seller's interests, and therefore cannot be easily stomached by many influential manufactures (Rusch, 1999, pp. 1684-1685).

② It needs to be mentioned that the buyer was also questionable on whether he was in good faith in this case.

should still in light of many factors, especially the nature of the subject matter and trade usages.

7.2.3 The U.S. scholars' standpoint as to the application of CISG Article 39

CISG Article 39 requires the buyer to give notice "within a reasonable time". This means, compared with the HGB, the time requirement for giving notice under the CISG is closer to the one under the UCC. The U.S. scholars argue against the presumed standard for determining a reasonable period, such as one "noble month". Professor Harry Flechtner argues that this kind of suggestion (a presumed standard) aims at arriving at "an internationally-oriented compromise between those (mainly Germanic) authorities" that have short notice period requirement in domestic laws and those have more "forgiving domestic law traditions" (Honnold & Flechtner, 2009, p. 372).[①] However, to provide a "presumptive" period for CISG Article 39 "departs from the intention of drafters", as they "could easily have included a presumptive period in Article 39(1)" and the process of negotiating the draft Convention would have been the "proper milieu for arriving at an internationally-acceptable compromise"; on the contrary, the drafters did not provide such a presumption, but chose a "radically flexible standard", which varies with the facts in individual case (Honnold & Flechtner, 2009, p. 372). Professor Flechtner even said that to impose such a presumptive period on the application of CISG Article 39 would "invade the function of the Convention's drafters and the sovereign prerogatives of the Contracting States." (Honnold & Flechtner, 2009, p. 372) Professor Flechtner (2008) did some examination and pointed out that even the German Supreme Court did not persist in the "noble month" standard in the late decisions (pp. 16-17). He pointed out that in one case involved a stolen vehicle the German Supreme Court seemed to refuse the presumption of one month as a normal reasonable period by stating: "the circumstances of each individual case are decisive in measuring the time period, so that a schematic fixing of the time for the notice of defect is impossible." (Flechtner, 2008, p. 17)

Nevertheless, Professor Flechtner also proposes a test for determining whether the buyer's notice is within the scope of "a reasonable time". This test asks whether the seller suffered substantial prejudice from the buyer's delay in giving notice. Such a test "sacrifices the

① This kind of endeavor has been widely appreciated (DiMatteo et al., 2004, pp. 430-431).

predictability of a presumptive period, but it appears more in keeping with the approach adopted by the Convention's drafters" (Honnold & Flechtner, 2009, p. 373). This approach is argued to:

> "[be able to] preserve the important function of Article 39 notice in the Convention's architecture, while ensuring that the notice requirement does not exceed its proper role as a secondary or derivative obligation intended to advance rather than interfere with the Convention's primary goals, which are to require the seller to deliver goods of the quality and in the manner required by the contract and to obligate the buyer to pay as agreed." (Honnold & Flechtner, 2009, p. 373)

It can be easily discovered that the test proposed by the U.S. scholars is based on the policy rationales concerning "prejudice" developed from the U.S. judicial practice. However, the policy rationales concerning "prejudice" in the new Article 2 of the UCC are to deal with to what extent remedies would be precluded by the buyer's failure to give notice, in other words, to ease the harsh consequences of the notice rule, whereas the approach advocated by the U.S. scholars regarding to the application of CISG Article 39 is to use these policy rationales to determine a reasonable time for notification, namely, to ease the "rigidness" when deciding a reasonable period for giving notice. In the former case, if the seller did not actually suffer prejudice from the buyer's failure to give notice, then the buyer will not be barred from all remedies, whereas in the latter case, if the seller did not suffer prejudice, the buyer may be granted a rather generous period for giving notice, but the buyer will still lose all remedies if he fails to give notice within a certain period. Hence, although the policy rationales approach has been introduced to guide the application of CISG Article 39, subject to the letter of provisions in this Convention, the plan adopted in the new Article 2 of the UCC cannot be completely transplanted to address the application of CISG Article 39, and the effect of this approach to strike a new balance between contracting parties has therefore been weakened.

Since the approach of policy rationales concerning prejudice on the seller has a "soft" control on the result of determining a reasonable period for giving notice, it can be imagined that it will not bring much uniformity to the application of CISG Article 39. When the U.S. scholars tried to summarize the results of decisions made in the U.S. after 15 years application

of the CISG, they came to the conclusion that the opinions of the courts were not unified at all (DiMatteo et al., 2004, pp. 364-366). It needs to be mentioned that the judicial decisions addressing CISG Article 39 made by the U.S. courts did not occupy a significant amount: only around 50 cases from 1988 to 2006 were made, and most of them were not reported (AcQuillen, 2007, p. 511).[①] Among these cases some U.S. courts referred to the decisions made by foreign courts when applying Articles 38 and 39 of the CISG, and did not find for a generous result for the buyer (Schwenzer, 2007, p. 118). It is fair to say that although policy rationales regarding "prejudice" seems to be an attractive approach for applying the notice rule under the CISG, whether it can play a constructive role in judicial practice is still unclear.

7.3 Guidance and starting scope when determining a reasonable period under the CCL

The approach of "noble month" may contribute to the uniformity and predictability in the application of law, whereas the guidance of policy rationales aiming to protect the seller from being prejudiced may be more suitable to fit specific requirement in individual case. Regarding the application of the CISG, the approaches for helping decision making provided by German and U.S. law scholars have shown, as in many other cases, different legal wisdoms.

When establishing a frame for determining a reasonable period, it is necessary to take into account both the predictability and flexibility of its legal application. I suggest that the guidance of policy rationales can be considered as the primary reference for determining a reasonable period, while a fixed scope or starting point can be used as a secondary reference.

The reasons for establishing such a frame are as follows. First, the requirement for notification under U.S. law is closer to the one provided in the CCL – both require the notice to be given within a reasonable period instead of "promptly", so it is more suitable to emphasize the experiences developed from the U.S. legal system, which has no tradition to impose a rather strict time limit on notification. Second, the approach of "noble month" merely reflects normal results in a few types of case, and this kind of results should vary in light of the nature

[①] This could certainly not match with the decisions made by the German courts. In around 2005, Professor Zimmermann (2005) pointed out that there had been approximately 1000 decision at that time around the world and over one quarter were made by the German courts (pp. 96-97).

of the subject matter, the nature of nonconformity, usage of transaction, and other specific circumstances. Third, many CISG specialists are rather skeptical of the "noble month" approach. The CISG Advisory Council (2004), in its second opinion, states that "no fixed period, whether 14 days, one month or otherwise, should be considered as reasonable in the abstract without taking into account the circumstances of the case." This standpoint deserves attention. In practice, Chinese judges usually lack the initiative to interpret statutory rules in depth. If a fixed scope of notice were established, it is possible that the judges tend to strictly follow it and ignore the importance of policy rationales behind it, in which case unjust decisions would be unavoidable. Last but not least, as I discussed in subsection 7.1.1 of this chapter, the legislative purposes of the notice rule under German law were also connected with protecting the seller's reasonable interests; therefore, policies concerning prejudice can reflect the common purposes and functions of the notice rule in different legal systems. All in all, the policy rationales regarding prejudice on the seller are suitable to be fundamental guidance and a relatively "fixed" scope could only be a secondary reference.

7.3.1 Policy rationales regarding prejudice as fundamental guidance

As I have introduced in the preceding subsections, there is more than one policy rationale to support the notice rule. These policies include: preserving opportunities for the seller to cure the breach and to mitigate damages, providing him opportunities to collect useful evidence, as well as generally enhancing the effectiveness of commercial transactions. Most of them aim at protecting the seller from being substantially prejudiced by the buyer's failure to give notice.

Specifically speaking, promoting the stability of legal relationship should not be the main purpose of the notice rule, because the general prescription has already had such a function. Since a rather short prescription –merely two years- has been provided in present Chinese law,[①] it is in particular unnecessary to establish a system that may promote the stability more rapidly. Given the notice rule is normally connected with commercial practices, what could be considered is the policy of promoting the effectiveness of commercial transactions. The policy of preserving the seller's opportunity to investigate and to collect useful evidence related to

[①] Professor Liang (2007) argues that the two-year prescription In China is too short, which is clearly an outcome under the influence of Soviet law. He argues that in the future, when codifying Chinese civil laws, the general prescription should be extended to no shorter than 5 years (p. 254).

alleged nonconformity is important. Although the rules on the burden of proof may to a large extent protect the seller's interests in this respect, the seller may still be prejudiced because of losing of opportunities to collect helpful evidences that may serve his interests in preparing litigation. As to mitigating the loss arising from the nonconformity, it should be a less important policy, because even if the aggrieved party failed to control the expansion of loss, he should only be liable for the expanded loss, but not be barred from all remedies.

It needs to be noted that the seller's interests in cure deserves protection. As I have introduced in Chapter 4, after the modification of German obligation law, the seller's supplementary performance has a priority (*Vorrang*) over other remedies (Looschelders, 2007, Rn. 82), which has been known as the seller's right to provide a second tender (*Recht des Verkäufer zur zweiten Andienung*) (Brox & Walker, 2006, §4 Rn. 40). When defects occur, the foremost concern of contracting parties is "repair and replacement, but not termination nor price reduction", and the seller's supplementary performance can usually satisfy these interests, the reasonableness of it has thus been widely recognized (Brox & Walker, 2006, §4 Rn. 40). In U.S. law, the seller's rights to cure are explicitly provided in UCC §2-508, to protect the seller's interests in the bargain (ALI & NCCUSL, 2010, p. 2189). By contrast, there is neither a seller's right to cure nor a seller's priority to provide a second tender in Chinese Contract Law, nevertheless, from the perspective of striking a balance of interests between contracting parties and maintaining the coherency of the remedy system, it is necessary to protect the seller's interests in cure. After all, only if the seller received a timely notice, is he able to provide effective supplementary performance, such as repair or replacement. Hence, one of the policy rationales behind the notice rule should be preserving the seller's interests in cure the breach.

To sum up, when determining a reasonable period, the most important polices should be protecting the seller to cure the breach, and enabling him to collect helpful evidence that may serve his interests in litigation. As to mitigating the loss, it could be connected with the policy of promoting cure. Furthermore, the effectiveness of commercial transactions could be another factor for consideration. Generally speaking, the higher the possibility of a prejudice for the seller, the stricter the determination of a reasonable period should be.

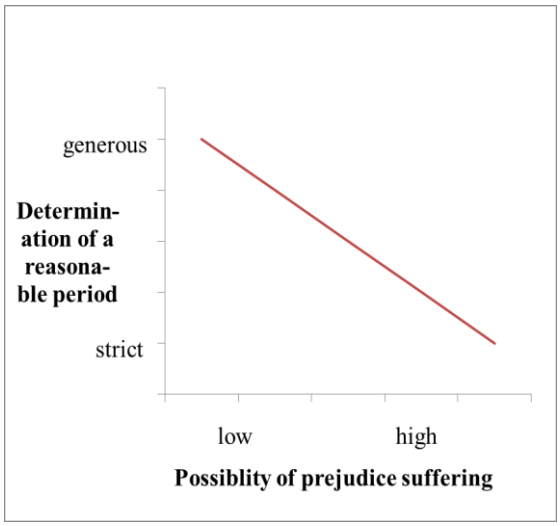

Diagram 7.1

Negative Relationship between the strictness of determining a reasonable period and the possibility of a prejudice for the seller

7.3.2 A generous starting scope as a secondary reference

In German legal practice, given the requirement for giving notice under the CISG evidently differs from the one in German commercial law, judges have been more generous when deciding a reasonable period under the CISG, by extending the notice period from original two weeks or a few days to around one month. In U.S. law, as demonstrated above, a period shorter than four months is usually safe for the buyer to give notice, except in special circumstances. Because the legal effect of the failure to give notice is to deem the subject matter to be conforming with the contract under the CCL,[①] it is agreeable to generally adopt a "generous" starting point, to protect the buyer from being seriously punished.

In this dissertation, I suggest a generous starting scope for a reasonable notification period, the range of which is between one month and a few months. The court may shorten or extend the length of this period in light of specific circumstances in individual case. However, when the judges decide to shorten or extend such a period, the accompanying requirement is providing sufficient reasons based on various policy rationales. If the court decides to shorten the period to less than one month, especially to less than two weeks, it should explain that, in

[①] Although some scholars argue that the nature of a reasonable period is extinction period, the explicit expression of CCL Article 158 shows that this interpretation can hardly be accepted. As to the argument for extinction period, see Liang (1991), as well as Han (2011a); as to the argument for special prescription, see G. G. Li (1999, p. 734) as well as Y. Wang (2001, pp. 109-117).

light of the nature of nonconformity or other related circumstances, why the period should be decided so strictly; likewise, if the court tries to extend the period for giving notice to more than a few months, such as to one year, it is also necessary to explain in detail why a notice given after such a long time is still acceptable. Given the existence of a fixed "starting scope", when determining whether a period could be considered as reasonable, the judge will be more or less restricted, and any decision with an extremely short or long period will be questioned.

7.3.3 Clarification of factors listed in the JILSC

The JILSC has listed many factors for the judge to refer to. The first paragraph of JILSC Article 17 provides that when determining a "reasonable period" as prescribed in CCL Article 158(2), the People's court should take into account the following factors:

> "(a) the nature of transaction, the purpose of contract, the ways of dealing, and customary practice between the parties; (b) the category, quantity, and nature of the subject matter; (c) the circumstances regarding installation and use; (d) the nature of defects; (e) the duty of reasonable care to be assumed by the buyer; (f) the inspection methods and the degree of difficulty in inspection, and the specific circumstances at the location of the buyer or inspector and their own skills, and (g) the principle of good faith."

It should be admitted that these factors are helpful for guiding judges to decide whether a period for giving notice is reasonable. Nevertheless, since the JILSC simply listed as many factors as possible, some of them lack clarification and therefore cannot be properly understood and applied.

First, factors related to the practicability of inspection are important, but these factors, such as inspection methods, the difficulty in inspecting the subject matter, and the skills of inspector should not be referred to when deciding the "length" of a reasonable period for giving notice, but should be connected with the "starting point" of a reasonable period. In other words, these factors should be considered when, and only when deciding when the buyer *should have discovered* the nonconformity in quality or quantity. As I argued in the preceding chapter, the inspection period and the notification period should in principle be divided and kept separate, and neither of them should be merged into the other. During the inspection

period, the buyer should do whatever he can to discover any nonconformity with the contract; when he discovered or should have discovered nonconformities due to preliminary inspection, a reasonable period for giving notice starts counting regardless of whether further inspection is necessary or actually goes on, otherwise, the notice period will be postponed to a rather late time.

Second, the nature of transaction should not be applied in light of the distinction between commercial contract and civil contract. Since the purpose of the contract, usage of transaction, the nature of subject matter, and the nature of nonconformity have been listed as independent factors for consideration, *the nature of transaction* becomes redundant. According to the explanation of the Supreme People's court, the nature of transaction mainly refers to whether the contract involves commercial contract or consumer contract, "in the case that consumers complain after using the product, it can still be basically considered as within a reasonable period, while if a businessman raises objection on the subject matter after using it, it should be regarded as exceeding a reasonable period in most cases." (Xi, 2012, pp. 320-321) This kind of view is not agreeable. In the first place, as discussed in Section 6.5 of Chapter 6, the notice rule can seldom be applied to consumer sales, disregarding the consumer used the subject matter or not, the policy rationales of the notice rule could be promoting the effectiveness of commercial transactions, but not generally promoting the stability of legal relationship. Besides, in modern society, given it is often difficult for a consumer who discovers nonconformity to pursue remedies in respect of either the ability of proving it or the cost to litigate, the product suppliers have generally been required to guarantee the quality in a certain period, which may range from a few months to a few years. This kind of policy has to a large extent overridden the policies to protect the commercial seller from being prejudiced by a failure of giving notice normally due to a bad faith behavior. Hence, it is unnecessary to impose the duty to timely inspect the goods on the consumers, and the duty to notify the seller within a reasonable period is basically nullified by the widespread guarantee period for quality. Second, even in the case of commercial transactions, it is not reasonable to require the notification to be given before the subject matter is used. This is a serious misunderstanding. As a matter of fact, the law has never required the notice to be given before the use of the subject matter; on the contrary, in some cases it is practicable to discover the nonconformity only in the process of using. Thus,

this view has introduced an obligation with no ground under the CCL.

7.4 Conclusion of this chapter

To determine a reasonable period for notification of nonconformity of goods, German-speaking countries have in the past few years been using “noble month” as a rough average period, whereas U.S. law has been pursuing the guidance of policy rationales to protect the seller from being prejudiced by the buyer’s failure to notify a breach. The former has an advantage in the uniformity and predictability in the application of law, but it has been criticized for being too rigid; the latter may be more appropriate to fit requirement in individual case, but of course at the expense of uniformity.

When establishing instructions for determining a reasonable period in Chinese law, it is necessary to take into account both the predictability and the flexibility of its legal application. The policy rationales regarding the seller’s prejudice are suitable as fundamental guidance, while a relatively “fixed” scope could be a secondary reference. As to the content of policy rationales, there should be more than one to support the “notice rule”. These policies include preserving opportunities for the seller to cure the breach, providing time to collect useful evidence, and mitigating damages caused by the breach, as well as generally enhancing the effectiveness of commercial transactions. Most of them aim at protecting the seller from being substantially prejudiced by the failure of giving notice. The JILSC has listed many factors for the courts to refer to when determining a reasonable period. However, their contents still need to be clarified.

Chapter 8 Conclusion

In Chinese contract law, just like in many other contract laws in the world, there are two "reasonableness" issues that deserve further research. One concerns the reasonable exercise of the buyer's remedy rights in case of quality or quantity problems in the subject matter; the other concerns the reasonable time limitation on these buyer's remedies. I considered those issues from the perspectives of the balance of interests between the contracting parties and the inner coherency and consistency of the system.

Before addressing these two issues, I had to overcome a theoretic obstacle in Chinese contract law, namely, the instability of certain fundamental instruments in the analysis of the relationship between a buyer and a seller. This instability, as we saw, stems from the divergence between the so-called "unitary" and "relative independence" theories, which disagree on whether the remedy regime for quality or quantity problems in tendered subject matter is a "single-track" or "double-track" regime. In the first part of this dissertation (Chapter 2 and Chapter 3), I discussed these two theories and argued for a shift in fundamental instruments for the analysis of the remedy system. The conclusion of this part can be summarized as follows.

First, in Chinese judicial practice, the concept of *warranty liability for defects* has been interpreted as an *a priori obligation of warranty* and an *a posteriori liability for breach of that obligation*. The divergence is due to the confusing juxtaposition of two different notions, "warranty" and "liability". The joint concept of "warranty liability" is therefore nearly unusable and should be avoided altogether in the future.

Second, the practice of maintaining a special remedy regime for latent defects besides the main remedy regime for breach of contract has been largely abandoned or is losing its charm in many civil law countries, where it first originated in. In China, it has become largely indefensible to argue that a "double-track" remedy system has survived in the CCL, as proponents of the relative independence theory persist to say. On the contrary, it is the unitary theory's vision of a "single-track" remedy system that should serve as the basis for an optimal interpretation of the Chinese Contract Law (CCL).

Third, the concept of *nonconformity with the contract* is clearer and more suitable than that of *defects* for interpreting the CCL, as the latter concept has various meanings in China. Accordingly, the notion of a seller's *obligation to tender conforming subject matters* is also more suitable than that of *warranty for defects* for determining contractual obligations under the CCL. The "warranty liability for defects" mentioned in China's Supreme People's Court's Judicial Interpretation should be interpreted as a type of the seller's obligation to tender conforming subject matters.

The second part of this dissertation, which included Chapter 4 and Chapter 5, discussed the reasonable exercise of the buyer's remedy rights. The conclusion of this part can be summarized as follows.

First, future efforts in Chinese contract law should go towards the construction of a seller's right to cure, to strike a balance between contracting parties and to maintain the coherency with the policies behind rules on termination of contract and those behind rules on notification of nonconformity. The right to cure should be understood in Chinese law as a right to suspend the buyer's inconsistent claims provided certain conditions are fulfilled, such as seasonableness and absence of unreasonable expenses for the buyer.

Second, under the CCL, given the buyer's right to require supplementary performance has been established as the foremost remedy in the case of nonconformity in the subject matter, it is not suitable to introduce the buyer's right to reject goods from Anglo-American law. Chinese law could, however, benefit from a deeper development of the buyer's right to refuse to take delivery. The condition for the buyer to refuse subject matters with a nonconformity in quality should be similar to the one in the case of those with a nonconformity in quantity, i.e., the right to refuse should arise as soon as the buyer discovers nonconformity which will harm his or her interests and is suitable to be removed immediately.

Third, an analysis of relevant case law disproves the prevailing view in Chinese scholarship according to which price reduction could be exercised – as a formation right – by a unilateral declaration of the buyer. Interpreting the right to price reduction as a formation right would lead to an imbalance in the interests of the parties, since there are no requirements in Chinese law to exhaust prior remedies or to give priority to a hypothetical seller's right to cure. In contrast, it is preferable to interpret the right to price reduction in Chinese law as a right to

require price reduction from the seller, i.e. a right to require a modification of the contract.

The third part of this dissertation (Chapter 6 and Chapter 7) covered the standard of reasonableness for time limitations on the buyer's notification of nonconformity. The conclusion can be summarized as follows.

First, although the periods for the buyer to inspect the subject matter and notify nonconformities should be distinguished and kept separate, the CCL has merged the two, which is detrimental to the buyer. We also saw that the guarantee period for quality could not equal the time limit for giving notice, but should instead be interpreted as a factor that may interfere with the length of the time limit. As a result, there is a problem of "double interference" with time limit, which I proposed to solve by pursuing various methods of contract interpretation.

Second, when determining a reasonable time for giving notice, we saw that it could be beneficial to borrow from the experiences of both the German-style "noble month" approach and the U.S.-style policy rationales concerning the prejudice on the seller, in order to take into account both the flexibility and predictability of the application of law. In China, the policy rationales behind the notice rule should be fundamental guidance, while a relatively "fixed" starting scope similar to the "noble month" could become a secondary reference.

This dissertation endeavored to contribute to the academic debate in the following aspects.

First, it aimed to demonstrate the ambiguity and confusion that arises in Chinese judicial practice from the structure of the "warranty liability for defects". The dissertation also discussed the reasonableness of replacing the concept of warranty liability by that of a seller's obligation to tender conforming subject matters, as a new analyzing instrument for constructing interpretive theory.

Second, on the level of interpretative theory, this dissertation has clarified the characteristics of the right to reject nonconforming subject matters and the one to refuse to take physical delivery of them. It has also suggested a new interpretation of the buyer's right to price reduction as a right to require contract modification. Further, the dissertation has also clarified the relationship among the inspection period, notification period, and guarantee period for quality, and proposed a framework for determining a reasonable period for giving notice, primarily guided by policy rationales and supplemented where necessary by a relatively

“fixed” time period.

Third, on the level of lawmaking theory, this dissertation argued in favor of the introduction of a seller’s right to cure, constructed as a right to suspend the buyer’s inconsistent claims. It proposed that the elements of this right to cure should include: promptness, absence of unreasonable inconvenience to the buyer, absence of unreasonable uncertainty for reimbursement, and contradiction of the buyer’s inconsistent claims.

The following issues have not been thoroughly discussed and deserve further analysis in the future: first, the theory on deciding the content of contractual obligation, which has close relationship with the theory of information disclosure, should be made further research. Second, in the case of nonconformity in subject matter for sales, the categories and calculation of damages is rather important and should be studied thoroughly.

References

AcQuillen, M. (2007). The development of a federal CISG common law in U.S. courts: Patterns of interpretation and citation. *U. Miami L. Rev., 61*, 509-537.

American Law Institute, & National Conference of Commissioners on Uniform State Laws. (2010). Uniform Commercial Code: Official text and comments. Eagan, Minn: Thomson West.

Andersen, C. B. (2012). Article 39 of the CISG and its "noble month" for notice-giving: A (gracefully) ageing doctrine? *J.L. & Com., 30,* 185-202.

Ayres, I., & Klass, G. M. (2012). *Studies in Contract Law* (8th ed.). New York: Foundation Press.

Bai, J. J. (2000). On the legal positive analysis. *China Legal Science,* (4), 29-39.

Bai, J. J. (2008). A little less *I believe that*, a little more *I found that*. *Journal of Peking University (Philosophy and Social Sciences), 45* (1), 25-33.

Basedow, J. (2005). Towards a universal doctrine of breach of contract: The impact of the CISG. *Int'l Rev. L. & Econ., 25*, 487-500.

Beale, H.G. et al. (Eds.). (2008). *Chitty on Contracts (Vol. 2) Specific Contract* (30th ed.). London: Sweet & Maxwell Ltd.

Beckmann, R. M. (2008). *juris Praxi Kommentar BGB Schuldrecht, Band 2.2* (4. Aufl.). Saarbrücken: juris GmbH.

Benfield, M. W. Jr., & Hawkland, W. D. (1986). *Cases and Materials on Sales*. Mineola, N.Y.: Foundation.

Bergsten, E. E., & Miller, A. J. (1979). The remedy of reduction of price. *American Journal of Comparative Law, 27,* 255-277.

Birch Ⅲ, R. M. (2006). Article 44 of the U.N. Sales Convention (CISG): A possible divergence in interpretation by courts from the original intent of the framers of the compromise. *Regent J. Int'l L., 4*, 4-15.

Bodenheimer, E. (1967). *Jurisprudence: The philosophy and method of the law*. Cambridge: Harvard University Press.

Bonell, M. J. (2002). The Unidroit Principles of International Commercial Contracts and the

harmonisation of international sales law. *R. J. T., 36*, 339-354.

Bonell, M. J. (2008). The CISG, European contract law and the development of a world contract law. *Am. J. Comp. L., 56*, 1-28.

Boujong, K., Ebenroth, C. T., & Joost, D. (2001). *Handelsgesetzbuch, Band 2.* München: Verlag C. H. Beck.

Bridge, M. (2003). Uniformity and diversity in the law of international sale. *Pace Int'l L. Rev., 15*, 55-89.

Bridge, M. (2007). A law for international sale of goods. *Hong Kong L. J., 37*, 17-34.

Bridge, M. et al. (Eds.). (2010). *Benjamin's Sale of Goods* (8th ed.). London: Sweet & Maxwell Ltd.

Brower, M. A. (2011). The "backlash" of the implied warranty of habitability: Theory vs. analysis. *DePaul L. Rev., 60,* 849-894.

Brox, & Walker. (2006). *Besonderes Schuldrecht* (31. Aufl.). München: Verlag C. H. Beck.

Brox, & Walker. (2010). *Allgemeines Schuldrecht* (31. Aufl.). München: Verlag C. H. Beck.

Brussel, G. S. (1993). The 1980 United Nations Convention on Contracts for the International Sale of Goods: A legislative study of the north-south debates. *N.Y. Int'l L. Rev., 6*, 53-74.

Canaris, C. W. (2006). *Handelsrecht* (24. Aufl.). München: Verlag C. H. Beck.

Castellet, L. (1999). The application of the Vienna Convention in the United States (CISG). *I. B. L. J.*, (5), 582-595.

Chen, G. Z. (trans.). (2010). *Italian Civil Code*. Beijing: China Renmin University Press.

Chen, L. H., & Liu, C. B. (2004). On the system of rejecting the goods. *Legal Science,* (9), 85-91.

Chen, L. H., & Li, Q. (2011). On the application and interpretation of Article 39 Paragraph 1 of the CISG in Germany. *Journal of Suzhou University,* (5), 96-101.

Chen, X. J. (Ed.). (2003). *Contract law.* Beijing: Higher Education Press.

Chen, Z. Q. (2010a). EU contract law in unifying. *The Taiwan Law Review, 181* (6), 113-132.

Chen, Z. Q. (2010b). Recent development of European contract law. *The Taiwan Law Review, 182* (7), 117-143.

CISG Advisory Council. (2004). *Opinion No. 2, Examination of the Goods and Notice of Non-Conformity Articles 38 and 39*. Retrieved from http://www.cisgac.com/default.php?ipkCat=128&ifkCat=144&sid=144.

Cui, J. Y. (2006). On classification of the nature and status of defects guarantee. *China Legal Science*, (6), 32-43.

Cui, J. Y. (2012). The qualitative and position of returning of goods and reduction of price. *Science of Law,* (4), 93-98.

Cui, J. Y. (Ed.). (2010). *Contract Law*. Beijing: Law Press.

Cui, J. Y. et al. (2010). *General Civil Law*. Beijing: Tsinghua University Press.

DiMatteo, L. A. (2011). The scholarly response to the harmonization of international sales law. *J.L. & Com., 30,* 1-22.

DiMatteo, L. A. et al. (2004). The interpretive turn in international sales law: An analysis of fifteen years of CISG jurisprudence. *Nw. J. Int'l L. & Bus., 24*, 299-440.

Dong, W. J. (2008). Unbalanced protection and balance of interests in Labor Contract Law in China. *Contemporary Law Review, 22*(3), 106-110.

Dörner, H. et al. (2002). *Bürgerliches Gesetzbuch: Handkommentar* (2. Aufl.). Baden-Baden: Nomos.

Du, J. L. (2008). The rule of price reduction in Chinese Contract Law: Defects and perfection. *Legal Science*, (4), 51-60.

Du, J. L., & Lu, C. (2012). *Warranty Liability for Defects in Modern Sales Law*. Beijing: Law Press.

Ebert, I. (2004). Das Recht des Verkäufers zur zweiten Andienung und seine Risiken fur den Käufer. *NJW,* (25), 1761-1764.

Eidenmuller, H. et al. (2012). The proposal for a Regulation on a Common European Sales Law: Deficits of the most recent textual layer of European contract law. *Edin. L. R., 16*(3), 301-357.

Faegre, D. D., & Benson. (1995). Reasonable notice of breach as a question of law. In J. R. Fonseca, *Williston on Sales, Vol.3, August 1995 Cumulative Supplemen* (pp. 514-531). Deerfield, IL: Clark Boardman Callaghan.

Farnsworth, E. A. (2004). *Farnsworth on Contracts, (Vol. 3)* (3rd ed.). New York: Wolters Kluwer.

Fei, A. L. et al. (trans.). (2004). *Italian Civil Code*. Beijing: China University of Political Science and Law Press.

Feng, Y. J. (2006). Three relationships that should be properly addressed in Chinese Labor Contract Law. *Contemporary Law Review, 20* (6), 24-27.

Ferreri, S. (2005). Remarks cncerning the implementation of the CISG by the courts (the seller's performance and Article 35). *J.L. & Com., 25,* 223-239.

Fest, T. (2005). Kein Anspruch des Verkäufers auf Nutzungsersatz bei Nachlieferung? *NJW,* (41), 2959-2961.

Flechtner, H. M. (2008). Funky mussels, a stolen car, and decrepit used shoes: Non-Conforming goods and notice thereof under the United Nations Sales Convention ("CISG"). *B. U. Int'l L. J., 26,* 1-28.

Fonseca, J. R. (1995). *Williston on Sales, Vol.3, August 1995 Cumulative Supplement*. Deerfield, IL: Clark Boardman Callaghan.

Gao, Q. C. (2006). The idea of modern legislations. *Nanjing Social Science,* (1), 85-90.

Girsberger, D. (2005). The time limits of Article 39 CISG. *J.L. & Com., 25,* 241-251.

Giuliano, A. M. (2006). Nonconformity in the sale of goods between the United States and China: the new Chinese Contract Law, the Uniform Commercial Code, and the Convention on Contracts for the International Sale of Goods. *Fla. J. Int'l L., 18,* 331-358.

Goetz, C. J., & Scott, R. E. (1977). Liquidated damages, penalties and the just compensation principle: Some notes on an enforcement model and a theory of efficient breach. *Colum. L. Rev., 77,* 554-594.

Gribanov, & Korneev. (Eds.). (1984). *Civil law of the Soviet Union (1)*. Chinese Academy of Social Sciences Institute of Law, & Research Department of Civil law and Economic Law. (trans.). Beijing: Law Press.

Grisé, J. E., Gelter, M., & Whitman. (2012) R. Rudolf von Jhering's influence on Karl Llewellyn. *Tulsa L. Rev., 48,* 93-116.

Gsell, B. (2006). Aufwendungsersatz nach §284 BGB. *NJW,* (3), 125-127.

Guo, M. R. (2005). *Contract Law*. Shanghai: Fudan University Press.

Haas, Medicus, Rolland, Schäfer, & Wendtland. (2002). *Das neue Schuldrecht*. München: Verlag C. H. Beck.

Hammond, G. F. (1985). Notification of breach under Uniform Commercial Code Section 2-607(3)(A): A conflict, a resolution. *Cornell L. Rev., 70,* 525-556.

Han, S. Y. (2001. June 23). Dispute regarding and reconsideration on contractual liability (2). *People's Court Daily*, p. 3.

Han, S. Y. (2007). Seller's guarantee liability on defects of object and China's contract law. *China Legal Science,* (3), 170-190.

Han, S. Y. (2008). Logical formulation of liability for price reduction. *Tsinghua Law Review, 2* (1), 15-29.

Han, S. Y. (2010). *Contract Law*. Beijing: Higher Education Press.

Han, S. Y. (2011a). Defects leased object and the contractual remedy. *China Legal Science,* (5), 57-69.

Han, S. Y. (2011b). *The Law of Contract*. Beijing: Law Press.

Han, S. Y. (2012). Norms for judgements, interpretation theory and empirical analysis. *Chinese Journal of Law,* (1), 46-48.

He, L. X. (2002). Reforming movement of warranty liability for defects in things and legislative modification in China. *Legal Forum, 17* (6), 38-43.

Henderson, G. E. (2009). A new Chapter 2 for Texas: Well-Suited or ill-fitting. *Tex. Tech L. Rev., 41*, 235-494.

Henderson, J. A. Jr., & Twerski, A. D. (2008). *Products Liability: Problems and Process* (6th ed.). New York: Aspen Publishers.

Henning, W. H., & Lawrence, W. H. (2009). A unified rationale for section 2-607(3)(A) notification. *San Diego L. Rev., 46*, 573-594.

Hente, V. (2005). The recent German law, implementing a modernisation of German contract law. *I.B.L.J.,* 3, 359-374.

Herresthal, C., & Riehm, T. (2005). Die eigenmächtige Selbstvornahme im allgemeinern und besonderen Leistungsstörungsrecht. *NJW*, (21), 1457-1461.

Heyers, J., & Heuser, M. Qualitative Unmöglichkeit -eine verkannte Rechtsfigur. *NJW*, 2010, (42), 3057-3061.

Hohfeld, W. N. (1946). *Fundamental Legal Conceptions*. New Haven and London: Yale University Press.

Honnold, J. O. (1999). *Uniform Law for International Sales under the 1980 United Nations Convention*. The Hague: Kluwer Law International.

Honnold, J. O., & Flechtner, H. M. (2009). *Uniform Law for International Sales under the 1980 United Nations Convention* (4th ed.). The Netherlands: Kluwer Law International.

Honsell, H. (2010). *Kommentar zum UN-Kaufrecht*. Berlin: Springer.

Hood, P. (2008). "A stitch in time"? Repairs and rejection in sale of goods. *Edin. L. R., 12* (2), 316-321.

Hopper, S. N. (2005). Changes in implied warranties and its effect in Michigan. *Wayne L. Rev., 51*, 1289-1308.

Hu, K. S. (Ed.). (1999). *Paraphrase on Contract Law of the People's Republic of China*. Beijing: Law Press.

Hu, K. S. (Ed.). (2009). *Paraphrase on Contract Law of the People's Republic of China*. Beijing: Law Press.

Jacobs, M. (2003). Die kaufrechtliche Nacherfullung. In Haas, et al. (Eds.), *Das neue Schuldrecht in der Praxis* (pp. 371-394). Köln: Carl Heymanns Verlag.

Japanese Civil Code (Law of Obligations) Reform Commission. (2009a). *Detailed Explanation on Draft Proposals for Principles of Reforming Obligation Law Ⅰ General Principles*. Tokyo: Business Law Press.

Japanese Civil Code (Law of Obligations) Reform Commission. (2009b). *Detailed Explanation on Draft Proposals for Principles of Reforming Obligation Law Ⅱ General Obligations and Contracts (1)*. Tokyo: Business Law Press.

Japanese Civil Code (Law of Obligations) Reform Commission. (2010). *Detailed Explanation on Draft Proposals for Principles of Reforming Obligation Law Ⅳ Specific Contracts (1)*. Tokyo: Business Law Press.

Jiao, F. M., & Lu, Y. (2009). The notion of cooperation and the constitution of the debtor's right to cure. *Journal of Yangzhou University (Humanit ies & Social Sciences), 13*(2), 66-71.

Kamata, K. et al. (Eds.). (2012). *Daily Compendiums of Laws*. Tokyo: Senseido Press.

Karton, J. D. H., & Germiny, L. de. (2009). Has the CISG Advisory Council come of age? *Berkeley J. Int'l L., 27*, 448-495.

Kasirer, N. (1999). Lex-Icogpaphie mercatoria. *Am. J. Comp. L., 47*, 653-669.

Koch. (1998). *Pace Review of the Convention on Contracts for the International Sale of Goods*. London: Kluwer Law International.

Kritzer, A. H. (1989). *Guide to Practical Applications of the United Nations Convention on the International Sale of Goods*. Deventer: Kluwer Law and Taxation.

Kröll, S., Mistelis, L., & Viscasillas, P. P. (Eds.). (2011). *UN Convention on Contracts for the International Sale of Goods(CISG): Commentary*. München: Verlag C. H. Beck.

Krüger, W. (2007). *Münchener Kommentar zum BGB, Band 2., Schuldrecht Allgemeiner Teil* (5.Aufl.). München: Verlag C. H. Beck.

Krüger, W., & Westermann, H. P. (2008). *Münchener Kommentar zum BGB, Band 3., Schuldrecht Besonderer Teil Ⅰ* (5.Aufl.). München: Verlag C. H. Beck.

Larenz, & Wolf. (1997). *Allgemeiner Teil des Bürgerlichen Rechts* (8. Aufl.). München: Verlag C. H. Beck.

Larenz, K. (1977). *Lehrbuch des Schuldrechts* (11.Aufl.). München: Verlag C. H. Beck.

Larenz, K. (1991). *Methodenlehre der Rechtswissenschaft*. Berlin: Springer.

Larenz, K. (2003). *Methodology of Legal Science*. Chen, A. E. (trans.). Beijing: The Commercial Press.

Lettl, T. (2011). *Handelsrecht* (2. Aufl.). München: Verlag C. H. Beck.

Li, G. G. (1999). *Interpretation and Application of Contract Law (1)*. Beijing: Xinhua Press.

Li, W. (2009). *A Commentary on the CISG*. Beijing: Law Press.

Li, Y. (Ed.). (2011). *Disputes on Sales Contract*. Beijing: Law Press.

Li, Y. J. (2008). *Contract Law*. Beijing: China Renmin University Press.

Liang, H. X. (1991). On Warranty. *Journal of Comparative Law*, (3), 29-47.

Liang, H. X. (1996). Disputes in drafting process of the Chinese Contract Law. *Legal Science*, (2), 13-15.

Liang, H. X. (2007). *General Introduction to Civil Law*. Beijing: Law Press.

Liang, H. X. (Ed.). (2003). *A Propositional Version for Civil Code Draft of China*. Beijing: Law Press.

Liang, H. X. (Ed.). (2010). *A Propositional Version for Civil Code Draft of China*. Beijing: Law Press.

Lin, C. E. (2007). *Specific Obligations in Civil Law, Vol.1*. Beijing: China Renmin University Press.

Looschelders, D. (2007). *Schuldrecht Besonderer Teil*. Köln: Carl Heymanns Verlag.

Lord, R. A. (2005). *Williston on Contracts* (4th ed.). St. Paul, Minn.: Thomason West.

Lorez, S. (2003). Selbstvornahme der Mangelbeseitigung im Kaufrecht, *NJW*, (20), 1417-1419.

Low, K. F. K. (2007). Repair, rejection & rescission: An uneasy resolution. *L. Q. R., 2007, 123*(Oct), 536-541.

Ma, J. (1998). Default of the obligee in Japanese civil law. *The Jurist*, (3), 109-114.

Ma, J. J., & Yu, Y. M. (2007). *The Theory of Civil Law* (3rd. ed.). Beijing: Law Press.

MacCormick, N., & Weinberger, O. (1986). *An institutional theory of law: New approaches to*

legal positivism. Boston: Reidel Pub. Co..

Macqueen, H. (2011). Faulty goods, rejection and connected lender liability. *Edin. L.R., 15*(1), 111-115.

Macqueen, H. et al. (2012). The proposed common European sales law. *S.L.T., 2012, 12,* 65-70.

Mao, R. H., & Cai, D. H. (2004). Understanding and application of quality complaint period in sales contract: Commentary on Article 158 CCL. *Journal of Law Application*, (4), 31-35.

Matsui, K. (2003). Das Nacherfüllungsrecht des Verkäufers. *Kanazawa Law Review, 45* (2), 199-246.

Medicus, & Lorenz. (2010a). *Schuldrecht Ⅰ Allgemeiner Teil* (19. Aufl.). München: Verlag C. H. Beck.

Medicus, & Lorenz. (2010b). *Schuldrecht Ⅱ Besonderer Teil* (15. Aufl.). München: Verlag C. H. Beck.

Medicus, D. (1997). *Schuldrecht Ⅱ Besonderer Teil* (8. Aufl.). München: Verlag C. H. Beck.

Medicus, D. (2006). *Allgemeiner Teil des BGB* (9. Aufl.). Heidelberg: C. F. Müller Verlag.

Medicus, D. (2007). *Schuldrecht I Allgemeiner Teil*. Du, J. L., & Lu, C. (trans.). Beijing: Law Press.

Miller, F. H. (2009). Uniform Commercial Code Article 2 on sales of goods and the uniform law process: A true story of good v.? *Duq. Bus. L. J., 11,* 143-166.

Miller, L. (2007). The common frame of reference and the feasibility of a common contract law in Europe. *J. B. L., 2007, Jun,* 378-411.

Mo, J. S. (1999). The Code of Contract Law of the People's Republic of China and the Vienna Sales Convention. *Am. U. Int'l L. Rev.,15,* 209-270.

Morita, H. (2002). *Imputation Construction of Contractual Liabilit*y. Tokyo: Yuhikaku Press.

Moser, L. G. M. (2012). Albert H. Kritzer, the 1980 UN Convention (CISG), and the Vis Moot: An inseparable relationship. *Pace Int'l L. Rev., 24,* 258-265.

Müller-Graff, P. C. (2011). EC Directives as a means of private law unification. In Arthur S. Hartkamp et al. (Eds.), *Towards a European Civil Code* (pp. 149-183). The Netherlands: Kluwer Law International BV.

Naidoo, A. (2011). Consumer remedies following the sales of faulty goods. *J. B. L., 8,* 807-812.

Nozawa, M. (2009a). Legal nature of warranty liability for defects (1): Three approaches of statutory liability theory. In Nozawa, M. (Ed.), *Warranty Liability for Defects and*

Liability for Nonperformance (pp. 15-30). Tokyo: Nippon Hyoron Sha Press.

Nozawa, M. (2009b). Legal Theory on warranty liability for defects in French law. In Nozawa, M. (Ed.), *Warranty Liability for Defects and Liability for Nonperformance* (pp. 83-100). Tokyo: Nippon Hyoron Sha Press.

Oechsler, J. (2004). Praktische Anwendungsprobleme des Nacherfüllungsanspruchs. *NJW*, (26), 1825-1830.

Ooki, M. (2006). *Comparative law* (Rev. ed.). Fan, Y. (tans.). Beijing: Law Press.

Oomura, A. (2005). *Droit Civil Fondamental Tome Ⅱ*. Tokyo: Yuhikaku Press.

Ortiz, R. I., & Viscasillas, P. P. (2012). The scope of the Common European Sales Law: B2B, goods, digital content and services. *J. I. T. L. & P., 2012, 11*(3), 241-258.

Pham, T. T., & Wautelet, P. (2001). The duties of parties and the sanctions for non-performance under the CISG. *I. B. L. J., 2001, 3/4.*, 293-352.

Phillips, J. J. (1972). Notice of breach in sales and strict liability law: Should there be a difference? *Ind. L. J., 47*, 457-480.

Piché, C. (2003). The Convention on Contracts for the International Sale of Goods and the Uniform Commercial Code Remedies in light of remedial principles recognized under U.S. Law: Are the remedies of granting additional time to the defaulting parties and of reduction of price fair and efficient ones? *N.C. J. Int'l L. & Com. Reg., 28*, 519-566.

Pound, R. (1911). The scope and purpose of sociological jurisprudence. *Harv. L. Rev., 24*, 591-619.

Pound, R. (1911). The scope and purpose of sociological jurisprudence. *Harv. L. Rev., 25*, 140-168.

Pound, R. (1912). The scope and purpose of sociological jurisprudence. *Harv. L. Rev., 25*, 489-516.

Pound, R. (1937). Fifty years of jurisprudence. *Harv. L. Rev., 50*, 557-582.

Pound, R. (1984). *Social Control through Law.* Shen, Z. L. (trans.). Beijing: The Commercial Press.

Pound, R. (2004). *Jurisprudence, Vol.1*. Deng, Z. L. (trans.). Beijing: China Political Science and Law Press.

Price, R. L., & Pinkston, M. R. (2010). The implied warranty of habitability in Illinois: A critical review. *Ill. B. J., 98*, 92-96.

Priest, G. L. (1981). A theory of the consumer product warranty. *Yale L. J., 90*, 1297-1352.

Qiu, C. Z. (2006). *Specific Obligation Law*. Beijing: China Renmin University Press.

Qu, M. H. (2002). The basic idea of Chinese civil law. *Qiu Suo*, (5), 38-39.

Rapp, G. C. (2004). Annual survey of Michigan law (June 1, 2002 - May 31, 2003). *Wayne L. Rev., 50*, 383-406.

Reimann, M. (2009). The good, the bad, and the ugly: The reform of the German law of obligations. *Tul. L. Rev., 83*, 877-917.

Reitz, J. C. (1988). Against notice: A proposal to restrict the notice of claims rule in UCC. *Cornell L. Rev., 73*, 534-595.

Robilant, A. di. (2006). Genealogies of Soft Law. *Am. J. Comp. L.*, 54, 499-554.

Rusch, L. J. (1999). A history and perspective of revised Article 2: The never ending saga of a search for balance. *SMU L. Rev., 52*, 1683-1715.

Ryan, L. M. (1995). The Convention on Contracts for the International Sales of Goods: Divergent interpretations. *Tul. J. Int'l & Comp. L., 4*, 99-118.

Schermaier, M. J. (2007). *Historisch-kritisher Kommentar zum BGB, Band Ⅱ Schuldrecht: Allgemeiner Teil*. Tübingen: Mohr Siebeck.

Schlechtriem, P. (1999). *Comments on Bundesgerichtsh of VIII ZR 287/98*. Barron W. M. et al. (trans.). Retrieved from http://cisgw3.law.pace.edu/cases/991103g1.html.

Schlechtriem, P. (2006). Subsequent performance and delivery deadlines -Avoidance of CISG sales contracts due to non-conformity of the goods. *Pace Int'l L. Rev., 18*, 83-98.

Schlechtriem, P., & Schwenzer, I. (Eds.). (2005). *Commentary on the UN Convention on the International Sale of Goods*. New York: Oxford University Press.

Schurhölz, M. (2005). *Die Nacherfüllung im neuen Kaufrecht, zugleich ein Beitrag zum Schicksal von Stück- und Gattungskauf*. Baden-Baden: Nomos.

Schwab, D. (2006). *Einführung in das Zivilrecht*. Zheng, C. (trans.). Beijing: Law Press.

Schwenzer, I. (2007). National preconceptions that endanger uniformity. *Pace Int'l L. Rev., 19*, 103-124.

Schwenzer, I., & Hachem, P. (2009). The CISG -successes and pitfalls. *Am. J. Comp. L., 57*, 457-478.

Sebert, J. A. Jr. (1990). Rejection, recocation, and cure under Article 2 of the Uniform Commercial Code: Some modest proposals. *Nw. U. L. Rev., 84*, 375-436.

Shen, D. M. (1995). The breaching party's right to cure in U.S. Law. *International Business*, (4), 17-21.

Shi, S. K. (2000a). *General Obligation Law*. Beijing: China University of Political Science and Law Press.

Shi, S. K. (2000b). *Specific Obligation Law*. Beijing: China University of Political Science and Law Press.

Shiomi, Y. (2009). *Specific Obligations Ⅰ*. Tokyo: Saiensu Sha Press.

Shiomi, Y. (2010). *Legal Theory on Remedies for Nonperformance of Obligations*. Tokyo: Shinzan Sha Press.

Smirnov, et al. (1987). *Civil law of the Soviet Union (1)*. Huang, L. P., & Ding, W. Q. (trans.). Beijing: China Renmin University Press.

Sono, H. (2009). Nonexistence of warranty liability in Vienne Sales Convention (CISG) and its reason. In Nozawa M. (Ed.), *Warranty Liability for Defects and Liability for Nonperformance* (pp. 117-135). Tokyo: Nippon Hyoron Sha Press.

Squillante, A. M., & Fonseca, J. R. (1974). *Williston on Sales, (Vol. 3)*. New York: Lawyers Co-operative Pub. Co..

Su, H. P. (2011). *Contract Law*. Beijing: China Renmin University Press.

Sun, X. Z. (2013). Avoid the fragment of legislations, promote codification of civil laws. *Journal of CUPL*, (1), 76-82.

Sun, Y. Q. (2011). Judicial determination of inspection period and quality complaint period: Understanding and application of Articles 157 and 158 of CCL. *Shandong Justice, 27* (5), 82-86.

Super, D. A. (2011). The rise and fall of the implied warranty of habitability. *Cal. L. Rev., 99*, 389-463.

Tamm, M. (2006). Remedies in the German law of obligations. *Cov. L. J., 2006, 11* (1), 45-57.

Travalio, G. M. (1984). The UCC's three "R"s: Rejection, revocation and (the seller's) right to cure. *U. Cin. L. Rev., 53*, 931-1003.

Treitel, G. H. (2003). *The Law of Contract* (11th ed.). London: Sweet & Maxwell.

Uchida, T. (2005). *Civil law Ⅲ General Provisions of "Obligations" and "Real Security Right"* (3rd ed.). Tokyo: University of Tokyo Press.

Uchida, T. (2011). *Civil law Ⅱ Special Provisions of "Obligations"* (3rd ed.). Tokyo:

University of Tokyo Press.

Ume, K. (1984). *Essence of Civil Law: Obligations*. Tokyo: Yuhikaku Press.

Vetri, D. et al. (2003). *Tort Law and Practice*. (Rev. 2nd ed.). Newark, N. J.: LexisNexis.

Wang, C. H. (tr. and annotated). (1907). *The German Civil Code.* London: Stevens and Sons, Ltd.

Wang, H. (2009). On the buyer's right to reject goods in the contract of international sale of goods. *Peking University Law Review, 10* (2), 398-452.

Wang, H. L. (2005). On the guarantee of flaws of things, Leistungsstörungsrecht and Culpa in Contrahendo. *Science of law,* (4), 64-74.

Wang, J. G. (2011). Study on the notice of nonconformity of goods under the Draft Common Frame of Reference and its references to China. *Northern Legal Science, 5*(5), 52-58.

Wang, L. M. (2001). A comparative study in Chinese and German purchase contract. *Journal of Comparative Law,* (1), 21-37.

Wang, L. M. (2003). *Study on Contract Law, Vol. 2*. Beijing: China Renmin University Press.

Wang, L. M. (2013). Perfection of the chapter of personal rights in Chinese Civil Code in the future, *Journal of CUPL*, (1), 34-42.

Wang, L. M., & Yao, H., (1995). On ten issues of perfection of liability for breach of contract in China. *China Social Science,* (4), 4-18.

Wang, W. G. (Ed.). (2012). *Civil Law*. Beijing: China University of Political Science and Law Press.

Wang, Y. (2001). Buyer's duty to prompt examination in contract for sales. In Wang, L. M., (Ed.), *Study on Judicial Decisions and Judicial Interpretations, Vol.1,* (pp.109-117). Beijing: People's Court Press.

Watanabe, T. (2011). Note on mechanism of "fault" in contractual liability in the Common Law. *Legal Science, 74*(6), 941-960.

Weiss, G. A. (2000). The enchantment of codification in the Common-Law World. *Yale J. Int'l L., 25*, 435-532.

Westermann, H. P. (1995). *Münchener Kommentar zum BGB, Band 3., Schuldrecht Besonderer Teil Ⅰ* (3.Aufl.). München: Verlag C. H. Beck.

White, J. J., & Summers, R. S. (1988). *Uniform Commercial Code* (3rd ed.). St. Paul, Minn.: West Pub. Co..

White, J. J., & Summers, R. S. (2009). *Principles of Sales Law*. St. Paul, MN: Thomson West.

White, J. J., & Summers, R. S. (2010). *Uniform Commercial Code* (6th ed.). St. Paul, Minn.: Thomson Reuters.

Willett, C., Morgan-Taylor, M., & Naidoo, A. (2004). The sale and supply of goods to consumers regulations. *J. B. L., 2004, Jan*, 94-120.

Williston, S. (1909). *The law governing sales of goods at Common Law and under the Uniform Sales Act*. New York: Baker, Voorhis.

Williston, S. (1924). *The law governing sales of goods at Common Law and under the Uniform Sales Act* (2nd ed.). New York : Baker, Voorhis.

Williston, S. (1948). *The law governing sales of goods at common law and under the uniform sales act,* (*Vol.3)* (3rd ed.). New York: Baker, Voorhis.

Xi, X. M. (2012). *Explanation and Application of Supreme People's Court's Judicial Interpretation on Sales Contract Law*. Beijing: People's Court Press.

Xia, H. Y., & Fu, J. (2008). Comparative analysis on rejection of goods. *ECUPL Journal*, (5), 72-78.

Xiang, M. E. (2010). Integration of European Civil law on remedies for non-performance: Focusing on the study of DCFR. *Cross-Strait Law Review, 29*, 5-20.

Xie, G. (2011). Restructing of the theory on the binding effect of a contact. *Chinese Journal of Law,* (2), 80.

Xu, D. F. (2004). On liability for defects arisen in sale of shares: A commentary on Sanjiu Beer Industry vs. Biancheng Bureau. In Wang, L. M. (Ed.), *Study on Legal Decisions and Judicial Interpretations, Vol. 3,* (pp. 190-199). Beijing: People's Court Press.

Xu, D. F. (2006). Concurrence of defects liability and Culpa in Contrahendo. *Legal Science,* (1), 87-94.

Yang, Z. L. (2010). On reduction. *Presentday Law Science, 8*(6), 59-64.

Yin, T. (1995). *Modern French Contract Law.* Beijing: Law Press.

Yunoki, K., & Takagi, T. (Eds.). (1993). *Commentary on Civil Law (14) Obligation (5) Gift・Sales・Exchange.* Tokyo: Yuhikaku Press.

Zamir, E. (1991). Toward a general concept of conformity in the performance of contracts. *La. L. Rev., 52,* 1-90.

Zhang, X. B. (2009). The tort law: function status, benefit balance and system construction.

Journal of Renmin University of China, (3), 2-8.

Zhao, L. (2010, January 14). Focus on the Tort Law: It matters our interests. *Southern Weekly*, p. 5.

Zheng, Y. B. (1986). *Specific Obligation Law*. Taipei: San Min Book Press.

Zhu, G. X. (2008). *General Contract Law*. Beijing: China Renmin University Press.

Zhu, G. X. (2012). *General Contract Law*. Beijing: China Renmin University Press.

Zimmermann, R. (2001). *Roman law, contemporary law, European law: the civilian tradition today*. New York: Oxford University Press.

Zimmermann, R. (2004). Liability for non-conformity: The new system of remedies in German sales law and its historical context. *Irish Jurist, 2004, 39,* 1-50.

Zimmermann, R. (2005). *The new German Law of Obligations: Historical and Comparative Perspectives*. New York: Oxford University Press.